Submission on the General Scheme of the Financial Services and Pensions Ombudsman Bill 2016

Free Legal Advice Centres

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1. Context

In 2014, FLAC (Free Legal Advice Centres) published a report, *Redressing the Imbalance*, which examined and critically evaluated the legislation establishing the Financial Services Ombudsman and its operations. It also looked at other legislation and codes designed to protect consumers of financial services. The report broadly concluded that there was a substantial 'inequality of arms' between consumers and providers of financial services and made a number of recommendations for reform across a wide range of areas, including a number of amendments to the core legislation.

On 25 September 2014, Sinn Féin spokesperson on Finance Pearse Doherty TD tabled a Private Members 'Central Bank and Financial Services Authority of Ireland (Amendment) Bill'. This bill contained a number of proposals for reform that were based upon recommendations made in *Redressing the Imbalance*. The Bill reached second stage in the Dáil on 6 October 2016.

Minister of State for European Affairs, Data Protection and the EU Single Digital Market Dara Murphy TD announced on behalf of the government during the second stage debate, that "*we are progressing legislation to amalgamate the Financial Services Ombudsman and the Pensions Ombudsman and to consolidate and generally update the legislation"* and *"the detailed heads of a Bill relating to the amalgamation were recently submitted to the Committee on Finance, Public Expenditure and Reform, and Taoiseach by the Minister following a full analysis and consultations with relevant stakeholders."* This 'General Scheme of the Financial Services and Pensions Ombudsman Bill 2016' had been published by the Department of Finance on 4 October 2016.

The second stage concluded with the Private Members Bill being referred to the Select Committee on Finance and Public Expenditure. On 27 October 2016, that Committee met to subject the Bill to pre-legislative scrutiny; the draft proposals or 'heads' of the government Bill were also discussed at that meeting. FLAC was invited together with the Financial Services Ombudsman and the Deputy Ombudsman to make a presentation and to participate in the discussion.

Following that Select Committee meeting, FLAC's understanding is that Deputy Doherty's Private Members Bill and the Heads of the Government Bill will now effectively be merged into one measure to both facilitate the merger and reform the legislation. The recently published Government legislative programme states that this matter is a legislative priority.

This submission therefore focuses on an analysis of the heads of the government Bill in advance of the publication of the Bill proper. It concentrates exclusively on substantive provisions rather than any administrative matters that will be required by the merger. Please also note that the observations made in this submission stem from FLAC's experience of the financial services rather than the pensions part of the new operation. FLAC intends to make further submissions when a Bill proper is published.

2. Some key principles & recommendations

The Financial Services Ombudsman provides a form of alternative dispute resolution (ADR) for consumers of financial services unhappy with the conduct of their financial service provider. This is designed in principle to allow consumers to make complaints without the need to resort to legal proceedings and the expense, delay and burden on court time that this may involve.

We recommend that new legislation seeking to amend and improve an existing system or establish a new system of ADR should adhere to certain key principles as follows:

- **Clarity in the process** – It should be clear to the user how the complaints mechanism works at every potential stage of the process. Any procedures must comply with the principles of natural justice. They should be explained in documentary form in a manner that is accessible for people with disabilities, literacy or language difficulties.
- **Free to the user –** Making the complaint should be free of charge.
- **Advice and representation where needed –** Users should be entitled to access free advice and assistance and representation where appropriate to formulate and pursue their complaints.
- **Voluntary mediation –** Resolving a complaint via mediation should be an option but not an obligation and the steps in the process should be clearly explained at the outset and throughout.
- **Settlements subject to adequate advice –** Where there is a proposal to settle a complaint, users should have access to independent advice on the nature and adequacy of the settlement proposed.
- **Adjudication where desired –** a complainant should be entitled to have his/her complaint investigated and adjudicated upon, should he or she so desire. This should not be subject to the discretion of the complaints body.
- **Prompt decisions –** following an investigation, decisions should be issued quickly, in writing, with grounds for the decision properly explained in a user-friendly manner, and published on the relevant website(s).
- **Right to appeal –** Parties should have a right to fully appeal the decision of the ADR body either to the Circuit Court or an independent quasi-judicial appeal body.

2.2 Recommendations

FLAC proposes the following recommendations on the draft Heads of Bill which are based on the guiding principles on ADR mechanisms outlined above and the analysis of the heads of the Bill which follows these recommendations.

1. *Head 26 (8) – Function and powers of the Ombudsman:*
   The proposed amendment, that the Ombudsman is now to act without undue regard to technicality or legal form, is an improvement on the previous position and should be retained.

2. *Head 26 (2)– Functions and powers of the Ombudsman:*
   The new legislation should retain the existing legislation's provisions that the principal function of the Ombudsman is to deal with complaints by mediation and, where necessary, by investigation and adjudication.

3. *Head 36 – Complaints to the Ombudsman:*
   i. The legislation should amend the definition of a long-term financial product to be a financial service with a duration (as opposed to a term) of over 6 years.
   ii. The alternative 'ought to have been aware' limitation period should be dropped unless a cogent rationale is provided for it, and it is clearly explained how it will be applied.
   iii. The legislation should clarify and make explicit any provisions on retrospectivity.

4. *Head 36 (3) (c)– Complaints to the Ombudsman* & *Head 39 (2) (c)– Jurisdiction of Ombudsman:*
   A complainant should not be prohibited from making a complaint to the Ombudsman on the grounds that he/she may have had a complaint that fell within the realm of the Equal Status Acts, particularly in circumstances where no such complaint has been made by the complainant.

5. *Head 36 (3) (f)- Complaints to the Ombudsman, Head 39 (2) a)- Jurisdiction of Ombudsman and Head 41 (1) - Internal Dispute Resolution Procedures*:
   The provisions in these heads should be reviewed and a number of specific issues addressed:
   i. The legislation should put an onus on providers to respond to complaints within a specified timeframe. This timeframe should be mandatory.
   ii. Where the provider fails to meet the timeframe, the consumer should be deemed to have complied with the requirement to have communicated the substance of the complaint to the provider.
   iii. The legislation should provide for the regulatory bodies, the Central Bank of Ireland and the Pensions Authority, to monitor compliance with the time limits imposed. It should also allow for enforcement action against providers who persistently fail to meet timeframes.

iv. The Ombudsman should be empowered to take into account the extent of the provider's efforts to resolve the complaint internally when conducting an investigation.

6. *Head 36 (6) – The form of complaints*:
   i. Hard copies of Ombudsman guides and leaflets should be made available and distributed through libraries, money advice services and Citizens Information Centres.
   ii. Any complaints format must be accessible to persons with a disability, people who may have literacy or language problems or who may not have easy access to the internet.

7. *Head 38 (1) - Investigation by the Ombudsman:*
   The investigation of complaints is an essential component of the right of access to justice and a complainant should be entitled to have his/her complaint investigated and adjudicated upon should he or she so desire. This should not be subject to the Ombudsman's discretion.

8. *Head 38 (2) - Investigation by the Ombudsman:*
   The proposed amendment referring to the different types of investigation to be concluded should be deleted.

9. *Head 39 (3) – Jurisdiction of Ombudsman*:
   Complainants should be given an opportunity to make the case that their claims are within the Ombudsman's jurisdiction, by means of a preliminary hearing as appropriate.

10. *Head 42 (1) – Declining to investigate or discontinuing an investigation*:
    i. The rationale for this proposed additional ground upon which the Ombudsman can decline to investigate a complaint should be clarified, particularly in terms of the degree of complexity that would make the courts the more appropriate forum.
    ii. Where the Ombudsman declines to investigate a complaint or discontinues an investigation on any one of the grounds in this head, the complainant should be given an opportunity, by means of a preliminary hearing as appropriate, to make the case that the complaint should be investigated.

11. *Head 43 (4) & (5)- Conduct of Investigation*:
    The proposed amendment giving the Ombudsman the power to issue a preliminary decision following an investigation and adjudication should be deleted.

12. *Head 44 – Mediation*:
    The proposed legislation should strike an appropriate balance between encouraging complainants and providers to use mediation as a voluntary option to resolve complaints and enabling complaints to be investigated if the parties do not wish to engage in mediation.
    i. The legislation should continue to provide for the complaint to proceed to investigation and adjudication where the complainant so wishes.

ii. Where financial service providers refuse to mediate, provision should be made to oblige them to them to advance reasons.
iii. Consideration should be given to providing for the publication of the names of financial service providers who frequently or always refuse mediation.

13. *Head 46 (1)– Adjudication of complaints and redress*:
The classification of findings should be amended to include 'upheld', 'substantially upheld', 'substantially rejected' and 'rejected'.

14. *Head 47 (2) & (3) - Decisions of the Ombudsman*:
The FSO should publish all adjudications following investigations on his website, and the proposal that a report of an investigation would be published needs to be explained and clarified.

15. *Head 48 – Avenue of appeal*:
There should be a *de novo* appeal route either to the Circuit Court or an independent quasi-judicial body to replace the current limited High Court appeal.

16. *Head 48 (3) (c) – Avenue of appeal – remitting appeals:*
The Ombudsman should adopt a rule of practice that cases remitted following a successful (or uncontested) appeal to the High Court be treated as a priority matter.

Additional recommendations not addressed in bill

17. Appeals under MARP process:
An independent body should be put in place to hear appeals against substantive decisions under the MARP process.

18. *Assistance for complainants to formulate complaints:*
The state should put in place advice and assistance for consumers to formulate and pursue their complaints.

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3. Observations on the Heads of the Bill

3.1- The Ombudsman's remit

Head 26 – Function and powers of the Ombudsman

> ***(8) The Ombudsman is entitled to perform the functions imposed, and exercise the powers conferred, by this Act free from interference by 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 merits of the complaint without undue regard to technicality or legal form.***

This sub-head largely replicates the wording of the existing s.57BK (4) in the 2004 legislation with one significant exception. The Ombudsman is now to act without undue regard to technicality or legal form as opposed to without regard to technicality or legal form. It is appropriate and sensible to require the Ombudsman is to act in an informal manner and according to equity, good conscience and the substantial merits of the complaint. The previous requirement to act without regard to technicality or legal form, however, was misconceived and could have been interpreted to allow the Ombudsman to ignore important legal principles, entitlements and provisions in arriving at legally binding decisions.

Recommendation 1: FLAC believes that the proposed amendment, that the Ombudsman is now to act without undue regard to technicality or legal form, is an improvement on the previous position and should be retained.

3.2 How complaints are dealt with

Head 26 – Functions and powers of the Ombudsman

(1)…….

(2) The principal function of the Ombudsman is to deal with complaints:

- ***a) informally,***
- ***b) by way of mediation,***
- ***c) formal investigation,***
- ***d) through the conduct of an oral hearing, or***
- ***e) by a combination of the various means***

as he considers appropriate and proportionate to the nature of the complaint

This head potentially represents a shift away from the current legislation, which describes the principal function of the Ombudsman as being to deal with **complaints by mediation and, where necessary, by investigation and**

adjudication. However mediation was a seldom-used option until the recent initiative of the Ombudsman to promote a mediation and early resolution approach.

The wording in this head now states that it is the Ombudsman who may decide **'as he considers appropriate and proportionate'** how a complaint might be dealt with. This gives rise to some concern that parties would not have a choice as to how the complaint is dealt with and may have mediation or an informal procedure imposed on them.

It is also unclear why dealing with a complaint by 'oral hearing' is a separate category here from a 'formal investigation' when an oral hearing may form part of and/or be required in a formal investigation.

Recommendation 2: FLAC recommends that the new legislation retain the existing legislation's provisions that the principal function of the Ombudsman is to deal with complaints by mediation and, where necessary, by investigation and adjudication.

3.3- Time limits on the bringing of complaints

Head 36 – Complaints to the Ombudsman

(2) A complaint or reference under this Head shall be made to the Ombudsman within whichever of the following periods is the last to expire:

(a) 6 years from the date of the act or conduct giving rise to the complaint or reference, or

(b) 3 years from the earlier of the following two dates, namely the date on which the person making the complaint first became aware of the said act or conduct and the date on which that person ought to have become aware of that act or conduct, but only where the complaint is against pension providers or financial services providers of long-term financial products.

FLAC welcomes the alternative time limit of 3 years contained in 2(b), which already applies to complaints to the Pensions Ombudsman. However it is only available where the complaint is against pension providers or financial services providers of **long-term financial products.**

Head 2 (definitions) defines a 'long-term financial service' as being a financial service within the meaning of the Central Bank Act 1942, as amended, the term of which exceeds 6 years and is not subject to annual renewal, sold to a consumer by a regulated financial service provider.

It is important that this definition does not inadvertently exclude legitimate complaints. For example, it may not be sufficient to cover payment protection policies associated with drawing down credit, especially mortgage credit, particularly in relation to the requirement that the term must exceed 6 years. Such insurance products do not usually have a fixed term as such, although the combined duration of the financial service will usually exceed six years.

Equally, there are types of credit facilities that do not have a fixed term, but the duration of the agreement may well exceed six years. For example, both credit card and overdraft agreements would generally be classified as 'open-ended' agreements, without a term as such, but which in individual cases may have been in existence for far longer than six years and in respect of which a consumer may wish to make a complaint. The key question to be resolved on this question is whether this definition of a long-term financial product refers to a pre-determined 'term' of a financial service or the total duration of it in practice.

A second issue that arises here is the point from which the alternative time period of three years should run. This head provides for an alternative period to make a complaint from the earlier of two date options: from the date on which the complainant first became aware of the provider's act or conduct about which he wishes to complain, or from the date on which the complainant 'ought to have been aware' of the provider's act or conduct. The Private Member's Bill proposed by Deputy Doherty, on the other hand, simply provided for an alternative of two years from the actual date of awareness.

The use of the word 'earlier' here could allow for the alternative three-year time period to elapse either before the potential complainant's actual date of awareness or during the three-year period from his or her actual date of awareness where he or she ought to have been aware of the provider's conduct that gives rise to the potential complaint. How will it be determined that the complainant ought to have been aware but was apparently not? The discussion on this point at the pre-legislative scrutiny stage did not provide much clarity on the need for such a provision.

Finally, Minister Dara Murphy TD in the Dáil debate of 6 October 2016 seemed to suggest that this head went further than the amendment proposed by Deputy Doherty in that it is a retrospective amendment; in other words, the alternative time limit will apply to complaints made in relation to products that have already been provided at the time the new legislation is due to come into operation.

Recommendation 3: FLAC recommends that:

i. **The legislation should amend the definition of a long-term financial product to be a financial service with a duration (as opposed to a term) of over 6 years.**
ii. **The alternative 'ought to have been aware' limitation period should be dropped unless a cogent rationale is provided for it and it is clearly explained how it will be applied.**
iii. **The legislation should clarify and make explicit any provisions on retrospectivity.**

3.4- Complaints outside jurisdiction

Head 36– Complaints to the Ombudsman and Head 39 – Jurisdiction of Ombudsman

Head 36 (3) - A complainant may not make a complaint or refer a dispute to the Ombudsman where the conduct complained of

[…]

c) relates to a matter that is within the jurisdiction of the Workplace Relations Commission or Pension Authority or an alternative forum or tribunal.

Head 39 – (2) The Ombudsman shall not investigate or determine a complaint or dispute where:

[…]

c) the complaint or dispute relates to a matter that is within the jurisdiction of the Workplace Relations commission or Pension Authority or an alternative forum or tribunal, […]

It is unclear what is intended by the collective effect of Head 36 (3) sub para c) and Head 39(2). It would appear to involve the Ombudsman declining to investigate a complaint where there may have been a potential complaint either under the Equal Status Act or the Pensions legislation, even in circumstances where the complainant has not referred a complaint under these pieces of legislation. This is excessively restrictive.

The determination as to whether a matter is within the jurisdiction of the Workplace Relations Commission is not necessarily clear. There may be minor elements of conduct which may for example constitute a potential claim under the Equal Status Acts but the majority of the conduct may not constitute conduct which could be construed as discrimination. Equally, the much stricter time limits to bring such claims under the Equal Status Acts may also have long passed.

A complainant should not be prohibited from making a complaint to the Ombudsman on the grounds that they may have had a complaint that fell within the realm of the Equal Status Acts, particularly in circumstances where no such complaint has been made by the complainant. It should be noted in this regard that Head 46 (2) (b) allows the Ombudsman to make a finding that conduct complained of was improperly discriminatory but does not define what is meant by discriminatory. This requires clarification.

Finally, any concern to prevent duplication of proceedings is already dealt with by Head 36 3(a) which excludes complaints where the conduct is or has been the subject of legal proceedings before a court or tribunal.

Recommendation 4: FLAC recommends that a complainant not be prohibited from making a complaint to the Ombudsman on the grounds that he or she may have had a complaint that fell within the realm of the Equal Status Acts, particularly in circumstances where no such complaint has been made by the complainant.

3.5- The obligation to first complain to the provider

Head 36 - Complaints to the Ombudsman, Head 39 - Jurisdiction of Ombudsman and Head 41 - Internal Dispute Resolution Procedures

Head 36 (3) - A complainant may not make a complaint or refer a dispute to the Ombudsman where the conduct complained of:

[…]

f) the complainant has previously communicated its substance to the regulated financial services provider or pension provider concerned and has not given that financial service provider or pension provider a reasonable opportunity to deal with it.

Head 39 (2) - The Ombudsman shall not investigate or determine a complaint or dispute where:

a) the internal dispute resolution procedures required in accordance with Head 41 have not been complied with,

Head 41 (1) - The Ombudsman shall not investigate or determine a complaint or dispute unless the complainant has previously engaged with the regulated financial service or pension provider concerned and has given that financial service or pension provider opportunity to deal with it through the providers' internal dispute resolution procedures.

There are a number of overlapping provisions in these heads which should be streamlined and reworded. It is also notable, in relation to the requirement of having to make an initial complaint to the provider, that no explicit reference is made here to the Central Bank's Consumer Protection Code (CPC) in these heads. However, up to now, compliance with the terms of the rules concerning complaints outlined in CPC has been mandatory, at least insofar as it concerns complaints against regulated financial service providers. Possibly this has not been stated explicitly because the CPC does not apply to pension providers.

A regulated entity currently has up to 40 business days under the CPC to 'attempt to investigate and resolve' a complaint (Rule 10.9 d) CPC). This wording is too imprecise in terms of the timeline it imposes. It has sometimes been interpreted by elements of the financial services industry as a target rather than a deadline to resolve a complaint. If the regulated entity does not meet this target, it must then provide the anticipated timeframe within which it expects to resolve the complaint and must also inform the complainant that s/he may now refer the matter to the relevant Ombudsman now that this target has not been met.

The obligation to first complain to the provider to give it an opportunity to resolve a complaint may be sensible in theory. However, in practice, for some complainants it may amount to a significant disincentive to making a further complaint to the Ombudsman. This is especially the case where the provider shows little interest in resolving the complaint after significant time delays and the consumer realises that s/he must start from scratch with the Ombudsman. Some complainants interviewed for the purpose of FLAC's 2014 study suggested that that the provider's engagement with their complaint was less than thorough. Where a potential complainant contacts the Ombudsman to be told that an initial complaint must be made to the provider, this may also act as a deterrent.

Overall, it is of some concern that a substantial number of complaints made to the FSO are subsequently classified as 'closed due to no further contact'. In 2015, for example, these amounted to 1,731 or 35% of all complaints.

Recommendation 5: FLAC recommends that the provisions in these heads be reviewed and a number of specific issues addressed:

i. **The legislation should put an onus on providers to respond to complaints within a specified timeframe. This timeframe should be mandatory.**
ii. **Where the provider fails to meet the timeframe, the consumer should be deemed to have complied with the requirement to have communicated the substance of the complaint to the provider.**
iii. **The legislation should provide for the regulatory bodies, the Central Bank of Ireland and the Pensions Authority, to monitor compliance with the time limits imposed. It should also allow for enforcement action against providers who persistently fail to meet timeframes.**
iv. **The Ombudsman should be empowered to take into account the extent of the provider's efforts to resolve the complaint internally when conducting an investigation.**

3.6 - The form of complaints

Head 36 (6) – A complaint must be in writing or any format as the Ombudsman considers appropriate in the circumstances. The Ombudsman must inform the public through its website and other communications as to the format of complaints that are acceptable

The complaint mechanism and format must be accessible to persons with a disability, people who may have literacy or language challenges or who may not have easy access to the internet.

It is unclear what 'other communications' are envisaged in the above provisions in relation to informing the public. Online information may be insufficient to inform all potential complainants, given that many people have difficulties with accessing the internet.

Recommendation 6: FLAC recommends that

i. **Hard copies of FSO guides and leaflets should be made available and distributed through libraries, money advice services and Citizens Information Centres.**
ii. **Any complaints format must be accessible to persons with a disability, people who may have literacy or language problems or who may not have easy access to the internet.**

3.7 –Investigation not mandatory

Head 38 - Investigation by the Ombudsman

(1) The Ombudsman may conduct an investigation into a complaint or dispute referred to him.

Section 57 BY of the Central Bank Act 1942 (inserted by section 16 of the Central Bank Financial Services Authority of Ireland Act 2004) provided that it was the duty of the Ombudsman to investigate complaints:

"The Financial Services Ombudsman shall investigate a complaint if satisfied that the complaint is within the jurisdiction of the Financial Services Ombudsman"

Head 38 no longer requires the Ombudsman to investigate a complaint but rather provides that he '*may conduct an investigation'*. The obligation to carry out an investigation is now being diminished to an enabling power to decide whether to do so. This correlates with the Ombudsman's proposed power under Head 26 to decide 'as he considers appropriate and proportionate' how a complaint might be dealt with (see comments above).

There is already provision in the proposed Head 42 (and in the existing legislation) for the Ombudsman to '*decline to investigate a complaint, or to discontinue the investigation of a complaint, where the complaint is frivolous or vexatious or was not made in good faith',* if the Ombudsman is of the view that there is no merit in the complaint and that it may be, for example, a perceived waste of public resources. Head 42 also provides a number of other grounds upon which the Ombudsman may decline to investigate a complaint.

Recommendation 7: FLAC believes the investigation of complaints is an essential component of the right of access to justice and a complainant should be entitled to have his/her complaint investigated and adjudicated upon should he or she so desire. This should not be subject to the Ombudsman's discretion.

(2) The Ombudsman shall inform the relevant parties to the complaint of the type of investigation to be concluded, and any subsequent change to the type of investigation.

The heads do not otherwise expressly provide for different types of investigations to be carried out so it is unclear what is envisaged here. As already stated, the complainant should be entitled to have his/her complaint investigated and the procedures involved in any such investigation should be clear and defined. Procedures may of course allow for flexibility within the investigation process. There is no necessity to confuse matters by a reference to different types of investigation.

Recommendation 8: FLAC recommends that the proposed amendment referring to the different types of investigation to be concluded should be deleted.

3.8 – Issues of jurisdiction

Head 39 – Jurisdiction of Ombudsman

[…]

(3) – The Ombudsman has sole responsibility for deciding whether or not a complaint is within the Ombudsman's jurisdiction.

In Head 42, the Ombudsman may decline to investigate a complaint on quite a wide range of grounds in addition to those already outlined above and here. Head 39 (3) makes it clear that this is his sole responsibility. This is,

procedurally unfair as it leaves a potential complainant with only judicial review as a way of challenging an adverse decision on jurisdiction**.** A complainant should be given an opportunity to make the case that the claim is within jurisdiction.

Recommendation 9: FLAC recommends that complainants be given an opportunity to make the case that their claims are within the FSO's jurisdiction, by means of a preliminary hearing as appropriate.

Head 42 – Declining to investigate

(1) The Ombudsman may decline to investigate a complaint, or to discontinue to an investigation of a complaint, where –

(a) the complaint is frivolous or vexatious or was not made in good faith,
(b) the subject-matter of the complaint is trivial,
(c) the conduct complained of occurred at too remote a time to justify investigation,
(d) there is or was available to the complainant an alternative and satisfactory means of redress in relation to the conduct complained of,
(e) the complainant has no interest or an insufficient interest in the conduct complained of, or
(f) the subject matter of the complaint is, in the opinion of the Ombudsman, of such a degree of complexity that the courts are a more appropriate forum.

This head largely replicates the wording of the existing Section 57BZ (1) with the critical addition of point (f) – ***'the subject matter of the complaint is, in the opinion of the Ombudsman, of such a degree of complexity that the courts are a more appropriate forum'.*** It is difficult to know under what circumstances the Ombudsman might exercise this additional power and this needs to be clarified, as a complainant's opportunity to have his/her complaint adjudicated upon should not be arbitrarily taken away.

In sub-head 4, it is notable that the office of the Ombudsman, when declining to investigate a complaint, has **the sole power to determine this issue,** subject to a requirement that '*[a]s soon as practicable after deciding not to investigate a complaint, or to discontinue an investigation of a complaint, the Ombudsman shall inform the complainant in writing of the decision and the reasons for it*'. The Ombudsman's Annual Review for 2015 suggests that 98 such complaints were declined in that year, but it is clear that this number has varied over previous years. For example, 477 such complaints were declined in 2013.[1]

Curiously the 2015 Review records these complaints under the heading '*Decision by FSO not to investigate the complaint e.g.* ***issue more appropriate for Court of Law'*** (our emphasis). This is even though the Ombudsman currently does not have the specific statutory power to decline a complaint for this reason. It may be that the Ombudsman considered this action was justified under the ground (d), that '*there is or was available to the complainant an alternative and satisfactory means of redress in relation to the conduct complained of****'.*** Note the

[1] In 2011 it was 125, in 2012 it was 160 and in 2014 –it was 136.

precondition that 'there must be available to the complainant **an alternative and satisfactory means of redress'**. Thus the Ombudsman's belief that a court of law was a more appropriate forum is not sufficient in itself. Perhaps the office of the Ombudsman has informally always felt that it had the power to exclude complaints because the issue was more appropriate for a court of law to deal with. If so, how has this power been exercised in what appears to be a relatively sizeable number of cases? FLAC is concerned that one of the reasons for the proposed extra ground (f) in Head 42 may be to specifically provide for what the Ombudsman has always informally allowed for.

On a related issue, the Ombudsman also currently has the power under s.57BX sub-section (3)(a) to decline a complaint '*if the conduct complained of is the subject of legal proceedings before a court or tribunal*'. On this issue, FLAC on one occasion had to bring judicial review proceedings in the High Court challenging a decision by the Ombudsman to decline jurisdiction on the basis that the conduct complained of was already the subject of legal proceedings before a court.[2] In that case, the consumer's complaint concerned the financial institution's handling of its obligations under the Central Bank's Code of Conduct on Mortgage Arrears, whereas the legal proceedings concerned the repossession of the complainant's family home. Thus, in FLAC's view, the conduct that was being complained of was not the subject of the legal proceedings before the Court. Ultimately the Ombudsman decided not to oppose FLAC's appeal, presumably on the ground that it was not confident of success, and the matter was remitted to the Ombudsman to deal with the consumer's complaint.

Finally, there is another potentially important angle to this discussion. The wording of the new ground to decline a complaint is quite specific. The Ombudsman must form the view that the subject matter of the consumer's complaint is of such a degree of complexity that the courts are a more appropriate forum. In the case of *Lyons and another v Financial Services Ombudsman* (Bank of Scotland PLC, Notice Party), the High Court stated that '*at first blush it may seem surprising that a complaint of this nature* [a dispute over whether €17 million worth of loans was or was not granted on an interest-only payment basis] *would come within the remit of the FSO, rather than being the subject of litigation in the Commercial Court*'.[3]

It is conceivable that the proposed new ground to decline complaints is intended to allow the FSO to refuse to deal with cases that he believes more suitable for the courts because they are essentially legal disputes over commercial dealings**.** However, this exclusion may be interpreted in such a way that relatively straightforward complaints - which nonetheless require some element of legal interpretation to be effectively determined - will be declined. What criteria will be used to determine the degree of complexity that will reach the threshold?

In summary, more information is needed on the rationale for and ramifications of this proposed amendment. This proviso could conceivably be used at some point in the future to exclude legitimate complaints because the FSO was disinclined to engage in a particular legal analysis.

[2] As provided for in Section 57BX (3) (a) – see *Phillips and Financial Services Ombudsman and EBS Limited* (Notice Party) 558 JR/2014.

[3] See discussion at pages 108 – 110.

Recommendation 10: FLAC recommends that:

i. **The rationale for this proposed additional ground upon which the Ombudsman can decline to investigate a complaint should be clarified, particularly in terms of the degree of complexity that would make the courts the more appropriate forum.**
ii. **Where the Ombudsman declines to investigate a complaint or discontinues an investigation on any one of the grounds in this head, the complainant should be given an opportunity, by means of a preliminary hearing as appropriate, to make the case that the complaint should be investigated.**

3.9 - Conduct of an investigation

Head 43 - Conduct of Investigation

(4) 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.

(5) The Ombudsman may, in the course of investigating a complaint, issue a preliminary decision to the relevant parties to the complaint, indicating the potential decision to be taken by the Ombudsman, any evidence and or facts considered to arrive at that preliminary decision.

It is distinctly unclear what is sought to be achieved by these draft provisions in relation to sub-head (4). The Ombudsman should be seeking to periodically report to the complainant on the progress of the investigation in any event.

On the other hand, it is also unclear what purpose is served by statutorily providing that the Ombudsman may make comments to the complainant on the investigation and its consequences and implications in advance of a decision. Are such comments to be made exclusively to the complainant and not to the respondent? This runs the risk of inviting allegations that the Ombudsman has prejudged the outcome of a case before the matter has been fully investigated.

In terms of sub-head (5), there is no stated purpose set out for the proposed power to issue a preliminary decision, indicating what the potential decision to be taken by the Ombudsman might be. However, the inference is that the parties may make further comments or submissions that could lead to a final decision that will be different to the preliminary decision.

One of the issues considered in the **'***Davy Stockbrokers'* case in 2010 was the FSO's (then) practice of delegating a complaint to a Deputy Ombudsman to file a report with a view on the merits of the dispute and then circulating that report to the parties for their further views, before the Ombudsman himself would make a final decision. The High Court characterised this practice as the FSO allowing an appeal against himself and found it to

be unacceptable. However, the Supreme Court disagreed with this conclusion and found for the FSO on this particular issue, suggesting that '*if anything the procedure adopted allowed for an additional layer of fair procedures for the parties to the complaint."*[4] However, it did express concern at the *'confusion in terminology which attends the process……variously described as conducting an appeal or requiring submissions'.*

These draft provisions may fall victim to the very danger of '*confusion in terminology which attends the process'* articulated by the Supreme Court. The (then) Supreme Court appeared to be confident that such a system might allow '*for an additional layer of fair procedures for the parties to the complaint'.* However, there are situations where the opportunity to make submissions on a preliminary decision in order to potentially alter its final course might work to the advantage of a legally represented respondent financial service or pension provider and might disadvantage an unrepresented complainant.

This proposed amendment would place a heavy onus on the Ombudsman to explain why the final decision is different from the preliminary decision and leaves the final decision more vulnerable to challenge. In our view, the Ombudsman should be able to reach a properly reasoned decision if proper procedures are applied in the investigation.

Recommendation 11: FLAC recommends that the proposed power for the Ombudsman to issue a preliminary decision be deleted.

3.10 - Mediation

Head 44 - Mediation.

(1) The Ombudsman may, in circumstances where he deems it appropriate, try to resolve a complaint by mediation …

The Ombudsman in 2016 put a far greater emphasis on handling complaints by way of mediation. He has produced some initial evidence to suggest that this is working well for complainants generally. FLAC awaits with interest more detailed findings from the Ombudsman in this respect. It is clear from the current information on the website that mediation is the Ombudsman's preferred method of dealing with complaints; complainants (as well as providers) are being strongly urged to utilise it.

FLAC fully accepts that many complainants see mediation as the ideal way of having their complaint handled. However others may take a different view; For example, if a complainant sees that the provider has appeared to show little appetite to resolve the complaint through its internal procedures, s/he might wish to proceed to an adjudication rather than waste further time on mediation. However complainants may perceive that this is not encouraged by the Ombudsman and we are concerned that some potential complainants may feel that they have no meaningful choice but to mediate.

[4] Page 46.

The lack of mediated cases since the establishment of the office has been striking and has often stemmed from provider's refusal to engage in mediation. FLAC welcomes the current Ombudsman's focus on remedying this. However, a complainant's right to a full investigation and adjudication should not be compromised by an undue emphasis on mediation as a way of dealing with complaints. An emphasis on mediation should not be motivated by expenditure/resource considerations and a complainant's right to a finding that his/her complaint has or has not been upheld should certainly not be compromised on grounds of cost. It should be borne in mind that a failed mediation will involve considerable resources and time for the parties and the office of the Ombudsman.

Recommendation 12: FLAC recommends that the proposed legislation strike an appropriate balance between encouraging complainants and providers to use mediation as a voluntary option to resolve complaints, and enabling complaints to be investigated if the parties do not wish to engage in mediation.

i. **The legislation should continue to provide for the complaint to proceed to investigation and adjudication where the complainant so wishes.**
ii. **Where financial service providers refuse to mediate, provision should be made to oblige them to them to advance reasons.**
iii. **Consideration should be given to providing for the publication of the names of financial service providers who frequently or always refuse mediation.**

3.11 - The classification of findings

Head 46 – Adjudication of complaints and redress

For complaints relating to regulated Financial Service Providers:

(1) In adjudicating a complaint relating to regulated financial services providers that has not been settled or withdrawn, the Ombudsman shall make a decision in writing that the complaint –
(a) is substantiated, or
(b) is not substantiated, or
(c) is partly substantiated in one or more specified respects but not in others.

Head 46 proposes to leave the current position in relation to classification of findings unaltered at 'substantiated', 'not substantiated' or 'partly substantiated' in one or more specified respects but not in others.

There are two concerns about this classification.

- First, a number of the interviewees in our 2014 study were surprised and indeed annoyed to find that their complaint had been recorded under the 'partly substantiated' heading when they felt that their complaint had in fact been substantially rejected and only succeeded in a very limited respect.

- Second, it is clear, in particular from some of the earlier Annual Reports of the FSO that the partly substantiated category had been used to boost the percentage of complaints that were reported to have had a favourable outcome for the complainant consumer when there was no tangible evidence presented that this had been the case.

We welcome that the current Ombudsman has moved away from any attempt to portray partly substantiated cases (or indeed settlements) as necessarily favourable outcomes for complainants and simply presents the figures. In passing, however, it might be noted that the 2015 FSO Annual Review demonstrates little or no change in success rates for complainants. Of the **1206** complaints closed that year that proceeded to an investigation, **140** (12%) were upheld (or substantiated), **285** (23%) were partly upheld (or partly substantiated) - twice the number of partly upheld for upheld - and **781** (65%) were rejected.

We reiterate the point made in our 2014 report that a partly substantiated complaint could just as easily be described as partly rejected and this reflected the views of a number of our interviewees.

Recommendation 13: FLAC recommends that the classification of findings be amended to include 'upheld', 'substantially upheld', 'substantially rejected' and 'rejected'.

3.12 – Publishing decisions

Head 47 - Decisions of the Ombudsman.

(1) …….

(2) The Ombudsman shall publish decisions made by him as appropriate and in such a manner that ensures a party to a complaint will not be identifiable in accordance with data protection legislation

(3) The Ombudsman may, if he considers it appropriate to do so in any particular case, publish, in such form and manner as he thinks fit, a report in relation to any investigation under this Part and the result of that investigation.

Although sub-head (2) appears to mandate the Ombudsman to publish decisions, the extent of this obligation may be compromised by the addition of the words 'as appropriate'. Our view is that **the FSO should publish on his website all adjudications following investigations**. A significant number of complainants bring their complaint without access to specific assistance. A proper database of decisions classified into complaints categories might help such unrepresented complainants to articulate their grounds of complaint in a more precise manner and facilitate the making of more focused submissions and responses to answers given by financial service providers to questions posed by the person assigned to investigate the complaint.

It is not clear in what circumstances sub-head (3) is intended to be invoked. **FLAC requests clarification as to the circumstances in which a report of an investigation would be published as opposed to the findings and result of that investigation.** The power envisaged here is clearly very different from Section 72 of the Central Bank

(Supervision and Enforcement) Act 2013, which allows the Ombudsman to name in his Annual Report any provider who has had three or more complaints against it substantiated or partly substantiated in the previous year.

Recommendation 14: FLAC recommends that the Ombudsman should publish all adjudications following investigations on his website, and the proposal that a report of an investigation would be published needs to be explained and clarified.

3.13 - Appeals

Head 48 – Avenue of appeal

Head 48 is very similar to Sections 57CL and 57CM in the current legislation, with only some minor amendments made to those provisions. There is no provision for a *de novo* appeal.

- **Views in FLAC report**

FLAC's 2014 report devotes quite an amount of attention to the question of an appeal from a finding of the FSO.[5] It is important to point out that the High Court has consistently ruled that an appeal from decisions of the FSO is limited in its scope, as first set out in the case of *Ulster Bank Investment Funds v Financial Services Ombudsman*.[6]

Some appellants are unaware of these limitations and believe the appeal will involve a full rehearing (or appeal *de novo*) of the case. Some consumer appellants, in particular, end up being lay litigants owing to the cost of legal representation and the unavailability of legal aid. Further, a practice has developed whereby the Ombudsman acts as the respondent in all such appeals (although under the terms of the legislation he is only empowered to be made a party to the appeal). In principle the Ombudsman will always indicate that he will pursue his costs regardless of whether it is the consumer or the financial services provider who appeals in these cases. A notice party is also entitled to make submissions and may equally seek costs. Any appellant therefore runs a substantial risk of an adverse costs order.

FLAC's 2014 report also noted that recent High Court statistics demonstrated that the majority of appellants were consumers rather than financial service providers.[7] Since the publication of that report, this trend has continued. For example, the FSO's 2015 Annual Report states that of 14 new High Court appeals received in that year, 12 were from consumers (two of whom were lay litigants) and only two were from providers. The 2015 FSO Annual Review in turn tells us that a total of 781 complaints closed by investigation in 2015 were rejected. While there may not be an exact overlap and correlation here, this broadly suggests that in 2015 only 12 out of 781 complainants appealed the FSO's finding dismissing their complaint, equivalent to 1.5% of the total. This is a

[5] See pages 101 to 115.
[6] [2006] IEHC 323.
[7] See page 107.

low appeal rate and while it may be suggested that this is an indication of satisfaction that a just outcome had been arrived at, FLAC believes that it is more likely to be due to the prohibitive cost of the appeal and the difficulties in obtaining civil legal aid.

Deputy Pearse Doherty's Private Members Bill provided that an appeal should lie to the Circuit Court and that this should be a full appeal rather than the more limited High Court option in seeking to implement the recommendations in the FLAC report, It also proposed that a time limit of 60 days should be allowed to lodge this appeal rather than the notional 21-day period to appeal to the High Court. However, we accept that this proposed amendment is not without its potential problems, but **FLAC is firmly of the view that there must be an avenue to a full appeal.**

- **Government view**

The Dáil discussion of 6 October 2016 on this question illustrates some of the contrasting views on this critical issue. For example, Minister Dara Murphy for the government stated in relation to the proposed PMB amendment that

> *A de novo appeal to the Circuit Court would involve the Ombudsman as a notice party only. This would mean that if the financial services provider appealed a decision that favoured the complainant, the complainant would have to defend the appeal in the Circuit Court, with all of the consequent or attendant expense*.

He went on to further state 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 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 operates 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 also that the existence of the threat of an appeal by the provider operates as a deterrent to consumers generally.*

However civil legal aid should (or indeed must) be available in principle on a means-tested basis to provide representation to the consumer who was successful at Ombudsman level, as there can be little doubt that, having succeeded at that level, the consumer would satisfy the merits test imposed by the Legal Aid Board in non-family law matters.

Secondly, the Circuit Court could be empowered not to award costs against a consumer complainant where the relevant provider successfully appealed.

Further, as we have illustrated above, it is clearly the case that the complainant appeals more often than the provider. Thus, it is currently more likely to be the financial service provider who is '*shielded by the high threshold that is applied to the statutory appeal*' in the High Court. It is also therefore more likely that the consumer runs the risk of costs being awarded to the FSO against him or her. This caused one interviewee in our 2014 study to very reluctantly drop his High Court appeal, even though he felt very strongly and had legal advice to the effect that the FSO's decision was incorrect.

- **Conclusion**

FLAC does not accept that the existence of the threat of a Circuit Court *de novo* appeal by the provider would necessarily operate as a deterrent to consumers generally or would necessarily encourage more providers to appeal than is currently the case. Any concerns in this regard may be resolved by the provision of legal aid and by empowering the Circuit Court to make no order as to costs. Again, as noted above, the prospect of costs being awarded against a consumer complainant who appeals to the High Court against an adverse decision of the Ombudsman, and fails in that appeal, is much more problematic.

Currently, a complainant to the Ombudsman effectively gets one opportunity to make a complaint and must accept the decision of the Ombudsman, subject only to a very limited and expensive option of appealing to the High Court.[8] The success rate of complaints being upheld at adjudication is currently less than one in eight. FLAC submits that there are there are important access to justice and fair procedures issues at stake and parties should be provided with a full right of appeal to the Circuit Court.

In the alternative, a number of ADR mechanisms allow for a full appeal to a quasi-judicial body and a further appeal may be brought, on a point of law only, to the High Court. This approach could be replicated with the Ombudsman. In this regard, it might be noted that a body called the Irish Financial Services Appeals Tribunal (IFSAT) was established by the Central Bank and Financial Services Authority of Ireland Act 2003 to determine appeals by aggrieved parties against decisions of the Central Bank.

Recommendation 15: There should be a *de novo* appeal route either to the Circuit Court or an independent quasi-judicial body to replace the current limited High Court appeal.

3.14 – Remitting appeals

48 (3) The orders that may be made by the High Court on the hearing of such an appeal include (but are not limited to) the following:

> ***(c) an order remitting that decision or any such direction to that Ombudsman for review with its opinion on the matter***

Where the High Court upholds an appeal or the Ombudsman has not ultimately contested an appeal and the matter is remitted to the Ombudsman to determine afresh, there is currently no provision for that case to be prioritised. In one appeal in which FLAC was involved, the complainant we represented had to wait a considerable additional period of time to have his complaint ultimately decided by a third party who was not involved in making the original decision. This is unfair when the complainant has already had to deal with the time delays that inevitably occur when a complaint proceeds to investigation and adjudication and the time that it takes to appeal that adjudication.

[8] Based on FSO figures for 2015.

Recommendation 16: FLAC recommends that the Ombudsman adopt a rule of practice that cases remitted following a successful (or uncontested) appeal to the High Court be treated as a priority matter.

3.15 - Some issues not addressed in the Heads of the Bill

- ***Appeals under the MARP process***

The Ombudsman's website contains the following entry in relation to the Mortgage Arrears Resolution Process (MARP) as part of the Central Bank's Code of Conduct on Mortgage Arrears (CCMA):

> '*Where a complaint relates to a mortgage arrears situation with a Provider and a proposal has been made by a Complainant to the Provider with regard to the mortgage repayment obligations, which the Provider has rejected, mortgage holders should be aware of the limitations of the jurisdiction of the Financial Services Ombudsman. In relation to Mortgage Arrears Resolution Process (MARP) complaints, where issues of sustainability/repayment capacity are in dispute, the Financial Services Ombudsman is only in a position to investigate a complaint as to whether the Provider, in handling a mortgage arrears issue, correctly adhered to its obligations pursuant to the Central Bank's Code of Conduct on Mortgage Arrears (CCMA). The Financial Services Ombudsman can investigate the procedures undertaken by the Provider regarding the MARP process, but will not investigate the details of any renegotiation of the commercial terms of a mortgage which is a matter between the Provider and the customer, and does not involve this Office as an impartial adjudicator of complaints. The Financial Services Ombudsman will not interfere with the commercial discretion of a financial service provider, unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to a Complainant, within the meaning of Section 57 CI (2) (b) of the Central Bank and Financial Services Authority of Ireland Act 2004'.*

In *Redressing the Imbalance*, it was pointed out that the decision of the Ombudsman to decline jurisdiction effectively leaves borrowers in mortgage arrears, unhappy either at the failure of a mortgage lender to offer them an alternative repayment arrangement (ARA) or who feel that an unsuitable arrangement has been offered, without an independent avenue of appeal. We have also argued that there is a legislative basis for the Ombudsman to deal with such complaints under the existing Section 57 CI (2) of the Act, particularly grounds (b), (c), (d) and (e).[9]

It is conceivable that a heavy work schedule and limited access to the expertise that might be required to properly adjudicate on a lender's efforts to properly assess the long-term viability of a mortgage in arrears may have contributed to the position the Ombudsman took here. However, we have consistently been of the view that an appeal option is needed against the core decisions of lenders taken under the MARP, especially where

[9] For discussion of this issue, see pages 50-53.

repossession is the next likely step.[10] Although it is now sadly too late for many borrowers and many others are now long out of the MARP process and before the Circuit Court facing repossession, **an appropriate mechanism should still be put in place to hear appeals against substantive decisions and if that is to be the Ombudsman, that office should be properly resourced to carry out that work.**

Recommendation 17: FLAC recommends that an independent body be put in place to hear appeals against substantive decisions under the MARP process.

- ***Assistance for complainants to formulate complaints***

Finally, there remains an inequality of arms in terms of the presentation and pursuit of complaints. Many consumers simply do not have the available resources to obtain advice and assistance to comprehensively formulate their complaint whereas the financial providers will most likely have ready access to legal advice and representation.

While the Ombudsman's increased focus on a mediation/early resolution approach may somewhat alleviate this imbalance, when complaints proceed to the investigation and adjudication stage, it is particularly evident that consumers are more likely to be disadvantaged in terms of presenting and responding to submissions and issues that arise in the course of cases. It may also be difficult for complainants whether at the mediation or investigation stage to gauge what may amount to a suitable settlement where one is offered or negotiated, without access to professional advice and assistance.

Recommendation 18: FLAC recommends that the state put in place advice and assistance for consumers to formulate and pursue their complaints.

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For reference: *Redressing the Imbalance* (2014)

- Full report: http://www.flac.ie/publications/redressing_the_imbalance/
- Executive summary: http://www.flac.ie/publications/redressing-the-imbalance-executive-summary/

[10] See Mortgage Arrears and Personal Debt Group, Final Report 16 November 2010, at page 17: '*The Group acknowledges that the member representing Free Legal Advice Centres would have preferred to see a new appeals body set up to deal with the full range of potential appeals arising out of the MARP'.*