DÁIL ÉIREANN

AN COMHCHOISTE UM AIRGEADAS, CAITEACHAS POIBLÍ AGUS ATHCHÓIRIÚ, AGUS AN TAOISEACH

JOINT COMMITTEE ON FINANCE, PUBLIC EXPENDITURE AND REFORM, AND TAOISEACH

Déardaoin, 27 Deireadh Fómhair 2016

Thursday, 27 October 2016

The Joint Committee met at 9.30 a.m.

MEMBERS PRESENT:

Deputy Peter Burke,	Senator Paddy Burke,
Deputy Pearse Doherty,	Senator Rose Conway-Walsh,
Deputy John McGuinness,	Senator Kieran O'Donnell.
Deputy Sean Sherlock,	

SENATOR GERRY HORKAN IN THE CHAIR.

The joint committee met in private session until 10 a.m.

Business of Joint Committee

Vice Chairman: Before proceeding with the scrutiny of proposed domestic legislation, I refer to the EU scrutiny decisions of the committee on EU proposals for noting on the public record. The committee agrees that EU proposal COM (2016) 597 warrants further scrutiny.

Scrutiny of the general scheme of the Financial Services and Pensions Ombudsman Bill 2016 and the Central Bank and Financial Services Authority of Ireland (amendment) Bill 2014, Private Members' business, shall conclude at 11.30 a.m. The general scheme of the financial services and pensions ombudsman Bill 2016 is proposed Government legislation in the name of the Minister for Finance. The Central Bank and Financial Services Authority of Ireland (amendment) Bill 2014 is a Private Members' Bill in the name of Deputy Pearse Doherty. The committee agreed this joint approach to the scrutiny of both proposals for legislation in view of the subject matter and synergies between Bills. In our first session, we will hear from the Minister for Finance on the general scheme of his proposed legislation and from Deputy Pearse Doherty on his Bill. In our second session, the committee will hear from representatives of the Financial Services Ombudsman's Bureau and representatives of the Free Legal Advice Centres, or FLAC.

It was agreed that the remaining EU proposals considered today do not warrant further scrutiny. Details of all EU proposals considered today and decisions made on them will be published on the committee's website.

General Scheme of Financial Services and Pensions Ombudsman Bill 2016 and Central Bank and Financial Services Authority of Ireland (Amendment) Bill 2014: Discussion

Vice Chairman: The Minister for Finance is very welcome to the meeting. Members are reminded of the long-standing parliamentary practice to the effect that they should not comment on, criticise or make charges against a person outside the House or an official either by name or in such a way as to make him or her identifiable. I invite the Minister to make an opening statement. He will be followed by Deputy Pearse Doherty.

Minister for Finance (Deputy Michael Noonan): I welcome the opportunity to brief the committee on the Government's priority legislation concerning the Financial Services Ombudsman and the Pensions Ombudsman. The purpose of these heads of Bill is to provide for the amalgamation of the Financial Services Ombudsman and Pensions Ombudsman and to update the legislation generally on their roles and responsibilities. The Government decision to amalgamate both offices follows the recommendation of a critical review under the public service reform plan. In the drafting of these heads, a full analysis was undertaken by my Department, including a public consultation process and consultation with relevant stakeholders, both public and industry representatives.

The Financial Services Ombudsman is an independent statutory officer who deals with unresolved complaints from consumers about their dealings with regulated financial service providers. The statutory role of the Pensions Ombudsman is to investigate complaints of financial loss due to maladministration and disputes of fact or law in relation to occupational pension schemes, trust retirement annuity contracts and personal retirement savings accounts. The Pensions Ombudsman performs these functions independently and acts as an impartial adjudicator. The heads of Bill propose to harmonise the rules under which the Financial Services Ombudsman and the Pensions Ombudsman can investigate a complaint and extend their strongest powers to the new financial services and pensions ombudsman. While the ombudsman will, of course, continue to be an independent officer, the draft legislation now provides that he or she shall resolve complaints in a manner that is appropriate and proportionate to the complaint. It gives the ombudsman a new role in improving the public understanding of the role and functions of the office, which compliments the current role of improving the public understanding of issues related to complaints.

With the amalgamation of the two bodies, the council and its oversight role of the Financial Services Ombudsman has been maintained but with some changes. I propose to remove the regulation-making power of the council with respect to how the ombudsman operates. The Minister for Finance rather than the council will now have the power to make regulations relating to the operation of the ombudsman on the advice of the ombudsman and the council. The council will continue to keep the efficiency and effectiveness of the office under review but will no longer be responsible for the appointment of the ombudsman or deputy ombudsman. The council will have a new role in approving the draft statement of accounts prepared by the ombudsman before they are submitted to me.

To reflect the unique funding arrangements of the new body, which involve both industry and the Exchequer, the council will continue to prescribe by regulation levies or fees to be paid to the ombudsman by financial services providers. To reflect the changing workload of the council, I propose to reduce its membership from a maximum of ten to a maximum of seven people. One member should have pensions experience, one financial services knowledge and now at least two members must have knowledge of consumer protection or consumer issues. The proposed legislation provides that I will now hold the responsibility for the appointment of the ombudsman and deputy ombudsman following an open competition run by the Public Appointments Service. I am also extending the role of the deputy ombudsman to the new financial services and pensions ombudsman, which is an improvement over the current situation whereby the legislation for the Pensions Ombudsman does not provide for a deputy.

With regard to the functions and powers of the ombudsman, the heads of Bill include significant amendments. The heads of Bill identify the number of options available to the ombudsman for dealing with complaints, ensure the ombudsman maintains and establishes systems and procedures and require the ombudsman to adopt and publish rules of procedure for dealing with complaints. These changes are suggested with the intention of providing clarity and certainty for the consumer as to the process for dealing with complaints and on what to expect when the ombudsman is dealing with a complaint. To further enhance the current reporting arrangements in respect of the ombudsman, annual reports will be required to include the breakdown of the manner in which all complaints submitted to the office were dealt with and the outcome of all investigations concluded or terminated, including those that were settled. The ombudsman will continue to report a summary of all complaints and a review of trends and patterns of complaints. I am also continuing with the name-and-shame reporting powers of the ombudsman with regards to complaints against financial services providers which was introduced in 2013.

In addition to this, the ombudsman shall publish determinations made by him. The intention of these amendments is to improve transparency and better reporting of complaints.

The most significant change in the draft legislation is the amendment of the time limit in which complaints can be made to the ombudsman. Providing the necessary protection to the consumer over the longer term is of paramount importance but needs to be achieved within the law and be able to operate practically. After significant consideration and consultation with stakeholders, I propose to extend the time limits for complaints about certain long-term financial services to the same time limit which currently applies to pension products, namely six years from date of the conduct complained of or three years from the date the complainant knew, or ought to have known, about the conduct. This greatly improves access to the ombudsman for consumers of long-term products who may not become aware of an issue until well after the original six years had passed. The rationale for this expansion is that those who have long-term financial services may not become aware of an event to be complained of until their service or product matures and they should have some access to the ombudsman at that stage.

For short-term financial services, the time limit for complaints to the ombudsman is unchanged at six years from the date of the conduct complained of. This approach was taken as it was considered to be a balance between the concerns of the consumer representatives to give consumers greater protection, as well as those concerns of industry about record-keeping and availability of documentation.

I am retaining the requirement for consumers to first try to resolve the matter with a provider's internal dispute process. However, I am now allowing the ombudsman to waive the internal dispute process in certain cases, such as when the ombudsman determines a complaint is of such importance as to warrant waiving the process. This means that in cases where the provider may be seen to frustrate the process, the ombudsman can intervene.

The heads of Bill strengthens the role of the ombudsman in promoting engagement in the mediation process, as well as continuing to provide for mediation as a tool for the ombudsman in cases where he sees fit. I am informed by the ombudsman that he is already taking a proactive role in mediation pending the introduction of this legislation. Following a significant strategic and organisational change programme with the objective of putting mediation at the centre of the ombudsman procedures, a minimum of 60% of cases will be resolved in the future by dispute resolution using mediation techniques. This is up from 1%.

Once the ombudsman has considered the complaint, he may now issue a preliminary determination which will indicate the potential decision to be made and the evidence considered in arriving at this. This ensures all parties to the complaint are aware of developments in a complaint and have the opportunity to ensure the ombudsman has all evidence necessary for making a final decision.

Other examples of improved measures include that the broader powers of the Pensions Ombudsman to compel witnesses and documents will now be extended to financial services complaints; the ability of the ombudsman to continue with a case on the death of a beneficiary; the ombudsman will issue preliminary determinations on cases to provide some level of expectation or guidance to both the provider and the complainant before completing the investigation; and the requirement for the ombudsman to publish guidelines for all procedures, the publication of cases for the Financial Services Ombudsman, and sample cases for the Pensions Ombudsman. If, following a complaint or investigation, the ombudsman considers there is a persistent pattern of complaints, he can now inform the relevant authority of such a concern.

The measures I have outlined should strengthen the functions of the new ombudsman, as well as improving the experience for consumers of both pensions and financial services. We look forward to debating these issues and any differences that may arise. My team and I are happy to take questions.

Deputy Pearse Doherty: I am delighted the committee is dealing with my legislation. I am also delighted my Bill, and the important issues it covers, has passed Second Stage and will now proceed to Committee Stage. Today, we are dealing with pre-legislative scrutiny and I welcome the opportunity to do that. I thank Members across the political divide who have unanimously supported the passage of this legislation.

Since then, the Minister for Finance wrote to me asking for priority to be given to his Bill which he just discussed. I only received the letter after the committee had agreed in private session to examine the Bills in tandem at the pre-legislative scrutiny Stage. I believe this is the best approach today.

The Bill is based on the excellent work of FLAC in its report, Redressing the Imbalance. I am glad we will hear from FLAC later this morning, as well as from the Financial Services Ombudsman. The day my Bill was debated on Second Stage, the Government published its own legislation. I am glad that after much delay, it did so. We can see a crossover, with the issues raised in my Bill now included in the Government's Bill. However, there are differences, some subtle and some not so. In particular, I am glad there was support across the spectrum for what I considered the most important element of my legislation, namely the amendment to the blanket ban on complaints after six years. I note the Government's Bill, as well as Deputy Michael McGrath's, supports this principle but has gone for a three-year rule instead. I am happy to work with that. However, as I will tease out later with the Minister, I believe the approach in the Government's legislation may have too many get-out clauses which may work against consumer. The term, which the Minister mentioned, "ought to have known" is also of concern to me.

The other critical issue for me, one on which I have not heard any sense of compromise from the Government, is the right of consumers, as well as of financial institutions, to have their day in court. That means having the right to appeal to the Circuit Court which provides greater ease of access to individuals. As we know, an appeal to the High Court is not only more costly but the appeals are legally tighter. I wish to work with the Government on this issue.

As I have said before, the appropriate course would be to consider merging both Bills. The Government's is far more comprehensive, as it deals with the merging of two existing offices and takes on board some of the issues I have raised. In that light, it would be open to me to withdraw my Bill if the important issues, including the right to appeal to the Circuit Court, were addressed or assurances could be given that these would be considered as part of the Government's legislation.

Regarding the definition of "consumer", my proposal is for a two-tier system for personal and commercial consumers. This has been suggested as a possible way forward to ensure the processes in place will genuinely cater for the ordinary person on the street. It would also ensure the Financial Services Ombudsman's office would not be overrun with complaints. In reality, complaints might be more appropriately dealt with by the Commercial Court, for example.

A question was raised about sole traders and charities. It is not my intention to exclude those from the definition of "consumer". That can be dealt with on Committee Stage.

Important points have been raised by our court system and, indeed, in the FLAC report, Redressing the Imbalance. The latter gave an example of where the courts have suggested that cases which have gone before the Financial Services Ombudsman would be better addressed in the Commercial Court. Its report questioned whether the ombudsman's expanded definition of "consumer" would stand the test of a constitutional challenge. That is the intention behind the relevant section in my legislation. Again, I am willing to hear from others as to the appropriateness, or not, of this section.

A seemingly small, but important, issue in this section of the Bill is to allow for a greater range of findings to be made by the ombudsman. The current options have failed to represent the actual results. FLAC research shows they have caused greater anger when a consumer who feels the system has not helped him or her in any way is told that the case was partially upheld. This is because, on a technical issue, the Financial Services Ombudsman has found in his or her favour, but the substance of the claim was rejected. The complaint has been partially upheld which seems a very positive finding, but the reality is that the claim was substantially rejected. Therefore, I propose four options in regard to findings, namely, upheld, substantially upheld, substantially rejected or rejected. They should mirror the legislation that allows for the name-and-shame principle, which was introduced a number of years ago.

As I indicated on Second Stage, I am open to discussion on all of these points. If I receive adequate reassurances on the issue regarding the Statute of Limitations and the right to access to the courts in particular, I would look forward to allowing priority for the Minister's Bill.

My Bill has already passed Second Stage and will proceed to Committee Stage, while the Government Bill is at the pre-legislative scrutiny stage. It is important that the more comprehensive Bill is allowed to pass through the Houses of the Oireachtas as speedily as possible. Following the debate on my Bill on Second Stage, the Government published its Bill which included many of the key issues, but there are quite important differences. It is to be hoped we can tease them out in the meantime and make sure that the time we have in the committee, Dáil and Seanad is best used to deal with one Bill that deals with all of the issues comprehensively.

Deputy Michael Noonan: I thank Deputy Pearse Doherty for his very constructive contribution. There is a great similarity between the intent of both Bills and the actual working out of the heads. I assume the committee will invite a number of witnesses to contribute to the discussion on both Bills today and will generate a report. When we receive it, the best way forward might be for my officials to discuss the further development of the heads with Deputy Doherty. If there is general agreement on the heads, we can proceed to drafting with a view to having a normal process whereby amendments are considered on their merits on Committee and Report Stages. If Deputy Doherty would agree to such a proposal, we can align our work with that.

Deputy Pearse Doherty: That is a very sensible proposal and one with which I would like to engage. I welcome the opportunity to engage with officials after the report of the committee has been published. Let us hear what the witnesses have to say and how the committee feels afterwards.

Deputy Michael Noonan: I thank the Deputy.

Vice Chairman: Are other members interested in making contributions?

Deputy Sean Sherlock: Not at this juncture.

Deputy Pearse Doherty: I am in a unique situation, because we are dealing with the pre-

legislative scrutiny of my Bill. I want to take the opportunity to ask a number of questions which will inform the committee's report on the Government's proposal. I will focus on a major difference between the two Bills.

While the timeframe for both Bills and the current rules on appealing to the Financial Services Ombudsman is within six years, the Government's Bill allows for three years after a person became aware or ought to have become aware of a difficulty. It is that definition of "ought to have become aware" about which I am concerned. When does the clock start ticking on when a person ought to have become aware of a problem? How do we define when somebody ought to have become aware of the fact there was an issue with the product he or she was sold?

Deputy Michael Noonan: Sometimes it is not possible to lodge a complaint within the six-year period. In the case of something like a tracker mortgage, an incorrect interest rate may not have come to the notice of the complainant and he or she may not know there were valid grounds for complaint within a six-year period. The three-year period is to allow a further period of time after it became apparent to the complainant that there was an issue about which he or she could lodge a complaint.

I presume the phrase "ought to be aware" means when something generally became public knowledge but it depends on each case. It would be a matter for the ombudsman to adjudicate on what "ought to be aware" means to admit a valid complaint at that point. In dealing with the heads of the Bill, we are dealing with the principles of issues and I am prepared to tease them out if the Deputy needs further refinement on that.

Deputy Pearse Doherty: I appreciate that we are only dealing with the principles. It is an area about which we are concerned and will have an opportunity to discuss with the ombudsman.

Deputy Sean Sherlock: On that issue, I was going to wait to make an intervention on that point at a later stage because it is something on which we would need clarity. The Bill will be very specific in regard to that point. It needs further teasing out.

Deputy Michael Noonan: Deputy Sherlock knows quite well that the heads contain the principle. There is an issue in that we have to find a space between allowing a three-year period at any stage in the process or tying it back in to when a person looking after his or her affairs would be expected to know that a wrong was perpetrated on that person that could be the subject of a complaint. It cannot be totally open. That concept has to be developed further in the draft Bill, which has to provide more detail on that. I am subject to the draft.

Deputy Sean Sherlock: That is the point I am making. Without being too pedantic, we will have an opportunity to do that. We are not closing out that issue at this juncture.

Deputy Michael Noonan: No.

Deputy Pearse Doherty: I refer to the section on the right to complain to the ombudsman. The new three-year provision will apply to long-term products, yet there is no definition of "long-term product" in the heads of the Bill. There is a definition of a "long-term financial service", which is defined as one that "exceeds 6 years and is not subject to annual renewal". I take it that the product will be the service. Can the Minister clarify whether products will have the same definition as long-term financial services?

Products that exceed six years but are subject to annual renewals would have to be com-

plained about to the Financial Services Ombudsman within six years of being sold. Therefore, is it the case that once they are renewed, the clock starts to tick again in year one? Can the Minister give us examples of products that would not be renewed annually but would exceed six years and for which people therefore would not have the right to appeal to the ombudsman?

Deputy Michael Noonan: First of all, the proposal in the heads of the Bill is to merge two different ombudsmen. There is already a time limit in the pensions legislation, which has generally operated well since 1996. There is experience of the operation of the provision in respect of the Pensions Ombudsman.

On the Deputy's question on the definition of a long-term financial service, I understand it means a financial service within the meaning of the Central Bank Act 1942, as amended, the term of which exceeds six years, is not subject to annual renewal and is sold to a consumer by a regulated financial service provider. We will carry that definition from the 1942 Act forward into this Bill.

Deputy Pearse Doherty: That definition is of a financial service but the right relates to a financial product. Is there a difference? Does there need to be a definition of a financial product? Does financial product need to be defined in the same way as services are defined?

Deputy Michael Noonan: The issues would be around mortgages, life assurances and so on and it relates to a service rather than a product.

Deputy Pearse Doherty: In terms of the phrase "annual renewal", what would that exclude? Let me phrase this differently. What products or services could be sold to consumers that are not renewed annually?

Deputy Michael Noonan: Things that are annually renewed would include things such as house insurance, pet insurance and travel insurance. Six years would be the limit and that should be sufficient. There is a range of things. The insurance company writes stating that a person needs to renew for the following year. All those kinds of products are annual renewal ones.

Deputy Pearse Doherty: I thank the Minister for the clarification. Let us stick with house insurance because it is renewed annually. Many consumers, for right or wrong, will take out house insurance with a company when they buy the house and usually it will be renewed. They will have set up a direct debit. It is like car insurance. If the letter is ignored, the disc will arrive in the post and the direct debits will be taken from the bank account. The problem is that, after six years of automatic renewal of the home insurance, the person finds out in year seven that there has been an issue in terms of the conditions and that the insurance was mis-sold. The person would not have a right to bring a claim to the Financial Services Ombudsman because it would be deemed a long-term product that is not subject to annual renewal. That is my concern.

Deputy Michael Noonan: The Deputy's concerns may be valid and we are happy to work with him on the definitions when the Bill is being drafted. There will be new definitions. The Deputy's concerns may be valid and we would like to tease them out.

Deputy Pearse Doherty: I appreciate that. There are issues in our legislation but we teased them out with the Minister on Second Stage and will tease them out with the different witnesses who will appear before us. There is no need to rehash those differences at this point in time.

The last thing I wish to raise concerns the current legislation. The chairperson of the council

must be chosen from the members and have experience of consumer issues in the field. The new draft seems to drop the stipulation that the chairperson would have experience of consumer issues in the field. This is probably an issue in terms of the council itself. There is no minimum requirement for the overall numbers on the council to have consumer experience. There was a requirement for the chairperson to have consumer experience, but that now seems to have been dropped. Was that intentional or is it something we can work on?

Deputy Michael Noonan: As they bring their past experience to bear on particular complaints, different levels of previous experience may be relevant and helpful in adjudicating on a complaint. The person with exclusively consumer issues experience at their fingertips might not necessarily be the person best positioned to adjudicate on a different type of complaint which involved the complications of a particular service. Again, it is a drafting issue and we are quite open to discussing it on the merits.

Deputy Pearse Doherty: The Minister might correct me if I am wrong but my understanding is that there is no requirement in terms of the mix of the council and the number of persons required to have consumer experience regardless of who fills the position of chairperson. Is that something that could be addressed in the legislation as it is progressed? Does the Minister have a view at this stage on whether there should be a minimum number of individuals with that type of experience serving on the council?

Deputy Michael Noonan: The proposed heads of the Bill provide:

> The Council is to consist of a maximum of 7 persons, one of whom is the Chairperson. At least two members must have knowledge or experience of consumer protection and other consumer issues relating to the provision of financial services; at least one member must have knowledge or experience of the financial services industry; and at least one member must have knowledge or experience in relation to the pensions industry.

One relates to financial services, one to pensions and two to consumer issues. Then the other three are open. However, that does not mean that one need only have two people with consumer related experience. There can be more than two, but there must be a minimum of two.

Deputy Pearse Doherty: I understand that. However, from the point of view of a body that, in my view, is concerned with consumer protection, although financial institutions can also take a case to it as well, the requirement seems very light, particularly in light of the fact that the chairperson will no longer be required to have a consumer interests background. It is something we can examine as the legislation progresses, but I think it needs to be rebalanced.

Deputy Michael Noonan: I agree.

Vice Chairman: I call Senator Paddy Burke.

Senator Paddy Burke: Will this cover vulture funds?

Deputy Michael Noonan: The general term "vulture fund" applies to property funds that acquire mortgages, for example, and whatever would be the legal position in respect of the obligations of the original owner would be transferred to the vulture fund as the new owner. We already legislated for that last year. The rights would transfer. Therefore, yes, it would.

Vice Chairman: I call Deputy Sean Sherlock.

Deputy Sean Sherlock: I appreciate that we are talking about principles here and that these

are the heads of a Bill. However, head 43 refers to the conduct of investigations. However, subsection (4) provides, "The Ombudsman may, in the course of investigating a complaint, periodically report to the complainant on the progress of the investigation and, in so doing, may make such comments to the complainant on the investigation and its consequences and implications as that Ombudsman thinks fit." What is meant by "thinks fit" or deems appropriate perhaps needs to be examined. Will the Minister give us a sense of the guiding principles?

We can compare this with head 44. If the ombudsman embarks on a process of mediation and the complainant or the ombudsman feels that the organisation, intermediary or institution against whom the complaint is being made is merely going through a box-ticking exercise to be seen to be going along with a process, what kind of recourse does the ombudsman have? What level of discretion does the ombudsman have in determining that the financial institution is not playing ball and, therefore, that a sanction will be issued? If the document is prepared for the purposes of the mediation, some of it may not be deemed to be admissible if it has gone through a mediation process. The question then is how much power in real terms does the ombudsman have to ensure the financial institution goes along with the process or, at least, is an honest party to the process.

Deputy Michael Noonan: If one thinks, in the first instance, of what the situation might be if the complainant went to the courts rather than to the ombudsman, both sides would present their case but the judge would not engage with either side and at the end would decide and adjudicate. Here, the process is more quasi-judicial but there is also mediation. We would envisage that there could be a dialogue between the complainant and the institution about which the complaint was made to see if a satisfactory resolution could be arrived at. The power, referred to in section 4 of head 43, is already in the current legislation.

Deputy Sean Sherlock: Yes.

Deputy Michael Noonan: The new ombudsman will be independent so it is not for me to prescribe how he deals with that particular section. As he is coming in here shortly, I am sure if the Deputy asks him he will elaborate. I am not avoiding the issue but the Deputy can see that even at this stage it is important we preserve his independence.

Deputy Sean Sherlock: I put him on notice by asking the question.

Deputy Michael Noonan: Yes. If he says something which requires a further refinement of the head we will take his advice.

Deputy Sean Sherlock: That is okay.

Senator Rose Conway-Walsh: On Second Stage, the Minister of State, Deputy Murphy, stated that the Financial Services Ombudsman would be precluded from acting as anything more than a notice party in an appeal in a Circuit Court. Is there a constitutional issue here or is there something that could be changed through legislation?

Deputy Michael Noonan: I will check that for the Senator. I need to take advice on the matter. We are very puzzled, Senator.

Senator Rose Conway-Walsh: That was not my intention.

Vice Chairman: Does the Senator have other questions?

Senator Rose Conway-Walsh: No, because I must speak elsewhere.

Deputy Michael Noonan: I have got a general piece which I will read. The briefing is by way of question and answer. The question is: will the Minister allow for an appeal and a full rehearing to be made to the Circuit Court? The complainants can decide at the outset whether to bring their dispute to the appropriate court, depending on the quantum of their claim or alternatively to complain to the ombudsman free of charge. There is an initial decision to go to the ombudsman when a complainant could go to the courts directly. The ombudsman is designed to be a low cost alternative to the courts system. The ombudsman has significant powers to investigate and examine witnesses similar to a High Court or a judge. However, there is the option of a High Court review of the ombudsman's decision as set out in head 48 but it is not a *de novo* appeal. It is a review of the actions of the ombudsman to see if there was an error in law.

Allowing for an appeal instead to a Circuit Court of a decision of the ombudsman brings challenges. For instance, the provider could appeal every decision made by the ombudsman in favour of the complainant in the hope that the court will provide a different outcome in their favour. The consumer would then have to defend the appeal to the Circuit Court with all the attendant expense.

The provider is in a considerably stronger position both to go to the Circuit Court and to succeed at the Circuit Court. The real effect is not only that the provider is in a stronger position on a case-by-case basis, but the existence of the threat of an appeal by the provider operates as a deterrent to consumers to complain generally. The complainant would be exposed to the risk of liability for costs of a successful Circuit Court appeal by the provider.

In the existing statutory appeal to the High Court the complainant is shielded by the high threshold, which is applied to the statutory appeal, and by the fact that the Financial Services Ombudsman can be a party to the complaint and thus take the role of defending its own decision. Neither of these factors operate in a Circuit Court *de novo* appeal so the real effect is not only that the provider is in a stronger position on a case-by-case basis, but that the existence of the threat of an appeal by the provider operates as a deterrent to consumers generally. The more subtle and long-term risk here is that it becomes a deterrent to the complainants bringing their case, even at first instance, as they could be exposed to the cost of the provider working their way up through the appeals system of the courts. In addition, allowing for a full rehearing could allow for a situation where people use the ombudsman as the first step in litigation before inevitably going before the courts. This would result in a floodgate scenario for the office which would have implications for staffing and the effectiveness of the office to process and determine complaints.

The ombudsman is a statutory officer with the powers of a High Court judge in carrying out investigations and examining witnesses. The ombudsman holds an important public role and to have appeals go to a lower court would undermine the work of the ombudsman. A review by the High Court is more appropriate.

Finally, where a Circuit Court appeals process may appear to benefit the consumer as it is cheaper it should be borne in mind that the Circuit Court can only award in cases up to €75,000 where the ombudsman can award compensation up to €250,000. In addition, the Circuit Court will not hold an investigation as the ombudsman can. Instead the consumer will be obliged to prove his or her case *de novo* to the civil standard without the benefit of the ombudsman who can look into all of the codes of practice and regulatory standards in addition to the facts of the case. On balance, therefore, I do not believe that an appeal to the Circuit Court would provide greater consumer protection.

To answer the Senator's question, it is not a constitutional issue. There is an appeal intended but it is confined to a point of law. It is a point of law appeal to the High Court. That is the first position. To have an appeal to the Circuit Court one would have to be equal in the rights given to the complainant and to the provider. The argument in the briefing note I have given the committee is that an appeal to the Circuit Court would tip the balance in favour of the provider rather than the complainant as the provider would be in a better position to carry the costs and could appeal *de novo* every new complaint and make it very expensive for a complainant. As a consequence, obviate the inexpensive access that a complainant would have to the ombudsman by putting a Circuit Court appeal on as a tail. As a consequence, this might operate as a deterrent to complainants and undermine what our intention is in going the ombudsman's route.

Deputy John McGuinness took the Chair.

Deputy Michael Noonan: The briefing note also makes the point, as the committee will have heard, that complainants who intend going to court anyway would use it as a kind of pipe opener free of charge to see where the land lies before they proceed to the courts. One might get a flood of complaints where the intention of the complainant was never to conclude them within the ambit of the ombudsman's powers but to use them as a kind of introductory procedure on the way to court. Again, that would act as an obstacle to the operation of the powers, as we intend them, vested in the ombudsman. There are a couple of sub-routes there as well. It is the kind of thing that we will need to tease out to see where the balance of advantage lies. I want it to operate in the interest of consumers that they have low cost or no cost access to a complaints procedure to the Financial Services Ombudsman or the Pensions Ombudsman, and that there are not other heads the consequences of which might be to obstruct that access in one way or another.

Senator Rose Conway-Walsh: I thank the Minister. I am sorry but I have to go now.

Deputy Pearse Doherty: I mentioned in my opening remarks that this is one of the big areas where we have a difference of opinion. I acknowledge what has been said by the Minister and the potential consequences that could flow from an appeal to the Circuit Court. I am not dismissing that. I am not fully sure that we can get around this. For example, if an appeal was made based on a point of law could the ombudsman represent the consumer in the Circuit Court and so on?

Representatives of FLAC will appear before the committee later today. I would like to take this opportunity to point out for the benefit of the Minister what FLAC has to say in its written submission. It states that in 2012, 37 appeals were recorded by the High Court, in respect of which in 31 cases the consumer was the appellant. In other words it was the consumers who took the financial institutions to the High Court. Many people would not have the means to do that. The Financial Services Ombudsman is the notice party in this area. If Mary has been mis-sold a financial product by one of the main financial institutions in this country and the Financial Service Ombudsman finds that Mary does not have a case that he or she can uphold and Mary then takes an appeal to the High Court, that case is defended by the Financial Services Ombudsman, involving the use of our money, rather than the financial institution, be that Allied Irish Banks, Bank of Ireland, Permanent TSB and so on. They are shielded, not the consumer.

While I do not agree totally with the arguments made by the Minister I do not dismiss them. I have been watching this area closely for the last number of years and I have noted a marked increase in terms of mediation, as mentioned by the Minister. Progress is being made in that regard and that is to be welcomed but regardless of who we are or in what sphere we operate

there will always be mistakes made or errors in terms of judgment. That will be the case with the Financial Services Ombudsman such that consumers will have the wrong decisions handed down to them. At this point in time the only option open to consumers that believe they have been wronged by the decision of the Financial Services Ombudsman is an appeal to the High Court, which is simply beyond the means of many individuals. The issue is how we ensure there is full recourse to the courts available to an individual. As I said, the record shows that in 2012 the rate of appeal on a decision of the Financial Services Ombudsman by consumers versus the regulated financial services was 6:1.

Deputy Michael Noonan: A Circuit Court review on appeal on a point of law would not be any more detailed than that of a High Court appeal in that no new evidence is submitted and the court is not rehearing old evidence. As such, a new perspective on the evidence would not apply. The adjudication would be whether the ombudsman erred in law or not. That would be the net point. Whether the appeal is to the Circuit Court or the High Court the procedure is the same. In addition, the Circuit Court jurisdiction value is lower than that of the High Court, which as I said, is set at €75,000 rather than €250,000 in the ombudsman's case. An appeal may need to be to the High Court or the Circuit Court, depending on the financial jurisdiction of the court. I do not think it is possible to have an appeals system to two separate courts for different complaint values. That could be confusing to consumers.

I do not want to be categoric about this at this stage of the process. We are only at the pre-legislative scrutiny stage. What we will take on board from this stage of the process is possible amendments to the heads or new heads of the Bill, which will form part of the examination of the process as a whole. There is merit in what the Deputy said. There is also merit in what I said in the speaking note which I read out. We need further consideration of the issue. I presume FLAC will offer its view to the committee later today and that the ombudsman will also have a strong view on this matter. I am prepared to wait for further advice and further discussion.

Senator Paddy Burke: I would like to return to the issue of vulture funds or to what the Minister termed debt-investors. The introduction by the Minister of the 20% tax closed off the loophole in this area, and rightly so. However, we now find that debt investors-vulture funds are running amok in terms of the penal interest rates, charges and penalties they are applying to loans which they have acquired. We may need to bring the credit service providers before this committee to discuss this issue or to consider the establishment of a credit service ombudsman. Will the penal interest rates, charges and penalties being charged by these debt investors-vulture funds be covered by this legislation?

Deputy Michael Noonan: The issue raised by the Senator is largely a separate issue. I have already responded to the effect that they would fall within the remit of the legislation if the institutions involved are regulated financial services entities. As I understand it, they are. In regard to the other points made by the Senator, I would need evidence from him that what he is saying is happening. My information is that this is not happening because when a so-called vulture fund acquires a loan book it has to honour the original provisions of the mortgage. As such it cannot under law do what the Senator is saying. We legislated to prevent that almost two years ago.

Senator Paddy Burke: That is not what I am told is happening on the ground.

Deputy Michael Noonan: If the Senator can send me on evidence I will pass it on to the Central Bank. If a vulture fund is operating in that way it is operating illegally.

Senator Paddy Burke: I thank the Minister.

Chairman: I thank the Minister and his officials for attending this meeting. I also thank members for their questions.

Deputy Michael Noonan: I thank the Chairman and members of the committee for their questions.

Chairman: I propose that the committee suspend until 11.30 a.m. Is that agreed? Agreed.

Sitting suspended at 11 a.m. and resumed at 11.30 a.m..

Chairman: We resume consideration of the general scheme of the financial services and pensions ombudsman Bill 2016 and the Central Bank and Financial Services Authority of Ireland (amendment) Bill 2014. In our earlier session, we heard the views of the Minister for Finance on the proposed legislation. The committee will now hear from Mr. Ger Deering, Financial Services Ombudsman, and Mr. Paul Joyce from the Free Legal Advice Centres. I acknowledge also the attendance of Ms Eilis Barry. I welcome the witnesses to today's meeting.

I draw the attention of witnesses to the fact that by virtue of section 17(2)(*l*) of the Defamation Act 2009, they are protected by absolute privilege in respect of their evidence to the committee. However, if they are directed by the committee to cease giving evidence on a particular matter and they continue to so do, they are entitled thereafter only to a qualified privilege in respect of their evidence. They are directed that only evidence connected with the subject matter of these proceedings is to be given and they are asked to respect the parliamentary practice to the effect that, where possible, they should not criticise or make charges against any person, persons or entity by name or in such a way as to make him, her or it identifiable. I invite Mr. Deering to make his opening remarks.

Mr. Ger Deering: Good morning Chairman, Deputies and Senators. I am pleased to have the opportunity, together with the deputy Financial Services Ombudsman, Ms Elaine Cassidy, to engage with the committee as part of the pre-legislative scrutiny of the financial services and pensions ombudsman Bill and Deputy Doherty's Private Members' Bill. The Government has decided to amalgamate the offices of the Financial Services Ombudsman and the Pensions Ombudsman and the legislation the committee is considering here today, if enacted, will enable this. We have undertaken considerable work in preparation for the amalgamation, including administrative integration and co-location. I was appointed as Financial Services Ombudsman in April 2015 and appointed Pensions Ombudsman in May 2016. Currently, I hold both of these offices in separate capacities under the relevant legislation. My colleague, Ms Cassidy, was appointed deputy Financial Services Ombudsman in January this year. She is deputy ombudsman designate for pensions as the current legislation does not provide for a deputy Pensions Ombudsman. She will assume that element of the role when the legislation under consideration here today is enacted. We look forward to fully amalgamating both offices on enactment of the legislation. We also look forward to the enactment of the other provisions in the Bill which will provide greater protection for consumers. I will comment further on this later but first I wish to provide some background to our work and its current legislative basis. In particular, I wish to provide details of a major transformation that we are implementing in our office.

The long and well-established role of an ombudsman is to seek to redress the difference in power and resources between the individual and large institutions. My job, therefore, is to address the very significant imbalance of resources that exists between the consumers and

providers of financial services. The Office of the Financial Services Ombudsman, FSO, was established in 2005 to deal independently with complaints from consumers about their dealings with regulated financial service providers. The operation of the office is funded by a levy on the industry. Complaints can be taken by individuals as well as limited companies and unincorporated bodies such as partnerships, charities, clubs, trusts and sole traders with an annual turnover of no more than €3 million. A time limit of six years for making complaints to the Financial Services Ombudsman is set out in the Act. The Office of the Pensions Ombudsman was set up under the Pensions Act 1990. The Pensions Ombudsman investigates and rules on complaints from members and beneficiaries of pension schemes regarding complaints about occupational pension schemes, personal retirement savings accounts and trust retirement annuity contracts in both private sector and public sector schemes. Generally, the Pensions Ombudsman operates under a six-year time limit but there is also a three-year awareness provision. The Pensions Ombudsman has some discretion to consider a complaint or dispute outside these timeframes. Subject only to an appeal to the High Court, the decisions of both offices are binding on all parties.

The 2004 Act establishing the Financial Services Ombudsman is very strong in its intent to establish a true alternative to the adversarial court system. It clearly sets out that the principal function of the Financial Services Ombudsman is to deal with complaints made by way of mediation and, where necessary, by investigation and adjudication. It also sets out that the Financial Services Ombudsman is required to act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form. These very important provisions have been supported by the High Court in a number of challenges to findings of the Financial Services Ombudsman. It is clear from the legislation as endorsed by the courts that the intention of the Oireachtas was to establish a system for resolving complaints against financial service providers that is informal and in which the preferred method of resolution is mediation. Only where necessary is it intended to resolve complaints by investigation and adjudication. However, I must acknowledge that this is not how the service has developed over the years. Until February of this year, fewer than 1% of complaints were resolved through mediation. This meant that a significant number of complaints required full investigation and adjudication. In the main, this was because financial service providers refused to engage in the mediation process.

While the 2004 Act clearly promotes mediation as the preferred method of resolving complaints, it also provides strong powers for the ombudsman to adjudicate. A complaint may be upheld on a very broad range of grounds including that the conduct complained of was contrary to law, unreasonable, unjust or improperly discriminatory in its application to the complainant, or that the conduct complained of was otherwise improper. This showed great foresight on the part of the legislators in 2004. It allows me to go beyond simply looking at contractual terms and, instead, to take a much broader view of the fairness and equity of an issue. Where a complaint is upheld, the 2004 Act contains a wide range of powers which are available to the ombudsman. I can direct a financial service provider to pay compensation of up to €250,000 and I can also direct rectification. Such rectification can be very significant as it can involve putting a person back to the position in which they previously were before the complaint arose. In some instances, such as where a home or life insurance policy has been voided or an income continuance or life insurance claim denied, this is potentially more important for the complainant than compensation. In addition, I can require a financial service provider to change a practice relating to that conduct. I can publish the names of financial service providers who have three or more complaints against them substantiated or partly substantiated in a year. Furthermore, I can make a report to the Central Bank where I have concerns that the conduct of a provider

could have negative repercussions for other consumers.

While it is clear that significant powers are available to the ombudsman, a view had emerged that the Financial Services Ombudsman was not making maximum use of these powers in the interest of consumers. To tackle this, I commissioned a strategic and operational review jointly with the then Pensions Ombudsman, Paul Kenny. This independent review consulted widely with our stakeholders, including a large cohort of complainants who had used our service. It examined current operations and business processes in both organisations. It also took into account the findings and recommendations of the FLAC report, Redressing the Imbalance.

The review report, which is available on our website, recommended that we should adopt a more proportionate, informal and preventative approach to dispute resolution. We have responded to our service users' feedback and the review recommendations by putting in place a three-year programme of change, which commenced in February 2016. This is already delivering significantly improved outcomes for users of our services.

All our stakeholders told us that they wanted a faster, less formal, simpler dispute resolution service. For this reason we introduced a new dispute resolution service through which we seek to achieve a fair resolution at the earliest possible stage through the use of mediation techniques which are flexible and informal. The new service involves considerably more interaction with the parties, particularly in terms of listening to them at an early stage of the process and giving everyone a chance to be fully heard. We use a combination of face-to-face meetings, phone calls and emails, and this approach is delivering a faster, more efficient and effective service that puts the needs of service users at its core and gives both parties the opportunity to develop a shared understanding of the complaint and work towards reaching a swift and fair resolution that both parties can accept.

Although it has to be acknowledged that it is very early days, I am pleased to report positive levels of engagement in the new process and very positive feedback from complainants who have used the new service. A total of 1,881 complaints were resolved through the new dispute resolution service between 1 February 2016 and 30 September 2016, compared to 70 complaints resolved by mediation in 2015, in itself a significant increase, and 822 cases settled directly between the parties in 2015. To evaluate its effectiveness and to enable continuous improvement we have now begun to undertake ongoing user surveys. The results of the first survey undertaken since the changes were introduced are very encouraging and demonstrate a more positive experience for service users, indicating that we have laid a strong foundation on which to build. The key findings include increased satisfaction among those who responded across all of the indicators. We have set these out in the document we have submitted and I do not propose to go through them in detail. While we are naturally pleased with these encouraging responses, we are also conscious that it is early days and that these responses do not include complainants who had their complaint adjudicated. All cohorts will be included over time.

Despite the success of the dispute resolution service there will inevitably be complaints that will not be resolved through these early interventions and there will be complainants who may not want to use this process. In such cases, the parties continue to have the option of having their complaint independently adjudicated by the ombudsman and a legally binding finding issuing. We are also making changes to our adjudication process and in 2017 we will commence issuing a preliminary finding to both parties. This will allow parties to make submissions relating to possible errors of law or significant additional points of fact prior to a legally binding finding issuing.

I again thank the committee for the opportunity to engage with it as part of the pre-legislative scrutiny for both Bills. I also thank the officials from the Department of Finance, with whom we have had considerable engagement. We welcome the financial services and pensions ombudsman Bill as published. We welcome the general consensus that appears to exist on the need for its provisions. The Bill as published retains the many excellent and important provisions of the 2004 Act, which gives the Financial Services Ombudsman significant powers to redress the imbalance between consumers and financial service providers and empowered us to implement our new processes. I believe the new Bill provides additional and very important powers. I particularly welcome the extension of the six year rule, the provisions relating to a complainant who is or becomes unable to act for herself or himself, the suspension of the limitation period during internal dispute resolution procedures, the specific provision to issue a preliminary decision, the provision to publish decisions while maintaining the confidentiality of the complainant and the provision to publish reports on any investigation as the ombudsman sees fit. The Bill as presented continues to strike the right balance between our ability to resolve disputes informally and, where this is not possible, to provide redress through investigation and adjudication.

Our promotion of, and emphasis on, informal dispute resolution and mediation should not be mistaken for some form of light touch approach. This approach is designed to provide complainants who use our service with a simple, effective and speedy resolution of complaints against financial service providers. However, I have very significant powers in terms of providing redress for complainants and I have not been, and will not be, found wanting in using these powers without fear or favour as they were intended. I assure the committee that, together with the deputy ombudsman and our entire team, I am fully committed to using any powers afforded to the financial services and pensions ombudsman by the Oireachtas to the fullest extent possible. I thank the Chairman and committee members for their time and I look forward to the discussion.

Mr. Paul Joyce: I thank the committee for the invitation to address it today on proposals to reform the legislation dealing with the Financial Services Ombudsman and the Pensions Ombudsman and on the Private Member's Bill sponsored by Deputy Doherty. We would like to put on the record our appreciation and thanks for the interest Deputy Doherty has shown in our 2014 report, Redressing the Imbalance, which forms some of the proposals in the Private Member's Bill before the committee.

We have put together a short submission, which I must say has been hastily assembled. We have been looking at the heads of the Bill, which are quite detailed and contain quite a lot of slightly altered proposals, and we hope to make a full submission on the heads of the Bill in due course.

I will now speak about our 2014 report and the reasons for it. As committee members probably know, we have been involved in many law reform campaigns, including on personal insolvency. When the personal insolvency legislation was finally put in place in 2013 we felt it was opportune to look at what went wrong and what protection was in place for consumers of financial services, in particular people availing of credit and associated products. We looked at a range of consumer credit legislation and consumer protection codes, and how these codes and legislation are enforced, particularly regarding reckless lending which is now acknowledged to have occurred very frequently during the years at the end of the boom in particular. We were looking at what legislative protection is in place for consumers of financial services, thus the name of the report, Redressing the Imbalance, because our ultimate conclusion is the consumer

is nowhere near as protected as the provider.

Part of the research was to speak to people who had made complaints to the Financial Services Ombudsman and to people who had assisted complainants, particularly those attached to the Money Advice & Budgeting Service, MABS. These interviews were conducted by our colleague, Dr. Stuart Stamp, a research associate at NUI Maynooth and an independent social policy researcher. The research indicated a fair degree of dissatisfaction from a number of complainants about the processes they faced when they made a complaint, particularly regarding an over-reliance on the exchange of paperwork. Many of the complainants felt this disadvantaged them and gave a natural advantage to the financial service provider. A big problem is the lack of access for complainants to specific assistance to frame complaints, understand submissions and look at issues such as the adequacy of settlements that might be proposed.

From a philosophical point of view, our report departs from the principle that a consumer of financial services takes an economic risk but instead is a person who contributes hugely to economic growth in the society in which he or she lives and therefore is entitled to substantial protection in law which, in our view, has not always been there. We feel this is part of a wider broader right of access to justice, that the consumer should be adequately protected by the State, entitled to fair redress and must be provided with timely and adequate advice and information.

With regard to the legislation establishing the Financial Services Ombudsman, the points we examined in the report which are reflected in the Private Member's Bill are the six-year time limit on complaints, what we feel is the ambiguous and difficult language concerning the ombudsman's mandate, the problematic definition of consumer, how findings are classified and the very difficult and, in our view, prohibitive avenue of appeal to the High Court. As we stated, we are also concerned by the view expressed by a number of complainants that the processes had essentially disadvantaged them. This is also reflected in the fact that the consumer must first make a complaint under the terms of the consumer protection code to the financial service provider's internal complaints mechanism before he or she can make a complaint to the Financial Services Ombudsman. While the provider is supposed to meet a 40-day time limit, it appears from anecdotal evidence that this time limit is often exceeded and by the time complainants get to the ombudsman, they may already believe they are up against it, as it were.

We also looked at the Financial Services Ombudsman reports for the period from 2006 until 2012. We found the information trends disturbing. For example, many complaints were disappearing from the radar under the heading "No further contact from the consumer". In addition, issues such as settlements were being recorded as being resolved in the complainant's favour, whereas a settlement is not necessarily always in the complainant's favour. We also looked at the low and declining rates of success for complaints that proceed to adjudication. In 2012, 10% of complaints were upheld, 17% were partially upheld and 73% were declined. Low levels of compensation are also a factor.

To be fair, since the publication of our report, the current Financial Services Ombudsman has been much more proactive about looking at and trying to capture information trends, as he has set out. Nonetheless, in 2015, for example, more than 1,700 complaints or 35% of the total were closed due to no further contact. The ombudsman and his staff are examining the reasons this is occurring. In our view, the reason may be the perception among complainants that the odds and processes are stacked against them and substantially advantage the provider.

In terms of pre-legislative scrutiny, we focus on five specific issues covered in the Private Members' Bill. As I indicated, the free legal aid centres examined the heads yesterday. Many

detailed issues arise which will require further elaboration.

On the issue of the statute of limitations, on which there is fairly broad agreement, albeit not on the nuances of what should be the amendment, we note that the three-year limitation period from the time the consumer becomes aware of, or ought to have been aware of, the conduct of the provider that gives rise to the complaint, is only available for long-term financial products. A long-term financial product means a financial service, the term of which exceeds six years. We are a little concerned about the wording used here. Does it include payment protection policies, for example, which do not have a term, as such, but are paid on a monthly basis? This issue should be clarified.

The issue of how a court will assess when a person ought to have known of the conduct that gave rise to the complaint and what criteria would be used is also critical. We have had difficulty for some time with the informal aspect, without regard to technicality or legal form, of the ombudsman's mandate. As a legal rights organisation, we have difficulty with a requirement to make decisions without regard to technicality or legal form. The High Court, on a number of occasions, has overturned decisions of the ombudsman where the ombudsman has acted incorrectly in law in the High Court's opinion. This mandate is unnecessary and should be clarified.

The problematic definition of the term "consumer" is raised in our submission and the FLAC report and it has been pointed out by the courts in one or two decisions. The definition is extremely wide. The Bill reflects the view that a distinction should be drawn between a personal or ordinary consumer and a commercial consumer. Well-known complaints have been brought by credit unions and investors with large property portfolios, which are very different consumers from an ordinary person who has an insurance policy that does not pay out. This issue needs to be addressed, perhaps in a two-tiered process.

Some of our respondents were very unhappy with how findings were classified. One or two were shocked and a little annoyed to find that their complaint had been classified as being partly substantiated when they believed it had been substantially rejected. We proposed in our report a reclassification of how findings are recorded.

The final issue addressed in the submission is the very important matter of the avenue of appeal to the High Court, as provided for in the current legislation. The proposed legislation maintains this avenue to the High Court. This is a limited appeal which is akin to an appeal on a point of law. The High Court is a prohibitive venue for consumers to go to, especially without access to legal advice and representation, which are, by and large, not available from the State. In the debate on 6 October last, the Minister of State, Deputy Dara Murphy, addressed this issue and made some interesting points. He stated, for example, that in the existing statutory appeal to the High Court, the complainant is shielded by the high threshold that is applied to the statutory appeal. A practice has developed over the years whereby the ombudsman acts as the respondent in all appeals. This is a little unusual for an alternative dispute resolution process. Our report records that 31 of the 37 appeals to the High Court in 2012 were brought by consumers. As such, if anybody is being shielded as a notice party, perhaps it is the financial services provider. We propose a full *de novo* appeal to the Circuit Court for both parties. Obviously, there are dangers inherent in this proposal, particularly if financial service providers decide to routinely appeal decisions of the Financial Services Ombudsman. However, the right to a full appeal is a fundamental issue of access to justice and should be buttressed by the availability of civil legal aid from the State for consumers to either appeal or defend an appeal.

There are still many people who wish to make complaints who do not have access to assis-

tance to properly frame their complaint, which is a major difficulty. I thank members for their attention.

Deputy Pearse Doherty: I welcome the two presentations and thank the free legal advice centres and the Office of the Ombudsman for the consultation in which they engaged on this Private Members' Bill.

To focus on the statute of limitations and the six-year rule and deal with the timeframes available, my Bill proposes a timeframe of two years from the point at which the complainant becomes aware of the conduct of the provider. Under the Government's legislation, the timeframe is three years from the point at which the consumer becomes aware of or ought to have become aware of the conduct. The provisions of the legislation governing the Pensions Ombudsman are close to those set out in the heads of the Bill, with one major omission, namely, the right of the ombudsman under section 131(4)(*b*) to extend the period. The relevant paragraph states a complaint may be made "within such longer period as the Pensions Ombudsman may allow if it appears to him that there are reasonable grounds for requiring a longer period and that it would be just and reasonable so to extend the period". This power is being removed from the office of the ombudsman in the new legislation. The power could be regarded as a safety net in respect of cases where a financial institution or pensions provider argues on a technicality that the complainant ought to have become aware of the conduct. In such cases, the ombudsman should have the power to extend the period. Should this option continue to be available to the Pensions Ombudsman and the new office of the ombudsman?

Mr. Ger Deering: We welcome the consensus that the six-year rule needs to be extended. Everybody is in agreement on that.

On the specific provision, I understand it has not been used, which does not mean it is not beneficial. I am not aware that it has been required. One of the risks with discretionary legislation is that it can become a focus as to how the Financial Services Ombudsman would exercise his jurisdiction. We should look to get the six-year rule more generally extended in both instances.

Pensions are generally long-term products, which means they are covered by the extension in general. To have that same discretionary provision for short-term products that are renewed regularly may not be necessary. However, it is a provision that exists and we would be happy to see it remain. Getting the six years extended for the long-term products is the key thing. The people who are disadvantaged at the moment are those who, for example, bought a life insurance policy and do not realise they have a difficulty until they come to claim.

Deputy Pearse Doherty: I appreciate that and I am happy to hear Mr. Deering say that he would be happy if it remained. Obviously, the focus is on the six-year rule, but we also need to deal with the detail of it. I asked the Minister how we would determine that a person ought to have known there was inappropriate conduct by the provider. It will fall to the Financial Services Ombudsman to make that determination. I ask Mr. Deering to give me some examples of where his office would adjudicate that somebody who was sold an insurance product or a mortgage ought to have known.

Mr. Ger Deering: The example that comes to mind most readily would be that of someone who bought insurance 15 or 20 years ago and who claimed last week and then suddenly discovered it was not what he or she expected or that he or she was unable to make a claim. At that stage, the person certainly knows there is a problem. As currently proposed, the clock

starts then and the person has three years from the date that the claim was rejected. I have to be careful here because each case needs to be considered in its own right. I am giving a fairly general example.

Deputy Pearse Doherty: I have a question mark over this "ought to have known". In that case that is when the consumer actually knew there was an issue, as opposed to "ought to have known". When is the point that they ought to have known? That is a really grey area where the provider could argue that the buyer signed the document and saw the terms. They may have been grey and not very understandable to a consumer, but the person signed the document and technically ought to have known what he or she was signing. In some cases people probably signed to confirm they understood what was being stated.

I know I am putting Mr. Deering on the spot here. I ask him to give an example and perhaps better still follow up later with the committee outlining hypothetical cases where "ought to have known" would have arisen.

Mr. Ger Deering: As the Deputy knows I have only taken over as Pensions Ombudsman in the past couple of months. I have not come across those cases where that provision has been used yet. I would be happy to provide anonymised case studies to the committee where it has been used.

In the case the Deputy has outlined, I accept that a provider might make that argument. However, if a person became aware today that they were being refused a policy that they believed covered what they purchased at the time, for me the trigger is the day on which they find out they cannot access that policy.

Deputy Pearse Doherty: Mr. Deering is making a very strong argument for deleting the reference to "ought to have known" and just leaving "have known". If that is the way these are to be adjudicated, there is no reason to have "ought to have known" in the legislation. If it is the case that it is when they have found out that in their view they have been mis-sold a product, then it should be left to when they "have known".

Mr. Ger Deering: One could argue that. It is also important to consider how we define when somebody has known. There is the argument that "ought to have known" leaves discretion there. Simply because somebody got a letter or something happened does not rule the person out from having the complaint. Our aim would certainly be to have as many claims as possible included. I appreciate that work remains to be done on this and we will be part of that discussion. Our aim would be to ensure that nobody is disadvantaged by any of the wording.

Deputy Pearse Doherty: I fully accept that.

Does FLAC have an opinion on the question of "ought to have known" and the current provision that allows the ombudsman to extend the period as he or she judges?

Mr. Paul Joyce: There could be scenarios where there would be a difference when someone knew and when someone ought to have known. For example, there has been considerable recent publicity about people having been unfairly taken off tracker mortgages with a look-back and complaints mechanism put in place. Hypothetically, I could envisage a lender claiming that that was in the public domain, that there was redress available for having been wrongfully taken off a tracker mortgage and that those who did not make a complaint at the time it was in the public domain certainly should have known they had time to make a complaint.

I absolutely take the Deputy's point that the time at which the person knew or ought to have known may be simultaneous but it is conceivable that in an instance like that, it would not be. It raises a very important issue of consumer knowledge. By and large the provider has the expertise and the financial knowledge, but many consumers, who simply have to avail of financial services as part of everyday life, do not necessarily have the financial expertise to understand products, and to understand when they ought to have made a complaint and when the clock starts to run. It is a very important discussion. During the debate on 6 October there was a suggestion that the Office of the Attorney General would have to look at this in some detail. Thankfully, we are only at the stage of the heads of the Bill, but it certainly requires considerable clarification and discussion.

Deputy Pearse Doherty: I know Mr. Deering was in the Public Gallery when I put this question to the Minister. House or car insurance, for example, with automatic renewal would not be deemed a long-term product. However, if I was sold it seven years ago, did not do anything and the premium continued to be deducted from my bank account, I would be excluded from making a complaint. I refer to making a claim seven years later only to find out the original policy I bought, which was renewed every year, was something completely different from what I thought I was sold. Does Mr. Deering think there is a requirement to reconsider the definition of long-term products?

Mr. Ger Deering: I do. As has been said already, the Office of the Attorney General will obviously look at all of this in detail. There is a crossover with the Statute of Limitations. There is a distinction between a policy that is renewed every year and one that is purchased with a view to a pension in 15, 20 or 30 years time or a life insurance policy that becomes more critical as the person gets older. There will always be a distinction between those types of products. We need to look carefully at the interaction between the Statute of Limitations and the six-year rule for the one that is renewed every year. There is a distinction between them and they would be treated differently in terms of consumer-----

Deputy Pearse Doherty: I appreciate there is a distinction and rightly so. However, in some people's minds these short-term products are long-term products. We are having this pre-legislative scrutiny of the heads of the Bill to ensure it covers as many cases as possible. I completely agree with Mr. Deering's view and, as I said earlier, from my point of view there is a marked improvement in the operation of his office. Would it be helpful for the legislation to allow additional scope to adjudicate on products that were automatically renewed and to allow assessments of them to continue? It is not a case where a person takes an insurance product and three years later they go with another company and then back to another company. If it was a case where the person said that he or she did not contact the company but the company kept sending out the renewal slips and it just automatically happened - then there would be flexibility for the ombudsman to actually extend the period in cases like that. It is linked to the original question around the Office of the Financial Services Ombudsman's discretion with regard to the timeframes. Would there be a requirement to do that in relation to this part of the heads of the Bill?

Mr. Ger Deering: Discretion is certainly useful and particularly for the longer-term policies, but even within those renewable type policies the Deputy has identified there are some that just automatically renew and there are some where people have to make a conscious effort to renew. Again, I would take the view that anything that extends our powers, and anything that brings complaints within our remit safely is welcome. By safely I mean that we must be conscious that there is a Constitution and the Statute of Limitations. There are other areas in

which we do not want to end up in conflict. Certainly anything that will benefit the consumer - by looking at self renewing policies, where people do not necessarily pay as much attention as they would if they were to make a conscious effort to renew - would be helpful, yes.

Mr. Paul Joyce: I wish to add to that. Perhaps the problem lies with the current definition of long-term financial service, because it says that the financial service must have a term which exceeds six years. Is this the term that is stated in the financial product when a person takes it out first, that it has a duration of over six years, or is it the sum total of duration of the service when the person goes to make a complaint? There are also forms of credit that have no fixed term, for example a credit card. A person can draw down a credit card in the year 2000 and still be using it in 2016. Is that a financial service the term of which exceeds six years? Clarification of the definition would be helpful. If it is the sum total of the time that a person has availed of the service then that would appear to allow complaints in. If it is the total of the term such as a 25 or 30 year mortgage, then it may unwittingly exclude legitimate complaints. That is the point we would like to make about the current definition of long-term financial service.

Deputy Pearse Doherty: That is quite helpful and we can examine that. I am conscious that there are other members who wish to speak but the ombudsman has not addressed some of the issues with regard to my own piece of legislation. With regard to the definition of the consumer, we have heard about individuals who are accessing the free services of the Office of the Financial Services Ombudsman. The courts have suggested that these individuals should not be accessing the services and they should be going to the Commercial Court. The courts have also questioned the council in expanding the definition of consumer and questioned whether it would stand-up to a constitutional challenge. I do not want to go into the constitutional part of it now as I want to go in to the principle behind it since we are only dealing with principles at the moment. In Mr. Deering's view should the likes of credit unions and property developers, who have quite large loans but who have a turnover of less than €3 million, be able to access the free services of the Office of the Financial Services Ombudsman or is it supposed to be very much for the personal consumer?

Mr. Ger Deering: We see the service as very much for the personal consumer but - and I know this is not the Deputy's intention - we would not like to rule out small businesses or sole traders or people like that. We are happy to come up with the definition that excludes major operators. In fact we currently do, on occasion, say that we believe a case is more suitable for the courts, and we have that provision in the current legislation. Obviously, if it was defined as a consumer we would be happy with that. We do not see our services as being available to major investments, we believe they should be consumers. As we have just said, how we arrive at that definition needs to be considered carefully so as not to exclude anybody unintentionally.

Deputy Pearse Doherty: I will leave section 3 for the moment and will return later to the informal manner. Section 4 of my proposed legislation considers the timeframe. Section 5 covers mediation and the requirement of financial providers - in this case it would be pension providers - to give the reason why they would not involve mediation. I do not want to repeat myself, but again, we recognise there is a marked and substantial increase in mediation and that is to be welcomed. While the Office of the Financial Services Ombudsman's efforts are to be acknowledged in that area there is no guarantee that the increased engagement in mediation will continue into the future. As Mr. Deering has acknowledged, the previously low rates of mediation were down to particular institutions not engaging and they may go back to that scenario. What is Mr. Deering's view of the proposal that while it is not forcing them to mediation it is actually asking them to justify why they are refusing to go into mediation?

Mr. Ger Deering: We would be happy with that. We have recently had a mediation awareness week. Ms Cassidy and I were in the Courts Service where three eminent judges spoke about mediation and the promotion of mediation. The whole thrust is on promoting mediation. I note also that the courts are moving into the space of requiring a reason why people do not mediate or why mediation was not a success in their case. We would be happy to welcome mediation and it fits with the suite of work we are doing in increasing and encouraging people to engage in mediation.

Deputy Pearse Doherty: I thank Mr. Deering. I will now turn to the next section. In the current heads of Bill we have the existing categorisation of decisions being continued with. The suggestion in this legislation stems from the work the FLAC has done and the suggestions that it has put forward. The argument is, as we have heard from Mr. Joyce, that the definition of long-term financial service should be changed to give a clearer view as to what the real decision was. The legislation would allow for different findings of sustained, not sustained and partially sustained. What is Mr. Deering's view on that?

Mr. Ger Deering: We would welcome anything that would bring more transparency to the actual findings. We accept that when they are all combined together it can be difficult to get an understanding. I know the perception is, for example, that a partly upheld or partly sustained finding can be very minor, and it can be. Equally, on the other side, I issued a finding recently where it was not fully upheld but the substantive part of it was upheld. Without getting into the detail of which they are, anything that brings transparency is welcome. We are quite open to the change that is proposed or to any of that type of change. We have suggested, and have urged caution, that it needs to be carefully tied in to the publication so we do not lose the benefits of that. The ultimate transparency is the proposal in the Bill that provides for publication as well. We believe that would help. We are open to the changes that are proposed and anything that would make our findings more transparent and understandable individually and collectively.

Deputy Pearse Doherty: The suggestion that has been put forward in my proposed Private Members' Bill would be for the type of case referred to by Mr. Deering, where the substantial part of the finding was upheld. The Financial Services Ombudsman had to issue a finding saying that it was partially substantiated which would be the same as somebody who had a very technical minor issue but where the actual core argument was rejected. Under the new legislation the ombudsman would be able to say that it had been substantially upheld.

Mr. Ger Deering: Yes.

Deputy Pearse Doherty: With regard the Circuit Court and the 60 days which allows for an appeal, I know this falls outside the remit of the ombudsman because it is up to the individual, the consumer or the provider to take the appeal. The legislation sets out that the Financial Services Ombudsman provides 21 days. The argument put forward is that after going into a quasi-judicial system where many people may not have legal representation and to then make a decision to go to the High Court along with the costs incurred to secure a solicitor, a barrister and to furnish them with the documents and so forth, 21 days is a very short period of time. Does Mr Deering have a view if this can be extended to 60 days or 40 days or a different duration? From his experience does Mr. Deering have any information on the difficulties the limited time, currently provided under statute, may cause individuals?

Mr. Ger Deering: The first thing to say is that it is arrived at from a court rule rather than the enabling legislation, but that is neither here nor there. The other thing is that the court has discretion to extend the time allowed, but not everyone would realise it. We would accept that

21 days is very short, particularly at certain times of the year when courts are not sitting or people are away on leave, etc. My understanding is that the legislation could provide for, say, 60 days and that the court rules would be amended to reflect that. In particular, I would accept that 21 days is especially short for a consumer. The provider knows, when it gets the finding, what it has to do, how the system works and that there is a time period of 21 days to appeal. The consumer, generally, is getting a finding or a decision for the first time. As Deputy Doherty rightly stated, by the time he or she has consulted someone, 21 days would be very short. We would therefore be happy to see the time allowed extended.

Deputy Pearse Doherty: I will finish on this point in order to let others in. I also would like to hear from the representatives of FLAC on this issue as it is one of the big core issues. I welcome what the Minister stated in terms of the High Court. The example FLAC gave of the number of consumers who appeal a decision in a particular year puts the ratio of appeals brought by consumers to appeals brought by financial providers at six to one. What are Mr. Deering's views, if any, on how the appeals issue could be addressed? Where decisions are taken by his office and consumers feel they were not right, they are basically being denied access to the judicial system because of the costs involved. This legislation attempts to make it more accessible by providing for access to the Circuit Court, subject to there being no unforeseen consequences. Does Mr. Deering have a view on how the circle could be squared? Will Mr. Deering provide us with details on appeals that have taken place over the past five or six years? Were they brought by the consumer or the financial institution and were they upheld or rejected by the court? Will he give us a sense of that for our report to the Minister?

Mr. Ger Deering: I will come back to the committee with those details. On the general point, I welcome what the Minister said about an engagement on this issue because it is a very big decision. There could be unintended consequences of having appeals to both the High Court or the Circuit Court. The risk associated with a *de novo* appeal in the Circuit Court for the consumer would be costs. We do not have a set view on whether it should remain with the High Court or the Circuit Court but it is important to examine and research this carefully. For example, in employment law, it was decided to move complaints from the Circuit Court because it was felt that the employer had deeper pockets in those cases. It certainly is true that financial services providers have deeper pockets. Before forming a final view on the matter, I would like to have some assurance that we would not find ourselves in a situation where people are afraid to take complaints to the ombudsman for fear of opening themselves to an appeal to the Circuit Court and that providers would see that as an avenue, in some way, to scare people. Is there a way that it can be done without consumers running the risk of costs? Mr. Joyce has mentioned the involvement of the ombudsman in the High Court. We can discuss whether it is a good or a bad idea, but, if the ombudsman did not involve himself in the Circuit Court appeals, I think that would run the risk of costs to the consumer. That is certainly a concern we would have.

Separately, it is worth noting that as part of our changes we are introducing a preliminary finding. Currently, the first one knows of how a decision will go is when the finding is received from the ombudsman. The point was made earlier that no one is infallible. Currently, if someone gets a finding and something comes to light subsequent to it, be it a point of law or fact, the only way to deal with it would be for the ombudsman to go to the High Court to have the decision quashed. We will now issue a preliminary finding. This will be all but a finding. It will not be legally binding but it will be a finding in every other respect. We will invite, at that stage, submissions from both parties on points of law or fact that they believe have been decided wrongly. It is not an appeal but it is our way of trying to give people an opportunity within the existing system to say they have an issue or a problem with the preliminary finding.

Regardless of where an appeal might lie, we think that will reduce the requirement on people to appeal. We will introduce that within the existing system. A lot more thought and consideration is needed before a final decision is arrived at as to where the appropriate place for an appeal lies.

The jurisdictional issue has also been mentioned. The Financial Services Ombudsman can make an award of up to €250,000 but I would say that is almost the least important remedy available. The rectification powers that the Financial Services Ombudsman can apply is far more important. For instance, a person's house is burned down and a financial service provider or insurance company has denied a claim simply because the person has said that he or she thought 30% of the roof was a flat roof but it turns out that 40% was a flat roof. I am talking about real cases here where I have overturned such a decision. In those cases, two things can happen. The first is that the claimant loses the insurance claim. In other words, the claim is not paid. However, sometimes, and every bit as significant, the company cancels the person's insurance. Now the claimant cannot get insurance anywhere else. In certain instances, I have directed that the insurance company reinstate the insurance and pay the claim. That can be much more important. From a jurisdictional point of view, the value of that is way beyond the current jurisdiction of the Circuit Court. Do we have a twin-track approach? A lot needs to be considered when changing the appeals process. I am not against the concept of an easier route to appeal. I just think we need to consider what are the possible consequences that might arise.

Deputy Pearse Doherty: Does Mr. Joyce wish to comment?

Mr. Paul Joyce: We agree that it is a difficult question. The first point to make is that the current situation is not satisfactory for a consumer wishing to appeal to the High Court. This is a limited appeal - something that the legislation does not make clear. An ordinary consumer reading the legislation would think an appeal is a full appeal on the merits of the decision. It is not. The High Court, in a series of decisions, has stated that the Financial Services Ombudsman is a specialist tribunal, that it will defer to his expertise and will only overturn his decision if there is an error in law or a serious error of fact. There are a number of decisions to that effect. It is a limited appeal and consumers do not necessarily understand that fact. Many consumers appeal on their own. They are lay litigants who are going down to the High Court and risking an adverse costs order being made against them. I think it is still the practice of the Financial Services Ombudsman to inform an appellant that costs will be pursued. The ombudsman may not necessarily do so in practice but that is the format. It is not satisfactory for consumers to find themselves in that position.

It is not easy to set out what would replace it. If there is a full Circuit Court appeal and financial service providers start to routinely appeal decisions, then there is a potential danger from the consumer's point of view that he or she will be fixed with a costs order in the Circuit Court. The point is that there needs to be an appeal mechanism. Mr. Deering sets out that, for example, in employment law now there is no longer an appeal to the Circuit Court. Under the new system, there are appeals on a point of law to the High Court. However, there is an appeal process in that a full *de novo* appeal can be made to the Labour Court. In the existing system, there is only one appeal from a decision of the Financial Services Ombudsman and it is a limited one to the High Court. That clearly is unsatisfactory.

Chairman: Before moving to the next set of questions, I ask Mr. Deering to clarify something he stated earlier. At present, can a small business launch a complaint with the Financial Services Ombudsman? Does he ask it anything about its business in terms of turnover? Does it have to be small or less than a certain amount? How is it defined?

Mr. Ger Deering: It is defined as a turnover of less than €3 million every year. Every business, whether a company or a sole trader, with a turnover of less than €3 million can bring a complaint.

Chairman: I want to tease out what happens where a claim has been denied by an insurance company and the reasons given are pretty questionable. Such a complaint goes to the ombudsman, who deals with it one way or the other. This is a concern for small businesses. What Mr. Deering has stated is that if they push the claim, which they believe they are entitled to do and are entitled to payment, they will lose insurance cover, but he can insist this cover continues should they process the claim.

Mr. Ger Deering: The legislation gives me broader powers with two elements. One is compensation and the other is rectification. I can award compensation but, as I mentioned, the rectification can be to put the policy back in place or to admit the claim. The best way to put it is that rectification tries to put the customers back to where they were before the event happened. This is one of the possibilities of rectification.

Chairman: The other query I have is in terms of transparency. To go back to what we have just been discussing, there are times when claims are denied where, in fact, the insurance company has not offered in its policy a great degree of transparency in terms of why a person might be refused. People make a claim under a section under which they believe they are covered and suddenly the insurance company comes with a questionable reason for denying the claim. The reading of the policy suggests a person is covered, but the company's interpretation thereafter denies the person the claim. There are instances where the ombudsman has received such complaints. I was at a small business forum recently and this was a particular issue. Some of the small businesses there had been denied continual insurance with the same company simply because they challenged it and the insurance company felt it had the financial and other clout to tell the businesses it would not continue their insurance if they persisted with it. Essentially this is the message and the ombudsman can deal with this.

Likewise, with regard to transparency, a financial adviser can give advice to a client about a particular product, which the client takes and proceeds to purchase the particular product, unaware of the fact the financial adviser is on both sides of the product. Does the ombudsman handle this type of complaint?

Mr. Ger Deering: We do, yes.

Chairman: Have the numbers of these grown arising from the financial collapse, whereby people find after a long period of time, which goes back to the issue of limitations, that what they thought they had purchased is not what they have, and that a financial adviser is involved? How does the ombudsman deal with this?

Mr. Ger Deering: At present, sadly, it is too late if it is outside of the six-year rule. There are some exceptions to it, but generally speaking if it is outside the six-year rule when the product was sold we are unable to deal with it. This is why the conversation that happened earlier, and the proposal to extend the six-year rule, is so important. As the Chairman rightly outlined, it is often too late and beyond six years before people realise what they thought they bought was not what they bought. We must differentiate sometimes between non-performing and misselling. They are quite complex sometimes.

Chairman: We cannot call it a criminal act, but it is an act where a financial adviser mis-

leads a client knowing that with a purchase the financial adviser will gain on every side of the product, and knowing the client who has purchased it will never be able to find out, or should never find out, should things go well, that the financial adviser is a beneficiary of both sides.

Mr. Ger Deering: This in itself is a breach of the code. It should be clear what commissions are being paid and it should be clear if people sell a product in which they have an interest.

Chairman: If it is not clear-----

Mr. Ger Deering: Again-----

Chairman: -----and not transparent-----

Mr. Ger Deering: -----that is a complaint that could be made to us and we certainly would investigate it. That is the type of complaint we could-----

Chairman: Does the limitation apply?

Mr. Ger Deering: The six-year rule applies at present.

Chairman: Then how does the ombudsman deal with it if the six-year rule applies and-----

Mr. Ger Deering: Sadly, we do not at present if it is outside the six years. This is why there is so much consensus around the fact that the six-year rule is a problem for this type of product and why we believe this legislation is so important.

Chairman: It just facilitates people in the business who knowingly set out, and as far as I can make out it is pretty widespread-----

Mr. Ger Deering: The nature of the product is that the person generally will not find out for some time.

Chairman: Nobody considers this. There is no flexibility to consider how could a client have found out when the very non-transparency of the whole thing facilitates this going on.

Mr. Ger Deering: At present, the six-year limitation is a problem. I can only stress that we very much welcome the proposed extension of this.

Deputy Pearse Doherty: With regard to acting in an informal manner, which we suggest be deleted from the legislation, the Government has included the word "undue" to try to reach a compromise. What is the opinion of the witnesses on this? In particular, I make the point if this was not in the original legislation do witnesses believe it would prohibit the office of the ombudsman from acting in an informal manner?

Mr. Ger Deering: It would be a huge loss to us. I use this regularly. Mr. Joyce has mentioned High Court cases, but there are High Court cases where this has been very usefully upheld in terms of appeals by providers against decisions we have made. The best thing I can do is give an example. The ombudsman found in favour of a complainant and made an award that compensation was to go to the complainant, but it should technically have gone to the estate and not the named complainant. We were able to rely on this and the judge was able to state the beneficiaries and the complainant are the same people. The judge in the case specifically used this and there are other examples.

I cannot stress enough this is an extremely important provision to us. It has been very ben-

eficial. I cannot see any advantage, frankly, of taking it out. It allows us to operate unlike a court. It is hugely beneficial to complainants who come to us who are not legalled up. I can understand how legal people would want this, but I cannot understand how consumers would benefit from taking it out. It is of huge benefit to us in terms of the processes we have changed. When we conducted our strategic and operational review everybody, without exception, responded there is too much paper, it is too legalistic and it takes too long. They said they wanted a fast informal means of resolving complaints.

The survey we carried out showed that of the people who had complained to their bank and came to us, 80% of them never got to speak to anybody in the financial institution. They had to deal with them by paper. I should clarify this is with regard to organisations which employ more than 50 people, but this is all the banks and insurance companies. Interestingly, the reverse was the case of the smaller brokers and those who employ fewer than 50 people, whereby 80% of people had an opportunity to speak to somebody. In cases involving the larger providers, 80% never had an opportunity to speak to somebody. We believe that if they had they might have resolved the complaint. They then came into a system where they were expected to deal with a complaint in writing again and they were already frustrated.

This is an extremely important provision. It is worth repeating that the Financial Services Ombudsman is entitled to perform the functions imposed and exercise the power conferred by the Act free from interference from any other person and when dealing with a particular complaint is required to act in an informal manner and according to equity, good conscience and the substantial merit of the complaint without regard to technicality or legal form. It allows us to adapt our procedures. It does not absolve us from fair procedures. Under no circumstances can any organisation ignore fair procedures and the law. I have no doubt it would be a one-sided benefit to the providers were we to take it out.

Mr. Paul Joyce: It seems to me the definition, or the mandate, was a good idea at the time. We understand what the Legislature was trying to set out in principle, but it is a little contradictory in places. The difficulty with the wording is the requirement to act in an informal manner. I do not believe the Financial Services Ombudsman is prevented from acting in an informal manner, even if it is not stated in the legislation. The second part of the mandate - "according to equity, good conscience and the substantial merits of the complaint" - gives the ombudsman plenty of scope to act informally. As a legal rights organisation, our big difficulty is with the requirement to act "without regard to technicality and legal form". We have had experience of this. We conducted some High Court appeals against decisions of the ombudsman that were, thankfully, successful where there had been errors and flaws. It is important that any alternative dispute resolution service take the law into account and be required to do so, whereas this mandate seems to suggest otherwise. We do not have a huge problem with informality; it is perfectly understandable that an alternative dispute resolution body such as the Financial Services Ombudsman would want to act informally, but, no more than the name and shame issue - we did not think the ombudsman had to have legislative power to name and shame - we do not think he has to have legislative power to act informally.

Chairman: If the Office of the Financial Services Ombudsman were to receive a complaint outside the six year rule, would the ombudsman consider investigating it to the point where he could find out if it stood? If it was outside the six year rule, fine, he could not touch it. If there was an individual adviser or company involved that was represented by an institute of national significance, would the ombudsman consider reporting the complaint to it-----

Mr. Ger Deering: For the first-----

Chairman: I want to work out what the process is. Would the ombudsman connect with another national organisation, perhaps one representing financial advisers?

Mr. Ger Deering: We have taken a very strong approach, particularly recently, in trying to bring in complaints. Again, it comes back to operating in an informal way. One of the things we do, even if there is an issue about whether we have jurisdiction, is say to providers and complainants where they are in dispute: "Engage in the dispute resolution process, get into mediation to see if they can solve this, or we will investigate whether we have jurisdiction." If we reach a certain stage where we do not have jurisdiction and the parties are not willing to agree, we will not progress the case to adjudication.

I will address the second part of the Chairman's question. We have a memorandum of understanding with the Central Bank. Not infrequently I make reports to it when I find something. It might concern one individual case, as the Chairman outlined, but I take the view that it could have a broader reach and could have happened to other consumers. It could happen for two reasons; I would consider the conduct to be either particularly egregious or possibly systemic. In these cases we would certainly report to the Central Bank. Generally, those involved are regulated financial services providers and their regulatory body is the Central Bank. That is where we would certainly report the behaviour about which the committee is talking.

Mr. Paul Joyce: I will make a brief comment on the existing limitation period. There is a view that it has been interpreted narrowly. A consumer is not entitled to make a complaint where the conduct complained of occurred more than six years before. This has been interpreted to mean more than six years from the date the product or service was purchased or received by the consumer. There is an argument that in an instance such as the one being described, where there is collusion and a financial adviser is being paid from both sides, that the conduct is ongoing and that the consumer has a right to complain about it.

Chairman: Is it conduct that has only been discovered?

Mr. Paul Joyce: Precisely.

Mr. Ger Deering: I shall explain in the interests of clarity. Although I have received threats of injunctions and actions, I have continued to take the broadest possible interpretation of jurisdiction. There is a provision in the legislation dealing with conduct of a continuing nature. I absolutely accept that if the conduct is of a continuing nature, it is relevant. As the Chairman described, what is relevant is that it is continuing.

Chairman: That is included.

Mr. Ger Deering: Of course, it is and we take the broadest possible view.

On jurisdiction, we are doing two things, one of which is asking people to suspend judgment. We were dealing with a complaint in the office for far too long and the argument was about jurisdiction. I wrote to the two parties to ask if they would engage in mediation. The provider stated it would engage on the basis that it would not concede jurisdiction. Actually, when engaging in mediation one is not conceding anything, other than agreeing to listen to the other side. The provider agreed to engage and the complaint was resolved. My point is we have taken a very broad view. I know that Deputy Pearse Doherty and Mr. Joyce have accepted this. It is important to note that the report was produced in 2014 and that we have changed the process significantly. We are pushing out the boundaries, particularly with regard to jurisdiction, and asking people to suspend judgment on jurisdiction to try to have the issue sorted and

resolved.

Chairman: That is welcome. I also welcome Mr. Joyce's comment on the limitations. Sometimes it is about how the descriptions are interpreted. The cost of challenging can then be put in front of someone, but I am glad that Mr. Deering takes the attitude that he does.

Senator Kieran O'Donnell: I want to touch on a few of the practicalities. On arrears, the biggest issue concerned endowment policies. It is, effectively, a legacy issue at this stage. Has the Financial Services Ombudsman conducted many investigations into such policies?

Mr. Ger Deering: Certainly not in my time. It comes back partly to the conversation we were having about the six year rule in that most of the policies were sold so long ago that they are, unfortunately, outside the time period in which to make a complaint. There may have been some investigations carried out in the past but not recently.

Senator Kieran O'Donnell: Does the fact that people have continued to make contributions not make it fall within the ambit of the six year rule?

Mr. Ger Deering: Again, in most of these cases the issue is how the policy was sold at the time and concerns the person's understanding of what he or she was told. That is the key issue.

Senator Kieran O'Donnell: What recourse does a person have if he or she has an issue with an endowment policy, apart from through the courts?

Mr. Ger Deering: My understanding is that a person probably does not have recourse through the courts because of the Statute of Limitations. He or she is probably not going to be able to do anything in them. Recourse might be possible if this legislation is enacted and made retrospective enabling endowment policies to be covered, depending on what stage they were at.

Senator Kieran O'Donnell: How would they be covered? If a case involving an endowment power was referred to the Office of the Financial Services Ombudsman, how would it be interpreted?

Mr. Ger Deering: Again, I am speaking hypothetically and assuming that the legislation will be passed, but endowment policies will certainly be seen as long-term products as ienvisaged in any of the amendments we have seen.

Senator Kieran O'Donnell: My second point is-----

Chairman: My apologies, Senator, but the point is that the legislation will not be retrospective and that it has now been almost proved throughout the State that this practice was systemic. People were sold a product without realising that for the individual adviser, bank or institution there would be ongoing benefits. There was a benefit for financial advisers, whether inside or outside banks, in walking a person down the road towards accepting such financial cover. Allowing this to go unchallenged is simply wrong. In the case of those who were and still are involved in the institutions in the practice of benefiting from borrowers, those who took out endowment mortgages and the people I have described who took out other financial packages to deal with their affairs, it would be wrong to let this go. It would be wrong not to, at least, bring together the information that proves that not only were the banks out of control at the time but that they were also abusing their position in benefiting from individuals and businesses that went to them for advice. Senator O'Donnell made a valid point about a case being outside of

the six years but it is worth commenting on, I think.

Senator Kieran O'Donnell: From personal observation, I was in practice as an accountant when endowment mortgages were very much of the time. I remember them as a product of the late 1980s to the early or mid-1990s. Endowment mortgages were sold to people on the basis that they could have it both ways. They could pay their mortgage but also receive a kickback when the endowment mortgage matured and at the end have a fund to educate their children. The initiative was high risk and most of the endowment mortgages have ended up pear shaped. I have found that this issue continually crops up and I have no doubt my colleagues have experienced the same. My main reason for raising the matter this morning is because I have tried to help individuals deal with such mortgages. Equally, people have contacted me because they ran the numbers and looked at their mortgages only to discover they have paid excessive amounts of money because they were caught for the premium and the endowment. The product was also sold on the basis that it would be tax free. It had a tiny element of a life policy that effectively made it tax free at the end.

A positive move would be to reform legislation but it would defeat that purpose if the elephant in the room that is endowment mortgages went unchecked. Mr. Deering has stated that his office liberally interprets the legislation. I have no doubt that multiple people have lodged complaints about endowment mortgages. Why was the matter never dealt with under the existing framework?

Mr. Ger Deering: Again, the matter occurred before my time. I would imagine it was because the product was sold outside of the six-year rule. I can only stress that is why it is important the time limit that currently exists is extended. As the Senator knows, the product was sold mainly in the 1990s.

Senator Kieran O'Donnell: Yes.

Mr. Ger Deering: Therefore, the cases were well outside the six-year rule.

In terms of the points made by the Senator and the Chairman, and coming back to the memorandum of understanding with the Central Bank and the work that we can do, last year we conducted a huge analysis of tracker mortgages. We provided a dossier that contained a significant amount of information to the Central Bank that has informed its current examination. Our co-operation with the Central Bank is extremely important and comes back to the Chairman's query about whether the matter is widespread or endemic. We have 300 tracker complaints on hold in my office. We have asked the consumers whether they want to progress or wait and the vast majority have decided voluntarily to put their complaints on hold. Irrespective of what comes out of the examination conducted by the Central Bank into those banks, those people will have an opportunity to progress their complaint in our office. Indeed, people will have an opportunity complain about the redress scheme if they are not satisfied that it is reasonable and meets their needs. Within the existing confines we try to take the broadest possible view. As Deputy Doherty has said, the most significant aspect of his Bill, and we would say the same about the Government's Bill, is the extension of the time limit, as it will be most beneficial to consumers.

Mr. Paul Joyce: To be helpful to the committee, we have copies of the report if anybody wants it. Page 77 contains a short piece on endowment mortgages. On 18 January 2006, one of Mr. Deering's predecessors explained endowments to the Joint Committee on Finance and the Public Service. He said: "if the complaint is that the product was mis-sold at a date which

is more than six years before the complaint was made" then it falls outside the FSO's statutory remit. He continued by stating "if the complaint is that on the maturity of the policy the financial service provider failed ... to pay out moneys in accordance with the contractual" agreement, then "provided the complaint is made within six years of maturity of the policy", the FSO "will investigate" and make a ruling.

The essence of endowment mortgages, as the Senator will have seen from his accountancy practice, is that a lot of them were mis-sold at the point of sale. In fact, the seller will have known that there would be insufficient proceeds to meet the principle that became due at the end of the endowment mortgage. That appears to have been what rules out the complaints. That brings us back to the question. Is the conduct only at the point the endowment mortgage was drawn down or is there ongoing misconduct associated with such mortgages that should allow one to lodge a complaint? I take Mr. Deering's point that a more liberal interpretation of the matter would be challenged in the courts. It also raises an issue about the "ought to have known" issue. Are people supposed to be following their endowment mortgage and how it is going so that they know they have a complaint? Is it acknowledged when they find out there is a shortfall?

Senator Kieran O'Donnell: One has to be careful. It could be alleged that a couple or single person who sought a mortgage from a financial institution but were on the edge of being approved and were told by an institution that it would be a good option to take the endowment mortgage route. I would dare to call that instructive encouragement because that is what happened in reality.

Chairman: I ask Senator Horkan to take the Chair because I and other members must go the Dáil Chamber for a vote. I thank the witnesses for attending.

Senator Gerry Horkan took the Chair.

Senator Kieran O'Donnell: The issue of vulture funds crops up a lot. Has Mr. Deering had many complaints from people who have had their loans or mortgages taken over by so-called vulture funds and who have suffered interest rate hikes?

Mr. Ger Deering: Not in huge numbers but we have received complaints from people who have had their mortgages transferred. We also have received complaints from people who have remained with their existing provider who, to put it mildly, are unhappy with the increased rate of interest they are being charged.

Senator Kieran O'Donnell: Has the FSO given a conclusion in those cases?

Mr. Ger Deering: We would have, yes.

Senator Kieran O'Donnell: What was the result of the deliberations?

Mr. Ger Deering: In most cases, the terms and conditions of a variable mortgage that a person signed up to does allow the provider to increase the interest rate, and that has been through the High Court and even the Supreme Court.

Senator Kieran O'Donnell: Has the FSO ruled in favour of the complainant?

Mr. Ger Deering: Not if the complainant had a contractual variable mortgage and the mortgage rate increased.

Senator Kieran O'Donnell: My next question is twofold. Has the FSO a limit of €3 million?

Mr. Ger Deering: That is for what I call non-individuals or corporate bodies.

Senator Kieran O'Donnell: Have many non-individuals lodged a complaint or is it mainly individuals?

Mr. Ger Deering: It is mainly individuals but we do get clubs and other organisations.

Senator Kieran O'Donnell: What about small businesses?

Mr. Ger Deering: Yes. It is an area that we want to promote because not everybody realises that the term "consumer" includes a sole trader or small business. The sector does not form a huge part of the complaints made.

Senator Kieran O'Donnell: That leads me to the point made by Mr. Joyce. FLAC would prefer a twin-track approach with one track to deal with SMEs and the other track to deal with a person or persons. Was that not included in the FLAC submission?

Mr. Paul Joyce: Yes, we did because we have seen cases where the complaints has been made. The Lyons and Murray case is a good example, as the complaint was about whether €17 million worth of loans were on an interest-only basis. To us, it takes a lot of resources of the Financial Services Ombudsman to deal with those complaints and this led to the proposal to redefine "consumer" to accord with what is in the consumer protection code where, on the one hand, there is a personal consumer and, on the other hand, the consumer. It may be possible, through some mechanism, to prioritise complaints from who we would regard as ordinary consumers who are frustrated about credit, insurance and investment issues.

Senator Kieran O'Donnell: Does Mr. Deering think that is a valid suggestion?

Mr. Ger Deering: We think it is useful that small businesses can use our service. Equally, we agree that we are not there for the 17 million generally. In fact, we have the discretion to say we think a complaint is more suitable for other areas. Given the lack of a statutory basis to do that, the argument can end up being about whether we have jurisdiction to do that. Clarity in that area would be useful.

Senator Kieran O'Donnell: We find many constituents use the service, which is very good. I compliment both organisations on the work they do. How long does it typically take for a case to be heard?

Mr. Ger Deering: We have made significant changes. I will ask the deputy ombudsman to deal with how long it takes cases to be heard. It varies significantly.

Ms Elaine Cassidy: It does vary significantly, because we have moved to a new dispute resolution model and people are being contacted by our office within a few days of making a complaint. Depending on the complexity of the complaint, it could be resolved within a few days. Some cases are more complex, in particular those involving insurance, and may take a few months to resolve. Ideally, we would look to close complaints within the dispute resolution system within eight weeks. That is our informal target. At the moment, because this is a new area, we are not quite making that target. It would take longer on the adjudication side.

Mr. Ger Deering: On the adjudication side, it has been taking up to a year or longer which

we acknowledge is too long. That is why we have made significant changes in order to reduce the time involved.

Senator Kieran O'Donnell: If the amalgamation takes place, are adequate resources in place? We get the impression from contacting the office that many inspectors are very over-worked and under a lot of pressure. They are dealing with very vulnerable people. In many cases, FLAC is a measure of last resort. I ask Mr. Deering to expand on that.

Mr. Ger Deering: I do know if anybody will ever have enough resources. We are like every other body, in that we are trying to manage with the resources we have. The office dealt with a tsunami of complaints four or five years ago, the legacy of which we are still dealing with. We would like to have some time to work our way through our new processes before we say what resources are required. For the moment, we are managing with what we have. It will be next year before we can say what resources are required.

Senator Kieran O'Donnell: What would the target to reduce the time taken to adjudicate cases be?

Mr. Ger Deering: We set a target of resolving 60% of complaints by mediation. In fact, we are significantly above that level at the moment. Perhaps if we can reach 60% to 70%-----

Senator Kieran O'Donnell: That is within an eight-week period.

Mr. Ger Deering: Yes. In terms of adjudication, cases differ. If we can have a target of three to four months after the dispute resolution mechanism is sorted, we think we will be doing well. It will take time before we can set exact targets within the new process.

Vice Chairman: I thank the witnesses for attending the meeting and assisting the committee. The committee will report on our scrutiny in due course.

The joint committee adjourned at 1.05 p.m. until 9.30 a.m. on Thursday, 17 November 2016.