The Surprising Value of a Complaint and how Freedom of Information has changed Ireland

Peter Tyndall became Ireland’s Ombudsman and Information Commissioner on December 2nd 2013. His appointment came in the wake of the 2012 extension of the Ombudsman’s remit to include an extra 180 public bodies, and on the eve of the introduction of new Freedom of Information legislation. ‘I am honoured to be appointed at such an exciting time for both Offices’, he said on acceptance of his appointment.

In an interview with Sinéad O’Loghlin, Mr Tyndall reflects on the freedoms and constraints of his new role, the rationale behind his two newest initiatives, why he will continue to argue for constitutional status for the Ombudsman, and what he sees as positive evidence of reform within the public sector.

Having served as Public Services Ombudsman for Wales between 2008 and 2013, Peter Tyndall knows from experience that low numbers of complaints arriving at the Office of the Ombudsman’s door are not always indicative of good public services.

This is why on Friday 13 June 2014 he announced an investigation into how complaints are handled by public hospitals in Ireland; ‘I’m concerned that the volume of health complaints coming here is well below what I would expect, comparing it with other jurisdictions’. As part of this investigation Mr Tyndall is calling on members of the public to submit their experiences, both positive and negative, of how their complaints about public health services in Ireland were handled.

Cases such as the Mid-Staffordshire Hospital in England, where it was alleged that hundreds of patients died between 2005 and 2009 due to substandard healthcare, provide further justification for conducting this initiative; ‘What happened there was that complaints were being ignored or not being dealt with properly. If the complaints had been dealt with properly, the problems would have been identified earlier and potentially lots of people wouldn’t have lost their lives’.

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He also points to the Portlaoise Hospital cases: ‘Clearly things were going wrong, somebody must have complained about them – what happened to those complaints?’

Mr Tyndall emphasises that this investigation is not about laying blame; ‘It’s not about finding fault, or putting blame at somebody’s door – we want to work with the HSE and the Department of Health about it. It’s about saying – is the complaints system working as it should? – how can we improve it?’ – with the emphasis on how we can improve it. This type of initiative is new in Ireland since the Office’s work is usually case-led. ‘It’s the first time where we’ve started off not from a case, where we’re using our own initiative to look at a subject matter’, he says.

Complaints about Complaint Handling

As well as fewer complaints coming into the Ombudsman’s Office than Peter Tyndall would consider indicative of a robust health service complaints system, a common thread running through the complaints which have made it into his hands has been another motivation for the new initiative; ‘many of them are complaints about the way complaints are dealt with’. It seems that the complaints system itself often serves to aggravate the dissatisfaction of some health service users.

‘People don’t get responses’, he says. ‘They don’t get all the questions they raised answered so then they say ‘Well, I asked you about these seven things, you’ve given me an answer on one’. Responses don’t arrive in a timely way. People aren’t told that there’s going to be a delay – there’s no explanation for the delay. I know staff are under pressure but they end up making work for themselves, and making people who were already unhappy, more unhappy. It’s how you can avoid compounding your errors that interests me.’

Mr Tyndall says that inefficiency within complaint systems is not solely an issue in the public health system, but a general issue across the public services sector in Ireland. Provision of redress for complainants is ‘a very disparate landscape at the moment’, he says. ‘I think we could simplify it quite considerably. It should all be straightforward. Normally, there should be a two-stage complaints process. Somebody should get an immediate answer from the person they complain to, and if it can’t be resolved at that point, then it should be investigated just once. I would say ‘investigate once, investigate well’.

As well as a standardised complaints process, Mr Tyndall believes that standardised training for members of staff dealing with the first stage of that process is imperative to avoid inconsistencies.

‘Training for members of staff in dealing with complaints, especially frontline members of staff – because most complaints are dealt with by the person providing the service; it could be a nurse on a hospital ward, it might be somebody emptying bins – training can be standardised if you’ve got a standardised process … and it also makes it much easier for my Office in examining complaints if they’re all being dealt with properly in the same way, then there’s much less work to do in reviewing them’, he says.

When the Office of the Ombudsman is reviewing complaints that have not been resolved at the initial complaint stage, the disparate landscape in the public services complaints systems at this stage can sometimes prove obstructive as well; ‘A lot of the time it’s not active obstruction. It’s just that people are disorganised and slow to respond when we need them to come back quickly to us’.

“It’s how you can avoid compounding your errors that interests me.”

Binding Powers

In terms of the influence his Office holds in securing co-operation with his investigations in comparison to that of Public Services Ombudsman in Wales, Mr Tyndall says the situation is somewhat different. ‘Both Offices have statutory powers to require information from a person or a body, but my powers are slightly less here in terms of instructing compliance with a request for information from public bodies. Here I can go to the Circuit Court to force compliance, while in Wales, to refuse such information was automatically considered contempt of court.’

He says that ‘generally, people are helpful’ and the vast majority of his recommendations are respected. He does, however, remark: ‘There are a small number of cases where public bodies reject the findings or recommendations. In Emily O’Reilly’s time the most highly publicised one was the Lost at Sea case. The cases related to a compensation scheme designed for families who had lost their loved one and their livelihood in a fishing accident, if a trawler had sunk. Emily produced a report on it saying that one person had been excluded from the scheme who should have been included – it was rejected by the previous government. It partly led to the creation of, or the access of the Ombudsman to the Public Service Oversight and Petitions Committee, so that’s an improvement; there’s a mechanism now to at least look at cases which have been rejected. But it’s always going to be the case that it’s for the political element of government or for local authorities for instance, to determine whether to agree to pay a sum of money in redress for example or to implement another recommendation’. Mr Tyndall thinks that the findings of the Office should merit a status which is binding on the public services body concerned; ‘I do think the findings should have legal status and should be binding, and should only be capable of being challenged in the courts. That would be my personal preference. Though I do accept, in keeping with all public sector Ombudsman schemes internationally, that our recommendations should not be binding. In the rare event that they are rejected and I choose to make a special report to the Oireachtas, this report should be debated on a non-partisan basis, and unless my recommendations are found objectively to be unreasonable, the Oireachtas should support them and ensure acceptance by the public body concerned’.

Perception versus Reality: Constitutional Status

Alongside legally binding powers for the recommendations of the Office’s investigations, constitutional status is something else which Peter Tyndall would like to see granted to the Office. Like his predecessor Emily O’Reilly, he believes in the importance of bringing the lines of public perception as close as possible to those of the reality of his Office’s work, which does function independently on...
a day-to-day basis; 'In practice, this Office has always been independent and has acted independently'. Nonetheless, in his view public perception of the investigative actions and decision-making of the Office of the Ombudsman is hugely significant in allowing it to function successfully. ‘People coming to the Office need to be confident that we’re not another branch of the government but that we’re actually looking at their complaint objectively,’ he says. ‘That we’re not more inclined to accept the view of a service provider than we are of the person complaining.’

He explains that since the purpose of the Ombudsman is ‘to provide an objective and independent route to redress, to looking at whether something went wrong and then, if it did go wrong, to put it right’, the Ombudsman ‘has to be fully independent of the bodies in the Ombudsman’s jurisdiction’. Again, it has not been active obstruction which has kept the Office of the Ombudsman from attaining constitutional status. In the first instance, the constitution in Ireland was created long before the Irish Office of the Ombudsman came into existence; ‘Newer Ombudsman institutions in Central and Eastern Europe or in Africa do have constitutional status because, of course, their offices were being created at the point the constitution was being written. I don’t doubt if Ireland was introducing a constitution tomorrow, it’s one of the things that would be in it’. Lately, it has been the prioritisation of other constitutional items that has led to this historical anomaly remaining unchanged; ‘It was one of the issues that the Constitution Convention parked if you like – it was one of the ones it didn’t have an opportunity to get around to considering’.

Avoidance of Compounding Errors

The value that Peter Tyndall places on complaints systems is reflected in a new ‘Ombudsman Casebook’ the Office has produced which is due out in early autumn and will be published thereafter on a quarterly basis. Only bigger case investigations currently get published as reports, but he believes smaller cases too should also be brought to light; ‘There’s learning in a lot of the cases where there isn’t a report published, and that needs to be available to service providers as well’. The staff at his Office are working to produce summaries of all the cases that are being closed, which will be assembled into the Casebook. Similarly to the own initiative hospital complaints investigation where the Ombudsman is reaching out to members of the public this initiative is about reaching out to public bodies; casebooks will be sent to the bodies under jurisdiction and other relevant organisations. The case digest is additional fruit of his experience in Wales, and Mr Tyndall believes that books such as these avoid frontline staff falling victim to the same errors of their predecessors; ‘Let’s say the complaint was about a certain aspect of healthcare, other people providing health services didn’t know what the outcome was, and if they had known they might have changed the way they did things to avoid the same thing happening to their patients … I found it very popular in Wales, and I’m sure the same will happen here’.

Impact of Freedom of Information

In respect of his position as Ireland’s Information Commissioner, the obvious major change taking place this year will be the new Freedom of Information (Amendment) Bill 2014. According to Mr Tyndall, since the introduction of Ireland’s first Freedom of Information Act in 1997 access to information in Ireland has changed considerably. ‘It seems to me that Freedom of Information has transformed the way we look at public services. You’ll look at any of the newspapers today – you’ll find that a lot of the stories are driven by information that has been accessed through the FOI Act, and of course, people have also been able to get information about themselves and reasons for decisions that have been taken that have affected them.’

Regarding the controversial changes made in the 2003 Act, Mr Tyndall agrees that they have deterred applicants; ‘Emily in particular spoke about the restrictions created by the current legislation, the Act we’re currently working to, which did restrict access to information compared to the previous arrangement’. He welcomes the crumbling of a number of those restrictions; ‘The new Bill is going to extend access, and that can only be a good thing’.

Another source of controversy had been the costs for access to information, which some argued were a way to reduce nonsense requests and time wasting, whilst others admonished the fees, saying they were undemocratic and served only to hinder access to information. On July 1 2014, the Government proposed the abolition of the €15 fee for making an FOI request, a move which Peter Tyndall welcomes; ‘The charging of fees ran contrary to the spirit and purpose of freedom of information. I welcome the fact that the decision to abolish the application fee brings Ireland’s FOI regime into line with its international counterparts.’

The new FOI Bill will extend Freedom of Information to approximately 100 additional bodies such as the Central Bank, NAMA, NTMA, An Garda Síochána and the Education and Training Boards, amongst others. However, as there are significant variations in the degree to which the Act applies to those bodies, Mr Tyndall does not think that the public’s appetite for information will be satiated. ‘Members of the public may be disappointed when they go looking for particular kinds of records and they find that they are excluded from FOI. For example, it is proposed that only the administrative records of An Garda Síochána will be subject to FOI and that records relating to its core activities will be excluded. Similarly, if you consider a body such as NAMA, which will attract a lot of interest, it is proposed that the Act will not apply to many of the records held by NAMA on grounds of commercial sensitivity. So I think people will be a little disappointed in some instances’, he says.

Commissioner for Environmental Information

Upon being appointed Ombudsman and Information Commissioner last December, Peter Tyndall also took
on the role of Commissioner for Environmental Information, an Office he says needs additional resourcing; ‘I think my biggest issue with being Commissioner for Environmental Information is that the activity has never been properly resourced, so we got additional staff to help cope with the expansion of the Information Commissioner work, but we’ve never had the equivalent for this. I’m just concerned that we would have preferred to see additional resourcing to enable us to do it when we took it on as an extra area of work’.

Fewer resources have inevitably led to time delays in resolving cases. ‘I’ve given a commitment of nothing more than a year old… it’s taking us longer on the Ombudsman side and on the Commissioner for Environmental Information side than I would like, and those are straightforward resource issues. The reality is that you can only work with the resources you’ve got’, he says.

Mr Tyndall says that some requests for environmental information have gone to public bodies which were not expecting them. ‘On environmental information, the first thing is that most people assumed requests would only go to bodies such as An Bord Pleanála. In fact, requests under the environmental legislation have gone to bodies like An Garda Síochána who probably weren’t expecting them. And it’s taken them time to get up to speed on issues like carbon footprint and so on.’ He says that, at times, members of the public attempt to stretch the definition of “environmental information” beyond its boundaries. ‘I don’t think even the legislators probably envisaged some of the ways in which people would be using the legislation to make queries, and oftentimes they’re trying to push the definition as far as it will go and sometimes further than it should go.

Lack of resources, and the consequent lack of training, has impacted the work of public bodies receiving unfamiliar information requests in much the same way as it has in dealing with complaints. ‘One of the impacts of the financial constraints has been that bodies no longer have specialists dealing with complaints, with information requests, or dealing with requests for environmental information, and the consequence of that is that lots of people are having to do it as part of another job, and they don’t have the specialism to deal quickly with it, they often get it wrong unfortunately, and also it just takes time, too much time.’

“I don’t think even the legislators envisaged some of the ways in which people would be using the legislation to make queries”

Some Positive Effects of Recession

According to Mr Tyndall, there have also been some positive consequences arising from the squeeze on the public purse. ‘I think you have to say that public service reform has been in part driven by the very difficult economic circumstances… there has been a commitment to looking at the way we do things, and whether there are better ways of doing things.’ He believes that the current government has been innovative in many of the changes they’ve made. ‘I think this government has been quite reforming – the changes to the Ombudsman Act were evidence of that. Minister Howlin, in particular, has had a strong commitment to reforming the public sector. We’ve seen changes on the Ombudsman’s side. We’re due to see changes on the Freedom of Information side, and I think we’ve got the Lobbying Bill likely to go through soon, and that will affect the Standards in Public Office Commission which I’m a member of.’

Peter Tyndall

Originally from Dublin, Peter Tyndall previously served as Public Services Ombudsman for Wales. He has also been Chief Executive of the Arts Council of Wales, Head of Education and Culture for the Welsh Local Government Association and has worked in a variety of senior positions in housing and social care, most notably in developing housing and support services for people with learning disabilities.

Mr Tyndall has an MSc in Strategic Management from Cardiff University and is married with three daughters.
Two Sides of the Coin -
Building Control (Amendment) Regulations 2014

Jarleth Heneghan and Cassandra Byrne say that the new building control regulations introduced on March 1 2014 will lead to better quality buildings and value for the future. Eoin O’Cofaigh contends that they lack adequate consumer protection.

Building the Future

The new building control legislation has the potential to profoundly change the construction and projects industry in Ireland. It aims to set Ireland on the pathway to an improved building control culture with an increased focus on compliance and regulation. Jarleth Heneghan and Cassandra Byrne outline the changes that the new legislation introduces, and discuss its long term result of better quality and compliant buildings for the future.

The Building Control (Amendment) Regulations 2014 (the “Regulations”) came into effect on 1 March 2014 affecting both public and private sector projects. This followed on from concerns arising from high profile industry cases ranging from contractor insolvencies, defects and fire safety breaches throughout recent years, such as the much publicised Priory Hall development. Much of this has been attributed to below standard adherence to building control across the board, from design to supply of materials and works practices. This highlighted the real need for a more robust building control regime and increased levels of professionals and contractor accountability from the outset to completion of works.

Following a long period of consultation with industry stakeholders, the Department of the Environment, Community and Local Government (the “Department”) published the Building Control (Amendment) Regulations 2014 (SI No 9 of 2014) (the “Regulations”) together with a statutory Code of Practice (the “Code”). The Code aims to provide additional guidance on application of the Regulations. Compliance with the Code will, prima facie, be taken as compliance with the Regulations.

Application

The Regulations are to be read in conjunction with existing building control legislation. The primary purpose of the existing legal framework pursuant to the Building Control Acts 1990 to 2007, the Building Regulations and Building Control Regulations, is to provide for the health, safety and welfare of people in the context of construction and design.

If a valid Commencement Notice is received on or after 1 March 2014 the new building control regime (as introduced by the Regulations) will apply.

Previous Building Control Regime

Prior to 1 March 2014 there was an obligation to obtain Opinions on Compliance with Building Regulations (and Planning Permission) in respect of all works for new buildings or material alterations/extensions/change of use – typically where a fire certificate is required. These have been required to demonstrate good and marketable title for conveyancing and due diligence purposes. However a key feature to note here is that these are Opinions, rather than Certificates. Typically other than Fire Safety Certificates and Disability Access Certificates, Ireland did not have an approval regime – akin to self-certification. These requirements will remain applicable.

Key Individuals: Who’s Who?

There are various new roles identified in the Regulations. The Owner has primary and legal responsibility for the Building. The Builder is appointed to build and supervise the works. The Design Certifier is responsible for designing works, compiling plans and specifications and inspects where appropriate. The Assigned Certifier is a new professional role responsible for jointly certifying compliance with the Regulations and implementing the inspection plan. Ancillary Certifiers include other consultants and specialist designers/sub-contractors. The Building Control Authority maintains the register, procures the validation as well as carrying out risk inspections.

Mandatory Certification

There are four new types of mandatory certificates (in prescribed form) to be completed. It is intended that the new mandatory certification will ensure greater transparency and accountability. Commencement Notice and 7 Day Notice
The form of Commencement Notice/7 Day Notice have been updated. Significant changes have also been made to documentation to be submitted with apply where the works comprise:

- design and construction of a new dwelling
- extension to a dwelling involving a total floor area greater than 40 square metres
- works to which Part III of the Building Control Regulations 1997 to 2014 applies

In such cases, the Commencement Notice and the 7 Day notice must now be accompanied by:

- Outline Plans and Documentation – to outline how the proposed works or building complies with requirements of the Building Regulations.
- Certificate of Compliance (Design) – A certificate (in prescribed form) to be completed by design professionals (the “Design Certifier”), confirming that:
  - it has been commissioned by the Owner to design, in conjunction with others, the building or works and inspect as appropriate;
  - it is competent to carry out the design and coordinate design of others; and
  - plans and other documents have been prepared by it and other design professionals (exercising reasonable skill, care and diligence) to demonstrate compliance with the Building Regulations.
- Notice of Assignment of person to inspect and certify works – signed by Owner.
- Certificate of Compliance (Undertaking by Assigned Certifier) – a certificate (in prescribed form) to be signed by the Assigned Certifier, such as a chartered engineer, registered architect or chartered surveyor. They undertake to use reasonable skill, care and diligence. They should be appointed early to plan inspection and contribute meaningfully to design management. The Assigned Certifier may require specialists for ancillary certificates.
- Preliminary Inspection Plan (including the Inspection Notification Framework).
- Notice of Assignment of Builder – signed by the Owner expertise to carry out works.
- Certificate of Compliance (Undertaking by Builder) - a certificate (in prescribed form) to be completed by the Builder confirming that it has been commissioned by the Owner to build and supervise the works and that it is competent to do so. Builders must also undertake to:
  - construct the works in accordance with plans and other documents detailed in the Commencement Notice/7 Day Notice;
  - cooperate with inspections carried out pursuant to the inspection plan; and
  - certify the works comply with the Building Regulations.

Builders should also be mindful of obtaining necessary ancillary certificates. Currently there is no mandatory registration system for Builders (although on the horizon). A voluntary register has been set up. The aim is to reduce unqualified individuals passing themselves as having requisite expertise.

There is an onus on Owners to establish that Designers, Builders and Assigned Certifiers are competent. They should have regard to the task they are required to perform taking account of the size and/ or complexity of the project or works. Certifiers must possess sufficient training, experience and knowledge appropriate to the nature of work to be undertaken and registration will assist here.

“There is an onus on Owners to establish that Designers, Builders and Assigned Certifiers are competent.”

Certificate of Compliance on Completion

Now, before works or buildings (to which the Regulations apply) can be opened, occupied or used, a validly completed Certificate of Compliance on Completion is required to be validated and registered on the statutory register maintained by the relevant building control authority. This mandatory Certificate of Compliance on Completion must be signed by the Builder and the Assigned Certifier. It should be accompanied by such plans and other documents outlining how the completed works or building differ from earlier submission and how it complies with the Building Regulations; and the Inspection Plan as implemented. Again this illustrates the continued focus on compliance from design stage to works completion.

Validation and Registration

The Regulations include mandatory and discretionary timelines within which the building control authority must respond to validity or invalidity of a Certificate of Compliance on Completion. There is automatic inclusion on the Register where no queries are raised within 21 days.

Building Control Management System

The Regulations introduce electronic filing through a Building Control Management System as the preferred means of building control administration. It will also facilitate building control resources to be applied with more effective focus. It should prove easier access to building control information and increased traceability. It will operate via www.localgov.ie and building control authority websites. By May 2014 over 2,000 registered construction professionals had set up accounts.

Liability

Failure to comply with the Regulations is an offence which may result in the imposition of fines and/or imprisonment, together with potential liability in contract and/or tort. All involved in the process will need to be mindful on how to best manage their liability.

Insurances

Increased responsibilities under the Regulations are likely to necessitate additional insurances in certain circumstances, such as professional indemnity (PI) insurance. The CWMF (Capital Works Management Framework) for public sector construction contracts has issued Guidance in this area and suggested levels. A new development is the maintenance of PI insurance by contractors, particularly on all public works from 1 January 2015. This represents a greater layer of insurance protection for Owners, Designers, Builders and end users in relation to the design and construction of building and while it may have outlay implications this is offset by the protection across the chain of responsibility.

“...a greater layer of insurance protection for Owners, Designers, Builders and end users in relation to the design and construction of building...”
Conclusion
The details and nuances of Regulations will need time to bed down, be further refined and should be supplemented by training to get the best results. Increased efficiency in document management will hopefully allow building control authority resources to better focused on the management of the process and greater transparency for end users. The new roles and increased responsibilities for all industry stakeholders, including in the public sector, aim to provide greater quality assurance. All involved in the process will need to seek advice on how their obligations and liabilities are best managed. Contracts will need to be updated to reflect the changes and best address the requirements of the Regulations going forward. All of this should contribute to an improved culture of building control practices and greater protection and value for the future.

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Failing to Protect the Consumer

The new building control regulations aim to improve the culture of building control in Ireland with a focus on care and safety. However, Eoin O’Cofaigh argues that these regulations are flawed and that they fail the consumer. He proposes a system which he believes would provide consumers with the protection needed.

The building regulations were introduced in 1991 after the ‘Stardust disaster’, which did much to raise building standards. But construction regulation in Ireland is reactive, and in 1992 and repeatedly afterwards, architects – among others – called for better enforcement of the regulations. Despite Ministerial promises, this never effectively happened. The €30.75 per house Commencement Notice fee charged in 1991 today stands at ... €30. It took the pyrites and Priory Hall disasters to introduce the next round of changes. An Irish solution to an Irish problem:- “When there’s a problem with enforcing a law: change the law.”

The 2014 regulations took effect from 1 March. They respond primarily to disasters in the speculative residential sector and have the laudable goal of improved consumer protection. However, they affect not only residential, but all projects requiring a fire safety certificate. This includes almost every new-build project, many non-residential extensions, and internal fit-outs or alterations of schools, shopping centres and other buildings. Furthermore, the regulations are not adapted to different forms of construction project procurement. One single “Assigned Certifier” certifies compliance with building regulations for the entire construction. The regulations do not allow for parallel main contractors, or shell-and-core and subsequent fit-out contracts, for example.

What’s wrong with the Building Control (Amendment) Regulations?
The Building Control (Amendment) Regulations 2014 impact on every significant building and interior fit-out project and not just on the speculative residential sector where the problems started. By restricting the persons who the building owner may appoint as Design Certifier and as Assigned Certifier to registered architects and surveyors, and chartered engineers, most of whom work outside construction, the regulations confer de facto control over the majority of building design in Ireland on these groups. Certificates are required in return confirming that everything designed and built complies in every detail with the building regulations, and places the certifier between the house buyer and the builder. However, the regulations exclude experienced architectural technologists from earning a livelihood in this field any longer.

By requiring a competent builder to be appointed, the centuries old tradition of ‘self-build’ in rural areas is stopped, a tradition still flourishing elsewhere, including the UK. Nothing is done for a new house buyer except the setting up of a paper trail to follow in the event of building failure. They distance the local authority building control inspectors from the practicalities of the entire process. They fail to implement all relevant recommendations of the Pyrite Panel report. They expose FDI intellectual property to internet theft. Furthermore, they introduce two key gateways to every project: a Commencement Certificate and a Completion Certificate, which the local authority can reject as invalid, putting the opening of new projects at
The New Regulations and Pyrites
The Pyrite Panel, set up to examine the ‘pyrite problem’ and to recommend how to avoid that problem in the future, reported in June 2012. While the Priory Hall and pyrite scandals differ, they both impacted most on dwellings built for sale, and were the genesis for the 2014 regulations. The regulations fail to implement relevant recommendations in the Pyrite Panel Report, while those same recommendations will be as important in preventing future Priory Halls as they are to addressing the problem of pyrites.

“Recommendation 18: a ‘Mandatory certification system’ recommends that “the system of independent inspections, carried out by the building control officers, should be strengthened to complement the mandatory certification process for buildings”. No provision is made in the regulations for strengthening the system of independent inspections by building control officers to complement the mandatory certification process. For the Pyrite Panel, these recommendations complemented each other; and for Priory Hall residents, independent inspections by building control officers might have made all the difference. These recommendations are complementary because an architect cannot enforce good building on a greedy developer, or on an incompetent contractor, perhaps not selected by the architect in the first place. The entire construction contract system gives the architect power only where the architect is responsible will create a “blame trail” and allows experienced technologists to participate; guarantee local authority-backed inspection of 100% of buildings sites; solve the intellectual property issues; and cost about €2m per year, being paid for by the developer and through increased Commencement Notice fees. To see such a system, take the boat to Holyhead.

The principles behind a better system
• In 2012, submissions by non-construction sector stakeholders (NCA) and the Pyrites Panel said that an inspection system independent of the designer and the contractor is needed.
• There is wide consensus across consumer organizations, supported by World Bank and European Consortium of Building Control studies, that self-certification as in S.I. 9 will not work, particularly for speculative residential development. It does not work in any other sector of the Irish economy.
• The unintended consequences for non-residential projects, especially complex projects and FDI projects, are such that the system unnecessarily increases costs and uncertainty.
• The State should not primarily be liable for the cost of building control but should it be liable for defects in construction.
• Simple measures to improve and sustain design and construction are what is required, particularly in speculative residential development, backed by compulsory latent defects insurance to guarantee redress in the case of the small number of residual defects, or in the case of financial failure of a development or construction company.

Recommendation 21: General Insurance issues, recommended (b) “a requirement for project-related insurance whereby cover for each specific project is available and adequate and is related to the project only”. The regulations should have been written to implement this recommendation, by requiring evidence of project-related insurance at the time of commencing the works. Even if mandatory latent defects insurance is unnecessary on every project, it should be implemented in projects involving dwellings for sale. By not implementing this recommendation, the regulations ensure litigation and distress for home-owners will continue to feature where buildings go wrong.

What should be done?
The Building Control (Amendment) Regulations 2014 (S.I. 9 of 2014) should be scrapped. In its present form it impacts unnecessarily on all sectors of construction, imposes unnecessary cost and hugely complex paperwork, and achieves nothing except monopoly conferral on a small number of construction sector actors in return for unacceptable levels of liability. A system of independent third-party inspection, by experienced architects and engineers paid for by the developer but licensed by and answerable to the local authority, would achieve better results. It would level the field for the self-builders; allow experienced technologists to participate; guarantee local authority-backed inspection of 100% of building sites; solve the intellectual property issues; and cost about €2m per year, being paid for by the developer and through increased Commencement Notice fees. To see such a system, take the boat to Holyhead.

Proposal
I propose to replace the regulations with a new statutory instrument along the following lines:
• Set up a register of “Approved Inspectors”, answerable to the building control authority. This register would be open to architects, architectural technologists, appropriately qualified engineers and building surveyors with adequate experience. Admission should be competency-based with knowledge of building regulations and building construction. Inspectors would carry appropriate professional indemnity insurance.
• The system would initially apply in the speculative residential sector and to the one-off house. The Inspector audits the design and inspects the construction works for compliance with building regulations. Inspection of designs would include Parts B and M for one-off houses. Pending review, fire safety and disability access certificates would still be required for apartments.
• The Design Team would prepare designs and inspect the works as done at present. The contractor builds in compliance with the building regulations as is routine. The Inspector reports to the local authority at the start and
completion of construction, confirming that he has inspected the design and construction and found nothing wrong.

- If the Inspector finds non-compliant design, he refuses a design certificate until he has been given amended design drawings. Given that the architect will have to explain any delays to his client, the architett will have to make sure the designs are right in the first place. This raises design standards. If the Inspector finds non-compliant construction, he tells the contractor and the architect, and has the ultimate sanction of a “Cease Works Notice”. He will refuse a completion certificate until the matter is put right.

- The Inspector inspects all designs and sites. On top of this, the building control authority profiles risk, and inspects a small number of designs and building works as indicated by its risk analysis to ensure that the system is working. If the Inspector is negligent, he can be struck off the register and be sued. Latent Defects Insurance, paid for by the developer with a one-off up-front payment, picks up any defects which get past.

Approved inspectors, independent company auditors, and the UK

A developer wants to build a building. The Approved Inspector operates independently of the contract administrator (Architect or Engineer) and has statutory authority. The Inspector inspects the design and the construction and signs off on them. The designs are lodged at the Building Control Authority. The Inspector is paid for by the developer, and is answerable to the Building Control Authority. The architect, engineer and builder have the complex task of designing and building the building; the Inspector’s task is to focus exclusively on building regulations compliance.

This Approved Inspector system resembles the “Approved Inspector option” in the building control system in England and Wales. The system is also the same as that in Northern Ireland except that there, the Approved Inspector, answerable to the local authority, substitutes for the N.I. building inspector in local authority employment.

The cost to the State is minimal since the developer pays the Approved Inspector. The only cost to the State is to maintain the register and monitor the operation of the system. This can be funded by raising the Commencement Notice fee. The learning experience for a young architect of having their designs audited by an experienced architect or engineer will be immensely fruitful and drive better design standards. Contractors will also learn by having an experienced Inspector arrive on site, who will be concerned with nothing except building regulations compliance, with local authority backing. This system gives the State an additional layer of protection since the Inspector with annually renewed professional indemnity insurance stands between the building defect and the exchequer.

The system can solve problems around experienced technologists whose livelihoods are undermined by S.I. 9. The system also solves the self-builder issue. He receives a straightforward independent inspection system which he pays for. If his designs are good enough, they pass. If not, he must prepare an adequate design. If his building is good enough when the Inspector arrives, he can continue with his plans. If not, he must rectify the defects just as anybody else would.

The system solves the FDI issue by allowing the technologically advanced (example:- Intel) FDI project proceed under self-certification. It does not require any change to construction contracts, which have still not been sorted, and hence it will not cause construction sector delays.

The learning experience for a young architect of having their designs audited by an experienced architect or engineer will be immensely fruitful and drive better design standards.”

Why is this system better than that in S.I. 9?
(i) Better for the State
The system will deliver better design and construction, not just better paperwork.

(ii) Better for the Consumer
Per the submission of the National Consumer Authority, this system will give better results than a system of self-certification. The consumer is protected from loss with a no-fault system of redress and no litigation is needed. The person who buys or rents a new home gets independent third-party audit by experienced professionals, answerable to the local authority.

(iii) Better for the Construction Sector
It will drive higher standards in the construction sector through dedicated experienced inspectors who with larger and recurring workloads will feed back into better design and better building. ‘Through feedback to the local authorities of the inspectors’ experience across many designs and sites, systemic problems will be spotted earlier.

Conclusion
A system as outlined above can be set up quickly. It involves no major change in existing contractual and legal structures. It needs no primary legislation: the Building Control Act already provides for the designation of such persons to act in this capacity. Such a system will have the support of the consumer organisations and the public.

Eoin O’Cofaigh has 30 years’ experience of architectural practice in Ireland. He was President of the RIAI in 1998-1999 and of the Architects’ Council of Europe in 2000. He contributes the section on “Building Control” in the publication “Construction Projects: Law and Practice”. After 12 years’ absence, he was re-elected to the RIAI Council last January.
Corporate Governance in the Public Sector

Sinéad O’Loughlin reports from the Public Affairs Ireland conference Corporate Governance in the Public Sector, held on May 29th at the Shelbourne Hotel in Dublin. This conference dealt with the topic of corporate governance in the public sector and in the NGO sector, addressing many of the challenges currently facing public sector and publicly-funded organisations in Ireland.

Pat Rabbitte TD, Minister for Communications, Energy and Natural Resources, delivered the keynote address.

‘Corporate Governance in the public sector has never been more topical and I think more relevant’, Minister Rabbitte began. He highlighted that focusing on corporate governance issues solely within the public sector would be an oversight. ‘It has been pointed out before that the bank at the heart of our economic collapse and that criminal trial was in breach of at least three provisions of the relevant corporate governance code, which currently operates only on a “comply or explain” basis’, he said. In 2009 the Labour Party proposed a Corporate Governance Code of Practice Bill which eliminated non-compliance. ‘It would have made compliance with corporate governance a condition for listing on the Irish Stock Exchange’, he said, ‘If the opportunity presents itself, I will certainly be pushing for its inclusion’.

Minister Rabbitte does not believe public sector reform can be separated from central government and departmental reform. To describe the government’s approach, he first outlined the 2011 backstop; ‘the inherited economic wreckage’, and ‘the loss of expertise’ resulting from decentralisation. Yet, this has been ‘an opportunity to redesign our public services’. ‘The wide civil and public services reform agenda is aimed at transforming the civil and public service’, he said, referencing changes such as the new Freedom of Information Act, regulation of lobbying bill, whistleblowing protection legislation, extension of the Ombudsman’s remit, and the review of the legal framework for accountability. In relation to the new Freedom of Information Act, Minister Rabbitte said he believes the state-owned monopoly companies ESB Networks, Eirgrid and Ervia should be covered. These reforms intend to address citizen mistrust in political and administrative structures. ‘Trust is a fragile attribute’, he said, ‘It can be damaged, sometimes fatally, by a single catastrophic failure, but can also be just as fatally undermined by being constantly eroded by cynicism and a focus on the negative.’

Minister Rabbitte discussed accountability, and observed the ‘corporate veil which can descend upon an entire department’. ‘Because of this, accountability does not work as it should’, he said. An independent panel examining accountability will submit its report shortly. Minister Rabbitte is eager for greater transparency; ‘My own vision is one which redefines the relationship between ministers and their departments so it is possible to identify relevant individuals and their roles, to recognise good performance … and, where necessary, to identify what went wrong’.

Recent lessons have confirmed competency-based appointing of board members as the only reasonable route; ‘Only people with real and relevant skills’, he said. ‘You should not be on a board if you do not realise and accept that you are joining an institution whose key function is to hold others to account’. The Code of Practice for the Governance of State Agencies is the defining framework and potential board members must now present proposed approaches to the Oireachtas.

Minister Rabbitte said the question of board membership naturally leads to the issue of directors’ duties, and ‘to whom these duties are owed’. He discussed the dilemma of civil servants being expected to disclose corporate boardroom information to Ministers; ‘Which master does the civil servant serve; the Minister or the company?’. Section 229 of the new Companies Bill outlines directors’ fiduciary duties; ‘The section provides that a director must act in good faith’, Minister Rabbitte said. ‘In the interests of the company as a whole’. A director may have regard to the interests of particular members who have appointed them, by way of entitlement to do this under the company’s constitution or shareholder’s agreement.

According to Minister Rabbitte, in 2010 a supplementary protocol to the Code of Practice outlined a procedure for civil servants on boards of non-commercial state bodies to report problems to Ministers to ensure that a director’s fiduciary duty did not prevent a ministerial nominee from reporting. Minister Rabbitte indicated that this same protocol had not been added to the commercial State sector due to concerns in this sector of adverse consequences to business by ‘flows of commercially-sensitive and confidential information from directors … to a Minister’.

He affirmed that the Companies Act will enable state company directors to have regard to both company interests and the Ministers, and he lamented the exemption of companies not created within the Act. He finished by asserting the faith he has in the reforms; ‘I have no doubt that as they cumulatively start to take effect, they will make a step-change in how we deliver to the public’, he said.
Kevin Prendergast, Head of Enforcement at the Office of the Director of Corporate Enforcement (ODCE), discussed the duties and obligations of directors in publicly-funded organisations. ‘The concepts are well-embedded’, he said. ‘However, how they apply in the public sector and the specific pressures that pertain are worthy of further debate’. Echoing the Minister, he said that his Office cannot regulate companies outside the Companies Act. However, if one of these companies sets up a subsidiary, those operations may fall inside the structures of company law. Mr Prendergast also observed that common law in the publicly-funded sector is an area with ‘scope for enormous damage, both reputational and financial’. There has been a recent surge in the number of public sector organisations establishing separate companies. ‘I don’t think there has necessarily been adequate comprehension of what that entails’, Mr Prendergast said. Being a separate legal entity with separate liability provides companies with protection, but it also compels the release of information to the public; ‘They are entitled to know that there is a company law construct in place, and therefore that your obligations and their rights under company law exist and have to be respected’, he said. Many aspects of company law are activities an organisation would carry out regardless such as keeping a record of its activities and subjecting itself to independent audit if it is in receipt of public funds for example. However, what is significant is that company law criminalises non-compliance. Limited liability companies in financial trouble will be scrutinised and where a company is insolvent it must comply with the required legal obligations and be wound up in the interests of creditors. Common law duties have generally been established in the courts through companies taking legal action against directors. Common law places the interests of a company above those of an employer, an authority, a State body or appointing department. However, in State bodies and local authorities, Mr Prendergast lamented; ‘That understanding is not always there’. In relation to these common law duties, including for example obligations of expertise, profession and care, Mr Prendergast said the ODCE cannot enforce these as they are not a criminal matter, and that a company must take a director in breach of these to the High Court. However, court costs, as well as fear of negative exposure discourages many companies from taking cases. ‘If I’m on the board of your company, and your company is suing me, I won’t be going down without a fight’, he said.

Mr Prendergast discussed the new Companies Bill, which aims to ‘ease the regulatory burden for the small private company’. The only significant change for companies limited by guarantee, which make up the majority of publicly funded companies, is that audit exemption has been introduced for certain companies ‘below the thresholds and subject to the request of one member’. There is no change for those in receipt of significant funding since funders normally require audited financial statements in any event. Another important aspect is the extension of fiduciary duties whereby the director may have regard to the member who appointed him or her. This extension ‘clouds’ the issue to a certain extent, according to Mr Prendergast, and its significance will only be clarified if a case arrives in court.

Finally, Mr Prendergast outlined some corporate governance lessons learned from recent court decisions. In common law, it is recognised that non-executives rely on their executive directors to some extent, and that the courts have historically recognised that difference. But recent case law has changed this; ‘We are seeing an expansion of the duties and obligations of non-executives’, said Mr Prendergast. The new Companies Act will mean non-executives will place increasing reliance on the executive board. Mr Prendergast said; ‘NED’s must actively ensure that executives are held to account, so that you’re satisfied you’re not legally exposed’. In defence proceedings it is not permissible to amalgamate wider financial issues, for example the social purpose and origin of funding, with the company’s, nor will obtaining legal or financial advice be an adequate defence. Mr Prendergast reiterated the significance of the extension of fiduciary duties, and reminded company directors to keep abreast of changes taking place via legislation and the courts.

John McGuinness TD, Chairman of the Public Accounts Committee, said he was there ‘to reflect on the work of the Public Accounts Committee and the changes that are taking place in response to a demand from a general public to see far more transparency and accountability within the public and civil service’. As an owner of a small private business with knowledge of the daily concerns business-owners have, when Mr McGuinness joined the PAC in 2002, he said he did not see evidence of the same concerns reflected in the civil servants or agencies coming before the Committee. After the 2011 election, Mr McGuinness said that he ‘was hoping that the reform this country needs would actually happen in a very significant way’. This has not been the case; ‘There is no reform - … the Public Accounts Committee is still in business’, he said.

Mr McGuinness said that a reform of the Public Accounts Committee should be ‘the first port of call’, and he cited examples to justify this call including the lack of access of the Committee to scrutinise local government spending and the Poolbeg Incinerator project. He questioned the lack of a reporting financial structure since the health boards were brought into the new body of the HSE. He commented that the members of boards are still often unaware of the day-to-day running of their companies, which he said leads to a loss of money and a breakdown in trust. He also called for greater protection for whistleblowers, particularly upon their actions becoming public knowledge. Mr McGuinness went on to indicate that an anonymous report about a third level institution had recently been sent by a whistleblower to the Public Accounts Committee which contains some potentially damning information. ‘If a fraction of it is true … legal action must be taken to make sure this does not happen again’, he said.

Finally Mr McGuinness encouraged civil servants to blow the whistle; ‘Look at what you can do to inform your Minister and senior personnel to say ‘Stop!’ in the interest of the Irish people’. He commented that the Public Accounts Committee has faced ‘huge obstacles’ in gaining ‘deep down’ access into public accounts, due
to a stonewalling of the system; ‘A bit of theatre is what is happening’. He emphasised that promotion within public bodies should only be competency-based and ‘not because of longevity or who you know’.

Pat Downes, Chairman of the Corporate Governance Association of Ireland, outlined the principles set out by the UK Corporate Governance Code; the code against whose requirements Irish listed companies must either “comply or explain”. It sets out principles of governance for organisations under the headings of Leadership, Effectiveness, Accountability, Remuneration, and Relations with Shareholders. Mr Downes compared the Code of Practice to a ‘health check’, saying it delivers valuable assurance to stakeholders and shareholders; a balance of autonomy and accountability; robust procedures in return for investment; and flexibility, since points of the code can be refined or augmented.

Mr Downes outlined the key aspects of the Code of Practice for the Governance in State Bodies, whose first set of guidelines were drawn up in 1992, with further updates and revisions in 2001 and 2009. In terms of the induction of new directors, this Code of Practice aims to demystify their role. ‘It is very specific in terms of new leader induction, listing ten separate items’, he said.

In relation to the requirement of Committee oversight in state sector corporate governance, Mr Downes said that the state sector is now ‘mindful’ that it has to engage with Committees, and be able to stand over its activities. The Code of Practice contains what he describes as ‘a canon of requirements’ for directors to be aware of, as well as a rolling five-year review. Strategically, he said, echoing what Mr Prendergast had earlier emphasised, corporate governance regulations are requiring greater active involvement on the part of non-executive directors; ‘There is more granular involvement by non-executive directors in recent years to ensure that the exercise is fit for purpose’. He went on to touch on the concept of risk management, saying that the quarterly requirement by the Code to update these is very practical due to changeable factors; ‘Depending on time of year risk might not be registered. Sometimes it’s hard to reflect weather on a register, or fire risk on bogs in summer’, he said. Mr Downes also observed that public sector suppliers should pay attention to the changes that have taken place in relation to Green Public Procurement, whereby buyers are increasingly taking environmental factors into account in line with the Government’s ‘Green Economy’ objectives.

To finish his talk, Mr Downes echoed the ‘Which master you serve’ dilemma Minister Rabbitte had spoken about earlier, saying that ‘the age-old argument of representation versus nomination’ has been troublesome. He also mentioned that he welcomes the engagement of the focussed entity, New Era, the body in charge of overseeing the corporate governance of ESB, Bord Gáis Eireann, EirGrid, Bord na Móna and Coillte. ‘It copperfastens the decision-making process’, he said.

Partner at Mazars, Corné Mouton’s talk discussed two key and intrinsically-linked elements of corporate governance; risk management and internal audit. Firstly, he dealt with risk management, commenting that ‘there is more to do’ in this arena. According to Mr Mouton, effective risk management must identify all relevant risks including such those that are environmental, as well as risks to reputation. ‘The public perception created around an event can cause lots of damage’, he said. In relation to risk management, Mr Mouton went on to connect risk management with the internal audit process, which he says ‘can provide guidance in terms of risk management’. The audit of risk management framework and processes gives assurance to boards that appropriate controls and procedures are in place. Mr Mouton said that the focus of internal audit work has changed over the last decade, evolving from examining the systems behind transactions to risk-based auditing, which aims to align internal audit plans to priority organisational risks. He pulled up a bar chart for which Irish organisations had provided data about the top risks they face compared with the risk areas in which their internal audit staff spend the most time. In some cases the internal audit plan has not been aligned with the top organisational risks; for example, although more than 50% of organisations considered ‘economic uncertainty’ as one of their top risks, for fewer than 20% of respondents was this one of the top risk areas in which they spend most time. The chart also demonstrated an over focus by internal audit on the area of data privacy and security relative to its perceived risk factor. This lack of alignment is why Corné Mouton concluded his talk by pointing to the need for internal audits and risk management to work in conjunction;
‘They need to work as an integrated function’, he said. Risk management is high priority; ‘It needs to be embedded across an organisation’, he said. To finish, he reemphasised the importance of knowing who in the management and board is responsible for risk management.

In the wake of recent upheaval and media controversy in the publicly-funded NGO sector, Deirdre Garvey, CEO of The Wheel – this sector’s representative body – spoke about the creation of a new culture of strong corporate governance and compliance within those organisations. ‘I’m here to talk about culture’, she said. She spoke of the ‘sudden and bewildering change in public attitudes’ since the December 2013 revelations about the CRC. ‘The public perceive us as having a culture of closed-ness, that the salaries of our Chief Executives are too high’, she said. ‘When did charity become a dirty word?’

Ms Garvey went on to outline the realities for the sector’s workers that this change in perception has brought about. ‘There definitely is confusion within the charity sector of what to do’, she said. She referenced a survey of 297 charitable organisations undertaken by The Wheel between 15 April and 7 May 2014 in which 61% of respondents said that recent publicity has negatively affected fundraising. Two-thirds of respondents said that there has been a rise in demand for charitable services. Ms Garvey said that the action plan to repair the damaged reality for the charity sector should be three-pronged; actions by charities, actions by government and actions focused on the public. One such needed action on the part of Ireland’s 8,500 charities is a straightforward reporting of financial activities. ‘We need to make sure we are posting user-friendly reports in terms of progress – No stories without numbers, no numbers without stories’, she said. The 2012 Governance Code for community, voluntary and charitable organisations is the new guide for organisations to adopt and follow; a ‘journey’ which Ms Garvey commented has taken two years for The Wheel to complete. In reference to actions by government, it must ensure that the Charity Regulator is well-resourced and effective and ‘it must stand up for the important role of charities’ amidst the deluge of negative publicity. This last point is tied to the domain of actions focused on the public, with Ms Garvey deeming it necessary for the public to be provided with a ‘reality check’ via media and direct communications on the importance of this sector to society, as well as on the realities and complexities of running charitable organisations.

In her final statement, Ms Garvey said that if an organisation is in possession of a CHY number, two points are clear; it is charitable in nature, and it has passed a public benefit test. Financially, this brings with it an inevitability; ‘Every cent of the money must be treated as if it were public money, no matter where it comes from’, she said. She finished her talk by reiterating the importance of organisations telling the truth in a straightforward manner in order to rebuild trust; ‘It’s too important to the work that our organisations do’.

John Devitt, Chief Executive of Transparency International (TI) Ireland, spoke about whistleblowing in a corporate governance context. He pointed out that TI is probably best known for its Corruption Perceptions Index, an annual index which draws on 13 expert assessments and surveys of businesspeople to rank 176 countries by perceived levels of public sector corruption. In the 2009 TI Ireland study of our National Integrity System – a term for the system which encompasses the key institutions, sectors, culture and activities which contribute to a society’s integrity, transparency and accountability – whistleblowing was highlighted as a cornerstone of this system; ‘We identified whistleblowing as the most important measure to be introduced’. The study identified the need for all-inclusive whistleblowing policies and protections to be implemented across the public and private sectors, instead of the piecemeal sector-by-sector legislative approach in usage at that time.

Regarding the whistleblower legislation already in place ‘there are twenty pieces in Ireland’ offering different safeguards and creating a great deal of confusion, he said. Mr Devitt is disbelieving of the 2007 Company Law Review Group’s work which argued that ‘there were no serious failings with corporate governance in Ireland’ and ‘there was no reason for enhanced whistleblower protection here’. John Devitt defines whistleblower as ‘someone who truthfully reports a concern they become aware of during the course of their work about harmful activity or the risk of harmful activity that their colleagues or employers are engaged in or have failed to address’. He observed that 40% of cases of fraud in the US and 50% in Switzerland are exposed by whistleblowers.

Mr Devitt believes that halting corruption is a cyclical approach whereby its prevention, its detection, the actions taken against it, and the changes brought about are cyclical components which directly affect one another. He welcomes the Protected Disclosures Bill 2013, which TI Ireland has advised Minister Howlin’s Department on; ‘It is the first Bill anywhere to use Transparency International’s Principles for Whistleblower Legislation in its creation’, he said. This Bill protects most categories of whistleblowers against unfair dismissal and penalisation, provides right of action in tort for damages caused by making a disclosure, and grants civil and criminal immunity. Employees can disclose concerns to an employer, a legal advisor, and public sector workers can also disclose concerns to the relevant Minister. Whistleblowers need to be able to give a credible reason for believing their concern to be true; ‘This is to make the information reasonably believable and for the allegation to be considered true’, he said. Mr Devitt commented that the right of tort action is an important aspect of the Bill, as well as the provision of interim relief, and the deletion of the ‘Good Faith’ requirement which means that a whistleblower’s motive is no longer legally relevant. Members of the Defence Forces will now also be protected. However, whistleblowing is not the sole aspect of strong corporate governance. ‘Whistleblowing is not going to promote good governance on its own’, he said. Mr Devitt thinks that if strong values are demanded, asserted, adopted and applied by organisations, this provides support to whistleblowers: ‘In order to underpin the rights of a whistleblower, these values need to be institutionalised’.
Right to Legal Advice in Detention: What about the Solicitor?

Since May 2014, where a detainee requests, solicitors can sit in on Gardai interviews with their clients. This change means that detainees can receive valuable support and advice in answering questions. For solicitors it represents additional work in terms of money, time and intellect. Dara Robinson believes that the abrupt implementation of this new rule has failed to take many practical aspects of the detention process into consideration.

Solicitors perform many and varied tasks and functions in society, from preparing simple wills to running complex multi-party litigation. Despite a number of high-profile cases tending to portray them in a poor light, the profession is generally held in good regard. Much of the work done by solicitors is low-key, and yet crucial. Recent developments in the sphere of criminal law have raised the profile of one facet of the work - the hidden task of attending on suspects in Garda Stations.

Historical antecedents to the new ruling

Until 1984, when the practice of detaining suspects under the guise of “assisting Gardai with their enquiries” was legitimised in the Criminal Justice Act of that year, the only power to question detained people about their suspected involvement in crime had lain in the Offences against the State Act. Something of a sledgehammer to crack a nut, the latter also suffered from its inherent limitations – it could only be used to arrest people for a “scheduled offence”, in practice those offences, such as firearms or explosives, traditionally associated with militant Republicanism. Consequently, there was no power to detain for questioning those suspected of, say, burglary or drugs offences. The 1984 Act also acknowledged implicitly that, more and more, the focus of many serious criminal investigations lay in the interrogation of detainees at the Garda Station.

30 years on, all interviews at the Garda Station are – or should be – electronically recorded. The State has a primitive means-tested system of payment, at extremely low rates, for the attendance at Garda Stations by solicitors to deliver legal advice. A much-criticised Supreme Court decision from 1999, Lavery, ruled out the entitlement of suspects to have their solicitors present during interviews. But subsequent developments at the European Court of Human Rights in Strasbourg, and in other jurisdictions in Europe, together with EU provisions in criminal procedural law, made the overturning of the Lavery decision inevitable. Then, in early May, without any prior consultation or notice, the DPP issued a notification to Gardai and the Department of Justice that henceforth solicitors should be permitted to sit in on the interviews of their detained clients, where the detainee requests it. This change was precipitated by rulings in the Supreme Court in March, in the cases of Gormley and White, heard together, in which Judges Clarke and Hardiman made it clear that Lavery would be overturned if challenged. The DPP was thus merely anticipating what was bound to come.

The reality of detention for all involved

The extent of Garda powers of detention for the “purposes of the investigation”, usually meaning for the interrogation of suspects, may not be generally appreciated. Most drugs offences can give rise to a (theoretical) detention period of seven days, as can murder involving the use of a firearm. Farther down the scale, suspected offences falling within the ambit of the Offences against the State Act can result in a 72 hour detention, while the 1984 Act is limited to 24 hours. The Supreme Court, through Judge Adrian Hardiman, has emphasised the constitutional position of all such detainees, noting that “...all of the people are presumptively innocent; most are innocent in fact and are not even charged at any stage”. All of that being so, it is reasonable that detained persons should retain as many of their basic entitlements as possible, including of course their right of access to legal advice.

“it is reasonable that detained persons should retain ... their right of access to legal advice”

Many detentions can involve multiple interviews over at least a whole working day. Others will see an identification parade conducted, the highest stress point of a criminal lawyer’s practice. The schedule of neither suspect nor lawyer plays a part in the time of an arrest, so these can often happen at unsocial hours. A well-planned day for a solicitor can be thrown into chaos by the demands of an open-ended visit to a Garda Station. A late night interview under caution does not automatically translate into a lie-in the next day. The physical working conditions rarely match the most basic office standards. Air-conditioning, for example, is almost non-existent. The atmosphere can be hostile, depending on the attitudes of the investigators and detainee. Defence practitioners now find themselves thrust into a rapid process of learning and change – as indeed, although to a lesser extent,
do investigating Gardai. The rates of pay on offer from the State are less than a third of the recently published hourly rates for, say, Nama-related work. Providing an on-call, out of hours, service plays havoc with social, personal and family life.

Caught between a client, a detective and an interpreter
The work is intellectually and emotionally demanding. Legislative developments have steadily eroded the traditional “right to silence” by the extension of “inferences” provisions, which threaten adverse consequences at trial for suspects who refuse to answer questions at the Garda Station. Caught between a client needing advice, and a detective looking for answers, the demands can be enormous. As Judge Hardiman has noted, “... the professional service required of a solicitor [at a Garda Station] is a complex and specialised one, requiring not merely a knowledge of the law, but a wide experience in the relevant area... The criminal law, and the law of evidence in criminal cases... has become strikingly complex and specialised in recent years..... There is rarely adequate time, and never an appropriate atmosphere, for the taking of such instructions in the circumstances of custody in a garda station.” Clients, isolated from the outside world, can be reliant on their adviser for moral, as well as legal, support.

Occasionally, the detainee is not of English mother-tongue, and a further complication, the interpreter, may be introduced into the equation. Standards of interpretation vary from the excellent to the very poor. The system of contracts whereby the State secures the services of interpreters for situations such as these has not led to a minimum level of quality control. In any event, having to, firstly, take instructions through an interpreter, and secondly, conduct an interview through the same process, add further layers of stress and delay to the whole process.

The risky business of cutting corners
Although the whole of the system of investigation and prosecution is vested in the public sector – DPP, An Garda Siochana, Forensic Science Laboratory, - the defence side of things has been sub-contracted to the private sector by way of the system of Legal Aid. There is no equivalent of the public defender system, which has been examined – and ruled out – by the State, largely on the grounds of cost. Legal Aid for criminal defence work is notoriously underfunded, and the subject of successive rate cuts since the recession began. Defence lawyers are obliged to tolerate, and suffer financially from, inefficiencies in the public sector – delays in Court proceedings, needless adjournments, waiting around in prisons to see clients. Both Judges Clarke and Hardiman impressed upon the State a need to “organise its systems” to provide appropriate, in effect immediate, professional support and advice for detainees, hinting, at, for example, the provision of a “duty solicitor” rota, such as exists throughout England and Wales. The State has taken no steps in that direction, and the proposed rates of pay, for unsocial hours in particular, threaten the availability of legal advice at certain times and in various areas. This is, for the State, a risky situation, and something of a gamble. It will only take one bad case, a miscarriage of justice perhaps, to expose its failure to provide properly for the future.

Dara Robinson is joint senior partner in the long-established Dublin criminal law firm Sheehan and Partners. He has practised in the field of criminal defence for over 30 years.

As Judge Clarke put it, “It seems to me ... that the point at which the coercive power of the State, in the form of an arrest, is exercised against a suspect represents an important juncture in any potential criminal process. Thereafter the suspect is no longer someone who is simply being investigated by the gathering of whatever evidence might be available. Thereafter the suspect has been deprived of his or her liberty and can ... be subjected to mandatory questioning for various periods and .... may be [required], under penal sanction, to provide forensic samples”. Underlining those coercive powers, Judge Hardiman noted that "... the detention of suspects for the purpose of interrogation often occurs very early in the morning. It may occur properly, discretely, tactfully ....But it may occur in circumstances of unecessarily heightened drama, sirens, breaking of doors, disturbance and trauma to spouses and children, and the rushing of handcuffed suspects out of their houses and into official vehicles.” He described conditions of detention in Garda stations in graphic and uncomplimentary terms - "... Many cells in Garda stations are frankly unsanitary and in a condition such that no normal person would wish to spend time there. Foul smells are not uncommon. ... The seating or bedding may be such that no reasonable person would wish to use it.... The noisy closing of a cell door, and the turning of a heavy key, leaving one alone in fetid semi-darkness is not an ideal preparation for what may well be the most important confrontation of one’s life".

“leaving one alone in fetid semi-darkness is not an ideal preparation for what may well be the most important confrontation of one’s life”
Lobbying Bill: A targeted measure but not a cure-all

Lobbying of governments and policy makers is a valid and vital part of policy formulation throughout the democratic word. When undertaken with integrity and transparency, says Nuala Haughey, it is a legitimate avenue for various interest groups to be involved in deliberative processes. Here, she discusses what the Registration of Lobbying Bill 2014 will mean for all those involved in lobbying activities.

A by-word for a dark art

In Ireland the term ‘lobbying’ has become a by-word for a form of dark arts practiced by middle aged men in suits stalking the corridors of Leinster House or hanging around council chambers with cash-stuffed envelopes. Given our recent history, this impression is understandable. Successive scandals relating to secret and unorthodox lobbying, trading in influence and political corruption have fundamentally undermined public trust in government and public life more generally. A common theme of tribunals of inquiry and indeed the recent financial crisis has been the unholy alliance between politicians and big businesses. Yet this is by no means the full picture of lobbying in Ireland, if we take lobbying in the correct sense to mean the activities of a range of interest groups in society. Interest groups play a central and often constructive role in public life here and a key part of their work in seeking to shape and influence policy is to lobby public officials, parliamentarians, civil servants and government ministers.

Who are the lobbyists?

Three main kinds of interest group activity have been identified in Ireland: ‘sectional’ groups, ‘cause’ advocacy groups, and business or private interests.1 Sectional interest groups comprise trade unions, organisations representing businesses and farmers, professional bodies representing lawyers, doctors and accountants, churches and the financial services industry. Many of these organisations have in-house lobbyists, while sectors like pharmaceuticals, tobacco or chemicals are more likely to recruit public affairs professionals. Representatives from these kinds of sectional groups are often influential, with routine high level access to bureaucracy and politicians.

Ireland also has a record of strong and effective ‘cause-centred’ groups attempting to influence policy outcomes in specific areas, particularly in relation to issues of morality such as divorce or abortion. Some of these are ad hoc groups, like those formed around an issue of constitutional reform, while others are permanent organisations or charities. The third category, classified as “private” consists of lobbying on behalf of private or business interests in an attempt to influence specific government policy or decisions.

Curbing legal corruption

Whether they call themselves lobbyists, activists or advocates, all of these interest groups will be affected by the new Registration of Lobbying Bill 2014. The bill aims to shine some light on the links between lobbyists and key decision makers in the political and public service systems. And it does what it says on the tin, by requiring those communicating with senior civil and public servants in specific areas to supply details in an online publicly available database. The database will be overseen by a new Lobbying Registrar – the existing Standards in Public Office Commission (SIPO) which currently oversees ethics and political finance laws.

I’ll come back to the bill in a bit. But first let me introduce Transparency International Ireland (TI Ireland), the Irish chapter or branch of the international civil society movement which works globally to promote integrity, transparency and accountability in public life and business. TI Ireland has long expressed concerns about the undue influence of powerful vested interests in Irish life. In our 2009 National Integrity Systems Study we drew attention to the perception of Irish business leaders who suggested that public policy here was unduly influenced to a greater degree than in many low-income countries. This phenomenon, known as “legal corruption,” is especially prevalent in jurisdictions where influence is sold or trafficked through lawful means such as lobbying or through informal networks reinforced by political donations. In that research, we proposed a range of legislative and administrative reforms, while recognising that a wider cultural shift in public life is a large part of the long term goal. Measures to regulate lobbying – to cater for registration of lobbyists and disclosure rules - were among these recommendations.

How will it work?

And so back to the current bill, which obliges lobbyists to register their details in an online database and to file returns of their lobbying activities three times a year, at the end of April, August and December. So how will this work? A helpful guide to the bill prepared by the Department of Public Expenditure and Reform (DPER) summarises it neatly as a framework for transparency in relation to who is contacting whom about what.

The bill defines these three key ‘Ws’ – the lobbyists (Who), the lobbied (Whom) and the matter which they are communicating about (What).

Lobbyists are defined as:

• Employers or their staff (where the employer has more than ten employees)
• Third party lobbyists (those who are paid by a client to lobby)
• Anyone lobbying about the development of zoning of land

This definition appears to be sufficiently wide enough to encompass lobbying by public affairs professionals as well as in-house lobbyists from businesses, professional, representative or voluntary organisations, trade unions, charitable, non-profit and faith based organisations. The lobby in the bill are termed ‘designated public officials’. These are defined as:

• Ministers and Ministers of State,
• Members of Dáil Éireann and Seanad Éireann,
• Members of the European Parliament for constituencies in the State,
• Members of local authorities,

Some exemptions

There are a few features of the bill as currently drafted which would potentially limit its impact. For example, there is a long list of “excepted communications” – those which would not have to be included in any returns filed. These include standard and appropriate exemptions to allow individual citizens to interact with elected public representatives about their private affairs and to allow trade unions to conduct negotiations about the terms and conditions of their members. However, other exemptions are more problematic. For example communications which relate to “factual information” where this has been requested by a public official do not need to be included in the register. If this clause was to mean in practice that lobbyists themselves were able to make a subjective assessment of what is purely factual information, and therefore exempt from registration, it could potentially be open to abuse.

One year down the road

It is somewhat reassuring to see that the bill provides for a review of the legislation one year after its commencement, an opportunity which DPER says is “to ensure that exemptions do not act as a conduit for what might be characterised as unregulated or ‘secretive’ lobbying lacking in transparency”. This review might also need to plug other emerging loopholes, and to examine whether the categories of public officials deemed to be “the lobbying” is extensive enough, particularly given that a good deal of significant interaction with lobbyists may involve middle tier public servants below the ranks of Assistant Secretary General.

Communications between members of bodies such as expert or advisory groups appointed by Ministers fall outside the registration requirements in the bill. Yet such bodies are clearly important fora for what might be termed institutional or insider lobbying. They would include the likes of the long-established and highly influential industry forum for the Irish Financial Services Sector, known as the Clearing House Group which has in the past been criticised for its lack of transparency. What the bill does do, however, is to mandate the Minister to publish a “Transparency Code” in relation to the work of such groups. TI Ireland considers this to be a potentially very important measure which could help ensure not only transparency in relation to the work of such groups, but also in relation to how they are created and their members selected.

Achieving full participation

In relation to the powers of the Lobbying Registrar, the bill allows SIPO to appoint officers to conduct investigations into possible contraventions, which include failing to register as a lobbyist, failing to file a return and providing inaccurate or misleading information. It also empowers, but does not mandate SIPO to develop a statutory code of conduct aimed at promoting high professional standards and good practice. TI Ireland sees the development of a statutory code of conduct, with maximum stakeholder buy-in, as a sine qua non if this bill is to achieve lasting change. This needs to be underpinned with resources to allow SIPO to fulfil its mandate in the bill to provide guidance in order to “foster understanding” of the law, particularly among groups who have hitherto not defined themselves as lobbyists.

Finally, the bill puts in place quite limited measures to control the “revolving door” phenomenon whereby former officials, politicians and political advisers quit their public sector posts and become lobbyists soon afterwards. While much more must be done to address the general schemes for regulating post-term employment, it is arguable that such reforms would sit better in the framework of the planned overhaul of ethics legislation and codes rather than in this particular piece of legislation.

Not a cure-all

Overall, the Registration of Lobbying Bill 2014 is to be welcomed for the targeted transparency measure that it is. And DPER deserves credit for the extensive consultations with a wide range of stakeholders which it conducted ahead of the bill’s publication in June. This bill is not intended as a panacea, and it would be wrong to view it as such. It has to be seen as only one part of a wider “integrity framework” for public life that must also include robust rules and practices in relation to political party financing, corruption prevention, protection of whistleblowers, ethics in public office, freedom of information and even political reform.


Nuala Haughey is Research Manager at Transparency International Ireland. She is leading TI Ireland’s forthcoming research on lobbying in Ireland which will be published in autumn 2014. The study is part of a multi-country research project funded by the European Commission.
Banking Inquiry faces a formidable challenge

Garrett Fennell reviews the pending Oireachtas Banking Inquiry and questions if it can meet its biggest challenge – Time!

The much heralded Oireachtas Committee Inquiry into the events concerning the collapse of the banking sector in Ireland and the subsequent Bank Guarantee finally looks like it is getting some traction. The members of the Committee have been appointed, albeit after some considerable controversy, and a number of initial meetings have been held to determine how the Committee will approach its work. The terms of reference will be fixed shortly and an advisory committee is being established to assist the Inquiry in its work.

Abbeylara

Given the constraints imposed on Oireachtas Inquiries by the Supreme Court decision in the Abbeylara case and the subsequent defeat of the constitutional referendum to overturn some elements of that decision, the Banking Inquiry will need to be mindful of conducting its affairs in a way that respects the constitutional safeguards that attach to individuals’ reputations. While it may be possible to conduct a review that concentrates on the actions of institutions and companies, rather than individuals, the Abbeylara judgement effectively precludes the Oireachtas from reaching adverse findings of fact against an individual who is not a member of the Oireachtas. And drawing a legally robust line between personal responsibility and executive responsibility will require some fine legal vetting.

Being mindful of sub judice matters

It is also unclear of the extent to which the Banking Inquiry will be inhibited by current or pending prosecutions arising from the banking crisis. It will be necessary for the Banking Inquiry to be conscious of the risk of straying into matters that are sub judice. Media reports indicate that there are a number of cases currently before the legal system which could impinge on some issues that fall within the remit of the Banking Inquiry.

Compelling witness co-operation

It will also be interesting to see how the Inquiry secures evidence, both documentary and oral testimony as it carries out the initial part of its investigative work. PAC recent hearings into some matters concerning the funding and governance of charities have highlighted challenges that Oireachtas Committees can face in securing compulsion in the attendance of witnesses. While there is a recognised power to compel witnesses to attend and give evidence before an Oireachtas Committee, this power is largely untested and may be more significant in the utterance than in actual fact. Again given the nature of the issues that the Banking Inquiry will be reviewing, it would be surprising if the extent to which the compellability powers can be exercised will not be tested.

“It will be necessary for the Banking Inquiry to be conscious of the risk of straying into matters that are sub judice”

Race against time

But perhaps the biggest challenge that the Inquiry will face is one of time. All investigations and inquiries are time consuming, particularly given the need to provide fair procedures to individuals and organisations that are party to specific scrutiny. It will be a mammoth task for the Committee members to carry out their work in a time effective fashion, avoiding any legal challenges to their investigative processes and yet produce a strong Report which addresses the public desire to learn more about the genesis of the events that led to the banking crisis and subsequent economic difficulties. Ensuring that all of this is done within a timescale that conforms to the remaining term of this Dail will provide the biggest single challenge to the Banking Inquiry on a path that does not have any time for delay.

“The much heralded Oireachtas Committee Inquiry ... finally looks like it is getting some traction”
What the new collective bargaining rules will change

The new proposals on collective bargaining have been developed amidst the demands of trade unionists for employers to be legally obliged to negotiate with unions, and employers arguing that this would only serve to discourage valuable multi-national company investment in Ireland. Following lengthy discussions between the divided stakeholders, John O’Dowd observes that a consensus seems to have emerged.

There has been a widespread welcome among employers and trade unions, including IBEC and ICTU, for the recently announced proposals from Government on collective bargaining. The Minister for Jobs, Enterprise, and Innovation, Richard Bruton TD, announced that he had Cabinet approval to reform the Industrial Relations (Amendment) Act 2001 with a view to improving and modernising the industrial relations arrangements on collective bargaining. These proposals aim to redress the damage done in the eyes of trade unions by the ‘Ryanair Judgment’ to the provisions of the 2001 and 2004 legislation.

Fine Gael and Labour had promised to address this issue in the Programme for Government. This reform follows on earlier decisions to restructure the state dispute resolution agencies into a new two-tier dispute resolution system based around the Labour Relations Commission and an expanded Labour Court.

Collective Bargaining Rights

Legislating for a right to collective bargaining has been a thorny political issue with employers and others arguing that strong legislation would be a barrier to continued investment from multi-national companies, especially US companies whose preference in many cases is to remain union-free. Unions and others argue that employees have a fundamental right to organise themselves collectively to promote their employment-related interests. One of the distinguishing features of employment law in Ireland is that workers enjoy a constitutional right to join a trade union but there is no corresponding legal obligation on employers to negotiate with trade unions. Indeed, a significant issue for trade unions has been the growth in the number of companies that choose not to have trade unions as part of their employee relations systems.

The legislation now being proposed by Richard Bruton does not confer any rights to trade union recognition but rather strengthens provisions for employees whose employer does not engage in collective bargaining to have their claims addressed through the established industrial relations procedures.

Legislating for a right to collective bargaining has been a thorny political issue

The New Proposals

Following lengthy consultation with all of the stakeholders a consensus seems to have emerged around the following arrangements:

• A legal definition of collective bargaining
• Provisions to help the Labour Court establish whether or not internal negotiation bodies are genuinely independent of the company concerned
• Clarity on the requirements that trade unions have to meet if they are to take claims under the new legislation
• Policies and principles the Labour Court must follow when it is assessing workers’ terms and conditions, including the sustainability of the business in the long-term
• New provisions to ensure that cases dealt with are ones where the numbers of workers are not insignificant
• Provisions to ensure remuneration, terms and conditions are looked at in their totality
• Provisions to limit the frequency of reassessment of the same issues
• An explicit prohibition on the use by employers of inducements (financial or otherwise) that are designed to have staff forego collective representation by a trade union
• Enhanced protection for workers who may feel that they are being victimised for exercising their rights by way of interim relief in the case of dismissal.

These proposals, in the words of the Minister, have been designed to respect Ireland’s voluntary industrial relations system while ensuring that where an employer chooses not to engage in collective bargaining either with a trade union or an internal ‘excepted body’ the employees affected will have a meaningful route opened to them to have their claims addressed. In such cases, unions will be able to use the new legislation to have disputes over pay and other terms of employment determined if necessary by the Labour Court.

Testing the Independence of Excepted Bodies

The new proposals will set out tests to ensure that if an employer chooses to collectively bargain with an internal ‘excepted body’, as opposed to a union, that body must pass tests to establish that it is genuinely independent of the employer. These tests have yet to be specified but it seems likely that they will be similar to
those applying to the establishment of works councils under EU led law. Such tests are seen as necessary to address trade union concerns that employers would seek to establish and to then control internal negotiation bodies that would have ‘excepted body’ status.

“unions will be able to use the legislation to have disputes over pay and other terms of employment”

Excepted body status is granted to a body which, under section 6 of the Trade Union Act 1941, is exempt from the requirement to possess a negotiation licence in order to carry on collective bargaining over pay and terms and conditions of employment. Excepted bodies may be trade unions or other types of representative bodies.

IMPACT Response
IMPACT General Secretary Shay Cody said: “This long-overdue legislation will allow trade unions to engage in collective bargaining and secure benefits for workers in companies where employers refuse to pay the going rate. It also gives statutory protection against the victimisation of workers in such companies for the first time.”

The new legislation will have little immediate effect in most parts of the public service because these are already highly unionised and have well-established collective bargaining arrangements through internal conciliation and arbitration schemes and through the LRC and Labour Court.

Unions will, however, see the new legislation as a necessary corrective to a very damaging High Court case – Ryanair – which set back their progress on resolving claims in cases where employers would not engage with them or where the employers maintained that they had internal negotiation machinery through which independent collective bargaining took place.

Dr John O’Dowd is an independent consultant and industrial relations specialist. He teaches negotiation in the Smurfit Business School, UCD, and delivers skills workshops for Public Affairs Ireland.

Conducting Effective Interviews
Tuesday 9 September 9am-1pm
Interview Skills for Interviewees
Thursday 11 September 9am-4pm

Public Affairs Ireland is running specialised seminars for both interviewers and interviewees in September 2014. These practical and interactive seminars will address issues including:

Interviewers
• The main elements of an effective interview
• The roles of the interview panel members
• Listening, questioning and body language during interviews
• Job assessment criteria and the scoring system
• Relevant legislation, equality and discrimination issues

Interviewees
• How interviews are conducted and assessed
• How to best prepare for interview
• Understanding what competency based interview questions are looking for
• Discovering a framework to use when answering questions

For more information about these seminars or any of our training events please contact us:
training@publicaffairsireland.com
01 8198500
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European Commission challenges Ireland to take action

This year, for the first time, Ireland is a participant in the EU economic governance arrangements, known as the European Semester process. On 2 June the European Commission proposed recommendations for each EU Member State. Tom Ferris looks at the recommendations for Ireland.

Table: European Commission’s recommendations for Ireland

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1. **Budget**: Fully implement the 2014 budget and ensure the correction of the excessive deficit in a sustainable manner by 2015;

2. **Healthcare**: Advance the reform of the healthcare sector initiated under the Future Health Strategic Framework to increase cost-effectiveness;

3. **Labour**: Pursue further improvements in active labour market policies, with a particular focus on the long-term unemployed, the low-skilled and, in line with the objectives of a youth guarantee;

4. **Poverty**: Tackle low work intensity of households and address the poverty risk of children through tapered withdrawal of benefits and supplementary payments upon return to employment. Facilitate female labour market participation by improving access to more affordable and full-time childcare, particularly for low income families;

5. **SMEs**: Develop further policy initiatives for the SME sector including policy initiatives to address the availability of bank and non-bank financing and debt restructuring issues. Advance initiatives to improve SME’s access to bank credit and non-bank finance;

6. **Banking**: Monitor banks’ performance against the mortgage arrears restructuring targets. Announce ambitious targets for the third and fourth quarters of 2014 for the principal mortgage banks to propose and conclude restructuring solutions for mortgage loans in arrears of more than 90 days, with a view to substantially resolving mortgage arrears by the end of 2014, and

7. **Legal Services**: Reduce the cost of legal proceedings and services and foster competition, including the enactment of the Legal Services Regulation Bill by the end of 2014, including its provision allowing the establishment of multi-disciplinary practices.

Some observations

The Commission’s recommendations are the product of extensive and objective technical analysis, validated by thorough discussion with the Irish authorities. The output from the Commission is not above criticism, on the grounds of presentation and content. The material is presented in a very bureaucratic fashion, with lots of jargon and little attempt made to present the findings in a consumer-friendly manner. Even very learned citizens might not know how to – “put in place a seamless FET referrals system between Intreo offices and Education and Training Board”, or how to – “tackle low work intensity of households”. As regards content, for example, the Commission recommended that action be taken to – “…make the government expenditure ceiling more binding by limiting the statutory scope for discretionary changes”. This recommended action fails to acknowledge the fact that the Irish Government has put the government expenditure ceiling on a statutory basis under the Ministers and Secretaries (Amendment) Act 2013. Furthermore, while the Commission recommends reducing the cost of legal proceedings, it does not specify any action for other economic sectors which might benefit from greater competition.

Ireland can benefit from implementing the tailored advice provided by the European Commission. However, the Commission does not make the final decisions. The recommendations have to be endorsed by EU leaders and ministers, as well as being formally adopted by EU finance ministers before Ireland takes action on the recommendations. It is in Ireland’s interests, however, to implement reforms to help recovery from the crisis and to create the foundations for sustainable growth.

Tom Ferris is a Consultant Economist. He was formerly Senior Economist at the Department of Transport.
Ireland gets smart about its future

Mark Ferguson explains the importance of providing an Irish workforce capable of meeting high-tech multinational company needs and outlines a strategy which aims to do just this.

One of the very welcome features of the recent improvement in Ireland’s economy has been the corresponding growth in the demand for jobs requiring a Science, Technology, Engineering and Maths (STEM) qualification. There is also an emerging consensus that this positive upward trajectory, while a gradual one, will be maintained. While this scenario is a positive one for employers as they compete to attract the best candidates.

The Workforce Ireland Needs to Provide

Employers in a range of Ireland’s high tech sectors including Technology, PharmaChem, Medical Devices and Manufacturing are faced with the challenge of finding enough people with STEM based qualifications to meet the needs of their expanding operations in Ireland. With nine of the top ten multinational pharma-companies now in Ireland, the availability of a highly-skilled workforce has been a key factor in attracting these companies. They have made a commitment to Ireland in return, providing the pool of skilled and talented employees that they need. Ireland has been successful in delivering on this commitment to date. As their industries evolve and change however, so too will their skills requirements.

Ireland is responding accordingly in taking action to ensure that the education and training sectors can provide these industry sectors with a pool of graduates that have the skill sets necessary to enable them to meet their future requirements and continue to base important global operations in Ireland. In addition, it is equally important that as careers in STEM continue to thrive, we act to ensure that our young students are in a position to avail of these exciting opportunities.

Educating for the Future

An important part of these efforts means ensuring that students at post-primary level in Ireland choose to study Science, Technology, Engineering and Maths (STEM) subjects. In this regard, a new three year strategy has just been announced for the SFI Smart Futures programme, which aims to future-proof the pipeline of STEM graduates in Ireland. It is a collaborative government-industry framework promoting STEM careers to post-primary students in Ireland. The new three year strategy aims to deliver a 10% increase in the uptake of STEM subjects at second and third level by 2016. The initiative is coordinated by SFI Discover, the education and outreach programme of Science Foundation Ireland (SFI), in partnership with Engineers Ireland’s STEPS programme, PharmaChem Ireland, the Royal Society of Chemistry, ICT Ireland and the Institute of Physics. The new three year strategy aims to raise awareness of STEM career opportunities among students, parents, guidance counsellors and people who influence students by encouraging industry to play an increased role.

Winning and Retaining Multinational Companies

Multinational companies in these sectors have been successfully attracted into Ireland. The availability of a highly-skilled workforce has been a key factor in attracting these companies. They have made a commitment to Ireland and in turn Ireland has committed to providing the pool of skilled and talented employees that they need. Ireland has been successful in delivering on this commitment to date. As their industries evolve and change however, so too will their skills requirements.

Ireland is responding accordingly in taking action to ensure that the education and training sectors can provide these industry sectors with a pool of graduates that have the skill sets necessary to enable them to meet their future requirements and continue to base important global operations in Ireland. In addition, it is equally important that as careers in STEM continue to thrive, we act to ensure that our young students are in a position to avail of these exciting opportunities.

Success of the Smart Futures Programme

In 2013, Smart Futures engaged with approximately 28,000 students through STEM outreach, careers events, competitions and online channels. In the current academic year 432 STEM volunteers have already been trained on delivering their career story to young students. This has enabled 427 school visits, engaging directly with approximately 15,270 students nationwide.

To-date, over 50 STEM-related organisations in ICT, PharmaChem, Medical Devices, Space, Engineering and Energy sectors, have participated in Smart Futures outreach activities, providing staff to talk to students during events such as Science Week, Engineers Week and SciFest.

By joining the programme industry members can avail of the opportunity to give back to the community, contributing to the national skills development needed for both their own requirements and also for national competitiveness. This is achieved while developing their staff with key communications training which is coordinated and delivered free by SFI Discover and its coordinating partners. Participation means industry members are connected with a national programme that is trusted by schools and which is measured for effectiveness relieving them of the coordination required to do this on their own.

Partnership with the Smart Futures network should be a key objective for any organisation that has a strategic interest in an increase in the quality and availability of STEM graduates in Ireland.

Against the backdrop of increasing employment opportunities in STEM, many of which are in exciting new roles that have only emerged in recent years, encouraging Ireland’s post-primary students to choose STEM subjects and STEM related courses at third level is integral to the delivery of Ireland’s national competitiveness and future job creation as identified under the Action Plan for Jobs 2014. The future starts here.

Professor Mark W.J. Ferguson is Director General of Science Foundation Ireland and Chief Scientific Adviser to the Government of Ireland.
Health’s Ageing Crisis: Need for Change

In light of the findings of the new BDO report Tadhg Daly examines the immediate need for alteration to Ireland’s national strategy regarding long-term residential care provision.

The debate surrounding requirement for nursing home care is often skewed; only one in 20 of those aged 65 require such care, increasing to around four in 20 for the 85+ population. “The level of frailty and complexity of the medical needs for those of that age [85+] increases, prompting a greater and often essential need for residential care,” the report states. According to the report Ireland already has one of the lowest numbers of long-term beds per 1,000 of the population when benchmarked against comparator countries. It also recalls Government commitment to develop an integrated care model that treats patients at the lowest level of complexity.

Implications of Inaction

BDO’s analysis says that diverting long-term residential care funding will only result in much higher social and economic costs, and states that: “Even if the government and its agencies are successful in developing alternative or complimentary models of care for our older population, the increases in the cohorts of our 85+ population, whose complex care needs can be best met in a nursing home, will continue to generate strong levels of demand for nursing beds.” The Fair Deal review that the Department of Health had set for completion before year end 2012 remains outstanding. The report states: “It is clear that the current Fair Deal Budget is inadequate in the context of an ageing population, with associated higher dependency levels.” It also points out: “The net weekly cost to the Exchequer of private nursing home care is averaged at c.€750 (excluding resident’s contribution) per resident versus a weekly cost of c.€6,000+ in the acute hospital sector.”

“The provision of residential care for our ageing population is rapidly heading for crisis; however this is a situation that can, with the appropriate actions, be avoided.”

The publication of Health’s Ageing Crisis: Time for Action – A Future Strategy for Ireland’s Long-Term Residential Care Sector coincides with a definitive moment for long-term residential care in Ireland. Nursing Homes Ireland (NHI) commissioned BDO Ireland to conduct this independent analysis to provide objective evidence regarding the growth in requirement for nursing home care, the assessment of public policy, recommendations for action and consequences of inaction.

What We Are Facing

The HSE in its National Operational Plan 2013 warned of a “significant national deficit of long stay beds by 2016”. Last May a HSE presentation outlined the stark scenario facing the State in the provision of public long-term residential care, when costs of €1.68bn were outlined to maintain current provision and a 20% public presence within the sector.

The 2013 Operational Plan stated that there is already an under supply of long-term residential care beds in urban centres which is evidenced by scenes of large numbers lying in trolleys awaiting care in our acute hospitals. This crisis is on our doorstep.

CSO analysis projects the population aged 85+ will increase 46% by 2021. A population growing older and living longer is to be celebrated, but brings important responsibility for Government, state agencies and policy planners.

Tadhg Daly is CEO of Nursing Homes Ireland. The organisation represents the private and voluntary nursing home sector, which provides care to over 21,500 people and direct employment to an equivalent number.

Health’s Ageing Crisis key recommendations:

Development of a clear strategy

It is vital that the Government, policy makers and key stakeholders come together to map out the future of nursing home care and implement an appropriate framework to meet the significant growing requirement for it.

A fair price for appropriate care

The development by the National Treatment Purchase Fund of a clear and transparent pricing policy/model which provides a fair price for patient centred care, must be undertaken as a matter or priority.

Consistency of standards & provision

It is vital that the Government addresses as a matter or priority how this investment is to be made and how it proposes to ensure that all public nursing homes can become HIQA national physical environment standards compliant by July 2015 deadline, or for this matter, if this is now a realistic or desirable objective.

A sustainable funding model

A model and appropriate budget for funding nursing home care that recognises the costs of providing resident centre care, but which is sustainable in the context of an ageing population must be developed as a priority. It is vital that Fair Deal for nursing homes remains intact. Efforts to increase the level of funding to other older care services or provisions must not be at the expense of a reduction in the overall funding available to those requiring long-term residential care.

Read the report in full at www.nhi.ie

Read the report in full at www.nhi.ie
## Appointments

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<tr>
<td>Jason Whooley</td>
<td>CEO of Bio-marine Ingredients Ireland (BII) Project</td>
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<tr>
<td>Rosemary Steen</td>
<td>Public Affairs Director at Eirgrid</td>
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<td>Kevin O’Malley</td>
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<td>Martin Shanahan</td>
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<td>Derek Moran</td>
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<td>Bernard Bot</td>
<td>Chief Financial Officer of Aer Lingus Group</td>
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<td>Federico Balzola</td>
<td>Chief People and Change Officer of Aer Lingus Group</td>
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<td>Heather McGuire</td>
<td>CEO of Cork Foundation</td>
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## Members of the Culture Ireland Expert Advisory Committee
- Mary McCarthy, Chairperson
- John Given
- Josephine Kelliher

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<tr>
<td>Professor Jane Grimson</td>
<td>Acting Chief Executive of Health Information and Quality Authority (HIQA)</td>
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## Tenders

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<tr>
<td>New HLA Lab Management System at the NHIRL, NBC, IBTS</td>
<td>Irish Blood Transfusion Service</td>
<td>Systemlink Inc</td>
<td>Undisclosed</td>
</tr>
<tr>
<td>Training services</td>
<td>Languages and International Trade Services Skillnet</td>
<td>PQMS Ltd</td>
<td>Undisclosed</td>
</tr>
<tr>
<td>Framework Agreement for a range of Systems Auditing Services (including the auditing of large-scale ICT systems)</td>
<td>Department of Justice and Equality</td>
<td>Morres Stephens Nathans -Cluster 1, Smith &amp; Williamson - Cluster 2, BDO - Cluster 3, Smith &amp; Williamson – Cluster 4, LHM Casey McGrath – Cluster 5, OSK – Cluster 6</td>
<td>Undisclosed</td>
</tr>
<tr>
<td>Outsourced Audits - Provision of Audit Services in respect of the 2013 financial statements of certain public sector bodies</td>
<td>Office of the Comptroller and Auditor General</td>
<td>Morres Stephens Nathans –Cluster 1, Smith &amp; Williamson - Cluster 2, BDO - Cluster 3, Smith &amp; Williamson – Cluster 4, LHM Casey McGrath – Cluster 5, OSK – Cluster 6</td>
<td>Undisclosed</td>
</tr>
<tr>
<td>Provision of a niche, music-driven radio service for Dublin City and County</td>
<td>Broadcasting Authority of Ireland</td>
<td>Star Broadcasting Limited (t/a Sunshine 106.8FM)</td>
<td>Undisclosed</td>
</tr>
<tr>
<td>Machine Road Condition Surveys in Dublin City 2014-2017</td>
<td>Dublin City Council</td>
<td>W.D.M. Limited</td>
<td>Undisclosed</td>
</tr>
</tbody>
</table>
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