

Submission to the Committee on Finance, Public Expenditure and Reform, and Taoiseach re pre-legislative scrutiny on Financial Services and Pensions Ombudsman (Amendment) Bill 2023

Background

The [General Scheme](#) of the Financial Services and Pensions Ombudsman's Bill was published on the Department of Finance's website on 9 April 2023.

The General Scheme amends the *Financial Services and Pensions Ombudsman Act 2017*, which set out the establishing framework for the Financial Services and Pensions Ombudsman.

Rationale for the amending legislation

The proposed amendments arise from the '*Zalewski ruling*.'¹ In the context of those determinations, it was deemed possible that the FSPO could be viewed as a legislative body which, pursuant to the *Financial Services and Pensions Ombudsman Act 2017*, administers justice in a manner which is limited in scope, as anticipated by Article 37 of the Constitution.

For that reason, it was decided that it would be prudent to make some targeted amendments to the FSPO's governing legislation to pre-emptively address any possible or perceived vulnerabilities in its processes.

Nature of the amendments

The amendments arising from the Zalewski ruling centre on oral hearings conducted as part of the FSPO's complaint investigation process.

The proposed amendments provide that the Ombudsman is required to take a decision on whether or not to hold oral hearings in public, clarify the processes around oath-taking in oral hearings, and provide the Ombudsman with the discretion to identify the relevant parties in a publication related to a decision where oral hearings have been held in public. The General Scheme also affirms that mediations should continue to be conducted in private.

The General Scheme also sets out a limited number of further amendments to the FSPO Act 2017. The purpose of these amendments is to address cross-referencing errors that have been identified, and clarify the legislation e.g. by addressing the potential overlap between decisions of the FSPO and opinions of the Credit Reviewer, setting out the Ombudsman's ability to investigate firms that may no longer be regulated, and the methodology for the calculations of the expenses associated with running the Office of the FSPO.

¹ *Tomasz Zalewski v The Workplace Relations Commission, an Adjudication Officer [Y], Ireland and the Attorney General* [2021] IESC 24.

Explanation of each Head of the General Scheme

The draft scheme comprises of eleven heads as follows:

Head 1 provides for the short title and commencement.

Head 2 provides for definitions of certain terms for the purposes of the Act.

Head 3 clarifies that for the purposes of investigating complaints a regulated financial service provider, shall, unless the context otherwise requires, be read as including a provider that was a regulated financial service provider at the relevant time.

Head 4 clarifies the methodology for the division between the FSPO's sources of funding from the financial services industry and Exchequer. The Act refers to complaints "*dealt with by the Ombudsman in the previous financial year*". The Head replaces the term 'dealt with' with '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 used in practice.

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 clarifies 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.

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.

Head 6 provides for the cross-examination of witnesses on oath where the Ombudsman has required a person to be examined on oath under Section 47 (3)(b) of the Act.

Head 7 corrects 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 proceedings in order to frustrate or delay its investigation.

Head 8 provides that the Ombudsman is required to take a decision on whether to hold oral hearings, as provided for in Section 12(1)(c) of the Act and as conducted under Section 47(3), 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 provides that mediation, as required under Section 12(2) of the Financial Services and Pensions Ombudsman Act 2017 and conducted under Section 58 of the Act, 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 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 provides that where an oral hearing has been conducted in public under Section 56(4a) (see Head 8 for reference), the Ombudsman has the discretion in relation to the decision arising from that investigation to name the parties concerned.

This Head also corrects a typographical error at section 62 of the Act.

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.”