

ACJRD SUBMISSION
TO
THE OIREACHTAS JOINT COMMITTEE
ON
JUSTICE, DEFENCE AND EQUALITY

TOPIC: Garda Oversight and the Garda Síochána Act 2005

May 2014

ACJRD seeks to promote reform, development and effective operation of the Criminal Justice System.

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ACJRD SUBMISSION ON THE EFFECTIVENESS OF THE LEGISLATION RELATING TO THE OVERSIGHT OF AN GARDA SÍOCHÁNA

1. Introduction

I The ACJRD

[1.1] The Association for Criminal Justice Research and Development (ACJRD) is a non-governmental organisation dedicated to promoting the reform, development and effective operation of the Irish criminal justice system. In particular, the ACJRD encourages innovation in criminal justice and seeks to facilitate interdisciplinary dialogue between agencies and practitioners in the sphere of criminal law. The ACJRD was formerly known as the Irish Association for the Study of Delinquency.

[1.2] The ACJRD's membership is varied, but is largely comprised of individuals who have experience working within the criminal justice system and who have a strong interest in criminological matters. These include probation officers, legal and criminological academics, social workers, members of the Gardaí, prison officers, mental health professionals and practising lawyers.

[1.3] The ACJRD's approach and expertise is therefore informed by the hands-on experience of practitioners and agencies who deal with all aspects of the criminal justice system. However, the views expressed in this submission are those of ACJRD in its independent capacity and are not those of the ACJRD members' organisations or their employers.

II The ACJRD's Approach to Garda Oversight

[1.4] The ACJRD notes that the Committee has invited written submissions on the effectiveness of the legislation related to the oversight of An Garda Síochána. The Committee proposes to consider the effectiveness of the provisions of the Garda Síochána Act 2005 ("the 2005 Act"), and regulations made thereunder, insofar as they relate to the oversight of An Garda Síochána, including, in particular, the powers and remit of the Garda Síochána Ombudsman Commission. The ACJRD is pleased to accept the Committee's invitation, and has set out a series of proposals for the Committee's consideration. These proposals are informed by the following factors:

- Conducting research towards the advancement of community welfare and the integration of those who are disadvantaged is a key goal of the ACJRD. This community focus is a critical issue in policing and consequently its incorporation into police oversight as public confidence is synonymous with rule of law principles.
- Another important focus of the ACJRD is the interaction of children and young people with the criminal justice system. Any interaction between members of An Garda Síochána and persons under the age of 18 is generally regarded as an important matter as is demonstrated by The Children Act 2001 and policy of the Department of Children and Youth Affairs. The ACJRD accordingly proposes some amendments to reflect the heightened importance of ensuring the protection of young people as a distinct cohort in these circumstances.
- One of the ACJRD's stated objectives is the promotion of the highest standards of practice amongst professionals who work in the criminal justice system. To this end, ACJRD's proposals in respect of the oversight of An Garda Síochána are proffered with a desire to suggest possible improvements towards best practice and effective policing. The ACJRD notes that it is important to strike a balance to ensure that any oversight system does not frustrate members of An Garda Síochána in carrying out their duties.
- The ACJRD aims to promote innovation in justice and supports the development of new approaches to criminal justice challenges. It is hoped that by suggesting innovative approaches that the governmental goal of achieving optimal oversight of An Garda Síochána will be assisted.

Accordingly, the ACJRD makes this Submission in the hope that it can assist the Committee through the advancement of these goals which will primarily focus on the role of the Garda Síochána Ombudsman Commission.

III Structure of this Submission

This section (**Part 1**) is designed as an introduction to explain the ACJRD, its goals and objectives and the approach it has adopted in making this submission. **Part 2** of the Submission sets out an Executive Summary of the proposals made by the ACJRD in respect of the 2005 Act. **Part 3** of the Submission sets out both the law at present in respect of Garda Oversight and the proposed amendments thereto which appear to be in public contemplation and is therefore presented for ease of reference purposes only. **Part 4** of this document then sets out ACJRD's proposals in some detail.

2. Executive Summary of ACJRD Proposals on the 2005 Act

[2.1] The ACJRD has noted the Government's commitment to the establishment of an independent policing authority to exercise executive control over An Garda Síochána, and is generally supportive of such a measure. Having regard to the fact that the design of such a body is a work in progress, the ACJRD has determined to make this Submission primarily in relation to the powers and remit of the Garda Síochána Ombudsman Commission ('the Ombudsman Commission') and the processing of public complaints regarding the behaviour of members of An Garda Síochána.

[2.2] The ACJRD proposes that, irrespective of what form the proposed policing authority should take, measures should be adopted to bolster the independence of the Ombudsman Commission. In particular, the ACJRD is proposing a unique system of Oireachtas Committee oversight of the Ombudsman Commission. Such a system should ameliorate the existing accountability and reporting gap which exists in respect of the Ombudsman Commission. The ACJRD also proposes that there should be a legislative restatement of the independence of the Ombudsman Commission, and that the present restrictions on the Commission in relation to the discussion of matters of policy should be removed.

[2.3] The ACJRD further submit that the present system imperfectly balances individual and collective responsibility with respect to public complaints. It is suggested that the Ombudsman Commission should be entitled to recognise and deal with systemic problems which cause complaints to be made. In a similar vein, it is suggested that certain duties in respect of complaints could be imposed on members of An Garda Síochána in an individual capacity, rather than in a collective/representative manner. It is therefore suggested that the mandatory reporting requirements in respect of serious incidents could apply in a discretionary manner to all members of An Garda Síochána individually with an appropriate mechanism to prevent multiple reporting. Individual Gardaí should bear a similar duty regarding the preservation of evidence, as occurs in the ordinary course of the prevention of crime. Furthermore, it is suggested that there should be a broad duty on individual Gardaí, The Ombudsman Commission and members of staff of the Commission not to discuss ongoing complaints outside of the complaints investigation process.

[2.4] In relation to the subject matter of complaints, the ACJRD propose that a broader definition of 'serious harm' should be adopted. It is further suggested that the special provisions under the 2005 Act in relation to cases involving death or serious harm might be extended to include non-minor incidents of misbehaviour which relate to persons under the age of 18. As a further measure, the ACJRD propose that the existing 6 month time limit which regulates the admissibility of complaints should not be applied where serious matters such as these are in issue.

[2.5] In a similar vein, the ACJRD submits that amended legislation could provide the Ombudsman Commission with a method of identifying complaints which are minor or routine in nature, and that an accelerated complaints procedure might be applied in respect of same. To this end, it is suggested that section 94 of the 2005 Act (if a complaint is referred to The Garda Commissioner) should be reviewed. It is submitted that it is appropriate for the duty to inform a member of the existence of a complaint, and the attendant discretion to delay informing them of same, could be transferred from the Garda Commissioner to the Ombudsman Commission. Finally, it is submitted that it is appropriate for the officers of the Ombudsman Commission to have the same set of powers in relation to any matter which requires investigation under Part 4 (Complaints, Investigations and Other Procedures).

[2.6] In order to facilitate the speedy processing of complaints, it is suggested that where matters of state security are in issue they should be resolved by way of direct application to court. It is also submitted that the Ombudsman Commission should be entitled to authorise its officers to access electronic information systems operated by An Garda Síochána, within the parameters of an ongoing investigation.

[2.7] The ACJRD submit that a determination that a member of An Garda Síochána was not on duty at the time when the behaviour complained of occurred should give rise to a discretion to discontinue an investigation where appropriate, rather than disentitling the Ombudsman Commission from considering the complaint at all. However, the ACJRD also suggest that complainants should be required to disclose any personal interactions or grievances which they may have with the member complained of.

[2.8] It is submitted that the scope of a 'breach of discipline' which may come within the remit of the Ombudsman Commission could be regarded as restrictive and that Schedule 5 of the 2005 Act (Breach of Discipline) ought to be revised accordingly. The ACJRD propose that provision be made for a Disciplinary Register wherein the Garda Commissioner records the outcome of all complaints procedures, which are then made available to the Ombudsman Commission, on request, while taking into account the confidentiality of information and personal data protection provisions. Where a complaint is upheld, consideration should be given to granting the Ombudsman Commission the power to impose minor sanctions equivalent to those available under internal Garda disciplinary procedures, subject to an appeals procedure.

[2.9] Having regard to the significant consequences which the upholding of a complaint may have, the ACJRD suggest that members who are the subject of a complaint should be entitled to legal aid once they are informed that they are being investigated for serious misbehaviour. In addition, it is proposed that members be entitled to apply to the Courts in order to have complaints overturned, or, alternatively, to have any public record of the complaint expunged once a pre-determined amount of time has passed.

[2.10] The ACJRD would suggest that the Committee consider adding a provision whereby complaints may be published along similar lines to those in place for the Solicitors Disciplinary Tribunal publications in the Law Society Gazette. It is also submitted that provision be made for a system whereby the Garda Síochána Inspectorate may request statistical information and data from the Ombudsman Commission and that appropriate safeguards be designed to allow such a request to be processed.

3. Current Legislation and Proposals for Change

I Statement of the Law at Present

A THE SCHEME OF THE 2005 ACT

[3.1] The Garda Síochána Act 2005 (“the 2005 Act”) was a consolidating piece of legislation which repealed existing provisions and established a comprehensive structure for An Garda Síochána. In addition, it brought about some very significant changes to the oversight of the force. It is therefore useful to set out the general scheme of the 2005 Act in order to give context to the specific proposals which the ACJRD has made below.

- Part 2 of the 2005 Act sets out the powers and functions of An Garda Síochána, its organisational structure, the powers relevant to its management by the Garda Commissioner and the Minister for Justice. It also provides for Joint Policing Committees and International Policing Co-operation.
- Part 3 of the Act establishes the Garda Síochána Ombudsman Commission (“the Ombudsman Commission”) and sets out its powers, functions, and organisational structure.
- Part 4 of the Act governs the public complaints process and the manner in which instances of suspected criminal behaviour or breaches of discipline involving members of An Garda Síochána are investigated.
- Part 5 of the Act deals with the establishment of the Garda Síochána Inspectorate (“the Inspectorate”).
- Schedule 5 to the Act sets out the basis on which a Breach of Discipline may be established.
- The Act also provides for the promulgation of Ministerial Regulations in respect of various matters. The relevant statutory instruments under the 2005 Act are:
 - S.I. 214/2007 (as amended) which sets out the Garda Discipline Regulations;
 - S.I. 413/2006 which provides for the Garda Reserve;
 - S.I. 168/2007 which regulated the confidential reporting of corruption or malpractice by members of An Garda Síochána;

- S.I. 485/2006 which sets out the process for Garda promotions.

With the minor exception of sub-section 122(1)(o), all provisions of the 2005 Act have now been commenced. The only substantial amendments to the 2005 Act prior to current proposals are contained in Part 7 of the Criminal Justice Act 2007. Sections 42 and 43 of that Act brought in amendments to the operation of Ministerial Inquiries into Garda matters and made various other minor amendments to the 2005 Act. Section 41 of the 2007 Act will be discussed separately below.

B GENERAL OPERATION OF THE 2005 ACT

[3.2] Broadly speaking, the powers of Garda oversight in the 2005 Act are delegated to five separate bodies; the Minister for Justice, the Garda Commissioner, the Ombudsman Commission, the Garda Síochána Inspectorate and the High Court. There are also some minor oversight powers under the Act such as the Audit Committee and the Professional Standards Unit, but these will not be considered in the ACJRD's Submission. The majority of the powers relating to the executive management of An Garda Síochána are exercised by the Garda Commissioner with direction from the Minister for Justice. The Ombudsman Commission is the body charged with the oversight of alleged criminal behaviour or breaches of discipline (as defined in Schedule 5 to the Act) on the part of members of An Garda Síochána. The Inspectorate is an advisory body primarily concerned with the efficiency of An Garda Síochána. They do not have substantial powers. There are also a number of circumstances in which the Act anticipates the potential need for a referral to the High Court, and in that respect the Court exercises a minor role in the oversight of An Garda Síochána. A more detailed summary of the relevant functions of each body is set out below.

C THE EXECUTIVE MANAGEMENT OF AN GARDA SÍOCHÁNA

[3.3] The Government has the power to appoint the Garda Commissioner who is then largely duty bound to the Minister for Justice. The Garda Commissioner is responsible for the day to day running of An Garda Síochána and for ensuring the effectiveness of its operations. The Commissioner is also responsible for the promotion of Gardaí and for maintaining internal discipline, and to this end is vested with a broad power to summarily dismiss any member of Inspector grade or lower if he/she believes that it is 'necessary to maintain (public) confidence' in An Garda Síochána.¹ The Commissioner is under various duties to report to the Minister for Justice in relation to the overall performance of An Garda Síochána and in respect of certain specified matters. The Act provides for the establishment of a Professional Standards Unit which operates under the direction of the Commissioner but reports to the Minister. The Minister for

¹ Matters of internal discipline are dealt with in accordance with the procedures set out in the Garda Discipline Regulations (S.I. 214/2007), this is discussed in more detail at paragraph [3.5] below. These Regulations are promulgated by the Minister pursuant to section 123 of the 2005 Act.

Justice has the power to propagate regulations for the force as a whole, and to issue directives to the Garda Commissioner. The Minister can also inform him/herself by establishing an inquiry into police matters on whatever terms he/she may determine. Sections 39 – 41 of the 2005 Act set out a clear hierarchical structure for accountability within An Garda Síochána, with each member accountable to his/her superiors and the Commissioner ultimately under a duty to keep the Minister informed of relevant matters.

D THE ROLE OF THE GARDA SÍOCHÁNA OMBUDSMAN COMMISSION

[3.4] The Garda Síochána Ombudsman Commission's powers under the 2005 Act are defined with reference to its investigative functions (as defined in Part 4 of the Act). With this in mind, it should be noted at the outset that, ultimately, the Ombudsman Commission only has the power to report its findings to either the Garda Commissioner or the Director of Public Prosecutions who then retain full discretion regarding what further steps, if any, should be taken on foot of evidence that misbehaviour occurred. The Ombudsman Commission consists of three members, one of whom is the Chairperson, who are appointed by the Oireachtas for a fixed term of between three and six years. The primary function of the Ombudsman Commission is to receive and investigate complaints concerning the conduct of members of An Garda Síochána, but it is also a statutory objective of the Ombudsman Commission to 'promote public confidence in the process for resolving (those complaints)'. The Ombudsman Commission may have staff ('officers') appointed to it, subject to the approval of the Minister, and its functions may then be delegated to those officers. The Commission's budget is determined by the Minister on an annual basis. There is also scope for the Ombudsman Commission to obtain 'Special Assistance' under the 2005 Act, by having a Garda or member of another police force seconded to it. The Ombudsman Commission reports to the Minister on an annual basis and there is also provision for an internal review every 5 years, these reports are then put before the Oireachtas. The Ombudsman Commission is also answerable to Oireachtas Committees. However, it should be noted that there are significant restrictions on the capacity of the Commission to comment on policy matters in general, and in particular when it is before a Committee. The Act states that the Ombudsman Commission is to be independent in the discharge of its functions and it is under a further obligation to carry out its functions fairly. ***Section 81 imposes a duty of confidentiality on the Ombudsman Commission and its officers, and prohibits the disclosure of information likely to have 'a harmful effect'.*** The powers of the Ombudsman Commission largely arise in respect of the investigation of complaints. This is considered below.

E BREACHES OF DISCIPLINE UNDER THE 2005 ACT

[3.5] The investigation of a breach of discipline by the Ombudsman Commission is a separate procedure which exists in tandem with internal Garda disciplinary procedures. Under the 2005 Act, the Ombudsman Commission have jurisdiction to investigate the alleged commission of offences or breaches of discipline by members of An Garda Síochána. However, the meaning of a ‘breach of discipline’ in this context is defined with reference to Schedule 5 to the Act, which is attached as an appendix hereto. The wording of Schedule 5 mirrors the Schedule to the Garda Síochána (Discipline) Regulations 1989, which were in force at the time of enactment and it should be noted that the Schedule to the present Garda Discipline Regulations contains 30 paragraphs. Significantly, a finding by the Ombudsman Commission that a breach of discipline has occurred has no binding consequences, as the Commission has no power to impose sanctions. The present Garda Discipline Regulations, set out in S.I. 214/2007 (as amended), prohibit an extensive range of behaviour. A determination by a Deciding Officer or a Board of Inquiry that the Regulations have been breached may result in a substantial penalty. A reduction of up to 2 weeks’ pay, reprimand, warning, caution, or advice, may be imposed for minor breaches, and a member is liable to being dismissed, receiving a reduction in rank, being required to retire or resign, or having up to 4 weeks’ pay deducted in respect of a serious breach. It should also be noted that section 17 of the Act allows for the establishment of a Code of Ethics which is binding under the Discipline Regulations, but not under Schedule 5.

F ADMISSIBILITY OF COMPLAINTS

[3.6] Part 4 of the 2005 Act sets out the process whereby complaints are dealt with. The first stage is a determination on the admissibility of a complaint. This is determined by the framework set out in sections 83, 84, and 87. Complaints may only be made by a member of the public who is directly affected by, or was a witness to the misbehaviour complained of. A complaint will not be considered admissible if it is made more than 6 months after an incident unless the Ombudsman Commission ‘considers there are good reasons’ for extending the time period. Complaints about general Garda practices, or in relation to members of An Garda Síochána who were not on duty at the time the complaint arose, are inadmissible. If the complaint is admissible, the Ombudsman must notify the Commissioner, who in turn will notify the relevant members of An Garda Síochána (although s/he may postpone this notification if s/he chooses), and take steps to ensure the preservation of relevant evidence. If a complaint is deemed inadmissible then GSOC may take no further action.

G INVESTIGATION OF COMPLAINTS

[3.7] The manner in which the Ombudsman Commission may proceed in respect of an admissible complaint is dependent on the nature of the complaint:

- **Informal Resolution** - If a complaint is deemed to relate to a breach of discipline suitable for mediation, and provided both the complainant and the relevant member of An Garda Síochána consent, section 90 provides for an informal, mediated, complaint resolution process. Where this process is followed, any record of the complaint is automatically expunged.
- **Referral to the Garda Commissioner** - Where a complaint is not linked to the death of, or suffering of serious harm by, an individual or to the commission of an offence, the Ombudsman Commission may refer the matter to the Garda Commissioner. Thereafter, the complex provisions of section 94 apply.
- **Ombudsman Hearing** - If a complaint does not disclose the occurrence of an offence, the Ombudsman Commission may hold a hearing in relation to the matter and then forward a report of its findings to the Garda Commissioner. Where appropriate, this report may recommend the institution of internal disciplinary proceedings against the relevant member.
- **Section 98 Investigation** - Where a complaint:
 - Relates to death or serious harm to a person in Garda custody or in relation to Garda operations,
 - Or, is not suitable for informal resolution,
 - Or, is deemed not to have been satisfactorily concluded by a referral to the Garda Commissioner,

The Ombudsman Commission may direct one of its officers to carry out an investigation under section 98. An investigation under this section may result in a report being forwarded to the Director of Public Prosecutions with a view to a prosecution being considered.

H POWERS OF THE OMBUDSMAN COMMISSION

[3.8] The powers of the Ombudsman Commission and its officers are dependent on which procedure is adopted in respect of a given complaint. In respect of an Informal Resolution, the Commission may determine that a complaint is not suitable for mediation with reference to its guidelines. In respect of a Referral to the Garda Commissioner, the Ombudsman Commission is entitled to supervise the process and review the outcomes with a view to taking further steps. In respect of an Ombudsman Hearing, the Commission has powers equivalent to a Court to compel attendance and the production of evidence. It is important to note that Section 96(10) provides that any evidence given or brought by a person before an Ombudsman Hearing is not admissible against that person in criminal proceedings. When conducting a Section 98 Investigation, officers are vested with powers broadly equivalent to those of members of An Garda Síochána, including

an express power to enter Garda Stations for the purposes of carrying out searches, where authorised by the Ombudsman Commission.

I SECURITY OF THE STATE AND THE OMBUDSMAN COMMISSION

[3.9] The concept of matters relating to ‘the security of the state’ features a number of times in the 2005 Act. In particular, the powers of the Ombudsman Commission to compel attendance and the production of evidence, or of its officers to carry out searches of Garda Stations may be restricted with reference to this concept. This process begins with the Ministerial power to promulgate regulations under section 126 which designate certain classes of information, documents, or Garda Stations as relating to the security of the state and not being subject to disclosure or search by the Ombudsman Commission. Under section 96, the Ombudsman Commission can refer a request for designated information to the Minister, who then makes a determination as to whether the information should be produced. Similarly, the Commission may refer a proposal to search a designated Garda Station to the Minister for determination. Although there is no appeal from the Minister’s determination, the operation of sections 94(4) - (6) and 99(3) - (5) are subject to oversight by a designated Judge of the High Court, who may also review any Regulations under section 126 and report directly to the Taoiseach.

J THE ROLE OF THE COURTS

[3.10] In addition to the review function of the designated Judge in respect of matters relating to the security of the state, the Courts are assigned a number of functions under the 2005 Act. The Ombudsman Commission may apply to the Circuit Court to enforce its powers to compel evidence. When appearing before an Oireachtas Committee, the Ombudsman Commission may refuse to answer a question put to it on the grounds that the subject matter is, or is likely to be, the subject of proceedings before a court or tribunal. Where such a refusal is made, an application may be made to the High Court to make a final determination on this. Finally, section 109 of the Act provides a mechanism whereby a Judge of either the High or Supreme Court may, at the instigation of the Minister, conduct an inquiry into the conduct of a designated officer of the Ombudsman Commission.

K THE GARDA SÍOCHÁNA INSPECTORATE

[3.11] The Garda Síochána Inspectorate is designed as an independent, expert advisory body which is primarily concerned with issues relating to the efficiency of An Garda Síochána, the effectiveness of its operation and administration, and the provision of advice to the Minister on best policing practice. The Inspectorate may be required by the Minister to carry out inspections or inquiries into particular aspects of the operation of An Garda Síochána.

II Provisions not yet in Force / Contemplated Amendments

A THE GARDA SÍOCHÁNA EXECUTIVE MANAGEMENT BOARD

[3.12] As mentioned above, the Garda Síochána Act 2005 was amended by Part 7 of the Criminal Justice Act 2007. However, section 41 of the 2007 Act has not yet been commenced. This section provided for the establishment of a new body, the Garda Executive Management Board, which was to be comprised of six members; the Garda Commissioner, the two Deputy Garda Commissioners and three laypersons. The lay members of the Management Board were to be non-executives and serve in an advisory capacity, but were to participate in reviews of the performance of An Garda Síochána and the preparation of reports to the Minister.

B STATED GOVERNMENT OBJECTIVES

[3.13] The ACJRD notes that the Government has recently announced its intention to establish an independent policing authority and make provision for the future appointment of Garda Commissioners by open competition, and that a new Cabinet Committee on Justice Reform is intended to oversee the development of proposals in relation to this. In addition, it is intended that the office of Confidential Recipient is to be abolished and replaced by mechanisms under the Protected Disclosures Bill 2013.

4. ACJRD Submission on the 2005 Act

ACJRD notes that at paragraph three of the Committee's call for submissions that "Submissions should be set out on a "Section by Section" basis as they arise in the Act....." and now makes its Submission in compliance with that format.

PROPOSALS IN RESPECT OF PART 2 OF THE 2005 ACT

Independent Policing Authority for An Garda Síochána

[4.1] The ACJRD notes that the Government has committed to the establishment of an independent policing authority. As is apparent from the proposals set out below, the ACJRD's submission is primarily concerned with the powers and functions of the Ombudsman Commission. In respect of the powers and functions of such an independent policing authority, the ACJRD would respectfully submit that the lay involvement in any such authority should be more extensive than was envisaged in respect of the proposed Garda Síochána Executive Management Board which was provided for in the 2007 Act but never established. It is submitted that the functions of this Board, if commenced, would appear to substantially overlap with the role and function currently discharged by the Garda Síochána Inspectorate, i.e. managerial and efficiency style reviews. On this basis, the ACJRD would submit that the role played by an independent policing authority should be more extensive than that which the proposed Executive

Management Board was designed to fulfil. The ACJRD would suggest that any model adopted may draw extensively on the experience of the Northern Ireland Policing Board as an example of active lay involvement in the management of a police force.

Legal Aid

Section 49 In line with the proposals outlined below in respect of section 87 and 90-98, the ACJRD recommends that the Committee consider extending the provision for legal aid under this section to cover members of An Garda Síochána who are the subject of an investigation which is non-minor in nature (i.e. where a criminal offence, or serious breach of discipline is anticipated).

Recording Complaints

New It is suggested that the legislation provide for the establishment of a Disciplinary Register, to be kept by the Garda Commissioner, on which the details of complaints against members of An Garda Síochána should be entered and preserved unless/until they are expunged.

PROPOSALS IN RESPECT OF PART 3 OF THE 2005 ACT

Committee Oversight of the Ombudsman Commission

[4.2] The ACJRD submits that, at present, Ombudsman Commission's independence of action is limited on a practical level on its resource dependency, and on a theoretical level by the statutory restrictions on its capacity to communicate. The ACJRD would also suggest that the present model can be perceived as facilitating the existence of a systemic accountability and communication gap; although the Ombudsman Commission comes within the remit of the Minister for Justice, it is not subjected to extensive oversight by the Minister due to an appropriate respect for its autonomy. As a result of this current gap, there is no satisfactory means of establishing the extent to which the Ombudsman Commission has the operational capacity to discharge its wide ranging functions, or to review its success in doing so.

[4.3] It is submitted that the unique nature of the Ombudsman Commission may require a unique solution. While it is noted that the Government propose to transfer substantial functions with regard to the executive management of An Garda Síochána to the proposed independent policing authority, such a body will presumably still come within the remit of the Minister for Justice. The ACJRD suggests that it might be considered whether the functions in relation to the oversight of the Ombudsman Commission might be assigned to an Oireachtas Committee. It is proposed that under a scheme of Oireachtas supervision, the Minister would allocate a budget to the Commission which would then be obliged to establish to the satisfaction of the Committee the

manner in which its resources will be allocated and the extent to which it will be capable of discharging its functions. A further advantage of such an arrangement is that it will provide an appropriate route by which the Commission may raise issues of public concern.

Section 67 I It is submitted that an additional subsection (aa) be added to section 67(2) to provide that it is a function of the Ombudsman Commission to receive complaints made by members of the public in relation to the operation of An Garda Síochána. This addition would allow the Ombudsman Commission to make findings which are not based on the individual culpability of a member of the force.

II At present, the Ombudsman Commission's independence is set out in subsection 67(4). It is submitted that this should be replaced with a specific section setting out a full guarantee of the independence of the Commission.

Section 79 The ACJRD suggests that consideration should be given to subsection 78(2)(b) and 79(10)(a) which preclude the Ombudsman Commission from commenting on any Government policy when appearing before an Oireachtas Committee which tends to operate in the context of a public interest format.

Section 81 *At present, section 81 imposes a duty of non-disclosure on the Ombudsman Commission and its officers where disclosure is likely to have a harmful effect. The ACJRD asks the Committee to consider strengthening this provision to prevent disclosures in respect of on-going investigations. This might be achieved either by amending the definition of 'harmful effect' under section 81(2) to include all information in respect of on-going investigations, or by the introduction of a separate subsection.*

New As set out in paragraphs [4.2] and [4.3] above, the ACJRD submits that the Committee should consider the insertion of a (number of) section(s) designed to bring the oversight functions of the Ombudsman Commission within the remit of an Oireachtas Committee.

Provision of Information by the Ombudsman Commission to the Inspectorate

New It is suggested that in relation to appropriate topics, and where the appropriate safeguards can be implemented, the Ombudsman Commission should have a method whereby information or data may be provided to the Garda Síochána Inspectorate, on request. Any such section would require appropriate measures regarding confidentiality. This is because the Ombudsman Commission obtains unique and useful data, in the course of carrying out its functions but is not designed to exploit this information to the benefit of An Garda Síochána or policymakers in this sector.

PROPOSALS IN RESPECT OF PART 4 OF THE 2005 ACT

Matters regarding Complaints

Section 83 It is suggested that there should be an obligation on complainants to disclose any personal relationship, or significant previous interactions, which they may have had with the member complained of.

Section 84 At present, the Ombudsman Commission may only consider a complaint which is made within six months, unless it considers there are good reasons for extending that time limit. While this is appropriate for routine complaints, it is submitted that this time limit should not apply where either:

- the complaint relates to death or serious harm suffered by an individual.
- the complaint relates to the treatment of a person under the age of 18.

It is submitted that this amendment would be appropriate since the inherent seriousness of these matters suggest that a 6 month delay could militate against a decision to investigate. Further, such a provision accords with ordinary civil law limitation periods.

Section 87 I It is suggested above that the Ombudsman Commission should be entitled to make a finding that a complaint has arisen as a result of a management or systemic issue with An Garda Síochána and recommend that such a complaint may be dealt with by way of apology / remediation by a representative of the organisation. The ACJRD suggests that the admissibility stage should be amended to anticipate such a finding in order to ensure that multiple files are not opened in relation to individual complaints, when a systemic matter is in fact at issue.

II It is suggested that the Ombudsman Commission should, at the admissibility stage, identify whether a routine or minor breach of duty is at issue, and, if so, inform all parties, adopt an accelerated procedure, and attempt to resolve the complaint within a short period of time (perhaps 2-3 weeks).

III The ACJRD would recommend that the current provision under section 87(3)(b) whereby a complaint is inadmissible *ab initio* by reason of its having been made regarding the conduct of a member of An Garda Síochána while they were not on duty should be replaced with a discretion under section 93 to discontinue an investigation where the subject matter is not sufficiently connected to the member's professional duties. This submission is suggested because members may perform some official tasks while off duty and also because certain

breaches of discipline would seem to be intrinsically linked with a member's private life (e.g. Sch. 5, para. 5: Corrupt or Improper Practice).

Section 89 I The ACJRD propose that the legislation should impose an obligation on all members of An Garda Síochána, The Ombudsman Commission and members of staff of the Commission not to disclose or discuss the existence, or subject matter of a complaint during the currency of its investigation by the Ombudsman Commission.

II It is further proposed that the duty to notify a member that a complaint has been admitted in respect of their alleged behaviour, and the attendant power to delay such a notification under sections 88(3) and 89(1)(b) should be transferred from the Garda Commissioner to the Ombudsman Commission, as it is the body to whom the complaint is made.

General Submission in relation to Sections 90-98

[4.4] While the ACJRD notes that it is appropriate that the powers employed by the officers of the Ombudsman Commission correlate to the significance of the matter being investigated, it is submitted that an initial impression regarding the significance of a particular complaint should not act to restrict the investigatory powers of the Ombudsman Commission. It is also submitted that the manner in which sections 90-98 set out the Ombudsman Commission's complaints processing procedure could benefit from clarification and simplification as could the description of different powers under sections 96 and 98. The ACJRD suggests that the Ombudsman Commission should have scope to identify complaints which appear to disclose, at their height, a routine or minor breach of duty (i.e. where a criminal offence, or serious breach of discipline is not anticipated). It is suggested that such complaints may be dealt with in a short time-frame using either the informal procedure under section 90 (Resolution of complaint by mediation or other informal means) or a simplified procedure. However, in all non-minor matters where an investigation may be required, there should be a unified set of investigatory powers vested in officers of the Ombudsman Commission. Where it transpires that a matter is more serious than originally anticipated, the member involved should be informed prior to being interviewed and offered legal aid in line with section 49 as set out above.

Section 90 The ACJRD would suggest that mediation should only take place on a voluntary basis in accordance with the International Mediators' Institute and the Mediators' Institute of Ireland guidelines. It is submitted that obliging members of An Garda Síochána to apologise for behaviour which they do not accept occurred, is unlikely to enhance the integrity of the complaints resolution process. *Accordingly, the ACJRD submits that subsection 90(3) should be retained and that no provision*

should be enacted whereby a member of An Garda Síochána might be directed to engage in mediation other than on a voluntary basis.

- Section 91 The ACJRD submits that, having regard to the significant nature of any interaction of children with An Garda Síochána, the application of special and immediate investigation under section 91 should be extended to include any complaint of significant misbehaviour affecting a person under the age of 18.
- Section 93 As discussed in relation to section 87 above (Determination of whether complaint is admissible), it is suggested that an express discretion to discontinue an investigation where the subject matter is not sufficiently related to the member's professional duties might be added to this section.
- Section 94 I The ACJRD suggest that this section has the potential to lead to an extremely prolonged disciplinary process and may therefore benefit from some simplification.
- II It is submitted that an accelerated procedure be designed whereby the Ombudsman Commission may deal with complaints which have been identified as being routine or minor in nature. At present the options of informal resolution and referral to the Garda Commissioner seem to be designed to deal with minor incidences, therefore if no agreement is forthcoming in relation to informal resolution, the Ombudsman Commission do not have an efficient way of dealing with minor complaints themselves.
- Section 96 A suggested amendment to subsections (4)-(6) of this section is discussed below in relation to section 100.
- Section 97 I The ACJRD suggests that consideration might be given to discussing whether the Ombudsman Commission ought to be given the power to impose limited sanctions, equivalent to those available for minor breaches of the Garda Síochána Discipline Regulations, where it has upheld a complaint. Such sanctions might include a deduction of 2 weeks' pay, reprimand, warning, caution, or advice. Such powers (if legally feasible) ought to be duly compliant with the requirements of the independent adjudication process of employment law and those of administrative law.
- II The ACJRD recommends that the Ombudsman Commission be given the power to make a finding that a complaint was a result of a systemic error and to suggest that an apology be made on behalf of An Garda Síochána. The present system is designed to identify a personal failing on behalf of an individual member of An Garda Síochána; this can lead to unsatisfactory results where there is a genuine complaint in respect of a matter which may simply be a systemic failure.

III It is further suggested that where the Ombudsman Commission makes a finding that a serious breach of discipline has occurred that it should have the power to instigate disciplinary proceedings under the Garda Síochána Discipline Regulations.

Section 98 It is submitted that the investigatory powers of officers of the Ombudsman Commission should be extended to include access to the relevant files, records and electronic information systems of An Garda Síochána, subject to authorisation by the Ombudsman Commission.

Section 99 I In line with its submission in relation to sections 90-98 set out above, the ACJRD submits that the power of the Ombudsman to authorise a search of a Garda Station to incorporate less serious instances might be made available on a statutory basis for all investigations necessary under this Part. Such powers, if considered appropriate, might simplify the Ombudsman Commission's investigatory procedures in circumstances where there was Ombudsman Commission authorisation applying a proportionality test. Such search warrant procedures could be distinguished from the constitutional inviolability principles that apply to dwellings, which have been extensively litigated. However, it should be noted that the present provisions have been shown to be adequate and extension of the powers currently in place have not been sought by Ombudsman Commission.

II A suggested amendment to subsections (3)-(7) of section 99 is discussed below in relation to section 100.

Matters of State Security

Section 100 The ACJRD proposes that, as the 2005 Act already provides for the designation of a Judge of the High Court to oversee the process described at paragraph [3.9] above in respect of documents, information or Garda Stations which are designated to be matters relating to the security of the state, it would be consistent if a determination on such a matter was made on direct application to that Judge. Any such hearing could be held *in camera* and as a matter of priority. It is submitted that such a process could have the capacity to increase the speed at which an issue under sections 96(4)-(6) or 99(3)-(7) could be determined.

Mandatory Disclosure in Certain Circumstances

Section 102 The ACJRD would suggest that the wording of the mandatory reporting requirement under section 102(1) warrants amendment towards an objective non-judgemental assessment of alleged wrongdoing. Further, in accordance with the suggestion in respect of section 91 (Investigation of complaints concerning death

of, or serious harm to, a person), it is submitted that this section should be applicable to cases involving children. In addition, the ACJRD believes that it is appropriate that this obligation might apply to members of An Garda Síochána generally. At present, the relevant subsection vests this function in the Garda Commissioner and reads:

‘(1) The Garda Commissioner shall refer to the Ombudsman Commission any matter that appears to the Garda Commissioner to indicate that the conduct of a member of the Garda Síochána may have resulted in the death of, or serious harm to, a person.’

It is suggested that this subsection be amended to facilitate referral to the Ombudsman Commission by any member of An Garda Síochána and specify alleged wrongdoing in respect of minors as follows:

‘(1) A member of the Garda Síochána shall refer to the Ombudsman Commission any matter where:

- (i) it appears that the activities of a member of An Garda Síochána may be related to the death of, or suffering of serious harm by, a person, or;*
- (ii) any matter where it appears that significant misbehaviour may have taken place with respect to a person under the age of 18.’*

Section 103 At present, section 103 places the Ombudsman Commission under a broad duty to keep the subject of a complaint informed in relation to the progress of the complaint against him/her. It is submitted that it might be appropriate to amend subsection 101(2) (Report following investigation under section 98 which deals with powers of designated officers of Ombudsman Commission for purpose of investigating complaints that appear to involve offences) to include a specific provision whereby the Ombudsman Commission may derogate from this section 103 obligation if it is deemed to be necessary for the purposes of following best practice in fully investigating a complaint. This submission is somewhat akin to proposal II made in respect of section 89 above whereby the duty to inform a member of the existence of a complaint against them, and the discretion to delay making that disclosure would be transferred to the Ombudsman Commission.

Complaints: Challenges, Expunging Records, and Publication

New Where a complaint has been made against a member individually and upheld, that member should be entitled to apply to the Circuit Court to challenge the finding made against them and, if successful, to have any findings overturned.

New It is suggested that, where a complaint has been made against a member individually and upheld, that member should be entitled to apply to the Circuit

Court, after an appropriate period of time, to have the relevant Disciplinary Register entry expunged. The Court may have regard to the nature of the complaint, the member's conduct since that date and other surrounding circumstances, and, if satisfied, direct that all relevant entries be expunged. However, within relevant rule of law and due process principles, consideration should be given as to whether such action might affect *confidential* records held by the Ombudsman Commission.

New The ACJRD submits that it should be a function of the Ombudsman Commission to publish the outcomes of the disciplinary process in some form or other. In particular, it is suggested that a model equivalent to the Solicitor's Disciplinary Tribunal might be adopted. Alternatively, the Committee may wish to consider the feasibility of allowing the Commission to prepare anonymous case studies in respect of certain cases.

PROPOSALS IN RESPECT OF SCHEDULE 5

[4.5] As noted above, the powers of the Ombudsman Commission to investigate an alleged breach of duty only extend to matters which are defined as a breach of duty under Schedule 5 to the 2005 Act. The wording of Schedule 5 is, therefore, fundamental to the role of the Ombudsman Commission. Schedule 5 is set out in full below as an Annex to this Submission. It is of note that Schedule 5, as drafted, essentially comprises extracts from the Garda Disciplinary Regulations 1989, which were in force as of the enactment of the 2005 Act. It is submitted that different considerations necessarily apply in respect of the internal disciplinary control of, and the external supervision of, a police force. The ACJRD therefore propose that the Committee consider, in detail, the adequacy of Schedule 5 and whether any improvements are desirable. If the Committee were to determine that it is important to maintain mutuality between the contents of the Schedule and internal Garda Discipline, it is submitted that a mechanism might be designed whereby the Schedule might be amended in the same manner as the Garda Discipline Regulations to ensure that new considerations will come within the remit of the Ombudsman Commission. In addition to this general submission, some specific amendments are suggested below. As an aside, the Committee may wish to consider whether the phrase 'breach of discipline' should be replaced in order to avoid confusion with internal Garda disciplinary procedures.

Specific Amendments to Schedule 5 to the 2005 Act (annexed hereto)

Para. 5 Insertion of a new sub-paragraph '(e) Showing favourable treatment or giving undue advantage to any person or business'. This amendment is suggested on the basis that improper practice may not involve a reciprocal or obvious advantage to

the member who indulges in it, but may be equally damaging to public perception of An Garda Síochána. Precise definition of the conduct complained of, would have to be included in the provision, i.e. what is defined as favourable treatment or giving undue advantage to any person or business. ***The ACJRD acknowledge that drafting any such a provision if deemed appropriate would be challenging.***

- New Whereas there is a specific provision in the Garda Síochána Act 2005 for a breach of discipline to have occurred where a member engages in actions calculated to frustrate an investigation by the Ombudsman Commission, it may be prudent to include a clear provision in this regard in Schedule 5.
- New It is also submitted that a breach of discipline might include the misuse of Garda resources.

Annex 1: Schedule 5 to the 2005 Act

SCHEDULE 5

Breach of Discipline

1. Discourtesy, that is to say, failing to behave with due courtesy towards a member of the public.

 2. Neglect of duty, that is to say, without good and sufficient cause—
 - (a) failing or neglecting—
 - (i) properly to account for any money or property received by the member of the Garda Síochána in his or her capacity as a member, or
 - (ii) promptly to do any thing that it is his or her duty as a member of the Garda Síochána to do,or
 - (b) doing anything mentioned in subparagraph (a)(ii) in a negligent manner.

 3. Falsehood or prevarication, that is to say, in the capacity of a member of the Garda Síochána—
 - (a) making or procuring the making of—
 - (i) any oral or written statement, or
 - (ii) any entry in an official document or record,that, to the member's knowledge, is false or misleading,
or
 - (b) doing any of the following with a view to deceiving any person:
 - (i) destroying or mutilating any official document or record;
 - (ii) altering or erasing or adding to any entry in an official document or record.
-
4. Abuse of authority, that is to say, oppressive conduct towards a member of the public, including—
 - (a) without good and sufficient cause, making an arrest, or
 - (b) using unnecessary violence towards any person with whom the member of the Garda Síochána is brought into contact in the execution, or purported execution, of his or her duty.

5. Corrupt or improper practice, that is to say—
 - (a) soliciting or receiving as a member of the Garda Síochána and without the consent of the Garda Commissioner any gratuity, present, subscription or testimonial (other than customary collections for such purposes as presentations to members on the occasion of transfer, marriage or retirement),
 - (b) placing himself or herself as a member of the Garda Síochána under a pecuniary obligation to any person in a manner that might affect the member's ability to discharge the duty of a member,
 - (c) improperly using (or attempting to use) his or her position as a member of the Garda Síochána for his or her private advantage, or
 - (d) failing wilfully and without good and sufficient cause to pay any lawful debt in such circumstances as to be liable to affect his or her ability to discharge the duty of a member or as to be liable to compromise other members.

6. Misuse of money or property in the custody of the Garda Síochána belonging to a member of the public, that is to say, misappropriating, or wilfully or carelessly misusing, losing or damaging, any such money or property.

7. Intoxication, that is to say, owing to the effects of intoxicating liquor or drugs or a combination of liquor and drugs, being unfit for duty either while on duty or while not on duty but wearing a uniform in a public place.

8. Discreditable conduct, that is to say, conducting himself or herself in a manner that the member knows, or ought to know, would be reasonably likely to bring discredit on the Garda Síochána.

9. Accessory to conduct specified in this Schedule, that is to say, conniving at or knowingly being an accessory to such conduct.