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**Comhchoiste um Airgeadas, Caiteachas Poiblí agus Athchóiriú,
agus an Taoiseach**

Tuarascáil maidir leis an nGrinnscrúdú Réamhreachtach ar Scéim
Ghinearálta Bhille an Ombudsman Seirbhísí Airgeadais agus Pinsean
(Leasú) 2023
Meitheamh 2023

**Joint Committee on Finance, Public Expenditure and Reform, and
Taoiseach**

Report on Pre-Legislative Scrutiny of the General Scheme of the
Financial Services and Pensions Ombudsman (Amendment) Bill 2023
June 2023

Membership of the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach

Deputies

CATHAOIRLEACH	LEAS-CHATHAOIRLEACH			
				
John McGuinness Fianna Fáil	Bernard Durkan Fine Gael	Richard Boyd Barrett People Before Profit-Solidarity	Rose Conway-Walsh Sinn Féin	Pearse Doherty Sinn Féin
				
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Senators

				
Maria Byrne Fine Gael	Pat Casey Fianna Fáil	Aidan Davitt Fianna Fáil	Alice-Mary Higgins Independent	Marie Sherlock Labour Party

Membership History:

- Mick Barry, Sep 2020 – May 2023
- Michael D'Arcy, Sep 2020 – Sep 2020
- Mairéad Farrell, Sep 2020 – April 2023
- Neale Richmond, Sep 2020 – Jan 2023

Cathaoirleach's Foreword



The Joint Committee agreed to conduct Pre-Legislative Scrutiny of the General Scheme of the Financial Services and Pensions Ombudsman (Amendment) Bill 2023. As part of its scrutiny the Joint Committee held one public meeting on the 10 May 2023 to discuss the provisions of the General Scheme with officials from the Financial Services and Pensions Ombudsman. The Joint Committee also requested further briefing from the Department of Finance.

This report sets out the details of that scrutiny, highlights a number of key issues and contains recommendations that the Joint Committee feel would enhance and strengthen the Bill.

I would like to express my sincere thanks to the witnesses for their assistance to the Committee, the Library and Research Service and to the Members of the Committee for their work in this process. The Joint Committee looks forward to the Bill's progression through the Houses of the Oireachtas and on engaging on the Bill again at Committee Stage.

A handwritten signature in black ink that reads "John McGuinness". The signature is written in a cursive style and is positioned above a short horizontal line.

John McGuinness T.D.

16 June 2023

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Recommendations

Head 3

1. The Joint Committee recommends that consideration be given to whether the proposed amendment under Head 3 of the General Scheme is sufficiently clear in clarifying the FSPO's existing power in this regard.
2. The Joint Committee recommends that it may be of benefit to consider if it necessary to include the prefix "*to ensure the Ombudsman has the power to investigate complaints*", and the word "*shall*" before "financial service providers".

Head 5

3. The Joint Committee recommends that consideration be given to whether the amendments currently proposed in Head 5 could be interpreted as precluding the FSPO from investigating a complaint concerning an alleged failure by a participating institution to adhere to its regulatory obligations when processing a loan application. This is especially relevant in circumstances where the Credit Reviewer has already issued an Opinion concerning the justifiability of the participating institution's decision to refuse the loan application taking into account the viability of the business and its ability to repay the loan.
4. Furthermore, the Joint Committee believes that it may be prudent to consider revising the proposed wording and instead use wording closer to that currently included in *sections 44(2)(c)(i)* and *50(3)(c)*, in order to preclude complainants from submitting complaints to the FSPO, and preclude the FSPO from investigating complaints and issuing a decision, where the conduct complained of relates to a matter that is within the jurisdiction of the Credit Reviewer.

Head 6

5. The Joint Committee recommends that, in order to ensure consistency with *section 47(8)* and the FSPO's Oral Hearing Guidelines, the Department consider amending the existing *section 47(3)(b)* to include the words "or affirmation" after the word "oath" and to revise the wording of the proposed amendment to *section 47(3)(b)* provided for in Head 6 to include the words "or affirmation" at the end of the additional text.

Head 10

6. The Joint Committee recommends that consideration is given to revision of the wording of the proposed additional sub-paragraph (f) of section 59(1) included in Head 10 to correspond more closely to the statutory definition of perjury included in section 2 (1) of the *Criminal Justice (Perjury and Related Offences) Act 2021*.
7. The Joint Committee recommends that the Department further consider whether the penalties applicable to the proposed offence should correspond with those imposed on a person who commits an offence under the *Criminal Justice (Perjury and Related Offences) Act 2021* (as provided for in section 12 of that Act).

Head 8

8. The Joint Committee recommends that the Department considers if the subject matter and nature of complaints investigated by the FSPO is of such "sensitivity for the participants" that it may be permissible to have a presumption in favour of private hearings at first instance before the FSPO, as provided for under Head 8.
9. The Joint Committee also recommends that consideration is given to whether the proposed amendments under Head 8 are compatible with the Constitution, in particular Articles 34.1 and 37.1, and are sufficiently robust

to equip the FSPO to withstand any potential future constitutional challenge to its operations.

Head 11

10. The Joint Committee recommends that consideration is given to the constitutional compatibility of the proposed amendments to the existing *subsections (2) and (3)* of section 62 and the proposed additional subsection (2a). Additionally, consideration may also be given to whether the proposed amendments are sufficiently robust to equip the FSPO to withstand any potential future constitutional challenge to its operations.

Additional Recommendations

11. The Joint Committee recommends that further clarity is provided by the Department of Finance on whether any quasi-judicial powers and functions of the Ombudsman, whose exercise may be deemed to amount to an administration of justice, are sufficiently limited in nature to fall within the scope of the exception of Article 37.1.
12. The Joint Committee recommends that further clarity is provided by the Minister for Finance on whether he is satisfied that the provisions of the 2017 Act sufficiently ensure the independence and impartiality of the Ombudsman, the Deputy Ombudsman and any staff of the FSPO whose functions should entail an administration of justice.
13. The Joint Committee also recommends clarification from the Minister for Finance that individuals engaged by the Ombudsman as consultants or advisors or staff engaged under contracts for services, in accordance with section 16, are considered to be appointed under section 15 and fall within the scope of section 15(7) to perform any of the functions conferred on the Ombudsman under the 2017 Act.

Introduction

The General Scheme of the Financial Services and Pensions Ombudsman (Amendment) Bill 2023 was provided to the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach ('the Committee') for decision on whether the Committee wished to undertake pre-legislative scrutiny in April 2023 – the text of the General Scheme can be found in full at Appendix 4.

The Committee decided to undertake pre-legislative scrutiny of the General Scheme by holding a meeting on 10 May 2023 with the Financial Services and Pensions Ombudsman.

Purpose of the Bill

The purpose of the Financial Services and Pensions Ombudsman (Amendment) Bill is to amend the [Financial Services and Pensions Ombudsman Act 2017 \(as amended\)](#). This Act provides for the establishment of the Office of the Financial Services and Pensions Ombudsman and to confer functions on it, so that it may provide an independent, impartial, fair and free service to help resolve complaints with pensions providers and regulated services providers.

This Bill seeks to amend the Act to:

- Clarify the statutory powers of the Financial Services Ombudsman (FSPO/the 'Ombudsman') in respect of complaints regarding financial service providers, which are no longer authorised by the Central Bank of Ireland (the 'Central Bank'); and
- Take account of the April 2021 judgement of a majority of the Supreme Court in *Zalewski v Adjudication Officer and the Workplace Relations Commission*¹

The [General Scheme](#) of Financial and Pension Ombudsman (Amendment) Bill contains 11 Heads in 3 Parts as follows:

¹ https://www.courts.ie/acc/alfresco/4b94d66e-d29c-45e8-8f91-ad0ff80257a5/2021_IESC_24%20O'Donnell%20J..pdf/pdf#view=fitH

Relevant Heads of Bill	Section	Measure	Discussed in Report
1		Short title and commencement	Page 9
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4	3	Expenses	Page 11
5	44	Making of complaints and Section 50: Jurisdiction of the Ombudsman	Page 11, 12
6	47	Powers of the Ombudsman in relation to investigation of complaint	Page 13
7	50	Jurisdiction of Ombudsman	Page 14
8	56	Conduct of Investigation	Page 14, 15
9	58	Mediation	Page 16
10	59	Obstruction of work of Ombudsman	Page 13, 14
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Procedural basis for scrutiny

Pre-legislative consideration was carried out in accordance with Standing Order 174A, which provides that, prior to its presentation or introduction, a General

Scheme of a Bill shall be given to the committee empowered to consider Bills published by the relevant member of Government.

Consideration of the General Scheme

Meetings Held

The Committee held a meeting on 10 May 2023 to discuss the provisions of the General Scheme with representatives from the Financial Services and Pensions Ombudsman. Further details and links to the opening statement and the Official report of this meeting are included in appendices to this report.

Financial services and Pensions Ombudsman (FSPO)

Mr Liam Sloyan, Financial Services and Pensions Ombudsman (also referred to as the FSPO and “the Ombudsman”), attended with his colleague Ms Mary Rose McGovern, Deputy Financial Services and Pensions Ombudsman.

Over the last two years, the FSPO has engaged with the Department of Finance on proposed legislative amendments, suitable to address the issues raised by the Zalewski judgement, including a specific consultation process in respect of the proposed provisions of the General Scheme. The FSPO welcomed the General Scheme.

Overview and Assessment of General Scheme

Part 1 – Preliminary and General

Heads 1 and 2 of the General Scheme are standard provisions necessary for its enactment.

Head 3 proposes to amend the definition of “financial service provider” contained in [section 2 \(1\)](#) of the Act, in order to clarify that the FSPO has the statutory power to investigate complaints against a financial service provider, which was regulated by the Central Bank at the time the conduct complained about occurred, but

subsequently lost their regulated status either before the complaint was made to the FSPO, or before the FSPO concluded their investigation of the complaint. During the public session on 10 May 2023, Financial Services and Pensions Ombudsman, Mr Liam Sloyan told the Committee that this Head “clarifies a position we are confident about already.”²

However, it may be pertinent to ensure that Head 3 is sufficiently clear in clarifying the FSPO’s existing power in this regard. Given the general rule against retrospective application of the law, it would appear important to provide this clarity if the Ombudsman has already addressed complaints against formerly regulated financial services providers.

Recommendation

1. The Joint Committee recommends that consideration be given to whether the proposed amendment within Head 3 of the General Scheme is sufficiently clear in clarifying the FSPO’s existing power in this regard.

The language used in Head 3 also appears to be forward looking “To *ensure* the Ombudsman *has* the power to investigate complaints, references to “financial service provider” *shall* include former financial service providers”.

As such, further consideration could be provided to ascertain whether it is necessary to include the prefix “*ensure the Ombudsman has the power to investigate complaints*”, and the word “*shall*” before “financial service providers”.

Recommendation

2. The Joint Committee recommends that it may be of benefit to consider if it is necessary to include the prefix “*to ensure the Ombudsman has the power to*

² JCFPERT transcript 10.05.23 p.28

investigate complaints”, and the word “*shall*” before “financial service providers”.

The office of the FSPO is funded via two sources. The first of which is an industry levy imposed on financial services providers on an annual basis in respect of the FSPO’s activities relating to the investigation of complaints, and the second source is funding provided by the Exchequer through the Department of Finance Vote. **Head 4** seeks to amend [section 3 \(3\)](#) of the Act, to clarify the methodology underlying the distribution of expenses across the FSPO’s two sources of funding. This Head proposes to replace references to complaints “dealt with” by the Ombudsman, with references to complaints “received by” the Ombudsman, as this is the metric used in practice. Further to this, Head 4 also proposes to amend Section 3 (3) to allow for expenses to be calculated over a three-year period, rather than a one-year period as is currently the case.

Part 5 – Complaints to the Ombudsman

Head 5 seeks to amend section 44 (2) (c) and section 50 of the *2017 Act* to clarify the discrete functions and jurisdictions of the FSPO and the Credit Reviewer³, in order to avoid any potential overlap. At present, it would in theory, be possible for a consumer to appeal a credit decision by a participating institution to the Credit Reviewer while at the same time, submitting a complaint regarding the conduct of the participating institution in relation to the same decision as the FSPO. These two processes could run in parallel and could result in a situation whereby the Credit Reviewer decides to uphold a credit decision made by a participating institution, whilst the FSPO concurrently decides to uphold a complaint regarding how that decision was made. Head 5 proposes to amend the Act to clarify that a complainant may not make a complaint to the FSPO, and the FSPO may not investigate a complaint, in circumstances where the Credit Reviewer has already issued an Opinion to the complainant.

³ [Home - Credit Review](#)

Recommendation

3. The Joint Committee recommends that consideration be given to whether the amendments currently proposed in Head 5 could be interpreted as precluding the FSPO from investigating a complaint concerning an alleged failure by a participating institution to adhere to its regulatory obligations when processing a loan application. This is especially relevant in circumstances where the Credit Reviewer has already issued an Opinion concerning the justifiability of the participating institution's decision to refuse the loan application taking into account the viability of the business and its ability to repay the loan.
4. Furthermore, the Joint Committee believes that it may be prudent to consider revising the proposed wording and instead use wording closer to that currently included in *sections 44(2)(c)(i) and 50(3)(c)*, in order to preclude complainants from submitting complaints to the FSPO, and preclude the FSPO from investigating complaints and issuing a decision, where the conduct complained of relates to a matter that is within the jurisdiction of the Credit Reviewer.

The judgement in the *Zalewski* case found that there was an omission of an express provision in the *Workplace Relations Act 2015* which would allow for the cross-examination of witnesses who provided evidence before adjudication. This was found to be unsatisfactory, given that cross-examination of witnesses of the opposing party is fundamental to fair procedures as guaranteed under Article 40.3 of the Constitution.

Head 6 of the General Scheme proposes to amend section 47(3) of the 2017 Act to insert additional text to the end of sub-paragraph (b) to read: "Each party will be entitled to cross-examine the person being examined on oath." Section 47(8) of the 2017 Act confers certain powers to the Ombudsman, including the administrations of

oaths and affirmations. The FSPO Oral Hearing Guidelines also contain reference to “oaths and affirmations.”

Recommendation

5. The Joint Committee recommends that, in order to ensure consistency with *section 47(8)* and the FSPO’s Oral Hearing Guidelines, the Department consider amending the existing *section 47(3)(b)* to include the words “or affirmation” after the word “oath” and to revise the wording of the proposed amendment to *section 47(3)(b)* provided for in Head 6 to include the words “or affirmation” at the end of the additional text.

Head 10 is related to Head 6 as they are included in response to the *Zalewski* judgement. Head 10 proposes to amend *section 59(1)(a)-(e)* of the *2017 Act* which outlines several acts which constitute an obstruction of the work of the Ombudsman and a summary offence punishable upon conviction by a class A fine and/or imprisonment for a term not exceeding 3 months. Head 10 would amend the section by inserting an additional sub-paragraph (f) to read: “gives false evidence on oath, whether wilfully or corruptly.” This addition provides that a person giving false evidence on oath will be committing an offence for which they will be subject to the punishments as outlined above.

In response to the *Zalewski* judgement, the *Workplace Relations (Miscellaneous Provisions) Act 2021* was amended to incorporate a new *subsection 12(b)* to allow for the imposition of a criminal penalty where an individual deliberately gives false evidence under oath or affirmation before a WRC adjudicating officer. This section uses wording which closely corresponds with the statutory definition of perjury included under Section 2(1) of the *Criminal Justice (Perjury and Related Offences) Act 2021*. In addition, the *Workplace Relations Act* has also been amended to provide that those found guilty of an offence under the Act will be liable for penalties

which correspond with those outlined in Section 12 of *Criminal Justice (Perjury and Related Offences) Act 2021*.

Recommendation

6. The Joint Committee recommends that consideration is given to revision of the wording of the proposed additional sub-paragraph (f) of section 59(1) included in Head 10 to correspond more closely to the statutory definition of perjury included in section 2 (1) of the *Criminal Justice (Perjury and Related Offences) Act 2021*.
7. The Joint Committee recommends that the Department further consider whether the penalties applicable to the proposed offence should correspond with those imposed on a person who commits an offence under the *Criminal Justice (Perjury and Related Offences) Act 2021* (as provided for in section 12 of that Act).

Part 6 – Complaints Procedure

Head 7 proposes to amend *section 50(1)* to correct a cross-referencing issue where section 50(1) of the Act refers to section 54(1) instead of section 50(3)(b). The inclusion of section 54(1) in section 50(1), is an error emanating from the original draft.

Head 8 proposes to amend the *2017 Act* to allow for oral hearings to be held in public before the FSPO in certain circumstances. In the *Zalewski* judgement it was held that an absolute ban on oral hearings before bodies exercising limited judicial powers and functions, as permitted under section 41(13) of the *WRC Act 2015*, was incompatible with Article 34.1 of the Constitution.

Article 34.1 of the Constitution requires that justice be administered in courts by judges and, apart from such special and limited cases as may be prescribed by law, that justice be administered in public. Currently, section 56(4) of the *2017 Act* states

that “the Ombudsman shall, without prejudice to the form of investigation, ensure investigations are conducted otherwise than in public.”

There is an understanding that the subject matter and detail of the type of complaints investigated by the FSPO can be of a sensitive nature and so it is generally in the interest of participants that investigations are carried out in private.

The proposed amendments of Head 8 provide that the default position shall be that oral hearings are held in private unless the Ombudsman takes a decision to hold oral hearings in public following an assessment of the case under the following three criteria – consultation of the parties concerned, consideration of the nature or circumstances of the complaint, and whether it is in the interest of justice to hold the hearing in public, rather than private.

Recommendation

8. The Joint Committee recommends that the Department considers if the subject matter and nature of complaints investigated by the FSPO is of such “sensitivity for the participants” that it may be permissible to have a presumption in favour of private hearings at first instance before the FSPO, as provided for under Head 8.
9. The Joint Committee also recommends that consideration is given to whether the proposed amendments under Head 8 are compatible with the Constitution, in particular Articles 34.1 and 37.1, and are sufficiently robust to equip the FSPO to withstand any potential future constitutional challenge to its operations.

Head 9 proposes to amend *section 58* to clarify that mediation will continue to be conducted in private. Accordingly, it seeks to ensure that mediation will not be impacted by any provision made in the legislation for oral hearings to be conducted in public.

Head 11 is related to Head 8 as the amendments proposed under this Head allow for the publication of certain information regarding public oral hearings that could result in the identification of the parties involved in certain circumstances. In the first instance, Head 11 proposes to amend section 62 of the *2017 Act* in order to correct a typographical error in the existing *subsection (1)*, which refers to “a decision of the Ombudsman under *section 61* or *62* in respect of a complaint.” However, the Ombudsmans’ powers to issue decisions are provided for under sections 60 and 61.

Section 62 currently requires the anonymised publication of decisions concerning complaints against financial service providers. Head 11 proposes to amend *subsections (2) and (3)* to insert an additional subsection (2a) to allow, in certain circumstances, the publication of certain information concerning public oral hearings that could lead to the identification of the parties involved. However, these amendments would not provide for the automatic publication. Rather, they would afford the Ombudsman the discretion to decide whether or not to publish a record of any procedural matter relating to the public oral hearing, if the Ombudsman is satisfied that in doing so, a person’s reputation would “not be unfairly prejudiced.”

Recommendation

10. The Joint Committee recommends that consideration is given to the constitutional compatibility of the proposed amendments to the existing *subsections (2) and (3)* of section 62 and the proposed additional subsection (2a). Additionally, consideration may also be given to whether the proposed amendments are sufficiently robust to equip the FSPO to withstand any potential future constitutional challenge to its operations.

Additional Recommendations

Quasi-Judicial Powers and Functions of the Ombudsman

Quasi-Judicial Powers and Functions of the Ombudsman in the Zalewski case, the Supreme Court examined the constitutionality of the process used by the Workplace

Relations Commission (WRC) to adjudicate upon employment-related complaints, as provided for under the *Workplace Relations Act 2015*. The Court was unanimous in finding that the WRC's adjudicative process amounted to an administration of justice. The Court also decided that judicial functions and powers exercised by the WRC adjudication offices and the Labour Court in respect of employment-related disputes were limited in nature and thereby permitted under Article 47.1 of the Constitution.

However, the Court was not unanimous in this decision. Accordingly, further consideration should be provided to ensure that the quasi-functions and powers afforded to the Ombudsman under the *2017 Act* are sufficiently limited in nature to come within the scope of the exception of Article 37.1.

Recommendation

11. The Joint Committee recommends that further clarity is provided by the Department of Finance on whether any quasi-judicial powers and functions of the Ombudsman, whose exercise may be deemed to amount to an administration of justice, are sufficiently limited in nature to fall within the scope of the exception of Article 37.1.

Independence and Impartiality

In the majority judgment of the Supreme Court in the *Zalewski* case, Justice O'Donnell observed that whilst matters related to the independence of WRC adjudication officers and members of the Labour Court were not the subject of argument, they would require careful scrutiny given that "*independence and impartiality are fundamental components of the capacity to administer justice*". Therefore, further consideration should be provided to ensure that the *2017 Act* includes sufficient provisions to ensure the independence and impartiality of the FSPO.

The *2017 Act* provides provisions relating to the staff of the Ombudsman and Section 15(7) permits the Ombudsman to authorise a member of staff appointed

under Section 15 to preform any of the functions conferred on the Ombudsman by the 2017 Act.

However, Section 16, which considers consultants and advisors of the FSPO, does not include an explicit provision providing that consultants or advisors or staff engaged under contracts for services shall be independent in the performance of their functions or shall perform their functions free from interference from any other persons.

The Joint Committee believes that clarity should be provided by the Department of Finance on this matter and specifically on whether individuals engaged by the Ombudsman as consultants or advisors or staff engaged in contracts for services, in accordance with section 16, are considered to be appointed under section 15 and fall within the scope of section 15(7) to perform any of the functions conferred on the Ombudsman under the 2017 Act.

Recommendation

12. The Joint Committee recommends that further clarity is provided by the Minister for Finance on whether he is satisfied that the provisions of the 2017 Act sufficiently ensure the independence and impartiality of the Ombudsman, the Deputy Ombudsman and any staff of the FSPO whose functions should entail an administration of justice.
13. The Joint Committee also recommends clarification from the Minister for Finance that individuals engaged by the Ombudsman as consultants or advisors or staff engaged under contracts for for services, in accordance with section 16, are considered to be appointed under section 15 and fall within the scope of section 15(7) to perform any of the functions conferred on the Ombudsman under the 2017 Act.

Conclusion:

The Committee welcomes the preparation and publication of the General Scheme and is broadly supportive of the measures it proposes to introduce. The Committee is of the opinion that the General Scheme would be improved by the inclusion of its recommendations.

The Committee looks forward to the speedy introduction of the Bill and to engaging further on it as it progresses through the Houses of the Oireachtas.

Appendices

APPENDIX 1 – Meeting Transcript

The transcript of the meeting is available [here](#) (10 May 2023)

APPENDIX 2 – Submissions Received

A briefing note was provided by the Department of Finance to the Joint Committee.

This note is available to view [here](#).

APPENDIX 3 – Opening Statements

The opening statement given by Mr Liam Sloyan, Financial Services and Pensions Ombudsman is available [here](#).

APPENDIX 4 – General Scheme of Financial Services And Pensions Ombudsman Bill (2023)

Draft Heads of Bill – Amendments to FSPO Act 2017

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Head 1 – Short title and commencement

Provide that:

1. This Act may be cited as the Financial Services and Pensions Ombudsman (Amendment) Act 2023.
2. This Act shall come into operation on such day or days as, by order or orders made by the Minister under this section, may be fixed therefor either generally or with reference to any particular purpose or provision, and different days may be so fixed for different purposes and different provisions.

Explanatory note

This Head is a standard provision.

Head 2 – Definitions

Provide that:

1. “Act of 2017” means the Financial Services and Pensions Ombudsman Act 2017.
2. An expression used in this Act has the same meaning in this Act as in the Act of 2017.

Explanatory note

This Head is a standard provision.

Head 3 – Section 2 - Interpretation

Provide that in subsection 2(1) of the Act of 2017, the definition of “financial service provider” is amended by the addition of the following after sub-paragraph (h):

“(i) To ensure the Ombudsman has the power to investigate complaints, references to “financial service provider” shall include former financial service providers where any of (a) to (h) of this definition applied at the date of the conduct complained of.”

Explanatory Note

The purpose of this amendment is to clarify that the FSPO has the statutory power to investigate complaints against a financial service provider, which was regulated at the time of the conduct complained of, even if said provider has lost its regulated status before the

complaint was made to the FSPO, or before the FSPO's investigation of the complaint has been concluded.

Head 4 – Section 3 - Expenses

Section 3 of the Act of 2017 is amended by the substitution of the following for subsection (3):

“The calculation of expenses to be charged to the levy, under subsection (2)(a), and to the Oireachtas, under subsection (2)(b), shall be based on the percentage division of the complaints received by the Ombudsman between—

(a) complaints relating to financial service providers, and

(b) complaints relating to pension providers,

in the previous three financial years”.

Explanatory Note

The purpose of this Head is to clarify the methodology for the division between the FSPO's sources of funding.

The Financial Services and Pensions Ombudsman (FSPO) is funded in two ways:

(1) financial services complaints are funded by an annual charge on the financial services industry in respect of the services provided by the FSPO to the industry, and

(2) pensions complaints are funded by the Exchequer, through the Department of Finance Vote.

In September 2018, the FSPO Council agreed a methodology whereby the proportion of funding provided by the Exchequer is based on the ratio of pensions-related complaints to financial services complaints.

While the Act refers to complaints *“dealt with by the Ombudsman in the previous financial year”*, it is considered the term ‘dealt with’ should be replaced by ‘received by’ as it is easier to identify when a complaint has been received, as opposed to when it has been dealt with and this is the metric which is used in practice.

It is further considered that providing for the calculation of expenses over a three-year period would ensure that any spikes, or the opposite, in relation to certain types of complaints received in the year, would not dramatically affect the calculation of expenses in a given year.

Head 5 – Section 44 – Making of complaints and Section 50 - Jurisdiction of Ombudsman

Section 44 of the Financial Services and Pensions Ombudsman Act 2017 is amended by the addition of the following under sub-paragraph (2)(c):

“(iv) has been the subject of an application to the Credit Reviewer as defined in S.I. No. 127 of 2010 and the Credit Reviewer has issued an Opinion on the viability and repayment capacity of the credit facility.”

Section 50 of the Financial Services and Pensions Ombudsman Act 2017 is amended by the addition of the below text under paragraph (3):

“(e) the conduct complained of has been the subject of an application to the Credit Reviewer as defined in S.I. No. 127 of 2010 and the Credit Reviewer has issued an Opinion on the viability and repayment capacity of the credit facility.”

Explanatory Note

The purpose of this Head is to clarify any potential overlap in jurisdiction between the FSPO and the Credit Reviewer.

In theory, it is currently possible for a consumer to appeal a decision by a financial service provider/participating institution to the Credit Reviewer while also lodging a complaint

regarding the conduct of the financial service provider/participating institution in relation to the same decision with the FSPO. Both of these processes could run in parallel and this could result in a situation where the Credit Reviewer could decide to uphold a credit decision, while the FSPO could decide to uphold a complaint relating to how that decision was made.

Section 44 intends to clarify that a complainant may not make a complaint to the FSPO where the Credit Reviewer has issued an Opinion to the complainant following an application to the Credit Reviewer.

Section 50 intends to clarify that the Ombudsman shall not investigate or make a decision on a complaint where the Credit Reviewer has issued an Opinion to the complainant following an application to the Credit Reviewer.

Head 6 – Section 47 - Powers of Ombudsman in relation to investigation of complaint

Provide that section 47(3) of the Act of 2017, is amended by the addition of the following text to the end of sub-paragraph (b):

Each party will be entitled to cross-examine the person being examined on oath.

Explanatory Note

Section 47 (3)(b) of the Act provides that the Ombudsman may require any person to attend before him and be examined on oath. This Head aims to amend the Act to include an express provision specifically providing for the cross-examination of witnesses on oath.

Head 7 – Section 50 – Jurisdiction of Ombudsman

Section 50 of the Financial Services and Pensions Ombudsman Act 2017 is amended by the substitution of the below text for subsection (1):

“Notwithstanding sections 44(2)(a)(i) and 50(3)(b), the Ombudsman may accept a complaint against a financial service provider or a pension provider that has initiated legal proceedings in relation to a matter to which the complaint relates, where the Ombudsman believes, based on reasonable grounds, that the financial service provider or the pension provider, as the case may be, has begun those proceedings in order to prevent the making of the complaint, or to frustrate or delay its investigation.”

Explanatory Note

The purpose of this Head is to correct a cross-referencing issue where section 50(1) of the Act refers to section 54(1) instead of section 50(3)(b).

Amending this reference to section 50(3)(b) clarifies that the Ombudsman may accept a complaint where a financial service provider or pension provider has initiated legal proceedings in relation to a complaint, where the Ombudsman believes, based on reasonable grounds, that the provider has initiated these proceeding in order to frustrate or delay its investigation. Without this reference to section 50(3)(b), section 50(1) could be interpreted as contradicting section 50(3)(b).

Head 8 – Section 56 – Conduct of investigation

Section 56 of the Financial Services and Pensions Ombudsman Act 2017 is amended by the substitution of the text below for subsection (4) and addition of subsection (4a):

“(4) Subject to Subsection (4a) the Ombudsman shall, without prejudice to the form of investigation, ensure investigations are conducted otherwise than in public.

(4a) Where the Ombudsman determines that it is appropriate or desirable for a complaint investigation to include an oral hearing, the Ombudsman shall decide whether to conduct any

such oral hearing in public or in private, having consulted with the parties and having considered the nature or circumstances of the complaint and whether it is in the interest of justice to do so.”

Explanatory Note

The Ombudsman’s functions in Section 12 of the Financial Services and Pensions Ombudsman Act 2017 requires the investigation of complaints in an appropriate manner proportionate to the nature of the complaint including informal means, mediation and formal investigation. Formal investigations may include oral hearing. Decisions issued on foot of formal investigations are legally binding.

The amendments above provide that the Ombudsman is required to take a decision whether to hold oral hearings, as provided for in Section 12(1)(c) of the Act and as conducted under Section 47(3), to be held in public or private. This decision is to be taken after consultation of the parties concerned and consideration of the nature or circumstances of the complaint or otherwise in the interest of justice.

Head 9 - Section 58 - Mediation

Section 58 of the Financial Services and Pensions Ombudsman Act 2017 is amended by the substitution of the following subsection for subsection (5):

“(5) The Ombudsman shall conduct mediations in private and evidence of anything said or admitted during a mediation, or an attempted mediation, of a complaint, and any document prepared for the purposes of the mediation, are not admissible—

a) in any subsequent investigation, under this Part, of the complaint (unless the person who made the admission, or to whom the document relates, consents to its admission), or

b) in any proceedings before a court or a tribunal in the State.”

Explanatory Note

Mediation as required under Section 12(2) of the Financial Services and Pensions Ombudsman Act 2017 and conducted under Section 58 of the Act does not constitute the administration of the justice. The purpose of this head is to ensure that mediation shall always be conducted in private. This is considered to be of critical comfort to complainants, who otherwise may be disinclined to submit complaints to the Ombudsman.

Head 10 – Section 59 - Obstruction of work of Ombudsman

Provide that section 59 (1) of the Act of 2017, is amended by the addition of the following sub-paragraph (f):

(f) gives false evidence on oath, whether wilfully or corruptly,

Explanatory Note

This addition of sub-paragraph (f) under section 59 provides that a person giving false evidence on oath, whether wilfully or corruptly, will be committing an offence and that they will be subject to a Class A fine or imprisonment of up to 3 months, or both, if convicted.

Head 11 - Section 62 – Decisions of Ombudsman

1. Section 62 of the Financial Services and Pensions Ombudsman Act 2017 is amended by the substitution of the below text for subsection (1):

“Subject to the outcome of any appeal under Part 7 against a decision of the Ombudsman under section 60 or 61 in respect of a complaint, the decision is binding on any party to the complaint.”

2. Section 62 of the Financial Services and Pensions Ombudsman Act 2017 is amended by the substitution of the below text for subsection 2, the addition of subsection (2a), and the substitution of the below text for subsection (3):

“(2) Subject to subsection (2a) and subsection (3) the Ombudsman shall publish decisions made by him or her after the establishment day in relation to complaints concerning financial service providers and case studies in relation to complaints concerning pension providers in such a manner that—

(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,

(ii) a provider shall not be identified by name or address, and

(b) in accordance with the Data Protection Acts 1988 and 2003.”

“(2a) Where the Ombudsman has conducted an oral hearing in public pursuant to Section 56(4a), the Ombudsman may, where he or she is satisfied that in doing so a person’s reputation would not be unfairly prejudiced, publish a record of any procedural matter relating to the public oral hearing, whether with or without any information which would enable the persons taking part in the proceedings, or any one or more than one of them, to be identified, as he or she thinks appropriate.”

“(3) The Ombudsman may, if he or she considers it appropriate to do so in any particular case, publish, in such form and manner as he or she thinks fit, a report in relation to any investigation under this Part and the result of that investigation. Where the Ombudsman has conducted an oral hearing in public pursuant to Section 56(4a), the Ombudsman may, where he or she is satisfied that in doing so a person’s reputation would not be unfairly prejudiced, publish a record of any procedural matter relating to the public oral hearing, whether with or without any information which would enable the persons taking part in the proceedings, or any one or more than one of them, to be identified, as he or she thinks appropriate.”

Explanatory Note

1. The purpose of this sub-head is to correct a typographical error at section 62 of the Act which refers to “a decision of the Ombudsman under section 61 or 62 in respect of a complaint” rather than to “a decision of the Ombudsman under section 60 or 61 in respect of a complaint”.

This amendment rectifies the typographical error so that Section 62 – “Decisions of Ombudsman” refers to Section 60 which is related to “Complaints and redress: financial service providers” while Section 61 refers to “Complaints and redress: pension providers.”

2. This is a consequential sub-head arising from Head 8 above. Where an oral hearing has been conducted in public under Section 56(4a), it makes sense that the Ombudsman has the discretion to name the parties concerned in relation to any publication arising from that investigation.

APPENDIX 5 – Terms Of Reference

Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach

Terms Of Reference – Standing Orders 94, 95 and 96 (as amended) July 2020

Standing Orders 94, 95 and 96 – scope of activity and powers of Select Committees and functions of Departmental Select Committees

Scope and context of activities of Select Committees.

94. (1) The Dáil may appoint a Select Committee to consider and, if so permitted, to take evidence upon any Bill, Estimate or matter, and to report its opinion for the information and assistance of the Dáil. Such motion shall specifically state the orders of reference of the Committee, define the powers devolved upon it, fix the number of members to serve on it, state the quorum, and may appoint a date upon which the Committee shall report back to the Dáil.

(2) It shall be an instruction to each Select Committee that—

(a) it may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders;

(b) such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil;

(c) it shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Joint Committee on Public Petitions in the exercise of its functions under Standing Order 125(1); and

(d) it shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—

(i) a member of the Government or a Minister of State, or

(ii) the principal office-holder of a State body within the responsibility of a Government Department or

(iii) the principal office-holder of a non-State body which is partly funded by the State,

Provided that the Committee may appeal any such request made to the Ceann Comhairle, whose decision shall be final.

(3) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice to the Business Committee by a Chairman of one of the Select Committees concerned, waives this instruction.

Functions of Departmental Select Committees.

95. (1) The Dáil may appoint a Departmental Select Committee to consider and, unless otherwise provided for in these Standing Orders or by order, to report to the Dáil on any matter relating to—

(a) legislation, policy, governance, expenditure and administration of—

(i) a Government Department, and

(ii) State bodies within the responsibility of such Department, and

(b) the performance of a non-State body in relation to an agreement for the provision of services that it has entered into with any such Government Department or State body.

(2) A Select Committee appointed pursuant to this Standing Order shall also consider such other matters which—

(a) stand referred to the Committee by virtue of these Standing Orders or statute law, or

(b) shall be referred to the Committee by order of the Dáil.

(3) The principal purpose of Committee consideration of matters of policy, governance, expenditure and administration under paragraph (1) shall be—

(a) for the accountability of the relevant Minister or Minister of State, and

(b) to assess the performance of the relevant Government Department or of a State body within the responsibility of the relevant Department, in delivering public services while achieving intended outcomes, including value for money.

(4) A Select Committee appointed pursuant to this Standing Order shall not consider any matter relating to accounts audited by, or reports of, the Comptroller and Auditor General unless the Committee of Public Accounts—

(a) consents to such consideration, or

(b) has reported on such accounts or reports.

(5) A Select Committee appointed pursuant to this Standing Order may be joined with a Select Committee appointed by Seanad Éireann to be and act as a Joint Committee for the purposes of paragraph (1) and such other purposes as may be

specified in these Standing Orders or by order of the Dáil: provided that the Joint Committee shall not consider—

(a) the Committee Stage of a Bill,

(b) Estimates for Public Services, or

(c) a proposal contained in a motion for the approval of an international agreement involving a charge upon public funds referred to the Committee by order of the Dáil.

(6) Any report that the Joint Committee proposes to make shall, on adoption by the Joint Committee, be made to both Houses of the Oireachtas.

(7) The Chairman of the Select Committee appointed pursuant to this Standing Order shall also be Chairman of the Joint Committee.

(8) Where a Select Committee proposes to consider—

(a) EU draft legislative acts standing referred to the Select Committee under Standing Order 133, including the compliance of such acts with the principle of subsidiarity,

(b) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,

(c) non-legislative documents published by any EU institution in relation to EU policy matters, or

(d) matters listed for consideration on the agenda for meetings of the relevant Council (of Ministers) of the European Union and the outcome of such meetings,

the following may be notified accordingly and shall have the right to attend and take part in such consideration without having a right to move motions or amendments or the right to vote:

(i) members of the European Parliament elected from constituencies in Ireland,

(ii) members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and

(iii) at the invitation of the Committee, other members of the European Parliament.

(9) A Select Committee appointed pursuant to this Standing Order may, in respect of any Ombudsman charged with oversight of public services within the policy remit of the relevant Department consider—

(a) such motions relating to the appointment of an Ombudsman as may be referred to the Committee, and

(b) such Ombudsman reports laid before either or both Houses of the Oireachtas as the Committee may select: Provided that the provisions of Standing Order 130 apply

where the Select Committee has not considered the Ombudsman report, or a portion or portions thereof, within two months (excluding Christmas, Easter or summer recess periods) of the report being laid before either or both Houses of the Oireachtas.

Powers of Select Committees.

96. Unless the Dáil shall otherwise order, a Committee appointed pursuant to these Standing Orders shall have the following powers:

(1) power to invite and receive oral and written evidence and to print and publish from time to time—

(a) minutes of such evidence as was heard in public, and

(b) such evidence in writing as the Committee thinks fit;

(2) power to appoint sub-Committees and to refer to such sub-Committees any matter comprehended by its orders of reference and to delegate any of its powers to such sub-Committees, including power to report directly to the Dáil;

(3) power to draft recommendations for legislative change and for new legislation;

(4) in relation to any statutory instrument, including those laid or laid in draft before either or both Houses of the Oireachtas, power to—

(a) require any Government Department or other instrument-making authority concerned to—

(i) submit a memorandum to the Select Committee explaining the statutory instrument, or

(ii) attend a meeting of the Select Committee to explain any such statutory instrument: Provided that the authority concerned may decline to attend for reasons given in writing to the Select Committee, which may report thereon to the Dáil, and

(b) recommend, where it considers that such action is warranted, that the instrument should be annulled or amended;

(5) power to require that a member of the Government or Minister of State shall attend before the Select Committee to discuss—

(a) policy, or

(b) proposed primary or secondary legislation (prior to such legislation being published),

for which he or she is officially responsible: Provided that a member of the Government or Minister of State may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Dáil: and provided further that a member of the Government or Minister of State may request to attend a meeting of the Select Committee to enable him or her to discuss such policy or proposed legislation;

(6) power to require that a member of the Government or Minister of State shall attend before the Select Committee and provide, in private session if so requested by the attendee, oral briefings in advance of meetings of the relevant EC Council (of Ministers) of the European Union to enable the Select Committee to make known its views: Provided that the Committee may also require such attendance following such meetings;

(7) power to require that the Chairperson designate of a body or agency under the aegis of a Department shall, prior to his or her appointment, attend before the Select Committee to discuss his or her strategic priorities for the role;

(8) power to require that a member of the Government or Minister of State who is officially responsible for the implementation of an Act shall attend before a Select Committee in relation to the consideration of a report under Standing Order 197;

(9) subject to any constraints otherwise prescribed by law, power to require that principal office-holders of a—

(a) State body within the responsibility of a Government Department or

(b) non-State body which is partly funded by the State,

shall attend meetings of the Select Committee, as appropriate, to discuss issues for which they are officially responsible: Provided that such an office-holder may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Dáil; and

(10) power to—

(a) engage the services of persons with specialist or technical knowledge, to assist it or any of its sub-Committees in considering particular matters; and

(b) undertake travel;

Provided that the powers under this paragraph are subject to such recommendations as may be made by the Working Group of Committee Chairmen under Standing Order 120(4)(a).

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