

Estimates 2023 requirements for Vote 19, Office of the Ombudsman ('The Office')

To: Dermot A. Nolan, Department of Public Expenditure and Reform

CC: Críona Brassill and Angelena Hollingsworth, Department of Public Expenditure and Reform

As part of the Revised Estimates process for 2023, I wish to set out the recent developments and future commitments in our Office which will have financial implications for Vote 19 in 2023.

Structure of the Office

Vote 19 comprises of the following statutory bodies;

- The Office of the Ombudsman,
- The Office of the Information Commissioner,
- The Commissioner for Environmental Information,
- The Commission for Public Service Appointments,
- The Standards in Public Office Commission including the Regulation of Lobbying and
- The Office of the Protected Disclosures Commission.

It also provides the staffing and shared services for the Referendum Commission when they are sitting.

It is somewhat unusual in structure as there is no programme expenditure, but rather our Vote is made up of staffing costs (approximately 80%) and administrative expenditure (approximately 20%).

The funding allocation mainly concerns staffing for the provision of the important statutory functions of the various services, and even though the statutory mandates continue to expand and are demand driven, we are endeavouring to keep providing the services within the allocation.

The Office of the Ombudsman

Demand for the Ombudsman services has increased significantly in recent years. In 2021 we received 4,004 complaints, which represents the highest amount ever in the 38-year history of the Office.

In addition, the Office completed 3,961 complaints in 2021 and responded to 6,125 enquiries.

In 2021 the Ombudsman published two significant reports. An investigation by the Ombudsman at the appropriateness of the placement of people under 65 in nursing homes for older people (Wasted Lives report), and a commentary report into unequal access for people with disabilities to personal transport schemes (Grounded report).

The Office has focused on streamlining its processes and improving efficiencies in recent years and this was instrumental in being able to deal with significant increase in demand for its services in 2021 and the continued delivery of high quality complex investigation reports during this time.

Additional resources sought in 2023 and update on proposed extensions to the remit of the Office of the Ombudsman;

Work is ongoing by the Department of Justice to complete the necessary actions to introduce the new Prisoner Complaints System and the introduction of the required Statutory Instrument to give it legal effect. Following the completion of this work, and subject to further discussion with DPER, a Statutory Instrument would be needed to be put in place to extend the remit of the Ombudsman to look at complaints in relation to detention facilities (prisons). Additional staff would be required to deliver on this extension to the remit of the Office.

The programme for Government commits to the extension of the remit to the Office of the Ombudsman to include Clinical Judgement decisions. Policy work is at an early stage in the Department of Health in relation to the development of a patient safety framework for clinical complaints and the Office is engaging with the Department on this.

As the timing and scope of the proposed changes to the remit of the Office of the Ombudsman set out above have not finalised at this stage, additional resources are not requested for the Office as part of Estimates 2023. Should there be significant advancements in this area that require additional resources during this period, the Office would engage with DPER as a priority.

[The Office of the Information Commissioner](#)

The Freedom of Information Act 2014 significantly extended the number of bodies under remit and reduced application fees, which has resulted in an increased workload annually.

Demand for review services in 2021 increased by 17% over 2020. In fact, in 2021 the OIC accepted the highest number of applications for review in any year since the introduction of the 2014 Act. Current trends suggest that demand in 2022 will at least match 2021. It is important to note that as the point of appeal of Commissioner decisions is the High Court, this can generate significant legal costs. It is also relevant to note that the Department is currently engaged in a review of the FOI Act, although it is not clear at this stage, what effect, if any, the review might have on demand for OIC services.

The Information Commissioner was also given a new role in 2017 in relation to decision-making under the Reuse of Public Sector Information. The European Commissioner repealed and replaced the 2003 PSI Directive in 2019 with Directive (EU) 2019/1024 on Open Data and the re-use of public sector information, which was transposed in 2021 by European Union (Open Data and Re-use of Public Sector Information) Regulations 2021. These new Regulations are aimed at greater transparency in public life and wider access to public sector information, which may result in an increased demand on the OIC's resources.

The Commission for Environmental Information

The number of appeals received by the Office of the Commissioner for Environmental Information increased threefold in 2021 compared with 2020, which represents a 130% increase on 2019, a year in which the OCEI received a record number of appeals. The OCEI also resolved more appeals in 2021 than in any other year, but this did not compensate for the exponential increase in cases received, resulting in a substantial caseload of 113 appeals on hand at year end.

The OCEI has continued to increase its productivity in 2022 with more cases closed by binding decision in the first half of the year than in any full year. Fortunately, as a result of the significant amount of work carried out on the decision-making processes of the Office, the level of court appeals about the OCEI's decisions has significantly reduced with only one of the 41 decisions issued in 2021 being appealed to the High Court. This is compared to 17% of decisions appealed in 2020. Statutory appeals remain an area of high risk from legal costs due to the special costs rule in place for environmental cases before the Courts.

It should be noted that the Department of Environment, Climate and Communications, which has responsibility for the Access to Information on the Environment Directive and Regulations, does not provide any funding for the Commissioner's role.

Standards in Public Office Commission

In terms of staffing resources, additional staffing will be required to continue to adequately resource complex investigations, and to accommodate expansion of the Commission's statutory responsibilities.

The capacity review recommended by the Review Group on Anti-Corruption headed by former DPP James Hamilton is due to be completed shortly. It should be noted that this may well also impact on the resourcing requirements of the Commission.

The Electoral Reform Act was enacted on the 25th July 2022 and it is noted that this may require additional resourcing. Pending legislative reform of both ethics and lobbying may also impact resource capacity.

The Standards in Public Office Commission require regular legal advice or guidance on matters before it. This legal input can place additional demands on the shared staffing resources of the Office of the Ombudsman. It is also noted that the Commission requires that external counsel advice is sourced on certain specific issues.

The workload in the Standards in Public Office Commission is significant given the breadth of its mandate and the relatively small size of the unit. Numerous electoral events (with elections, bye-elections or referendums in every year since 2016) and increased investigative activities have placed significant pressure on existing resources. Resources have been reallocated from other areas of the Commission's responsibility, reducing capacity in lobbying, ethics and investigations to accommodate the increased demand on the electoral side.

Given the expected capacity review and pending legislative reform of both the ethics and lobbying legislation, the Commission believe it would be premature to identify resources required stemming from those reviews.

Commission for Public Service Appointments

The steps initiated in 2021 to improve efficiency and work processes are continuing. The Commission directed two special investigations in 2019. However, while it has not directed further investigations since then, it reserves the right to do so should it consider it appropriate. Therefore, resources in this area will need to be monitored.

Referendum Commission

The Office provides the staffing and secretariat for referendums. Legislation to establish a new Electoral Commission which, when established, will subsume the functions of the Referendum Commission, is at an advanced stage with commencement scheduled for later in 2022. However, as implementation of this legislation is not within the control of the Office, we cannot be certain if we will retain the Referendum Commission during 2023 or, if so, what the staffing implications of such retention will be.

Pay Increases (no increases included in this submission)

Pay increases and any potential revision of the 'Building Momentum' pay agreement are not included in this submission. The Office is aware that DPER will calculate these amounts centrally and notify us of our allocation, which will be over and above what is to be provided for in the 2023 Estimates.

ICT Expenditure

The Office continues to implement the largescale ICT modernisation programme of recent years. Much progress has been made and, in particular, the substantial investment in hardware and software allowed all staff to move offsite and be fully productive at the beginning of the pandemic.

A key ICT project commenced in 2021 to digitalise Ethics Returns. Currently the annual returns submitted by those with obligations under both the Ethics in Public Office Acts are in paper format. These include statements of interest, evidence of tax compliance, certificates of monetary donations, statutory declarations, statements of accounts, etc. Given the statutory requirement to receive and retain materials under the Ethics Acts for 15 years, the volume of paper to be received, processed and stored is immense. As other organisations such as Revenue have moved to online systems it would seem appropriate for the Commission to move in a similar direction. Therefore, the Office is seeking to create a secure digitalised system that will allow for the receipt and storage of this documentation and allow for easier statutory reporting to the Houses of the Oireachtas. The additional estimated cost of this project is €200,000 was provided for in 2021 but due to delays in acquiring resources for the project the work will not complete until 2022. These delays have had a knock on effect on the phases of this project and as a result the front end portal part of the project where started in 2022 will now not conclude until 2023 so some expenditure allocated in 2022 on this and other ICT projects will only be spent in 2023. Therefore, the ICT budget for 2023 should be retained at the 2022 level to accommodate this expenditure.

Office of the Protected Disclosures Commission (Estimated full year staffing costs €315,000)

The Office is scheduled to assume responsibility for the management of protected disclosures within the new Office of the Protected Disclosures Commission (OPDC).

The Protected Disclosures Act 2014 protects workers in the public, private and not-for-profit sectors from retaliation if they speak up about wrongdoing in the workplace. Workers can report wrongdoing internally to their employer or externally to a third party.

The Act's definition of the term worker includes:

1. Employees or former employees
2. Trainees
3. People working under a contract for services
4. Independent contractors
5. Agency workers
6. People on work experience and the Gardaí

Additionally, there is a wide ranging definition of wrongdoing in the 2014 Act and a 2019 EU Directive that seeks to harmonise protections for whistle-blowers who report breaches of EU law.

The legislation gives the OPDC 7 days to acknowledge reports, which is calculated by including the day on which the report is received, and it also stipulates that the OPDC has 14 days to transmit reports to an appropriate prescribed person or another suitable person "or, in exceptional circumstances, due to the nature and complexity of such report, within such extended period as the Commissioner considers reasonable in those circumstances".

Both time limits were discussed with the Department at length during our engagement on the draft Bill provisions.

Based on all of these factors the caseload that the Office will have to take on could be significant, and the new unit will have to be properly resourced.

Preparatory work for the establishment of the OPDC has begun within the Office, and expenditure has already been incurred on both our pay and non-pay budgets.

The full year pay costs of operating this unit in 2023 are estimated to be €315,000, based on officers operating at the midpoint of their relevant salary scales. This estimated amount would cover one existing member of staff at PO level (40% of whose time will be dedicated to the OPDC), one member of staff at AP level, and four members of staff at EO level.

The above is based on dealing with new disclosures. However, if a situation arises that the Commissioner is drawn into dealing with pre-existing or legacy cases, the volumes may increase substantially.

Legal Expenditure

A large proportion of the legal spend incurred by the Vote continues to be litigation-related expenditure, some of which is unavoidable. The decisions of the Information Commissioner and the Commissioner for Environmental Information are subject to a statutory right of appeal to the High Court, with further appeals available to the Court of Appeal and the Supreme Court and possible references to the Court of Justice of the European Union. In addition, investigations conducted by the Standards in Public Office Commission are quasi-judicial in nature and normally involve legal representation. That Commission also has functions of referring electoral offences to the DPP for prosecution and bringing its own prosecutions in respect of lobbying offences. The various offices are also occasionally involved in the defence of judicial review or other claims, including complaints to the Workplace Relations Commission under the Equal Status Acts and related appeals. It is anticipated that the Office of the Protected Disclosures Commissioner, when established, may be involved in the defence of early judicial review claims as the boundaries of the new legislation are tested.

The legal budget was significantly reduced under the previous Vote, from €980,000 in 2021 to €680,000 in 2022. While it is anticipated that legal spend will reduce in future, it is likely to remain the same in 2023.

The in-house legal team manages the majority of the litigation brought against each statutory office. Outstanding litigation managed by the in-house legal team includes statutory appeals, judicial review challenges, complaints to the Workplace Relations Commission, prosecutions brought or instructed by the Standards in Public Office Commission, as well as ethics preliminary inquiries and investigations. The in-house legal team also provides a large amount of advice to each statutory office to support the exercise of their functions in a manner that avoids litigation being brought and avoids adverse decisions on any litigation that is brought. External solicitors are continuing to manage a small number of outstanding matters, the majority of which relate to decisions of the Office in 2019 and 2020.

The Office continues to take measures to reduce legal costs overall. The focus of the legal team in 2021 and 2022 has been on:

- supporting the decision-making functions of each of the statutory offices in order to avoid adverse outcomes in potential legal challenges;
- managing litigation by or against each of the offices to minimise legal costs; and
- supporting constructive engagement with the Government on legislative change to ensure reforms are operationally practicable and do not create additional risks of adverse litigation outcomes.

The trend of statutory appeals against decisions of the Commissioner for Environmental Information illustrates the effectiveness of this approach. In 2019, the Commissioner made 40 decisions, 7 of which were appealed; in 2020 the Commissioner made 23 decisions, 4 of which were appealed; and in 2021 the Commissioner made 42 decisions, 1 of which was

appealed. In the first half of 2022 the Commissioner made 41 decisions, none of which have been appealed.

It is anticipated that legal staffing costs, which are drawn from the Ombudsman budget, will marginally increase in 2023. However, that additional legal staffing should have the overall effect of reducing legal costs for the Office in future as a result of fewer cases being contracted to external solicitors and better litigation outcomes due to greater support for decision-making and in the implementation of legislative reforms.

Elaine Cassidy
Accounting Officer
Office of the Ombudsman (Vote 19)
12 August 2022