



Your ref: PAC32-I-1065

11 October 2018

Ms Margaret Falsey
Committee Secretariat
Committee of Public Accounts
Leinster House
Dublin 2

Dear Ms. Falsey,

I refer to your correspondence dated 1 October 2018.

Following the completion of Ms Niamh O'Donoghue's review of the workload and operations of the Tax Appeals Commission, I am pleased to inform you that her report was published on Budget day, 9th October. It is available to view and download on the Budget 2019 website www.budget.gov.ie

In his Budget Statement Minister Donohoe said he fully supports the recommendations in the Report. Accordingly, funding relating to additional staff, IT and office equipment has been provided for in the 2019 Estimates. This will allow the Tax Appeals Commission to address its caseload.

I attach a copy of the Report for your information.

Yours sincerely

Derek Moran
Secretary General

REVIEW OF THE
WORKLOAD AND
OPERATIONS OF THE
TAX APPEALS
COMMISSION

Report to the
Minister for Finance
August 2018

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Introduction

I was appointed by the Minister for Finance on 6th June 2018 with the following terms of reference:

Terms of Reference:

“To conduct a review of the staffing structure, governance and operation structure of the Tax Appeals Commission (“TAC”).

The review will be informed in part by the output of an ongoing independent review commissioned by the TAC and comparison with similar domestic and international appeal models.

The review process should include engagement with relevant stakeholders by interview.

The aim of the review is to produce a report by mid-August containing recommendations on:

1. Staffing resources required, including:
 - a) Consideration of the balance (if any) between temporary staff required to address the backlog of work and permanent staff required for the continuing operation of the TAC into the future, and
 - b) Staff requirements of varying grades, from Clerical Officer to Appeals Commissioner
2. Governance structures, independence and accountability – is the existing governance model fit for purpose or could it be improved?
3. Internal operational structures and the potential to improve workflow and efficiency.
4. To note any potential legislative amendments, which could be considered to facilitate the work of the TAC, that are identified during the review process”

Conduct of the Review

In the period since my appointment, I have reviewed a considerable volume of documentation regarding the establishment and current operation of the TAC and interviewed many of the stakeholders and parties to the operation of the TAC with a view to understanding the current structure and operations of the organisation.

I did not conduct a business process review as I had understood that this would form the basis of the Crowley DFK review. I have, however, formed some high-level views on the processes in place through the documentation available and the interviews held.

I would like to express my gratitude to all those who contributed their time and views to assist me in my work. I would particularly like to thank the Tax Appeals Commissioners, the staff of the Tax Appeals Commission, the staff of the Tax Policy Unit in the Department of Finance and the staff of the Tax Policy Unit in the Office of the Revenue Commissioners. I would also like to thank the practitioners and representatives of representative bodies who were kind enough to meet me and give me their views on the issues facing the TAC.

Níamh O'Donoghue

August 2018

Executive Summary

Over the course of a number of years, there were a number of calls for a review of the model of tax appeals prevailing in Ireland. The origin for this appears to have been the report on the DIRT enquiry 2001, the Revenue Powers Group Report 1999 and 2003; a Law Reform Commission Report in 2004 and the Commission on Taxation Report in 2009¹.

The importance of ensuring the independence of the Appeal Commissioners through appropriate appointment procedures and providing an enhanced and cost-effective appeal mechanism for tax cases featured as key recommendations of these reports which sought to provide a system of transparency, proportionality and increased confidence for taxpayers.

In reading the debate and commentary around the introduction of the Tax Appeals Act, 2015, it is very clear that those involved in the consultation around and preparation of a new appeals model were determined to create a modern, efficient and transparent appeals structure which would enhance the operation of and inspire confidence in the tax system in Ireland. What is now clear, however, is that the structure put in place on foot of the Act has not yet met stakeholder expectations in this regard and indeed, has suffered some reputational damage in terms of its ability to deliver on its remit.

There are a number of contributing factors to the current situation – and some, at least, are in my view, unintended consequences of decisions deliberately and positively made in relation to the structure and operations of the new body.

The new Act proposed a number of new approaches to enhance transparency, introduce new forms of dispute resolution and ensure the independence of the new body.

In particular, the Act introduced the appeals body as a new organisation, an independent agency of the Department of Finance. This independence extended not just to the functions of the new body, but also to its funding and staffing – the new TAC was assigned its own vote, and it was decided that one of the Commissioners would be the Accounting Officer for the new body. This in itself is not unusual, however, what is unusual is that this approach was adopted for an organisation of the size and scale of the TAC.

¹ Statement by Mr Des O’Leary, Department of Finance during the pre-legislative scrutiny of the Heads of the Finance (Tax Appeals Commission) Bill on 27 January 2015.

I have examined the structure and scale of a number of similar ‘independent’ bodies – various Commissions, Tribunals, Authorities etc – in a later part of this report and the unusual nature of the TAC is extremely apparent in this context.

The other critical changes (of direct relevance to this review) introduced by this Act were

- Appeals would now be made in the first instance to the TAC (rather than to the Revenue Commissioners).
- Hearings of the Appeal Commissioners (by default) would be in public – although an appellant can request the Hearing to be private.²
- Determinations of the Commissioners would be written and published.
- An Appeal against a determination of the Commissioners is to the High Court – on points of law. (Access to the Circuit Court for a full rehearing of the case, which had been a feature of the previous model, was withdrawn)

Each of these changes was considered to be a positive contribution to increasing the transparency of the tax appeals process. In addition, the removal of access to the Circuit Court was a deliberate action to ensure that all stakeholders engaged comprehensively with the appeals process at the TAC.

In reality, however, the changes have created a series of ‘overheads’ on the TAC operations which were not planned for in sufficient detail in the transition to the new organisation.

The introduction of the new system also came at a time when the operations of Revenue were under increased scrutiny because of some Judgements and resulting public commentary about engagement with the tax system by large multinational firms. It has been alleged that one consequence of this is that Revenue is now ‘quicker’ to go to assessment in its engagement with taxpayers than had previously had been the case. Once an assessment has been raised, the only option the taxpayer has, if they don’t agree with the assessment, is to raise an appeal. This suggests that recourse to appeal is now an increasing feature of taxpayer engagement. I did not seek to validate the argument regarding the timing of assessments, however, there is no doubt that there has been an increase in the number of appeals being lodged since the establishment of the TAC.

All stakeholders (Revenue officials and representatives of taxpayer interests) that I met during the course of this review indicated that it was in everyone’s interest that the appeals system functioned properly and promptly. From a Revenue perspective, there is concern that delays in the system mean that there can be delays in collecting funds outstanding to the State (and lack of clarity as to

² The Bill establishing the TAC was amended to provide for this during its passage through the Oireachtas. One consequence of this amendment is that it has added another element to the ‘process’ for handling an appeal.

the 'correct' approach to interpreting aspects of the tax code). From a taxpayer perspective, delays can result in considerable added expense – particularly because of the way in which interest charges are levied on monies outstanding.

All sides are agreed, however, that the current system is not operating properly.

It is alleged that there are delays in bringing matters to hearing in the first instance and that even when a hearing takes place, there have been extraordinary delays in the issuance of the resulting Determination. At a more mundane level, considerable frustration has also been expressed about deficiencies in communications with and within the Commission, and a lack of transparency in relation to the progress of appeals. This does not match the expectations of stakeholders in relation to what they thought the new body would deliver and is causing significant tension in the system.

The upshot of this is that there is considerable frustration on the part of stakeholders in relation to the 'performance' of the new body. (It should be said that this is primarily being judged on the basis of the number of cases brought to conclusion at Hearing and the finalisation and publication of Determinations and does not take into account the numbers settled, withdrawn, dismissed or refused).

Furthermore, whilst it is acknowledged that a small number of determinations have issued and been published, it has been suggested that the 'value' of these to tax professionals (and Revenue) is limited by virtue of the nature of the cases involved. One of the expected advantages of the new system – the creation of a database of determinations which would be of assistance in considering whether an appeal should be taken or not, has not yet been realised to any great extent.

Having carried out an examination of appropriate documents, interviewed many of the stakeholders and having considered the report of the organisational review by Crowleys DFK, I am of the view that there are changes that can be made to the governance, resourcing and operational practices of the TAC which would (a) assist in clearing the current backlog of cases and (b) equip the organisation to deliver on its mandate in accordance with the objectives originally set.

Accordingly, I am submitting, recommendations in each of the areas detailed in my Terms of Reference, as set out overleaf for consideration by the Minister.

Recommendations:

1. Governance:

- 1.1 It is recommended that the Minister appoint a Commissioner to be Chairman, Accounting Officer and Head of Office. In addition to normal duties as Commissioner, the Chairman would be responsible for overseeing case allocation, quality assurance, consistency and management of the operations of the Commission. In addition, the Chairman Commissioner would be the head of organisation in all respects and would be the Accounting Officer for the funds voted to the Commission. (It may be appropriate, as for other similar bodies, for the Chairman to receive additional remuneration in respect of these additional duties.)
- 1.2 The appointment of Chairman should follow the appointment of the new Commissioners recommended at 2.1 below.
- 1.3 In the recruitment of Commissioners attention should be paid to ensuring that there is a balance of professional backgrounds (Tax practitioners; Legal professionals with tax experience; Former Revenue Officials) to ensure a balance of approach by the Commission to its work. Particular attention should be paid towards ensuring that there is organisational management experience amongst the ranks of the Commissioners.

Independence

- 1.4 Provision of corporate supports
- 1.4.1 The provision of corporate supports (including Internal Audit, Health and Safety Services, Risk Management) for the TAC should be a responsibility of the Department of Finance in the short term.
- 1.4.2 The Civil Service Management Board should be asked to consider how best a shared service solution for these areas might be progressed for the TAC and other small agencies as the need arises in the future.
- 1.5 Provision of IT services
- 1.5.1 It is recommended that there is re-engagement between Revenue and the TAC in relation to the provision of IT systems design, support, and hosting facilities. This should be given due priority within Revenue in the context of ensuring a properly functioning appeals system, and should be fully supported by the Commissioners in both organisations.

1.5.2 The Department of Finance should use its influence to ensure that the OGCIO, in recognition of the scale of the Commission, provides full support to the TAC in relation to assisting with IT development; connectivity with Government networks; office systems and other sundry technical matters.

2. Additional resources required:

2.1 Recommendation: Allocation of additional resources as follows:

Appeal Commissioners x 1 (and 2 x Temporary Commissioners)

Principal Officer x 1 (to replace the current seconded post – so no addition)

Assistant Principals x 3 (including replacement for current contractor)

HEO x 3.5

EO x 2

CO x 3

2.2 All numbers suggested are on a full time equivalent (FTE) basis, however, this could be achieved in some instances through the recruitment of part time personnel (particularly at Commissioner level).

2.3 The intention of this additional resource is to facilitate the creation of a new organization structure with separate teams specifically to facilitate the identification and management of backlogs together with current caseload. The final determination of how support functions should be organised should be a matter for the Principal Officer with the agreement of the Commissioners.

2.4 All additional support staff should be appointed as core permanent staff at this point. However, the overall resourcing of the Commission should be re-examined in 3 years having regard to progress made, ongoing business requirements, and automation and efficiency gains.

Recruitment of staff

2.5 The TAC should engage with PAS in relation to the recruitment of staff with particular skillsets (eg Case Management; Legal Skills; Taxation Skills) on a joint basis with other organisations.

2.6 Experience in Revenue should be considered as relevant experience for the purposes of making appointments to roles in the Commission either at Commissioner or any other level.

2.7 Given the time lags in external recruitment, if the resources required are not available in the timeframe sought by the TAC, consideration should be given to seconding the additional staff on a temporary basis from other organisations in the civil service. Given that both the Department of Finance and Revenue have a direct interest in ensuring the effective operations of the TAC, I would suggest that they should take the lead in the provision of secondees with appropriate skills as a clear demonstration of their commitment to the effective operation of the TAC.

2.8 The TAC should request DPER to explore and put in place mobility and career development mechanisms for staff of the Commission and staff of other similar organisations.

3. Dealing with Backlogs

3.1 The Commissioners should identify and categorise caseload on hands with a view to determining the scale of the 'backlog' of current cases. They should put a plan in place to deal with this in accordance with some of the suggestions outlined. The plan should indicate a timeframe for the elimination of the backlog and targets for progress against which progress can be reported.

3.2 The Commissioners should communicate with all parties to appeals caught up in the backlog outlining the approaches being taken and identifying when progress might be expected in relation to different categories of appeals.

4. Process Improvements

4.1 The Commissioners should maximise the delegations available within the Act to optimise the contribution of Case Managers in the progress of appeals. These delegations should apply to the work of all Commissioners (permanent and temporary).

4.2 The support structures and systems in place must be optimised through utilisation in a consistent manner by all Commissioners, including Temporary Commissioners. The responsibility for ensuring this happens lies with the Accounting Officer.

- 4.3 The Commissioners should publish indications for expected timeframe for finalisation of determinations following hearing of appeal. A target of two months is suggested. The Commissioners should report on progress in meeting this target.
- 4.4 The Commissioners should, using the support of Case Managers in place, whilst appropriately balancing the issuance of determinations of appeals already heard with scheduling of new appeals, give priority to the finalisation of determinations currently outstanding.
- 4.5 The Commissioners should focus on more complex appeals with the support of researchers. Case managers should be focused on drafting determinations on less complex appeals in accordance with guidance provided by the Commissioners.
- 4.6 The TAC should formalise liaison arrangements with Revenue to facilitate greater efficiency in the operation of the appeals process.
- 4.7 An interdepartmental group, chaired by the TAC, should be established to explore options for the electronic exchange of information that is required by both the TAC and Revenue in line with the Revenue proposal for same.
- 4.8 In the light of suggested changes of Revenue practice regarding the raising of assessments, Revenue should consider how their internal/external review processes of Revenue might be strengthened.
- 4.9 There should be an exploration of how ADR might be accommodated at different stages of the process.

5. Legislative amendments which might facilitate the work of the TAC.

- Provide authority for the Commissioners to delegate decision making (determinations) in accordance with guidelines.
- Inclusion of guideline timeframes for finalisation of determination following hearing of appeal. In the event of timeframe not being met, it is suggested that a process similar to that which exists in the Court Service might be appropriate - there should be re-engagement with the parties after two months to indicate when finalisation will occur. Commissioners to report to the Chairman on ongoing basis in relation to determinations outstanding. Report to the Minister at end year of all such instances.

- Remove the requirement for agreement of the parties to the finalization of a determination without a hearing. Provide for appeal to the Commissioners against finalisation of a determination in such manner on limited grounds (more complexity; precedence value etc)
- Provide authority for TAC to refer cases to Revenue for review before matter is progressed as an appeal.
- Provide for ADR process at various stages of the process.

Chapter 1 - Examination of the Tax Appeals Commission

The traditional justification for the establishment of a quasi-judicial administrative appeals system over other forms of redress centre around **ease of access, fair procedure, timeliness and cost**.

Accordingly, any consideration of the operation of the TAC must consider whether these principles are adhered to or not. In the 'Model Complaint System and Policies' published by the Ombudsman (Office of the Ombudsman, 2016) a further principle is outlined which is considered appropriate in the current context - **complaints should be dealt with as early as possible and ideally at the first point of contact**.

The legislation providing for the establishment of the TAC is specifically designed to try and ensure that once the matter has moved beyond Revenue, the matters of access, and fairness of procedure are dealt with through the structures put in place. One objective of this type of approach is to make the process as accessible as possible and to minimise the kind of formalities and structures normally associated with the judicial system. Whilst the idea of an administrative appeals structure is specifically designed to keep costs to a minimum, such costs are inextricably linked to decisions made by the parties in relation to representation and the time taken to progress an appeal.

Timeliness in relation to the progress of appeals made to the TAC was the most significant issue raised with me by all stakeholders. Concern was expressed about how long it takes for any progress to be made, however minor. It has been stated that there is a lack of transparency around the timeframe for progressing an appeal through the various stages required. The experience of many was that even if the appeal was accepted into the process and contact made for the initial statement of case, this was no indication that the Hearing of the appeal was in anyway imminent. Indeed, it was suggested to me that once the appeal was accepted into the process, clients and Revenue were requested to supply 'statements of case' and then 'outline of arguments' in a pro forma manner meeting tight deadlines, to complete the documentary file within the Commission in situations where the actual appeal is not even close to being scheduled for hearing. This has given rise to considerable frustrations and it is suggested can involve the accrual of significant costs in a context where the actual hearing might be some way off.

It was pointed out to me that despite the ambitions of the administrative appeals approach, the costs associated with making an appeal to the TAC has increased compared to the previous arrangements. It was suggested that the absence of access to the Circuit Court means that taxpayers

are now almost obliged to have legal representation at the TAC in order to make the best possible case and having regard to the fact that appeal from the TAC is restricted to points of law. From my examination of the systems in place in other countries, however, this 'early' cost incurrance is not an unusual feature in tax dispute resolution matters. What is at stake here, however, is that if there are significant delays between the various steps of the process, then briefing and appearance costs can substantially increase.

A further frustration indicated to me by a number of parties was that even in situations where the hearing had taken place, there was no indication of when a determination would be made.

The consequences of delays featured in almost all of the submissions to the public consultation exercise carried out by the TAC in late 2017. In essence, the taxpayer representatives argued that the delays were costly for taxpayers in terms of interest payable and the cost of briefing representatives (often repeatedly). From a Revenue perspective, delays in the finalisation of appeals potentially means a delay in the collection of outstanding taxes and also a lack of clarity in relation to questions of interpretation.

The principle of having one's case heard within a reasonable time is a core right³ that has been upheld on many occasions within the judicial system in the context of the hearing of appeals against decisions in relation to refugee status and also in the context of appeals against decisions made in relation to social protection payments. I am not aware that recourse to law on this basis has happened as yet within the tax system, however, if delays persist I have no doubt that this could arise in the future

Governance Structures

Corporate governance comprises the systems and procedures by which organisations are directed, controlled and managed. Deficiencies in some of the 'control' structures in the Commission have already been reported elsewhere⁴ and progress has been made to address these over the course of the last year. Rather than referencing these again, my focus in this chapter is on the structures in place to direct and manage the Commission.

³ European Convention on Human Rights

⁴ Report of the Account of the Public Services, 2016, Office of the Comptroller and Auditor General

The legislation establishes a Tax Appeals Commission which shall consist of as many members as the Minister determines. It is not clear, however, from the legislation how the “Commission” should operate or be managed. It is apparent that, like the Office of the Appeals Commissioners, each Commissioner is independent in relation to their own judgement. What is not apparent, however, given that the Commission has a separate legal personality and vote, how normal governance ‘obligations’ should be satisfied by the membership.

A basic difficulty appears to be that none of the Commissioners is *primus inter pares* in relation to the duties of the Commission. A factor adding to the complexity of the governance arrangements is that the Act provides for the appointment (if required) of Temporary Commissioners, who shall not be regarded as members of the Commission, but who have the same authority, power and obligations as other Commissioners in relation to the performance of their functions. It is not clear how Temporary Commissioners are responsible or accountable to the Commission for the performance of their functions.

This is an unusual situation. In most of the other similar bodies that I have examined, it is provided in the governing legislation, that where there is more than one Commissioner, the Minister shall appoint one to act as Chairman. In most cases, the Chairman then has some additional defined responsibilities in relation to corporate leadership and accountability.

Where this area of governance becomes very important is in the context of accountability for dealing with matters in a timely manner. Whilst the legislation dealing with the activities of the TAC is very specific in relation to some timescales underpinning the making of an appeal, there are aspects of the process which are not constrained by a specified timescale. In particular, there are no timelimits for the hearing of an appeal once it has been accepted as valid. In addition, there is no time-limit for the finalisation of a determination once an appeal has been heard. The Commissioners are required to notify parties in writing not later than 21 days after a determination has been made. It has been suggested to me that there are many appeals which have been waiting for over a year to be heard and also that there are cases which have been heard over a year ago and for which a determination has not yet been issued. These are both serious indicators of difficulties within the current system.

The fact that all Commissioners are independent in their activities and not accountable to each other means that there is no structural mechanism to establish, monitor and enforce standards in relation to the performance of functions by individual Commissioners under the Act.

In the case of the TAC, the Minister has appointed one of the Commissioners to be the Accounting Officer. The Commissioners have indicated, however, that it is their intention to rotate the role of Accounting Officer between them over the course of their current term of office⁵. This is very much in keeping with the Commissioners view of 'shared management' of the Commission, however, it is an extremely unusual arrangement in the context of the structures of public service bodies. I have only come across one instance where a similar, but not identical situation arises⁶. It is not clear how the current TAC envisages the management of 'rotation' of the role if the Minister chooses to add to the membership of the Commission.

The Public Service Management Act, 1997 as amended, seeks to provide a structure for enhancing the management, effectiveness and transparency of operations of Government Departments and various other offices of the State. This Act clarifies the role and authority of the person appointed as the principal officer of the office or, where no such person has been appointed, the person designated by order of the Government to be the Head of the Scheduled Office for the purposes of the Act.

There is nothing in the legislation governing the TAC to indicate who the Head of Office should be and I am not aware that the TAC has been added as yet to the schedule to the Act (and formally comprehended by its provisions). In a context where the Commission is an independent statutory body and staff are appointed to the Commission (in accordance with S20 of the Act) this is an extremely important issue in the context of the management of the office and the designation of who is the 'appropriate authority' for staff.

Since the establishment of the TAC, the Commission has benefitted from the secondment of two successive Principal Officers to the staffing of the body. Whilst the role played by the secondee has become styled as 'Head of Administration' there is no so such formal post within the complement of the body. I am not aware of any clear delegation of responsibility to the Principal Officer or formal authority for the Principal Officer in relation to governance or output of the Commission.

It would appear that the lack of clarity in relation to roles and responsibilities has caused some difficulties in the governance arrangements in the TAC and has also caused some tensions between the individuals in different roles.

⁵ Tax Appeals Commission, Annual Report 2016;

⁶ Commission for Communications Regulation

Independence

From my consideration of the documents dealing with the establishment of the TAC, independence was considered to be a critical issue. There is no suggestion that the previous Appeal Commissioners were lacking independence in the determinations they issued, but there is certainly a general sense that the fact that the previous Office operated under the jurisdiction of Revenue, with staff seconded from Revenue and with all support operations provided by Revenue created a situation where the independence and integrity of the Office was open to question.

In a public consultation document issued in late 2013, it is stated that the Office “should have full independence and be responsible for its own staffing, IT systems, administration, listing of appeals and all related matters.”

This view certainly underpins the approach taken by the TAC in relation to its operations. There is a stated desire to demonstrate the independence of the TAC from the Office of the Revenue Commissioners in relation to all matters. The Accounting Officer referenced this at his appearance before the PAC in June 2018 and the Crowley review reiterates that the TAC perceives this as a key objective to be realised over the course of the coming months.

This requirement for independence from Revenue appears to have coloured all aspects of the establishment of the Commission and perhaps has extended even to the recruitment of Commissioners and staff, where it has been alleged that in some instances persons who had previously worked in Revenue were excluded from consideration for appointment to the Commission.

Considerable efforts are currently underway to disengage from the service level agreement with Revenue in relation to corporate supports currently being provided. In addition, there appears to be a specific desire to disassociate from Revenue in relation to IT matters – even to the housing of IT servers in Revenue data sites. Whilst Revenue had been initially involved in providing considerable IT support to the TAC on its establishment in terms of system development etc, this support apparently is no longer there. There are somewhat conflicting accounts as to what has occurred, nevertheless, the current position is that the TAC has contracted a Project Manager to assist in its IT development.

The requirement to build self-sufficiency in all corporate services is one element of the resourcing request made by the Commission. It is also referenced in the Crowley DFK review and underpins some of the recommendations contained therein.

Volume of Activity

I have heard various views in relation to the proportion of appeals lodged that would be expected to progress to hearing in normal circumstances. These numbers have ranged from 10% to 30% of appeals lodged. In considering the volume of activity for the Commission, the Working Group on the resource requirements of the Tax Appeals Commission considered the progress of appeals during the years 2012 and 2013. The Group concluded that of the appeals that progressed to the appeal commissioners for hearing (844 and 900 cases/tax issues respectively), approximately 71% were settled by agreement with Revenue, about 19% were finally determined by the Appeal Commissioners and only a relatively small number proceeded to Court.

These figures do not take into account the fact that under the previous structure (OAC), the initiation of an appeal was through Revenue – therefore, there was a ‘filtration’ system in operation in relation to the number of appeals submitted to the Appeal Commissioners which has not been quantified – and which would suggest that the number of appeals to be made to the TAC would considerably exceed the numbers submitted to the OAC.

The Group did conclude, however, that while the Appeal Commissioners determined about **80** cases per year under the ‘old’ structures, it was likely that this number would increase considerably under the revised structures of the new TAC.⁷

In 2016 the TAC received 900 new appeals. In 2017 this number increased to 1,751 new appeals. Indications are that this number is continuing to increase in 2018.

If the WG metric is applied, however crudely, to the 2017 volume, it would suggest that approximately **330 determinations** (1751 x 19%) would have been required of the Appeal Commissioners just to meet current demand during 2017. This does not take any account of legacy appeals (2,731), pre-establishment appeals (278), carry over from operations during 2016 (705) that were on hands during 2017 or activity in relation to cases stated that might be required.

When considering this expected output, however, there are some further factors that need to be taken into account having regard to the new structures:-

⁷ Report of the Working Group on the resource requirements of the Tax Appeals Commission.

Factors that potentially reduce productivity	Factors that could increase productivity
<ul style="list-style-type: none"> - It is arguable that written determinations require more preparation time than oral determinations. - Appeals to the High Court on points of law impose a more serious obligation on the Commissioners now in the absence of access to the Circuit Court for re-hearing of the case. - Publication of Determinations requires greater care in relation to the information to be made available. - Reporting and accountability requirements places additional demands on the available time of the Commissioners. 	<ul style="list-style-type: none"> - Given that all appeals are now lodged directly with the TAC, there must be an increase in scope for further engagement and settlement with Revenue before a case proceeds to hearing. - The assistance of case managers to (a) prepare/host case management conferences and/or (b) to research/draft determinations - Early publication of determinations could give guidance to practitioners and influence decisions to appeal - Greater use of electronic interface with Revenue would improve efficiencies in relation to progress and resolution of appeals - Some changes to the legislation could improve the rate of closure

The TAC currently receives between **40-50** notices of appeal per week. There are occasional ‘spikes’ in activity during the year eg shortly after income tax, VAT and CT returns have been filed with Revenue. A number of the notices received relate to issues that are outside the remit of the TAC and this has to be communicated to the applicant.

It is clear that over the course of the last year, there has been progress made with the usage of some of the newer mechanisms available to the TAC in dealing with appeals lodged. This would appear to be largely down to the increased utilisation of case management conferences and the impact of the introduction of case managers. Whilst the CMCs do not provide for mediation, they at least serve the purpose of bringing parties together, outlining the cases from both, establishing if there are ‘gaps’ and providing a mechanism whereby one or other may see value in further re-engagement.

Whilst those to whom I spoke commended the progress made in this area, concern was expressed that the use of CMCs had now reached its optimum usefulness – particularly in the case of legacy appeals – and that priority effort should now be focused on scheduling hearings and finalising determinations.

The processes currently in place have been designed to maximise the impact of available support staff – including the recently appointed case managers. The intention of processes put in place is to aim for the closure of approximately **100** appeals per month through settlement, determination etc. There is no doubt that this is an ambitious target and significantly linked to the ability of the case managers to fully support the Commissioners in both case management, research and drafting, and to the Commissioners confidence and reliance on the case managers in this regard. However ambitious, it is still useful to have targets in place to bring focus to the efforts of all staff and to provide a benchmark against which actual performance can be measured. Once norms in both volumes of appeals and process flows have been established, the targets can be re-examined with a view to more realistic targets being put in place.

There are a number of ‘drivers’ for appeals activity. These include

- The approach of Revenue to raising assessments (and settlement)
- Deadlines for concluding tax matters
- Expectations of taxpayers in relation to potential outcomes from appeal

Audit activity by Revenue involves engagement between the organisation and taxpayers (or their representatives). This engagement generally includes clarification in relation to various issues and queries in relation to the tax treatment of various matters. This engagement is drawn to a conclusion with the raising of an assessment by the Inspector. Once an assessment has been raised, the taxpayer is required to comply and pay the amount due or alternatively to appeal the assessment.

It has been alleged to me that Revenue has changed its practice in relation to the finalisation of assessments to the extent that assessments are now being raised at an earlier stage of engagement with taxpayers. It has been suggested that this change has arisen because of increasing public concerns in relation to the payment of taxes and greater interest in such matters by oversight bodies including the C&AG.

Whilst I have no way of validating a change in approach, if earlier assessment is a reality, it could also be a consequence of Revenue wishing to regularise engagement with taxpayers in the context of improving compliance and in the light of the move to new arrangements for appeal. The number of legacy cases that emerged during the transition to the TAC structures were an indication that in

some instances matters that were in dispute went unresolved and unconsidered for very long periods of time.

It has also been suggested to me that the time-limits for collection of taxes (four years) is also a driver in itself of appeals activity. The suggestion here is if the process of engagement between Revenue and the taxpayer is approaching the statutory deadline for the collection of funds due, there is an incentive to raise an assessment regardless of the status of discussion between the parties.

The existence of an appeals process which is accessible and can be low cost is itself a driver of appeals activity. If a taxpayer has an issue with an assessment made by Revenue or with the interpretation of some element of tax law, taking the matter to appeal is an easier and cheaper option than taking the matter to court. If the appeals process yields outcomes that are favourable to taxpayers, then this may be an incentive to others to try the process.

The volume of activity within the Commission can also be a factor of the processes in place. The journey of an appeal is now different to the arrangements that were in place before the establishment of the TAC. In the first instance, appeals are now sent directly to the TAC. Once received, they have to be sorted, acknowledged, and notified to Revenue. At that point the validity of the appeal has to be determined by the Commission having ascertained the views of Revenue in relation to same. These are all new administrative functions that have to be carried out by the TAC.

Once the validity of the appeal has been confirmed, the Commission is required to register the appeal and to 'commence' the formal appeal process. The appeal itself involves a number of stages including

- Considering the scope of the matter at stake ('triage');
- Establishing if a hearing is required, and if not, securing the agreement of both parties to a written process;
- Seeking statements of case from both parties;
- Scheduling case management conferences if appropriate;
- Seeking outlines of arguments from each party;
- Considering requests for extensions from either/both parties in relation to the submission of requested documentation or the scheduled date of hearing;
- Clarifying requirements around the hearing of the appeal;
- Scheduling the hearing;
- Undertaking further research (if applicable);

- Drafting the determination;
- Finalisation of the determination;
- Notification and publication of determination;
- Providing advice in relation to further appeal;
- Providing a 'case stated' to the High Court in the context of an appeal being progressed to that jurisdiction.

In all of the above stages, there is a requirement to communicate (and exchange documentation) with all parties to the appeal to ensure that everyone is aware of the current status of the appeal and to ensure that there is communication within the various areas of the Commission. My understanding is that in the previous organisation arrangements, much of the communication activity was actually carried out by Revenue on behalf of the OAC. The creation of the new separate structure means that this activity now falls to the Commission to deliver.

It would appear that there are opportunities for automation to assist in creating better efficiencies within the operations of the Commission – and particularly in the context of inter-agency communication with Revenue.

It has also been represented to me that given the fact that appeals are now notified in the first instance to the TAC, there is potential for appeals to be closed at an earlier stage in the process because the notification of appeal can itself prompt a more serious engagement between Revenue and the taxpayer. Ironically, given the concerns expressed about delays in the process, a criticism that has also been made is that the once the appeal is 'in process', the deadlines for moving the issue through the process imposed by the TAC can actually impede an early settlement of the issue!

In summary, therefore, there is no doubt that the Commission is required to engage in considerably more administrative activity in support of the appeals process than had been the case under the previous OAC arrangements. The need to filter and 'triage' appeals lodged; the prescription of moving through different stages; the need to secure agreement from all parties to various issues; and the need to engage openly and fairly with both parties in relation to all developments have created additional work. In addition, the actual number of appeals being made is now approximately double the number that made it through to the OAC.

Resourcing

The Tax Appeals Commission, when established, consisted of two Commissioners (one of whom was appointed as Accounting Officer by the Minister), a small number of administrative staff – some of

whom transferred from the previous Office of the Appeals Commissioners and a Principal Officer on secondment from the Department of Finance.

Anecdotally at least, it would appear that the decision to appoint two Commissioners to the TAC was made on the basis that in the previous structure, the two Appeals Commissioners were able to deal with the number of appeals that presented and there was no reason to suggest that the number of appeals would be any different under the new body.

In considering the resourcing of the new body, a Working Group on the resource requirements of the TAC Appeals Commission Resourcing effectively concluded that it was difficult to predict with any certainty what the resourcing requirements of the new TAC would be given the changes being introduced to operations and approach, and that the precise complement and type of staff required would have to be considered by the Appeal Commissioners as normal business pattern emerges.⁸

A complicating factor, to the resourcing of the new body, was the transfer of legacy appeals from the Revenue Commissioners to the TAC. Although the existence of legacy appeals was well flagged during the transition to new arrangements, the exact number and 'status' of such appeals had not been fully determined. When these appeals were eventually identified and transferred, despite some interventions by Revenue they gave rise to a substantial body of work in the TAC in terms of categorisation, classification and processing. Whilst this group of appeals is finite and self-contained and good progress has been made in reducing the outstanding number through utilisation of all of the mechanisms now available to the TAC, there is still a considerable body of work to be undertaken in bringing these to conclusion.

Finally, in determining the resourcing of the Commission, it is not clear that adequate consideration was given to the facts that the Commission as a new body would have certain compliance obligations to fulfil from start-up, that new operational processes would have to be devised and put in place, and that there would be a learning lag for new staff appointed. There was an assumption that the pre-existing support provided by Revenue Commissioners would continue for some time, and there were recommendations about the transition of other corporate support functions to other organisations but ultimately many of these recommendations do not appear to have been put into effect.

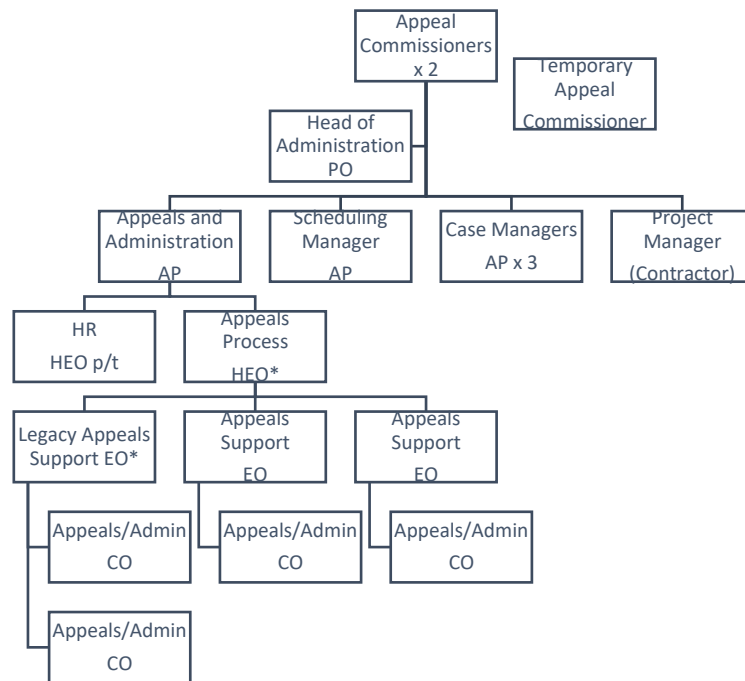
The initial resourcing of the TAC was minimalist at best given the changes in approach and new responsibilities being assigned to the Commission. There have been several increases in the

⁸ Report of the Working Group on the resource requirements of the Tax Appeals Commission

resources provided to the Commission. In many ways, however, the impact of these increases in staff numbers have been beset by lags in the recruitment process and the need to upskill new staff when they arrived. A further complication has been that a particular HR issue which has arisen in the TAC has absorbed a considerable amount of management time.

The current organisation structure of the TAC is detailed in the following organisation chart

Organisation Chart – Tax Appeals Commission (August 2018)



*HEO is on long term sick leave. EO from Legacy Support is acting as HEO

From my conversations with the parties directly involved, it is clear that the resourcing of the Commission is a cause of serious tension and has caused damage in relationships with the parent Department. There is a perception in the Commission that, in spite of all the signals pre-establishment about appropriate staffing being a matter to be determined as business needs arose, they have not received the support expected given the demands that have materialised. This perceived lack of support is not just about numbers, but also extends to support in accessing panels or engaging in a recruitment process. From the perspective of the Department, the view is that significant additional resources have been provided to the Commission since its establishment, which means that the staffing of the Commission is now a multiple of that which existed on establishment day. Furthermore, the Department is of the view that these additions have been provided on a ‘good faith’ basis without the support of a detailed business case as to how the resources will be used.

That said, however, this does not mean that the staffing complement is as yet sufficient to meet the workload and as can be seen from the detail above, the volume of demand on the Commission continues to increase.

The organisation of workload amongst available staff is an ongoing challenge for any organisation. For an organisation which is just being established, and which, over the course of its early years, has to deal with all set up arrangements, devise procedural guidelines, assimilate new staff and deal with a current caseload this challenge is considerable. When you then layer on a significant number of both pre-establishment and legacy cases where the information quality is not optimum, that challenge is escalated to an extraordinary level. This places enormous demand on the senior management structures within the organisation – and if these structures are unclear, then difficulties are compounded.

Since its establishment, as new resources have become available, the shape of the organisation has had to adapt and it is fair to say that the benefits of some of the changes put in place have yet to be fully realised (ie the employment of case managers). In moving to a more ‘steady state’, further restructuring of the TAC will be required. There is a need to formalise support structures and segregate functions to gain some efficiency dividends and identify clear lines of responsibility. It would appear that some good work has already been done in relation to the development of the case management function and the formation of support teams and this approach can be extended as the organisation matures.

There are two challenges facing the TAC

- Dealing efficiently with current cases as they arise;
- Dealing with the backlog (which is in two parts – (i) legacy cases and pre establishment cases and (ii) cases that have been lodged since establishment)

Resourcing is part of the required response to these challenges, but the sanctioning of additional resources alone won't address all the issues that currently exist with the operations of the TAC. I will address this further in my conclusions and recommendations.

Chapter 2 Comparisons - Domestic and International

(a) Other Bodies (domestic)

There are many other 'single purpose' bodies established by Government, through various means, to carry out specialist or expert functions including regulation, investigation, appellate or other roles. In this way, there are many comparators for the Commission. These include

- Agriculture Appeals Office
- An Bord Pleanála
- Commission for Communications Regulation
- Commission for Regulation of Utilities
- Consumer and Competition Protection Commission
- Data Protection Commissioner
- Financial Services and Pensions Ombudsman
- Garda Síochana Ombudsman Commission
- International Protection Appeals Tribunal
- Irish Financial Services Appeals Tribunal
- Office of the Comptroller and Auditor General
- Office of the Ombudsman
- Policing Authority
- Property Services Regulatory Authority
- Social Welfare Appeals Office
- Valuation Office
- Workplace Relations Commission

The interesting thing about these bodies is that (a) they are all expected to be independent in their functioning and (b) there is no one single approach to how they are structured or governed. They vary considerably in terms of scale and budget, and there is also considerable variation in how they are funded and are accountable for funds provided.

The table at appendix 1 details a very high level analysis of some of the key features across the above named bodies.

The striking feature of this analysis is that only a very small number of these bodies are funded through separate Votes. All of those funded in this way, with the exception of the Policing Authority, are bodies that are significantly bigger than the TAC in both staff and operational terms.

Another interesting feature of this analysis is the variety of governance arrangements that are in operation. There are many ways in which to break down the bodies listed. For the purposes of this exercise I have divided them into two groups.

The first group includes bodies where there is a single Office Holder who is responsible for the statutory (or constitutional) functions of the office eg C&AG, Ombudsman, Data Protection Commissioner and Valuation Office. Interestingly, where the offices for these bodies have a separate Vote, the Accounting Officer role is not usually held by the Officeholder⁹, but rather by a separate designated individual (Secretary/Head of Audit in C&AG; Director General in Ombudsman etc).

The second group includes bodies where there are a number of members involved in the Governing Authority eg Commission for Communications Regulation, Central Bank Commission, Commission for Energy Regulation, Consumer and Competition Protection Commission, International Protection Appeals Tribunal, Police Authority etc. In almost all of these bodies, there is a designated Chairperson of the body and that person is almost always also designated as Head of Office (but not necessarily as Accounting Officer or 'Accountable Person').

It is clear that the TAC, as currently configured, does not comfortably fit into either of the categories described. It has a separate Vote and a designated Accounting Officer – yet it has the smallest staff of all the bodies listed. In relation to other governance issues, the TAC has a Commission which has more than one member, yet there is no Chair or Head of Commission designated. Indeed, although as mentioned earlier, the Act establishing the TAC is silent in relation to how the Commission should operate as a body and in relation to the designation of the Head of Office function in accordance with the PSMA¹⁰.

⁹ Except in the case of the Valuation Office where the Commissioner is also the Accounting Officer and Head of Office.

¹⁰ This has particular relevance in relation to exercising authority over staff of the Commission in terms of discipline etc.

(b) International Models

For the purposes of this exercise, I had a brief look at the structures of the tax appeals systems in operation in the UK, Australia and New Zealand.

I was particularly interested to establish the nature of the dispute resolution structures that are in place within the tax system and, specifically, the use of **alternative dispute resolution processes (ADR)** within those structures given that this was a feature referenced in several submissions to the public consultation process organised by the Commission. ADR can be defined as the use of processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve issues between them.

In each country examined, there are appeal structures in existence which operate independently of the appropriate taxation authority. These are

UK – Tax Tribunal

New Zealand – Taxation Review Authority

Australia – Administrative Appeals Tribunal (a cross government appeals process which is not restricted to tax matters)

In the case of the UK and NZ, these bodies are quite formal and quite legalistic in nature, whereas the Australian model is more firmly grounded in traditional administrative appeal arrangements.

What is particularly interesting, however, is that in each country there is provision for an **internal review mechanism** (within the taxation authority) in order to try and minimise the number of appeals that progress to the appeals body.

In the **UK**, the HMRC has a published Litigation and Settlement Strategy (LSS) with well established internal support structures for the consideration of disputes that arise.

If the disputes relate to complaints about the HMRC, there is also recourse to an independent Adjudicators Office, and from that to the Parliamentary and Health Services Ombudsman.

There is also an alternative disputes resolution process (ADR) available to those who wish to appeal a taxation matter. The ADR is considered to be relevant and helpful in certain instances and there is considerable guidance available on how and when it might be accessed.

Not all cases that progress to the Tax Tribunal in the UK, go to a formal hearing, but the appellant can seek a hearing. If there is a hearing, the tribunal panel will normally include a judge and the

hearings are generally held in public. Decisions from the tribunal are required to be delivered within certain time limits. There is a further avenue of appeal, if the first-tier tribunal made a legal mistake, or if it failed to fully explain its decision, to the Upper Tribunal – but access to this is determined by a Judge.

In **New Zealand**, there is a two-stage (internal) administrative process – a Conference stage, and an Adjudication stage - available to facilitate the resolution of disputes before a taxpayer files a matter with the Tax Review Authority. A taxpayer can election to opt-out after the conference stage and go directly to the TRA (or the High Court) if certain criteria are met. The adjudication stage is a function of the Disputes Review Unit of the Office of the Chief Tax Counsel and the role here is to take a fresh look at tax disputes in an impartial and independent Manner. Whilst within the overall remit of the Inland Revenue Commissioner, the Unit is independent of the investigative or audit function and it is staffed by qualified accountants and solicitors.

In **Australia**, ADR is also available and the Australian Tax Office is committed to using it at any stage of an appeal, where appropriate, to resolve disputes. The type of ADR process that may be employed include facilitative (eg mediation), advisory (eg neutral evaluation or case appraisal) or determinative (eg arbitration). Blended processes, where the ADR practitioner plays multiple roles, may also be utilised. In the Australian model there is a specifically developed ADR programme, an in-house facilitation process, for less complex disputes arising from certain issues.

The existence and usage of formal internal review structures in the three countries considered appears, on the face of it, to contrast with the structures in place in Ireland. Although Revenue has both internal and external review processes, the number of cases which progress through these appears to be low. This point was made by the TAC Accounting Officer during his recent appearance before the Public Accounts Committee¹¹. Furthermore, it was represented to me during the course of my interviews with stakeholder interests, that people do not have confidence in the current review system as it would appear the remit of the review system is constrained and there is a ‘high bar’ for finding against Revenue.

It is clear that in all three other jurisdictions examined, there has been considerable evolution of practice in how tax disputes are progressed. Considerable emphasis is placed on creating opportunities for dispute resolution at an early stage very much in keeping with the principle advocated by the Ombudsman which I referenced earlier. There have been some very interesting academic studies of the processes in place in both Australia and New Zealand which evaluate the

¹¹ Public Accounts Committee Hearing – 28 June 2018

systems in place against best practice principles of dispute resolution. Interestingly, these studies identify that some of these principles are not applicable to tax cases – particularly the principle of progressing from low to high cost approaches. Nevertheless, the studies provide a good opportunity for further research to benchmark the processes in Ireland.

Chapter 3 Conclusions and Recommendations

Governance Structures

From my research I have not been able to find any particular rationale as to why the TAC was established in its current form apart from the desire to create a body that was independent in its functions. It is perhaps true that the focus was on creating a quasi-judicial body where each of the Commissioners would operate on an independent basis – not just independent of stakeholder interests but also independent of each other. [In the only reference to the Commissioners acting together, the Act explicitly provides that appeals must be heard by an uneven number of Commissioners in order to ensure that there is at least a process to yield a majority view]

Whilst this independence may be laudable in terms of the integrity of the process, it is at least arguable that there is also a complementary need to ensure that there is some consistency and quality assurance in relation to the product of any of the Commission's deliberations. In addition, given the nature of the TAC, it appears to me that it would be appropriate for there to be a structure around the prioritisation, allocation and management of cases amongst the Commissioners.

From my discussions with the Commissioners, it is clear that they take the issues of quality assurance and consistency very seriously. It would appear, however, that in a situation where there are only two members of the Commission¹², the manner in which they go about this could be considered to reduce the output of the TAC rather than improve it as, from my understanding, they each currently provide 'quality assurance' to the other through the consideration of each other's determinations etc prior to issue. Whilst this approach certainly provides quality assurance, it is not an efficient way to manage the output of the Commission or to maximise productivity in the finalisation of determinations.

Accountability

If the objective of improving accountability and governance in the TAC is to be served, there are two issues that have to be addressed

- Strengthening the operations of the Commission as a body through the designation of one Commissioner as Chairperson with specific functions including

¹² The Temporary Appeals Commissioner is not considered to be a member of the TAC

- management of the allocation and prioritisation of cases;
 - quality assurance of appeal processes and outcomes;
 - consistency measures;
 - setting targets and overseeing performance of individual members in relation to output;
 - ongoing professional development of Commissioners
- Formal designation of Head of Office role to provide greater clarity in relation to roles and responsibilities within the organisation.

Looking at the models existing in other bodies (in Ireland), it would seem to me that there are at least two ways in which these issues could be addressed.

(i) Separate the personality of ‘Commission’ from the support organisation.

In essence this would mean that the Commission would have responsibility for the ensuring that the objectives of the Act are served through the **output** of the organisation but would not have any **management** responsibilities for the support structure. It is suggested that under this model, the Commission could consist of all Commissioners (both permanent and temporary) and one of the Commissioners would be appointed as Chairman to oversee the allocation, quality and consistency of appeals which are determined by the Commission. This would allow the Commissioners to focus entirely on the matter of appeals and not be drawn into day to day organisational management or governance.

Separately, there would be a supporting administrative system headed by a Head of Office/CEO who would be the Accounting Officer for the organisation. The relationship between the two entities could be somewhat modelled on that which exists between a Minister and Secretary General in a Government Department.

(Insofar as the Head of Office and Accounting Officer functions are concerned, this model would be consistent in many ways with the structure envisaged by the resource request made by the TAC to the Minister in February 2018. It also has some resemblance to the option which I understand to be preferred by the current Commissioners, however, is not entirely identical to this.)

This model would require changes to the governing legislation for the TAC.

There are advantages and disadvantages to this model:

Advantages	Disadvantages
<ul style="list-style-type: none"> • Commissioners sole focus is on determination of Appeals; • Recruitment of Commissioners can be focused on their professional experience alone; • Greater clarity in relation to the day-to-day management of the organisation. • Accountability for staff and support structures is clear. • Clearly asserts the 'independence' of the Commissioners in the exercise of their functions. 	<ul style="list-style-type: none"> • Commissioners are 'distanced' from the support organisation; • CEO/Accounting Officer has no 'authority' over the work of the Commissioners and therefore the final product of the Commission; • Lack of clarity as to what and how the Commissioners would be held to account. • Moves the appeals structure way from an administrative process and more towards a 'judicial' approach. • Complexity of the structure given the size and scale of the office. • Legislation required to clarify roles and responsibilities

(ii) Designate one of the Commissioners to be Chairman, Head of Office and Accounting Officer

The change to the status quo here is the formal designation of one Commissioner as Chairman with responsibilities in relation to the allocation, quality assurance, consistency and management of the operations of the Commission. In addition, in this model, the Chairman Commissioner would be the head of organisation in all respects and would be the Accounting Officer for the funds voted to the Commission.

This is an integrated approach to the organisation, is more in keeping with the concept behind a simplified administrative appeals system and provides accountability on an end to end basis for the appeals process.

The question that arises in this model is if the Chairman is at the head of the organisation structure, whether the other Commissioners form part of the senior management team or not.

In the model proposed by Crowleys DFK, which sees one of the Commissioners appointed as Chairman and Head of Office, it would appear that the Chairman alone has management responsibilities. This would seem to be somewhat awkward in organisational terms and certainly flies against the spirit of an integrated organisation.

The Minister currently appoints one of the Commissioners to be the Accounting Officer, and in addition, it is possible for the Minister to designate the Head of Office under the terms of the PSMA, 2007. It would be preferable, however, for the position and role of Chairman to be explicitly provided for in legislation so that there is clarity for all concerned.

Advantages	Disadvantages
<ul style="list-style-type: none"> • Clarity in relation to roles and responsibilities. • Integrated approach to management of process and output. • Chairman (and potentially Commissioners) have greater ownership of processes and systems in place. • Simple structure in keeping with size and scale of organisation. 	<ul style="list-style-type: none"> • Chairman’s role not focused entirely on determining appeals • Chairman (and potentially Commissioners) become involved in organisational matters • Legislation potentially required to clarify roles and responsibilities

The critical difference between the two models relates to the involvement of the Commissioners in governance and organisation management. Although there is merit to both models, I have concluded based on the scale and nature of the TAC that the second model is a better fit and is the more compelling response to the current position of the Commission.

Recommendation:

It is recommended that the Minister appoint a Commissioner to be Chairman, Accounting Officer and Head of Office. In addition to normal duties as Commissioner, the Chairman would be responsible for overseeing case allocation, quality assurance, consistency and management of the operations of the Commission. In addition, the Chairman Commissioner would be the head of organisation in all respects and would be the Accounting Officer for the funds voted to the Commission.

The appointment of the Chairman should follow the appointment of additional Commissioners as recommended below.

In the recruitment of Commissioners, attention should be paid to ensuring that there is a balance of professional backgrounds (Tax practitioners; Legal professionals with tax experience, Former Revenue officials) to ensure a balance of approach by the Commission to its work. Particular attention should be paid towards ensuring that there is organisational management experience amongst the ranks of the Commissioners.

Independence

I was also specifically asked to look at the issue of independence.

Independence is an important principle for the operations of the TAC to inspire public confidence in its processes and output. There are a considerable number of aspects to the creation of the TAC in 2015 which go a long way towards providing assurance to the public in relation to the independence of the Commission:-

- The TAC is established as a separate statutory body with a separate legal identity from any other organisation of State;
- Commissioners are appointed by the Minister following a competition organised by the Public Appointments Service, having satisfied certain specified requirements in relation to their qualifications and experience;
- The TAC is funded by a separate Vote to any other organisation;
- The TAC is required to report on its activity on an annual basis;
- The TAC is required to publish guidelines to assist tax-payers in the making of an appeal
- The Determinations of the TAC are published and available for scrutiny;
- Staff are appointed to be staff of the TAC.

It has been suggested that in order to provide complete independence, the Commission should also be independent in terms of its staffing, IT systems, administration and all related matters. It has stated its ambition to withdraw from the service arrangements it has with Revenue and instead to build its own competence in these areas.

It is in this context, however, that I am of the view that there also needs to be due consideration given to proportionality and cost effectiveness.

The corporate support and governance compliance issues to be serviced by a small independent body are the same as those that have to be satisfied by larger bodies. In an organisation of the size of the Commission, I would question why separate corporate support arrangements (risk management, internal audit, health and safety, data protection, etc) have to be built from scratch and maintained within the organisation.

This is an area which seems to be particularly suited to a shared services approach and I am certain that there are many other small organisations who would be prepared to engage in such an approach. Indeed, the idea of a shared approach for functions of this nature is not new. It was flagged in the Mullarkey Report¹³ in relation to internal audit and Audit Committees, and it is an area of interest to the Civil Service Management Board. There are certainly arguments of scale and cost efficiency to support such an arrangement. There is also an argument about ensuring best practice in these areas through repeated engagement – something which is unlikely to arise in small organisations. I am aware that both the Department of Justice and the Department of Communications, Climate Action and Environment have made progress on organising shared services across a number of functions to their respective agencies and similarly, in the health services, there are a number of shared service approaches that could be replicated.

At the time of the establishment of the TAC it was expected that the Financial Management Shared Services (FMSS) project would have progressed substantially within a short time and that most of the TAC financial functions would be carried out within the FMSS. The project has not progressed in line with these expectations and it is my understanding is that it will still be some years before this is the case. My view is that even when the FMSS is operational, there will still need to be some residual support provided for at participating body level.

I have no reason to believe that the support arrangements offered by Revenue compromise the integrity of the outcome of the Commission's work in any way. If, however, there is a view that continued association in this regard between Revenue and the TAC 'looks' inappropriate, my view is that the support arrangements currently being offered by Revenue could and should be provided by another organisation rather than building a new structure within the Commission. The other organisation could be the Department of Finance, or another of its agencies; the Department of Public Expenditure and Reform or one of its agencies; or another Regulatory Body by agreement. It should be a matter for the Department of Finance to resolve this in the short term.

¹³ Report of the Working Group on the Accountability of Secretaries General and Accounting Officers (2002)

Recommendation:

- (i) The provision of corporate supports (including Internal Audit, Health and Safety Services, Risk Management) for the TAC should be a responsibility of the Department of Finance in the short term.**
- (ii) The Civil Service Management Board should be asked to consider how best a shared service solution for these areas might be progressed for the TAC and other small agencies as the need arises in the future.**

Turning specifically to the issues referenced in relation to the provision of IT services. Regardless of the history in the matter, I would argue that it is in Revenue's interest that the IT systems in the TAC are fully functioning. By this I mean, that the systems should service the business needs of the Commission, provide for appropriate communication channels with all parties to appeals and greater efficiencies in the inter-organisational interface provide for the proper exchange of information and documents. I think that it is well within Revenue's capability to provide technical assistance to the TAC in an impartial manner and that this should be re-activated as soon as possible – particularly in the wider context of making progress on the interface project referenced in the section dealing with process improvements below.

In relation to the specific concerns identified about 'hosting' the server in the Revenue data centre – I believe this to be a non-issue. I am aware that Revenue host servers for a wide range of Government Departments and bodies in their data facility (as do the Department of Employment Affairs and Social Protection). There are protocols to be followed in relation to access etc, however, I am of the view that there should be no concern to the Commission about the location of servers in a state of the art facility with maximum security benefits.

Recommendation:

It is recommended that there is re-engagement between Revenue and the TAC in relation to the provision of IT systems design and support, hosting facilities. This should be considered as a priority within Revenue in the context of ensuring a properly functioning appeals system, and should be fully supported by the Commissioners in both organisations.

The Department of Finance should use its influence to ensure that the OGCIO, in recognition of the scale of the Commission, provides full support to the TAC in relation to assisting with IT development; connectivity with Government networks; office systems and other sundry technical matters.

Under the previous structures, Commissioners were appointed from a variety of backgrounds – including Revenue. This variety brings a very rounded experience to bear on the work of the commission. I have not heard any suggestion that the rationale for an independent appeals body arose from any bias in the determinations of former Commissioners (including those who had previously served in Revenue). The main issues indicated to me were around transparency and governance.

Indeed, it seems to me to be extremely odd if the adjudication body established to determine appeals is does not contain persons who have acquired experience and expertise from working with one of the main stakeholders to the process. It is the relevance of expertise and the integrity of the individual in upholding due process which is important in the making of appointments to a body such as the Commission.

Recommendation:

Experience in Revenue should be considered as relevant experience for the purposes of making appointments to roles in the Commission.

[Additional resources required](#)

There is no doubt that the Commission suffered from the outset with being under-resourced. This was not due to any deliberate intention to obstruct the work of the Commission but rather I think from a lack of appreciation of what would be required to establish and embed the new body and its organisation structures.

Despite being in operation for over two years, it is still not entirely clear what the scale of ‘normal business’ is for the Commission because of the lags in hearings and the issuance of determinations. There is no easy way, at this point, of quantifying the impact an efficient and timely process would have in terms of acting as a deterrent or incentive to further appeals. Accordingly, it is not easy to determine what the appropriate permanent staffing of the organisation should be.

A further complication in this regard is the fact that creation of an automated workflow system potentially could create significant efficiencies in relation to the processing effort required for both correspondence and appeals lodged.

In effect there are now two ‘backlogs’ of work for the Commissioners. The first relates to the legacy appeals and is being managed by a separate team within the Commission. I would argue that a

similar approach should be taken to the backlog of 'current' work i.e appeals on hands that have been lodged under the new system but have not yet been progressed.

In considering resource requirements for the Commission, I would consider that there are a number of different elements to be considered:

- A modest corporate support structures for the TAC – HR/Finance/IT/Facilities/Data security etc to facilitate some internal service delivery and liaison with other providers;
- Support structures, case management and Commissioner requirement to handle current appeals;
- Support structures, case management and Commissioner requirement to handle backlogs of (i) legacy appeals and (ii) current appeals

I have considered the recommendations made by Crowley DFK in this regard, but am of the view that, whilst considerable additional resources are required, the shape or grading proposed by that review is not appropriate given the overall size of the organization. I also believe that there is a need for a Chief Operations Officer in the structure to oversee all the support structures for the Commissioners. Accordingly whilst the numbers of additional staff suggested is broadly similar to that contained in the Crowleys DFK report, the grading profile is different.

I would also recommend that rather than differentiating between permanent and temporary assignments at this point, additional resources should be provided to the Commission at this point and that the overall ongoing resource requirement should be reviewed in three years having regard to workload and efficiencies delivered through automation and process improvement.

Finally, in order to provide immediate support to the Commission, I would recommend that in the event of lags in recruitment, resources should be seconded from appropriately skilled personnel across the civil service on a temporary basis – particularly to assist in the elimination of backlogs. Given the particular interest of both the Department of Finance and Revenue in the effective operation of the TAC, I would suggest it appropriate that they should take the lead in the provision of such resources. If temporary assignment is made for a period of one year, this would then facilitate a more planned approach to recruitment in conjunction with PAS. I believe that there should be exploration of a joint approach to recruitment with other bodies seeking similar skills and that this should also be the foundation for considering future career and mobility structures for staff in the Commission and other similar bodies.

Recommendation:

Allocation of permanent additional staff as follows:

1 x Appeal Commissioner (and 2 x Temporary Appeal Commissioners)

1 x Principal Officer (permanent post to replace seconded officer)

3 x AP (incl replacement for contract post)

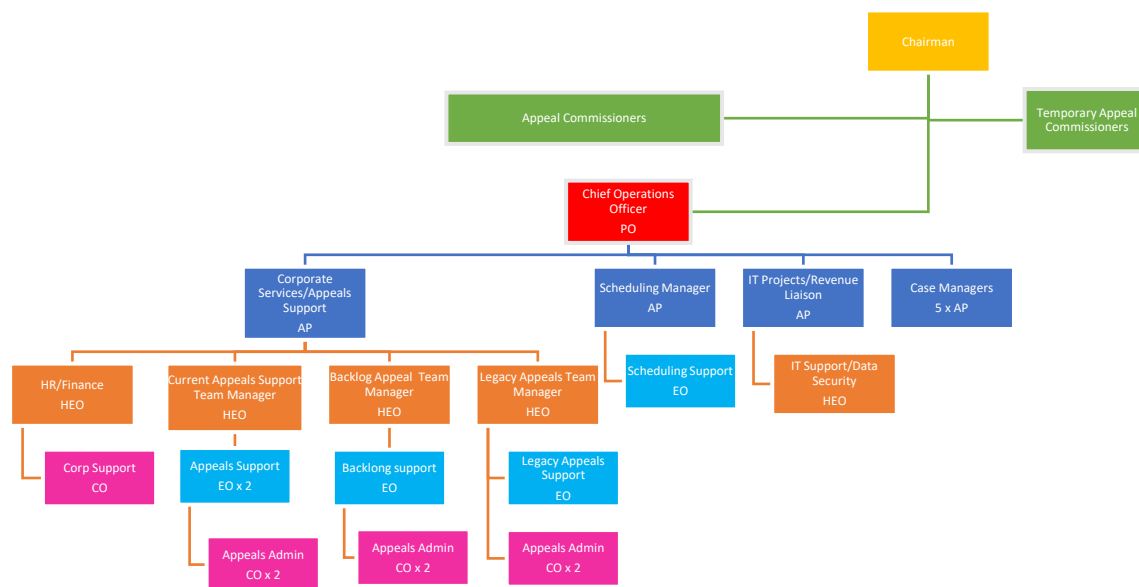
3.5 x HEO

2 x EO

3 x CO

All numbers mentioned are on a full time equivalent (FTE) basis, however this could be achieved in some instances through the recruitment of part time personnel (particularly at Commissioner level).

The intention of this additional resource is to facilitate the creation of a new organization structure with separate teams along the lines identified in the suggested organisation chart below, however, the final determination of separation of functions should be a matter for the Principal Officer in conjunction with the Chairman of the Commissioners.



Recommendation:

All additional staff should be appointed as core permanent staff at this point. However, the overall resourcing of the Commission should be re-examined in 3 years having regard to progress made, ongoing business requirements, and automation and efficiency gains.

The TAC should engage with PAS in relation to the recruitment of staff with particular skillsets (eg Case Management; Legal Skills; Taxation Skills) on a joint basis with other organisations.

Given the time lags in external recruitment, if the resources required are not available in the timeframe sought by the TAC, consideration should be given to seconding the additional staff on a temporary basis from other organisations in the civil service. Given that both the Department of Finance and Revenue have a direct interest in ensuring the effective operations of the TAC, I would suggest that they should take the lead in the provision of secondees with appropriate skills as a clear demonstration of their commitment to the effective operation of the TAC.

The TAC should request DPER to explore and put in place mobility and career development mechanisms for staff of the Commission and staff of other similar organisations.

Dealing with backlogs

The TAC needs to formally identify the scale of the backlog they face (as opposed to current activity) and put in place a plan to deal with it. The plan should have regard to a 'categorisation' of appeals (age, complexity, value, precedence value etc) and should indicate a timeframe for the elimination of the backlog and targets for progress against which progress can be reported.

The TAC is already dealing with legacy appeals as a ring-fenced backlog with a dedicated Commissioner and a separate support team in place. This approach is sensible – there is a finite number of cases to be handled and progress can be measured and reported.

In relation to all other cases within the Commission, the most immediate issue is to 'audit' where all current cases lie with a view to targeting resources at eliminating obstacles to progress. From the information currently available to me, whilst I am aware of the caseload on hands in the organisation, I am not clear where all the backlogs currently exist in the process and therefore where attention should be focused. Whilst there are obvious points of backlog are around the scheduling of hearings and the finalisation of determinations, it is not clear to me if there are backlogs at earlier stages in the process as well.

If this is the case, I would suggest that such cases should be treated as another 'backlog' to be addressed in a ring-fenced manner. This could include all cases lodged up to a nominated date on which no action has yet been taken or where they have not proceeded beyond a very early stage in the process. This would allow for better management and reporting on these cases as the numbers involved are progressed.

One issue, however, that needs to be considered carefully in this regard is that an end to end view is required of the appeal journey in both the allocation of resources and the setting of progress targets or deadlines for responses from different parties. There is little point in making progress on certain stages of the process, if momentum cannot be continued to point of determination or decision. This just causes enormous frustration on the part of those affected and damages their view of the operations of the organisation.

The 'triage' approach to early identification of matters not relevant or appropriate to the TAC; invalid appeals; and matters where a hearing is not required should be continued.

The Commissioners should agree to a committed timeframe for the 'fast track' determination of appeals where both parties agree that a hearing is not required. This should be flagged to the parties at the time their agreement to this approach is being sought. These cases may be suitable to be worked by case managers or newly appointed or part-time Commissioners.

Once the plan is in place for the management of the backlog, there should be communication with all parties involved outlining the approaches being taken and giving some idea of when progress might be made on different categories of appeals.

Recommendation:

The Commissioners should identify and categorise caseload on hands with a view to determining the scale of the 'backlog' of current cases. They should put a plan in place to deal with this in accordance with some of the suggestions outlined. The plan should indicate a timeframe for the elimination of the backlog and targets for progress against which progress can be reported.

The Commissioners should communicate with all parties to appeals caught up in the backlog outlining the approaches being taken and identifying when progress might be expected in relation to different categories of appeals.

Process Improvements

It has been represented to me that the Commissioners consider that they currently are responsible for up to 60% of the 'handling' of an appeal that is made to the Commission. This is an area which is ripe for change.

Good work has been started on developing processes for the progress of appeals within the organisation. This work needs to be formalised and agreed by the Commissioners. This involves greater progress in delegating authority, in accordance with the provisions in the Act, to the fullest extent possible. The recent recruitment of case managers facilitates the greater disaggregation of work and the use of delegated authority particularly in the early parts of the process and in research and the drafting of determinations for sign off by the Commissioners.

Recommendation:

Commissioners should maximise the delegations available within the Act to optimise the contribution of Case Managers in the progress of appeals. These delegations should apply to the work of all Commissioners (permanent and temporary).

It has been suggested to me that the independence of the Commissioners can extend to the use or non-use of support staff and structures within the organisation. If individual Commissioners take individual views in relation to communications with the parties to an appeal or the scheduling of hearings, this creates inefficiencies of administering the appeals processes. Furthermore, it is critically important that all correspondence and communication with parties is appropriately recorded so that (a) there is no confusion as to the current status of any individual appeal and (b) accurate reports can be provided to the Minister or as appropriate.

This will be a matter for the Chief Operating Officer to bring to the attention of the Chairman of the Commissioners in due course, however, in the interim, it is appropriate for Head of Administration to advise the Accounting Officer of any such concerns to ensure that any inadvertent inefficiencies are eradicated.

Recommendation:

The support structures and systems in place must be optimised through utilisation in a consistent manner by all Commissioners. The responsibility for ensuring this happens lies with the Accounting Officer.

The issue raised most often with me was the lack of transparency around timelines for progression of appeals within the process. In particular concern was expressed about experience of considerable lags in time between the hearing of an appeal the finalisation of a determination.

The explanations offered for the time lags, leaving aside the issue of lack of resources, have focused on:-

- (i) the need to adopt a very high bar in relation to the content of the determination because appeal against a determination is restricted to access to the High Court on points of law alone;
- (ii) the absence of appropriate balance in scheduling between hearing appeals and writing up determinations;
- (iii) the need to provide for quality assurance through the sharing of determinations prior to issue.

In relation to (i) above, a similar situation prevails in relation to appeals against decisions or determinations of the Financial and Pensions Services Ombudsman, the Ombudsman, and many other bodies. Yet the same 'anxiety' about the absolute comprehensiveness and content of the determination does not appear to exist in those bodies and they function well.

There is a real case here of balancing the needs of the overall system with the needs of the individual good in terms of delivery of results. It is undoubtedly the case that, regardless of the efforts made by the Commissioners to deliver foolproof determinations, a proportion of cases will end up at the High Court and that there will be findings against the Commission. If that is the case, then the Commissioners should learn from the process and move on. What they should not do, however, is to spend disproportionate amounts of time on any one case to the detriment of progressing many others. It may be the case that as the organisation matures operational practice in this regard will settle.

There is no absolute guideline on how long it takes to prepare a determination as the nature of individual cases will vary. Various average timescales have been suggested to me ranging from 6 weeks to 6 months. As an initial indicator, I would suggest that a target of two months should be established.

In relation to (ii) above, a variety of views have been expressed to me as to what the appropriate balance should be with ratios between time to be spent between hearings and determination finalisation varying from 4:1 to 1:1. Issues such as the complexity of case and length of hearing are of course relevant here, however, the support of case managers should mitigate some of these

challenges at least. Whilst I am not well positioned to say what the precise ratio should be for the purposes of scheduling arrangements, there are other bodies where similar processes are in place and where examples of balance could be obtained.

In relation to (iii) above, the current practice where for quality assurance purposes the Commissioners each read the others determinations before issue, whilst understandable in a start up organisation, is entirely inefficient in the use of time at the most senior level within the organisation. Quality assurance is a matter which should be of concern to all Commissioners – both permanent and temporary, and there are ways in which processes for same can be put in place without disrupting output. Once again, this is a matter where advice might be sought from other appellate bodies issuing determinations appealable to the Courts only on points of law.

Recommendation:

The Commissioners should publish indications for expected timeframe for finalisation of determinations following hearing of appeal. A target of two months is suggested. The Commissioners should report on progress in meeting this target.

The Commissioners should, using the support of Case Managers in place, whilst appropriately balancing the issuance of determinations of appeals already heard with scheduling of new appeals, give priority to the finalisation of determinations currently outstanding.

The Commissioners should focus on more complex appeals with the support of researchers. Case managers should be focused on drafting determinations on less complex appeals in accordance with guidance provided by the Commissioners.

Liaison with Revenue

The independence of the Commission is extremely important in relation to its consideration and determination of appeals. However, every appeal has one thing in common – Revenue is one of the parties to the appeal. On this basis, I think that there is ample potential to improve efficiency within the Commission through the establishment of a formal liaison function with Revenue. This function could inter alia

- Establish if, following notification of appeal, establish if there is prospect of further engagement and possible resolution between Revenue and the other parties;
- Provide feedback in relation to any issues that come to light in the appeals process in relation to decision making or interpretation within Revenue;

- Explore and progress any scope for process efficiency or automation in communications or document exchange between the parties;
- Provide feedback in relation to any breaches of timeframe in the provision of appropriate responses to the appeal process.

Recommendation:

The TAC should formalise liaison arrangements with Revenue to facilitate greater efficiency in the operation of the appeals process.

It is well known that Revenue is extremely keen on doing business electronically where possible. I am aware that Revenue would wish to see the development of an electronic interface between the TAC and Revenue and has been disappointed that the case management system in use within the TAC does not currently provide for this.

It has been suggested to me that Revenue would be keen to see the establishment of an inter-departmental group to explore options for the electronic exchange of information that is required by both the TAC and Revenue. In developing any such system, each body would continue to own and control access to its own systems and data, the TAC's independence would not be undermined, statutory requirements would be met and data protection obligations could be satisfied.

It is proposed that the interdepartmental group could be chaired by the TAC and include representatives from Revenue (IT and operational), Department of Finance and OGCIO. The group should be established immediately with a short time frame for completion of its work. A baseline provision for development should be included in the 2019 TAC Vote allocation.

Recommendation:

An interdepartmental group, chaired by the TAC, should be established to explore options for the electronic exchange of information that is required by both the TAC and Revenue in line with the Revenue proposal for same.

Review Mechanisms

One of the critical changes that has occurred with the introduction of the TAC is that appeals are made, in the first instance, directly to the TAC rather than to Revenue. Although Revenue has an internal and external review mechanism, these do not seem to have confidence amongst the stakeholder representatives to whom I spoke. The submissions to the TAC public consultation process indicates that there is a perception that these could be improved.

A further call for improvement is the possibility of introducing ADR or mediation. These processes have worked well in both the UK and Australia.

Recommendation:

In the light of suggested changes of Revenue practice regarding the raising of assessments, Revenue should consider how their internal/external review processes of Revenue might be strengthened.

There should be an exploration of how ADR might be accommodated at different stages of the process.

Legislative amendments which might facilitate the work of the TAC.

The Terms of Reference indicated that I might suggest any legislative changes which could assist the work of the Commission. Although I have not undertaken a detailed review of the legislation, there are a number of areas where I feel changes would be of assistance.

- Provide authority for the Commissioners to delegate decision making (determinations) in accordance with guidelines.
- Inclusion of guideline timeframes for finalisation of determination following hearing of appeal. In the event of timeframe not being met, it is suggested that the model which exists in the Courts should prevail - there should be re-engagement with the parties after two months to indicate when finalisation will occur. Commissioners to report to the Chairman on ongoing basis in relation to determinations outstanding. Report to the Minister at end year of all such instances.
- Remove the requirement for agreement of the parties to the finalization of a determination without a hearing. Provide for appeal to the Commissioners against finalisation of a determination in such manner on limited grounds (more complexity; precedence value etc)
- Provide authority for TAC to refer cases to Revenue for review before matter is progressed as an appeal.
- Provide for ADR process at various stages of the process.

Appendix 1 Governance Arrangements and Staffing

State Body	Separate Governing Authority	Head of Office	Separate Vote	Staff No
Agriculture Appeals Office	No	Director	No	
An Bord Pleanála	Chairperson + 10 members	Chairperson	No	152
Commission for Communications Regulation	3 x Commissioners (one of whom is Chair)	Chairperson	No	115
Commission for Regulation of Utilities	3 x Commissioners (one of whom is Chair)	Chairperson	No	90
Office of the Comptroller and Auditor General	No	C&AG *	Yes	164
Consumer and Competition Protection Commission	Chairperson + 3 members	Exec Chairperson	No	90
Data Protection Commissioner	No	Commissioner *	No	85
Financial Services and Pensions Ombudsman	Council (Chair +6 members)	Ombudsman	No	
Garda Síochána Ombudsman Commission	2 x Ombudsmen (one of whom is Chair)	Chairperson	No	85
International Protection Appeals Tribunal	Tribunal of 77	Chairperson	No	37
Irish Financial Services Appeals Tribunal	Chairperson + 6 members	Chairperson	No	1
Ombudsman	No	Ombudsman *	Yes	84
Policing Authority	Chair and 8 members	CEO	Yes	35
Property Services Regulatory Authority	Chairperson + 10 members	Chairperson	No	31
Social Welfare Appeals Office	No	Director	No	84
State Laboratory	No	State Chemist	Yes	97
Valuation Office	Commissioner (one)	Commissioner	Yes	151
Workplace Relations Commission	Chair and 8 members	Director General	No	228
		*Office holder is not the Accounting Officer		