



Garda
Ombudsman
INQUIRY INDEPENDENCE IMPARTIALITY

GARDA SÍOCHÁNA OMBUDSMAN COMMISSION

Proposal for Legislative Change

Submission to the Department of Justice and Equality



December 2017

GARDA SÍOCHÁNA OMBUDSMAN COMMISSION

PROPOSAL FOR LEGISLATIVE CHANGE

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GLOSSARY

Term	Explanation
The Act	The Garda Síochána Act 2005, as amended
DPA	Data Protection Acts 1988 and 2003
O/DPP	The Office of the Director of Public Prosecutions
The Department	The Department of Justice and Equality
The Discipline Regulations	The Garda Síochána (Discipline) Regulations 2007
EcvHR	European Convention on Human Rights
EctHR	European Court of Human Rights
GSIO	Garda Síochána Investigating Officer
GSOC	Garda Síochána Ombudsman Commission
HSE	Health Service Executive
IR	Informal Resolution
The Minister	The Minister for Justice and Equality
The Ombudsman Commission	The three members of the Ombudsman Commission comprising the Chairperson and two Commissioners
PD	Protected disclosure (as defined under the Protected Disclosures Act 2014)
The Protocols	Memorandum of Understanding Protocols and Agreement on Operational Matters between the Garda Síochána Ombudsman Commission and the Garda Síochána (2013)
TUSLA	The Child and Family Agency

PART 1: BACKGROUND AND INTRODUCTION

1. EXECUTIVE SUMMARY

This submission proposes new legislation to revise and replace Parts Three and Four of the Garda Síochána Act 2005, as amended (the Act) which gave rise to the Garda Síochána Ombudsman Commission (GSOC), operational since 2007. This submission is based on our experience, since then, of implementing the provisions which give effect to independent oversight of policing. On 11 January 2017, GSOC met with the then Minister for Justice and Equality Frances Fitzgerald, TD and officials from the Department of Justice and Equality (the Department) to discuss changes to the legislation governing the activities of GSOC. The possibility of a stand-alone piece of legislation was discussed and welcomed. Subsequently, on 18 May 2017 GSOC again met with officials from the Department. At this meeting, two options were discussed; the first option was amending the current Act, the second was new stand-alone legislation. GSOC reiterated its preference for a stand-alone act. Also in early 2017, the Commission on the Future of Policing was formed. GSOC met the Commission on 20 September 2017. At that meeting, GSOC committed to sharing its views on legislative change with the Commission during the Commission's consultation period.

This paper sets out the views of GSOC with regard to the legislation governing its activities. The Ombudsman Commission believes that the current Act prescribes processes that are too complicated¹ and should be replaced with a stand-alone piece of legislation setting out revised processes for the exercise of GSOC's statutory functions. Revised legislation would, in GSOC's view:

- enhance the independence of the organisation;
- place greater emphasis on early resolution to the benefit of gardaí and complainants alike;
- streamline the more formal investigative processes;

- give statutory underpinning to important matters like the sharing of information between GSOC and the gardaí;
- augment the openness and transparency of the complaints process, and
- make proper provision for the investigation of protected disclosures.

GSOC has been operational since 2007. GSOC works side-by-side with other independent agencies, notably the Garda Síochána Inspectorate and the Policing Authority, to provide effective oversight of the policing system.

The Policing Authority, operational since January of 2016, provides oversight on how the Garda Síochána performs its policing functions and uses its resources. It also deals with matters of strategy, planning, ethics and human resources.

The Garda Inspectorate, established in 2006, carries out inspections on the operation and administration of the Garda Síochána, to ensure that resources are used to achieve the highest levels of effectiveness and efficiency. It also provides advice to the Minister and to the Policing Authority with regard to best policing practice.

GSOC's function is to deal with complaints by members of the public, usually involving alleged misconduct by members of the Garda Síochána, as effectively and fairly as possible. Independence is a key driver of public confidence. GSOC is appointed by and answerable to the Oireachtas. GSOC, rightly, has a reporting relationship with the Department of Justice and Equality. However, in addition to the reporting relationship, the financing of GSOC is currently a matter for the Minister for Justice and Equality: the accounting officer of GSOC is the Secretary General of that Department. We believe that independence and public confidence in the system would be enhanced by the designation of GSOC as a fully independent body.

GSOC proposes that it be responsible for the investigation of all complaints. The Act provides for complaints of a non-criminal nature to be

¹ The legislative process underpinning the complaints process is detailed in Appendix A.

referred to the Garda Síochána for investigation, either unsupervised or supervised by GSOC. This system is questionable in terms of public confidence and efficiency. Discontinuing this practice would involve a considerable reappraisal of the resources available to GSOC.

The current system, as dictated by the Act, places too much focus on retribution and not enough on resolution. This is because it channels non-criminal matters primarily towards investigations in line with the Garda Síochána (Discipline) Regulations 2007, which are focused on garda members and which do little to provide satisfaction to the public.

In GSOC's experience, many complaints of a less serious nature i.e. where there is no suggestion of criminal behaviour or serious misconduct, are problems of failure in service delivery on the part of the Garda Síochána, not always exclusively by an individual member. GSOC is of the view that issues such as the non-return of phone calls are best dealt with by seeking to resolve the problem in the first instance. A management or corporate response followed by action, in many instances, is what the public seek. The Garda Síochána should be encouraged to provide such responses. A less bureaucratic way for service issues to be dealt with, using the normal line management processes within the Garda Síochána, could make for much more satisfactory and efficient outcomes in a significant proportion of appropriate cases. It would also mean that GSOC could function like most other ombudsman services – providing an avenue of complaint that is a last resort.

Legislation should allow GSOC to decide on when attempts at local resolution are appropriate. These solutions would better reflect the functions of an ombudsman: that of seeking resolution of problems rather than an almost exclusive focus on sanctions for misconduct.

We believe that processes and timeliness should and could be improved, to build satisfaction in the system. A key contributor to such improvement would be the elimination of certain cumbersome aspects of the legislation which dictate that disciplinary matters can only be investigated when investigation into criminal allegations have been concluded. In practice this means that in cases

where a criminal investigation is undertaken, disciplinary matters which emerge during the course of the investigation cannot be addressed until very late in the process, to the dissatisfaction of everyone concerned.

In the interests of even-handedness and efficiency, we propose that GSOC be enabled to make some preliminary enquiries of the Garda Síochána regarding complaints in order to assist in the determination of admissibility. Currently, GSOC makes such enquiries regularly of complainants, but has no ability to do so in the case of the Garda Síochána.

GSOC and the Garda Síochána interpret certain sections of the Act differently. We propose that legislative amendment could bring greater clarity to two areas in particular. One is the ability of the Garda Síochána to investigate complaints made to them by members of the public regarding conduct of garda members. We believe that some complainants have confidence in the Garda Síochána to investigate such matters and, on occasion, that may be the appropriate response to the complaint. We propose greater empowerment of the complainant by allowing them a voice in the decision as to who should investigate. Secondly, legislative reinforcement of the duty of the Garda Síochána to cooperate with GSOC, particularly in the matter of information provision, would enhance efficiency.

The Act is quite prescriptive regarding notifications and the timing of them. For example, GSOC is obliged to notify gardaí regarding inadmissible complaints. This has been a constant source of irritation to gardaí and a heavy bureaucratic burden on GSOC. It is proposed that greater flexibility regarding notifications be introduced in new legislation.

GSOC's operational independence is compromised by the requirement of governmental and ministerial consent regarding investigations into the conduct of the Garda Commissioner. We believe this should be reconsidered. GSOC is obliged to notify the Garda Commissioner in advance of conducting any search in a garda station. We believe this too should be reconsidered. The Policing Authority is empowered to refer matters to GSOC for

investigation. We believe that GSOC should retain the ability to apply a public interest test before conducting investigations into these matters. Otherwise, this may become an appeals mechanism against GSOC decisions in previously-investigated cases.

We believe that the transparency of the entire process can be improved. In situations where a formal investigation is appropriate, we believe that the outcome should be subject to genuine oversight. In particular, we believe that the concept of GSOC having no power to seek a rationale should the Garda Síochána decide to go against our recommendation, is questionable in terms of effective oversight. In the matter of nonparty disclosure, where GSOC might hold material that may be relevant to an accused for his or her defence, there is no statutory provision governing how GSOC might make such material available to interested parties. Similarly, the provision of relevant information to the Policing Authority is rendered very difficult if the information has been acquired by GSOC through a protected disclosure. Legislative provision for both these instances would be helpful.

The Ombudsman Commission is conscious of the important role it plays towards discharging the State's duty with regard to Article 2 of the European Convention of Human Rights. The strict processes set out in the Act, between section 102 and section 91, have given rise to confusion. Particularly problematic are instances where no garda misbehaviour is immediately apparent. It is proposed that GSOC be obliged to investigate, rather than examine, all matters referred by the Garda Commissioner under section 102. The Ombudsman Commission also believes that strengthening the definition of serious harm, particularly with regard to sexual offences, should be considered.

This submission also seeks further clarity regarding the police powers exercisable by designated officers of GSOC. Some practical difficulties arise where senior investigating officers cannot exercise powers above that of a garda rank e.g. making requests for coronial adjournments. Clarity is also sought regarding the capacity of GSOC to investigate matters which

also involve persons who are not members of the Garda Síochána.

The Protected Disclosures Act 2014 has created many new issues for GSOC. This submission contains several proposals regarding protecting the anonymity of disclosers; the extent of GSOC's discretion to investigate matters referred by the Minister; and the protection of data arising from protected disclosures. The fact that issues which come to GSOC's attention as protected disclosures may be subject to investigation and possibly disciplinary or criminal proceedings by more than one agency is also addressed.

Towards the end of the document examinations under section 106 are discussed as is a potential statutory right of review. The document also draws attention to the fact that the scope of an inquiry under section 109 was the subject of discussion and commentary arising from the inquiry presided over by Mr Justice Frank Clarke. The closing suggestions relate to simplifying the list of breaches on the part of a garda that may be subject to some disciplinary sanction and to enabling GSOC to seek to conduct joint investigations with other agencies who may have relevant specialist investigative skills.

The proposals contained in this submission would see GSOC undertake significantly more work than at present. Therefore we must stress that the resourcing of the organisation is every bit as important as the legislative change.

1.1 This Document

In section 2 below, we describe how the complaints system operates in practice currently. We outline the various types of investigations we conduct and the outcomes resulting from these. Throughout this section we introduce, in very general terms, the issues we later explain in greater detail in Part 2.

Part 2 of this document identifies the problems that have come to light in our 10 years of experience. We have not laid these issues out in order of priority or in terms of the sections of the Act. In each case we have identified a problem, we have also proposed a solution we hope could be provided for in new legislation.

2. GSOC'S OPERATIONS

2.1 What GSOC Does

The principal function of GSOC is to deal with matters involving alleged misconduct by members of the Garda Síochána. One of the main ways this arises is as a result of a complaint from a member of the public, about their experience with a garda member, which may amount to either:

- a criminal offence or,
- behaviour contrary to the Garda Síochána Discipline Regulations 2007 (the Discipline Regulations).

If their experience does not fall into either of those categories, it will not fall within the admissibility criteria specified in the Act and we cannot deal with it. For instance, while we can investigate the behaviour of former gardaí, as they are no longer employed by the Garda Síochána and are no longer subject to the organisation's Discipline Regulations, we can only really deal with complaints of a criminal nature against them.

GSOC has several other responsibilities unrelated to complaints. These are:

- To conduct independent investigations, following referral by the Garda Síochána, in circumstances where it appears that the conduct of a garda may have resulted in the death of, or serious harm to, a person (provided for by section 102(1) of the Act).
- To investigate matters in relation to the conduct of gardaí, when it is in the public interest, even if a complaint has not been received (provided for by sections 102(4), 102(4)A, 102(5) and 102(7) of the amended Act).
- To examine any "practice, policy or procedure" of the Garda Síochána (provided for by section 106 of the Act). Two such examinations were completed by GSOC to date. The first, completed and submitted to the Department of Justice and Equality in 2009, examined the Fixed

Charge Penalty System². The second³, completed, submitted and published in June 2015, was in relation to dealing with persons who are committed to custody on remand by a court.

We have two further examinations ongoing. The first relates to the practice within the Garda Síochána of detaining persons arrested under the Criminal Justice (Public Order) Act 1994, where no power of detention exists. The second is in relation to garda policy around seizure of vehicles. There have been over 40 complaints to GSOC alleging that occupants of vehicles have been left in vulnerable situations by the Garda Síochána. Garda guidance regarding the safety and welfare of occupants of seized vehicles appears unclear.

2.2 Pre-admissibility - How Complaints are Received, Handled and Difficulties Arising with the Processes

Complaints arrive at GSOC through a variety of routes, one of which is via the Garda Síochána in accordance with section 85 of the Act. We believe that there should be no impediment to local management attempting to resolve complaints in the first instance. We suggest that it should be implicit in legislation that local intervention is permissible and should be attempted in advance of referring complaints to GSOC except in the following circumstances:

1. The complainant does not wish the Garda Síochána to be involved in the complaint;
2. In circumstances of death or serious harm including allegations of rape and sexual assault.

2.2.1 Acceptance of Complaint and Issuing Notification of Receipt to the Garda Commissioner

At the beginning of the complaints process, GSOC assesses whether or not we can accept the

2 Examination of Practice, Policy and Procedure under section 106 of the Garda Síochána Act 2005 in regard to the Fixed Charge Processing System as operated by the Garda Síochána, GSOC (2009).

3 An examination under section 106 of the Garda Síochána Act 2005, as amended, into the practice, policy and procedure employed by the Garda Síochána in relation to dealing with persons who are committed to custody on remand by a court, GSOC (2015).

complaint. Section 86 (1) of the Act requires GSOC to immediately record the complaint and the date and time of its receipt, provide the complainant with a written acknowledgement of its receipt and notify the Garda Commissioner of the complaint.

GSOC is very much in favour of resolving complaints informally and without delay. It is suggested that resolution of customer service complaints might be improved if they were categorised as such and channelled directly into Informal Resolution (conducted by GSOC or garda line management) without the necessity to immediately notify the Garda Commissioner or make an admissibility determination. The decision on the appropriate method of resolution should rest with GSOC. Suggestions for when garda line management intervention would be appropriate are made later in this document. At the time of writing, we are engaged, with gardaí in Pearse Street Garda Station, in a pilot programme designed to test a new system of local intervention along the lines proposed later in this submission.

2.2.2 Admissibility Determination and Issuing Notification of Admissibility to the Garda Commissioner

The criteria for assessing whether GSOC can accept a complaint - "admissibility criteria" - are clearly set out in section 87 of the Act. The two most common reasons that complaints are deemed inadmissible are that:

- the conduct complained of does not constitute a criminal offence or a breach of the Discipline Regulations as per section 87 (2) (b) and,
- the complaint was not made within the time limit (which is within one year of the incident – see section 87 (2) (c).)

There is a practical reason for a time limit, because the longer the time between the alleged incident and the making of the complaint and any subsequent investigation, the more difficult it may be to preserve evidence, find potential witnesses, secure accurate statements, etc., and thereby conduct an effective investigation. However, there is a safeguard in the legislation which allows GSOC to admit "out of time" complaints with good reason and we admit 10-15 per cent of them annually.

The Ombudsman Commission also has the power to open an investigation into a matter referred to in a complaint which is "out of time", should we deem it to be in the public interest to do so.

2.2.3 Dealing with a Complaint

The possible ways a complaint may be dealt with are outlined below.

2.2.3.1 Allegation of a Criminal Offence

If the complaint alleges that a garda member may have committed a criminal offence, the complaint will be investigated by a GSOC investigator. Section 98 of the Act governs this process. In these investigations, the GSOC investigator has "all the powers, immunities and privileges conferred and all the duties imposed on a member of the Garda Síochána". At the end of a criminal investigation, if we consider that there is sufficient evidence that a crime may have been committed, a file may be sent to the DPP with a recommendation. The DPP takes a decision, based on the investigation file, whether to prosecute or not.

2.2.3.2 Allegation of a Breach of Discipline

If the complainant alleges that a garda member may have committed a breach of the Discipline Regulations, it may be dealt with in one of the following ways:

1. Informal Resolution

Under section 90, an Informal Resolution process may be proposed for complaints where such an approach could potentially resolve the matter more quickly. If both sides agree, mediation by telephone is conducted between a GSOC officer and the individuals, to try to find a resolution acceptable to both. This complaint-handling method (because of its informality) has the shortest duration of all.

However, the Act does not give GSOC the power to decide that informal resolution should be attempted, in the way that the Police Ombudsman of Northern Ireland can, for example. Both the complainant and the garda member must agree to participate, which does not always happen.

As a result, a low number of complaints are resolved informally.

Another practical impediment relates to sections 88 (2) (a) and (b) which set out the requirement to notify the Garda Commissioner of the admissible complaint and provide a copy of the complaint. This immediately impacts negatively on the confidential nature of Informal Resolution. Furthermore, the method of notification of an admissible complaint to a garda subject of complaint is through a complicated mechanism of internal communication which exists within the Garda Síochána.

2. Garda Investigation

Section 94 (1) provides for a garda investigation into complaints that appear to involve disciplinary matters, with reporting to GSOC. This is a formal investigation process conducted by the Garda Síochána, in line with their Discipline Regulations whereby, the Garda Commissioner appoints a garda investigator (GSIO) from a different garda district to the garda being complained of to investigate it. They decide whether, on the balance of probabilities, there appears to be evidence of a breach of the Discipline Regulations or not. They inform the complainant, the garda concerned and GSOC of the outcome. The majority of complaints about garda discipline are handled in this way. This process usually takes 9-10 months, despite a timeframe of 4 months agreed in the most recent Protocols between the two organisations.

Section 94(10) of the Act allows a complainant to request GSOC to assign an investigator to review this type of investigation if they are unhappy with the outcome. However, according to the process undertaken in line with the Discipline Regulations, the garda concerned will already have been informed of the outcome and this cannot be overruled by GSOC. Therefore the right of review is a paper exercise only and offers no redress for the complainant in any real way.

3. Garda Investigation - Supervised by GSOC

Under section 94(3), the Ombudsman Commission may decide that it is in the public interest for a GSOC officer to supervise the GSIO's investigation. A rationale must be provided for this and it is usually related to how serious or sensitive a case is. We make this decision in 15-20 per cent of discipline cases. In these cases, the GSOC officer is involved in deciding how the investigation will be conducted and reviews it before the outcome is decided. So there is an opportunity for independent oversight of these cases. However, because of the application of the Discipline Regulations process, there is also duplication, which makes the process disproportionately long-running.

At the end of these cases, if there is evidence of a breach of discipline, GSOC sends a report to the Garda Síochána, who assign a different officer, usually a superintendent, to review the case again and decide whether the outcome is appropriate. In brief, the investigation is undertaken by a garda superintendent, overseen by a GSOC officer, then reviewed again by a different garda superintendent. If a possible serious breach of discipline is concerned, there is a fourth step, whereby a board of inquiry may be set up to consider the case again. The current lengthy process extends the uncertainty and outcome for both complainant and garda.

4. GSOC Investigation into Complaints that do not Appear to Involve Criminal Offences

While it is made clear by the Act that disciplinary matters are for the garda authorities to deal with under the Discipline Regulations, there is a provision, under section 95, that GSOC may investigate matters "that do not appear to involve offences" (which we will refer to as non-criminal matters). This may include disciplinary and/or systemic matters. GSOC does not have police powers in conducting these investigations. While the Act states that the Ombudsman

Commission may require a person to provide any "information, document or thing" to the investigation and to "attend before the Commission", in practice GSOC has experienced difficulty in securing cooperation with this type of investigation.

Non-criminal matters take the longest of all investigation types. At the end of these investigations, similar to above, GSOC sends a report to the Garda Síochána, who assign a superintendent to review the case and decide whether GSOC's recommendations will be followed. GSOC has no power to impose its findings or recommendations.

Therefore, even if the GSOC investigator has highlighted evidence of a breach, the Garda Síochána may decide that there is no breach, take no action and provide no rationale to GSOC. This happens often. It contributes to a feeling of futility for a complainant and for us - particularly when such a result is the culmination of years of engagement with, and work on, an investigation.

2.2.4 Possible Outcomes of a Complaint for a Member of the Public

With the exception of Informal Resolution, the possible outcomes of making a complaint to GSOC are all related to proof of a criminal offence or breach of the Discipline Regulations.

GSOC is purely an investigative agency. We do not have the power to prosecute, nor do we have the power to decide whether there has been a breach of discipline and apply sanctions if appropriate. These powers are, rightly, with the office of the DPP and the Garda Síochána respectively.

The possible results of GSOC investigations—and the frequency of actual outcomes for the five year period 2012 to 2016 are:

1. Referral to the DPP - if an investigation establishes evidence that a criminal offence may have occurred, a file is sent to the DPP, who takes a decision whether to prosecute or not. Fewer than one per cent

of investigations result in a file being sent to the DPP.

2. Breach of the Discipline Regulations is identified (3 per cent).
3. No breach of the Discipline Regulations is identified (26 per cent).
4. Complaint informally resolved (less than 1 per cent).
5. Allegation withdrawn (7 per cent).
6. The most common outcome (almost 60 per cent) is that the investigation is discontinued. This is mostly because independent evidence is not available. This can happen quickly, if it is clear from the outset that there is no independent evidence, or it can happen after many months spent following lines of enquiry and attempting to establish this evidence. Another reason a case may be discontinued is if a complainant does not cooperate. Also, if the garda concerned resigns or retires, the Discipline Regulations no longer apply to them, so there may be little point in continuing the investigation.

Of the 25,369 allegations received by GSOC between 2012 and 2016, almost 6,000 (24 per cent) were deemed inadmissible. If one were to consider complaints as opposed to allegations, then of the 10,110 complaints received by GSOC between 2012 and 2016, some 4,102 (40 per cent) were deemed inadmissible. The most common reason for inadmissibility (almost 70 per cent) is that the act or behaviour complained of is neither a breach of discipline or a crime; the second most common reason (23 per cent) is that the complaint was received outside the time limit specified in the legislation.

2.3 Current Focus is on Retribution rather than Resolution

2.3.1 Successful Outcome

With the exception of the less than 1 per cent of cases which were informally resolved, the possible outcomes as listed above are focused on

blame and punishment. The current system does not favour outcomes related to whether a solution was actually found to the issue that a person complained of. The current process does not allow for an apology to be given to a complainant, which in many cases would be the preferred outcome sought by the member of the public.

2.3.2 Systemic Recommendations

The exercise of an ombudsman function is broader than just complaint handling, and includes providing feedback, so that lessons can be learned from cases.

Though not provided for by statute, GSOC decided a number of years ago, to report to the Garda Síochána, not only with regard to the conduct of individuals, but also in relation to systemic issues that come to light during investigations.

Our hope is that such observations will inform policy development and policing practice, helping to reduce the number of complaints against gardaí. We believe that this is as valuable a contributor as reporting on the behaviour of individuals - and that these recommendations constitute important outcomes to cases, in their own right.

A statutory framework for such recommendations would be beneficial to both GSOC and the Garda Síochána.

PART 2: GSOC'S PROPOSALS FOR CHANGE

1. GOVERNANCE

1.1 To Increase the Administrative Independence of GSOC

1.1.1 Background

GSOC is currently a body under the aegis of the Department of Justice & Equality. While GSOC is accountable to the Oireachtas Committee for Justice and Equality and our Chairperson is accountable to the Public Accounts Committee, GSOC falls under the Department's vote so the financing of GSOC is currently a matter for the Minister for Justice and Equality. The Accounting Officer of GSOC is the Secretary General of that Department. GSOC is accountable under the current legislation (sections 77.78.79) to the Public Accounts Committee and other Oireachtas committees. Its accounts are subject to audit by the Comptroller and Auditor General. At present by consequence GSOC has accountability without control. Public confidence in the independence of GSOC will be enhanced by full independence.

1.1.2 Problem

Credibility in the capacity of GSOC as an independent oversight organisation is impacted as a result of its relationship to the Department of Justice & Equality. In particular the areas of finance and human resources management are controlled through Departmental structures, thereby restricting GSOC's autonomy. In practice, the impact of such a restrictive approach is manifested through, for example, recruitment and maintenance of staffing levels within the organisation.

1.1.3 Solution

We propose that consideration should be given to legally designating GSOC as a fully independent body with its own voted financial resources and an autonomous Accounting Officer answerable to the Public Accounts Committee in its own right. This would be in line with recent developments in the areas of human rights and policing: the Irish Human Rights and Equality Commission and the Policing Authority were created by recent legislation giving them their own accounting officer thereby underlining their independence. It would also be in line with recent developments regarding oversight agencies, such as the decision of Government to make the Office of the Director of Corporate Enforcement an independent agency.

We believe that such an approach would increase its independence and enhance the efficiency and effectiveness of the organisation.

2. GSOC TO INVESTIGATE ALL COMPLAINTS

2.1 To Discontinue Investigations by Gardaí into Complaints to GSOC

2.1.1 Background

The current legislation provides for three types of investigation:

1. section 94 (by the Garda Síochána, supervised and unsupervised investigations);
2. section 95 (by GSOC, disciplinary), and
3. section 98 (by GSOC, criminal).

2.1.2 Problem

GSOC does not believe that continuing the practice set out at 1. above is conducive to the promotion of public confidence. We believe that the concept of gardaí conducting investigations on our behalf is questionable in terms of independence and effectiveness. The system has not delivered the desired results. Timeliness has been a constant issue.

A significant element of the difficulties encountered over the past 10 years is the fact that garda investigations of a disciplinary nature are conducted under the Discipline Regulations. While these may be suitable for internal garda investigations, they conflict with the Act. Problems arise in relation to how a complaint is dealt with, and reported on, when a supervised or unsupervised investigation is conducted by the Garda Síochána under the Discipline Regulations. What happens, in many cases, is that the outcome is decided and sanctions are applied (if a breach of discipline is found) before GSOC and the complainant are informed. The complainant may then, and often does, request GSOC to review the investigation. However, the decision has already been communicated to the garda member and the sanctions have already been applied, so it is too late for a review to have any effect. When this happens, it can be confusing to the general public. It gives rise to suggestions that the system of “guards investigating guards”, without independent oversight, has not really changed.

2.1.3 Solution

GSOC proposes the discontinuation of gardaí investigating complaints under the Discipline Regulations on its behalf. GSOC is of the view that its investigations should be conducted outside of the processes set out in the Discipline Regulations.

3. EFFECTIVE RESOLUTION

3.1 To Establish More Efficient Processes to Deal with Less Serious Issues

3.1.1 Background

Many admissible complaints do not allege serious misconduct or criminal behaviour, but rather allege minor breaches of discipline. At their core, many complaints arise from dissatisfaction in relation to the service provided by a member of the Garda Síochána in addressing routine queries.

While the Informal Resolution process allows for a degree of flexibility in resolving complaints, the disciplinary processes are lengthy, expensive and highly bureaucratic and do not necessarily address the issues raised by the complainant.

3.1.2 Problem

With the exception of matters dealt with under IR, the focus of a disciplinary investigation is whether or not the complaint should be upheld and a sanction imposed. There are complaints where this approach is appropriate. However, with regard to service level complaints, focus on blame and sanction has the effect of causing those involved to miss the benefits of problem-solving and organisational learning.

GSOC is of the view that issues such as the non-return of phone calls or non-investigation of a reported crime, are best dealt with by seeking to resolve the problem in the first instance. A management or corporate response, or simple acknowledgement of the issue, in many instances, may address the complaint and the Garda Síochána should be encouraged to provide such responses.

Under the current legislation, consent is required from all parties in order for a matter to be dealt with and successfully concluded by informal resolution. Many gardaí exercise their right to refuse to consent to informal resolution. This is the major impediment to resolving minor matters informally. The alternative means of dealing with the complaint is usually either closure or the commencement of a lengthy, bureaucratic, disciplinary investigation. GSOC is aware that in other jurisdictions, such as Northern Ireland, the Ombudsman is empowered to decide whether

informal resolution is appropriate and there is no right of veto.

3.1.3 Solution

We propose that the legislation make it clear that the Ombudsman Commission has the power to decide whether informal or local resolution should be attempted in the first instance with regard to more minor complaints. It is vital that GSOC retains the option to manage informal/local resolution itself, liaising directly with the member of the Garda Síochána involved. Should this happen, GSOC would direct complainants towards garda line management in the first instance for resolution and/or remedial action by directly addressing the matter.

GSOC, when referring such appropriate matters to garda line management, would make it clear that the referral is for the purpose of resolving the problem, not investigation. It will be necessary for GSOC to have a clear mandate to issue guidelines setting out the process, particularly in terms of timeliness.

A number of key issues arise. These include:

- An efficient and effective communication loop would be needed between the Garda Síochána and GSOC.
- Protocols drawn up and agreed to ensure oversight and transparency of the recording of complaints.
- The need for garda management to report the outcome of any local management action to GSOC for consideration, lest further action be required.
- Garda Síochána line management should be empowered to provide an organisational or corporate response, e.g an apology, to complainants if such is deemed appropriate.
- Whether and under what circumstances GSOC would provide a second port-of-call for issues that could not be resolved by garda line management.
- The degree of confidentiality of the discussions held between the parties in trying to resolve the complaint.

4. EFFECTIVE INVESTIGATION

4.1 To Establish More Efficient Processes for GSOC Investigations

4.1.1 Problem

The Act stipulates that investigations by GSOC are conducted within certain sections of the Act i.e. section 95 (disciplinary) or section 98 (criminal). A criminal investigation must be so designated in order for police powers to be available to designated officers. While designated officers are conducting an investigation in that phase, they may encounter issues that do not amount to criminal conduct but that may warrant recommendations of disciplinary proceedings. As the Act is constructed, disciplinary matters must await the conclusion of the criminal investigation i.e. an investigation must move from one phase e.g. section 98 to another e.g. section 95. As criminal investigations are often lengthy, sometimes involving the forwarding of files to the DPP, the disciplinary matters may not be dealt with for a significant period of time after the original incident. This means that certain members of the Garda Síochana may find themselves being questioned about disciplinary matters a long time after the events in question. This system inhibits good investigation and leaves gardaí with allegations hanging over them for a significant period of time. The Ombudsman Commission is of the view that the system does not deliver the optimum in terms of outcomes or fairness.

4.1.2 Solution

GSOC proposes two forms of independent investigation by GSOC officers:

1. Investigations where criminal powers may be invoked

GSOC proposes that this would be akin to the current section 98 model of investigation where an allegation of a criminal nature has been admitted for investigation. GSOC would propose that such an investigation would encompass any ancillary disciplinary matters that arise during the course of the investigation.

2. Investigations that do not require criminal powers

GSOC proposes that this type of investigation would be akin to the current section 95 model of investigation where there is no allegation of a criminal nature and consequently no recourse to criminal powers.

The proposed new approach would enable GSOC to focus on the investigation of both criminal and disciplinary complaints simultaneously. It would also provide for more efficient investigations and reinforce GSOC's role as an investigator whilst preserving the role of discipline for the Garda Commissioner.

GSOC does not consider that conducting a simultaneous investigation into possible criminal and disciplinary matters would give rise to a breach of fair procedures provided that the garda member subject to the investigation is advised, at the outset or as soon as has been established, of the nature of the GSOC investigation.

It is proposed that, at the outset of a GSOC investigation, the nature of the investigation would be explained to the garda member subject of the investigation. They would be informed that evidence obtained during the course of an investigation can be used in disciplinary and/or criminal proceedings. At the conclusion of the GSOC investigation, and where appropriate, a file may simultaneously be referred to the DPP recommending criminal proceedings and/or the Garda Commissioner recommending consideration of disciplinary action. The decision as to when and if disciplinary proceedings/action should be taken by the Garda Commissioner in accordance with the Discipline Regulations is a matter solely for the Garda Commissioner.

Essential to any such proposal would be an increase in GSOC staff resources to cater for the significant additional workload to be undertaken.

Under the Act, the Garda Commissioner is required only to inform GSOC of the outcome of any disciplinary proceedings or action taken on foot of a report arising from a GSOC investigation. The member of the public, by consequence, is provided with only minimal information i.e. that

there were disciplinary proceedings or action; that a sanction may or may not have been applied; or that there were no disciplinary proceedings or action. GSOC cannot tell complainants how decisions were arrived at. See section 8.1.

4.2 Enduring Nature of Police Powers

4.2.1 Problem

The Act confers police powers on designated officers for the purposes of investigations under section 98. A considerable amount of bureaucracy attaches to the designation of an investigation as one that is to be conducted under section 98 e.g. designation by line management and notifications to garda members. The Act, under section 101, further prescribes that designated officers report to the Ombudsman Commission on completion of their investigation. Given that the investigation has been completed, it is arguable that police powers do not endure beyond this point. In practice, the Director of Public Prosecutions may require further information before making a decision. The collection of such information may require police powers which arguably are not available to GSOC designated officers at that point. Similarly, during the coronial process, designated officers perform many of the functions normally carried out by gardaí. The non-endurance of police powers for designated officers beyond the completion of their investigative duties presents practical difficulties. GSOC has taken legal advice on this issue but such advice would not be necessary if clarity is brought to the statutory provision.

4.2.2 Solution

We propose that police powers be available to designated officers of GSOC in the performance of their duties. Designated officers would carry a warrant card and use it in the same way that members of the Garda Síochána do. By consequence of this measure and the eradication of the 'phases' as outlined in section 4.1.2, GSOC designated officers would investigate incidents and allegations without always having to declare them exclusively criminal or exclusively disciplinary at the outset. This would also provide for police powers to endure in relation to a case, not simply the evidence gathering phase of an investigation, as is currently the case. Any concerns about overuse/misuse of such powers will always, as with members of the Garda Síochána, be subject to court review and sanction.

5. ADMISSIBILITY AND RELATED NOTIFICATIONS

5.1 Pre-Admissibility

5.1.1 Problem

Currently, when GSOC receives a complaint, we have no statutory powers to conduct enquiries into the circumstances of the complaint other than to seek further information on a voluntary basis from the complainant, to assist in determining the admissibility of the complaint only. We cannot make any enquiries on PULSE or with the gardaí to ascertain very simple facts such as dates of arrest, detention or locations unless a complaint has been determined to be admissible.

5.1.2 Solution

We propose a statutory provision relating to pre-admissibility enquiries that would enable investigation (without recourse to policing powers) of matters for the purposes of determining whether a criminal, non-criminal investigation or whether an investigation is necessary or appropriate.

5.2 To Allow the Complainant Greater Choice

5.2.1 Problem

There is currently a difference of opinion between GSOC and the Garda Síochána over the interpretation of section 85. The Garda Síochána is of the view that complaints alleging misconduct should automatically be forwarded to GSOC under section 85. GSOC, by contrast, is of the view that some complainants expect the Garda Síochána to respond to their complaints of misconduct by way of an investigation into the allegations. GSOC believes that a complainant is entitled to expect that the police service will investigate allegations of crime or misconduct against its own members. GSOC's position is that a complainant should be asked whether or not they are comfortable with the Garda Síochána conducting an investigation or whether they would prefer an independent investigation.

5.2.2 Solution

Section 85 could be amended to clarify that such complaints must be notified to GSOC although the decision as to which agency investigates is a matter for the complainant, recorded in writing, unless the complaint relates to death or serious harm in which case GSOC should investigate.

5.3 Notification of Complaints Deemed Suitable for Local/Informal Resolution

5.3.1 Background

Section 88(2)(a) sets out the requirement to notify the Garda Commissioner of an admissible complaint and provide a copy of the complaint.

5.3.2 Problem

One of the advantages to garda members seeking to resolve a complaint through local resolution is the non-recording of a sanction against the member concerned. While it seems appropriate to involve local line management, it may not be necessary to involve the most senior line management at such an early stage.

5.3.3 Solution

We propose an amendment to section 88 to remove the necessity to notify the Garda Commissioner or provide copies of the complaints which have been categorised by GSOC as suitable for local resolution. This would allow greater opportunity to resolve complaints informally.

The responsibility for the issuing of notifications to members of the Garda Síochána of the receipt and admissibility of a complaint in these particular cases should rest with GSOC⁴.

A copy of the complaint will be provided to the Garda Commissioner if attempts by GSOC and/or garda line management to resolve the issue are unsuccessful and a more formal investigation is considered necessary.

4 p 148 Report of the Honourable Mr. Justice Frank Clarke concerning an Inquiry pursuant to Section 109 Garda Síochána Act, 2005 [2016].

5.4 To Modify Notification Requirements regarding Inadmissible Complaints

5.4.1 Background

When a complaint is received by GSOC, we must notify the Garda Commissioner of the complaint. If, following initial screening, the complaint is determined to be inadmissible, GSOC must notify the complainant, the garda member concerned and the Garda Commissioner, and include in the notification the reason for the determination. This process is in line with section 88 (1) of the Act.

5.4.2 Problem

Section 88 (1) of the Act outlines in strict terms what GSOC is obliged to do in terms of the content of the notification of inadmissibility. A garda member receives a letter from GSOC saying a complaint has been made and has been deemed inadmissible. The letter will also give the reason for inadmissibility, i.e.:

- The person making it is not authorised;
- The conduct alleged does not constitute misbehaviour;
- The complainant is out of time, or
- The complaint is frivolous or vexatious.

However, the letter does not provide any detail of the complaint, leading to frustration among garda members as they have no knowledge of the alleged behaviour that led to a complaint. Routinely, as a way to find out more about the inadmissible complaint, gardaí make requests under the Data Protection Acts 1988 and 2003 (DPA) for copies of their personal data. In 2016, over 50 per cent of all data access requests received were from gardaí and many arose as a result of inadmissible notifications.

In direct conflict to the right of the garda to access their personal data, the confidentiality of the complainant is protected under section 81 (2) (b) and (c) of the Act which obliges GSOC not to disclose information that will result in the identification of a complainant, unless their

identity is public knowledge. The right of the garda member to access their personal data however, makes it extremely difficult for GSOC to disclose data that will not result in the identification of a complainant. Our current approach is to disclose, where appropriate and possible, the nature of the allegation made. However, this approach could still be in breach of section 81 of the GSA, as even that detail could lead to the identification of the complainant by the garda concerned.

This conflict between section 81, section 88(1) and the DPA makes it difficult for GSOC to comply with all its obligations “*in full fairness to all involved in complaints*”⁵.

5.4.3 Solution

The Ombudsman Commission proposes the following:

That the requirement to notify a garda member of an inadmissible complaint be removed.

If the requirement is to be retained then the Commission proposes:

- A specific exemption dis-applying the provisions in relation to the processing of data where such processing is in aid of a regulatory function.

or

- Legislate for a balancing test to balance potential competing rights.

5.5 Frivolous or Vexatious Complaints

5.5.1 Background

A criterion of admissibility is that “*the complaint is not frivolous or vexatious*”. It is suggested that section 87 (2)(d) be removed.

5.5.2 Problem

While there are complaints which are frivolous or vexatious in nature, some complainants find the

⁵ Section 67 (1) (a) Garda Síochána Act, 2005 as amended.

language inflammatory. This has inhibited the use of the section because it is unlikely to assist in the achievement of GSOC's section 67 objectives.

5.5.3 Solution

It is suggested that the language be replaced with:

“Having regard to all the circumstances, the Ombudsman Commission is of the view that investigation is not necessary or reasonably practicable.”

6. EFFICIENCY

6.1 To Improve Timeliness of Information Provision

6.1.1 Problems

Timeliness regarding the provision of information to GSOC remains a concern.

The Principal Act was amended by the insertion of the following section after section 103:

“103A. The Garda Commissioner shall ensure that information to be provided by the Garda Síochána to the Ombudsman Commission for the purposes of an investigation by the Commission of a complaint, or an investigation by the Commission of any matter under section 102 or 102B, is so provided as soon as practicable.”

It was enacted in March 2015. In the period of a year from April 2015 to April 2016, the time taken to receive information through this system was 22 days, in comparison to 28 days in the same period the previous year. This shows that legislative change does have the power to improve the operation of the system.

Notwithstanding this, an average 22 day wait for a standard piece of information - such as the name of a garda, or whether they were working at the time of an incident complained of - clearly contributes to long durations of investigations into even minor matters, and we do hope to see even further improvement in this area.

It is not practical for requests for evidence or information requests of a time-critical nature, to be processed through the current system. In such circumstances, the GSOC designated officer makes their specific urgent request directly to the relevant District Officer, requesting the return of the information directly to them, or attends in person and takes possession of the evidential material required. (An example of a situation where information requests are typically time-critical would be a request for CCTV footage, or initial accounts in the context of a serious criminal or disciplinary investigation.)

6.1.2 Solution

We note that in the legislation governing the working of our sister organisation in Northern Ireland, the Police (Northern Ireland) Act 2000, the following provision is included under section 66:

“The Chief Constable and the Board shall supply the Ombudsman with such information and documents as the Ombudsman may require for the purposes of, or in connection with, the exercise of any of its functions.”

The Ombudsman Commission feels that such a statutory power would strengthen the hand of GSOC in getting all the necessary information to fully investigate complaints. Such a provision, we believe, would be stronger than the current section 103A. It would allow an avenue of enforcement through the courts if necessary, should materials required for an investigation not be forthcoming.

7. INDEPENDENCE

7.1 Remove Requirement for Consent from Minister/Government to Investigate Garda Commissioner

7.1.1 Problem

Under section 102B, the Ombudsman Commission is prevented from investigating the conduct of the Garda Commissioner without Ministerial and Governmental consent. This inhibits GSOC's independence and freedom to act. It may be injurious to public confidence in that GSOC's hand may be stayed by Government in very serious matters.

7.1.2 Solution

We propose that GSOC is enabled to commence investigations into the conduct of the Garda Commissioner on its own initiative.

7.2 Policing Authority Referrals

7.2.1 Problem

Under section 102 4A, the Policing Authority may request the Ombudsman Commission to investigate certain matters and the Commission shall investigate. Without a qualification that matters previously considered or investigated by GSOC are not referable, the Policing Authority could become an appeals mechanism against Ombudsman Commission decisions. We do not believe this is the intention of the legislation.

7.2.2 Solution

We propose a legislative provision for GSOC to exercise its own discretion as to whether investigation of such referrals is in the public interest.

7.3 Searching Garda Stations

7.3.1 Problem

Under the current provisions of section 99, GSOC is required to notify the Garda Commissioner in advance of conducting a search of a garda station that has been designated as a station that is exempt for State security reasons. At present no stations have been specifically designated for exemption. This causes difficulties for GSOC as there is a concern that it may inadvertently search a station where State Security material is being held. To offset this concern GSOC has put the

Garda Commissioner on notice of every intended garda station search.

7.3.2 Solution

We propose removing the requirement for advance notification in future legislation.

8. OPENNESS AND TRANSPARENCY

8.1 The Garda Síochána to Provide Rationale for Decisions Concerning GSOC Recommendations

8.1.1 Problem

At the end of disciplinary investigations, GSOC sends a report to the Garda Síochána, who then assign a superintendent to review the case and decide whether GSOC's recommendations will be followed. GSOC has no power to impose its findings or recommendations. Even if the GSOC investigator has highlighted evidence of a breach, the Garda Síochána may decide that there is no breach, take no action and provide no rationale to GSOC. This means that the complainant will receive sparse information about the outcome of his/her complaint.

8.1.2 Solution

We propose a legislative provision mandating the Garda Commissioner to update GSOC in relation to the outcome of any disciplinary decision taken including the rationale for same. We further propose that the Garda Commissioner be statutorily required to inform GSOC of any disciplinary action taken or proceedings instituted or not, on foot of a report furnished to their office at the conclusion of a GSOC investigation. The Garda Commissioner should also be required to provide GSOC with the reasons for not instituting disciplinary proceedings or taking disciplinary action. The reasons would then allow us to report back to the member of the public who made the complaint in a transparent manner.

8.2 Non Party Disclosure

8.2.1 Problem

GSOC has agreed a Protocol for Non Party Disclosure with the DPP. This is a non-statutory framework and has, in practice, given rise to many administrative and procedural difficulties. Non party disclosure needs to be placed on a statutory footing particularly in light of the new General Data Protection Regulation requirements.

8.2.2 Solution

Specific provisions need to be made for how material held by GSOC that may be relevant to the prosecution and/or to an accused for his/

her defence of a criminal trial should be made available to the prosecution and the defence.

8.3 Data Sharing

8.3.1 Problem

The sharing of information in compliance with the current statutory regimes for Protected Disclosures, the Data Protection Acts and the Garda Síochána Act is complicated.

GSOC receives requests from the Policing Authority for the suitability of applicants for promotion. Consent is obtained from such applicants for enquiries to be made with GSOC. However, having regard to the terms of section 16 of the Protected Disclosure Act, 2014 GSOC may be precluded from sharing such information even though this may have significance for the Policing Authority.

8.3.2 Solution

We propose either of the following solutions:

- A specific exemption dis-applying the provisions in relation to the processing of data where such processing is in aid of a regulatory function.
- or
- Legislate for a balancing test to balance potential competing rights.

8.4 To Place GSOC Recommendations on a Statutory Footing

8.4.1 Problem

GSOC makes recommendations to the Garda Commissioner arising from the results of some investigations. These recommendations are often of a systemic nature. While these recommendations are made in writing there is no statutory basis for them and there is no obligation on the Garda Commissioner to engage with GSOC regarding implementation of these recommendations.

8.4.2 Solution

A statutory provision to enable GSOC to make systemic recommendations.

9. ARTICLE 2

9.1 To Increase the Categories in which GSOC and the Garda Síochána can Complete Protocols

9.1.1 Background

The European Court of Human Rights (ECtHR) permits oversight bodies to cooperate with the body within jurisdiction in order to complete necessary tasks it could not complete itself. Section 108 of the Act makes provisions for Protocols between GSOC and the Garda Síochána in the categories at (a) to (d). These relate to the use of detention facilities; treatment of persons in custody; the handling of investigations by GSOC that coincide with investigations by the Garda Síochána into the same matters; and the sharing of information.

9.1.2 Problem

Arguably, GSOC is only entitled to conclude Protocols with the Garda Síochána in the categories provided at section 108 (a) to (d) of the Act.

9.1.3 Solution

The legislature may wish to give consideration to extending the categories in which the respective agencies can conclude protocols. This would enable GSOC and the Garda Síochána to complete new protocols as needs arise e.g. in response to new legislation.

9.2 To Place GSOC's Current Practice of Forwarding all Files where Article 2 Engages to the O/DPP on a Statutory Footing

9.2.1 Background

The ECtHR requires investigations where Article 2 engages to be effective, meaning they must be capable of determining *inter alia* if the force used was justified and, if not, to identify those responsible⁶.

9.2.2 Problem

GSOC cannot prosecute suspects. GSOC sends a file to the O/DPP in all cases where Article 2 engages even where GSOC does not recommend

a prosecution. The O/DPP has indicated it will receive and consider such files. However, this may cause stress to persons under investigation.

9.2.3 Solution

We suggest a legislative amendment to provide for the mandatory forwarding of all files to the O/DPP where Article 2 engages.

However, to balance this we propose an amendment to section 103 of the Act to provide that GSOC may disclose the results of its investigation and recommendation (if any) to interested parties.

9.3 To Define the Timeframe in which the Garda Síochána must make Referrals to GSOC

9.3.1 Background

The ECtHR has commented that investigations must be conducted promptly⁷.

9.3.2 Problem

Section 102(1) of the Act does not prescribe a timeframe within which the Garda Síochána must refer any matter where it appears the conduct of a member of the Garda Síochána may have resulted in the death of, or serious harm to, a person. Delays in referrals can result in loss of evidence.

9.3.3 Solution

The legislature may wish to give consideration to proposing the insertion of the word, "*promptly*" or equivalent into section 102(1). This may need to be re-enforced by concluding a relevant Protocol between the Garda Síochána and GSOC.

9.4 To Define Serious Harm

9.4.1 Background

Section 102 relates to investigations by GSOC, other than those made on foot of a complaint made by a member of the public. In other words, investigations into matters referred by the Garda Commissioner, possible offences or misbehaviours that the Ombudsman Commission considers it desirable in the public interest to

⁶ *Ogur v Turkey* (2001)

⁷ *Ramsahai v Netherlands* (2007)

investigate or matters which have given rise to concern on the part of the Minister or the Policing Authority that a member of the Garda Síochána may have committed an offence or behaved in a manner that would justify disciplinary proceedings.

9.4.2 Problems

Based on our experience to date, we are satisfied that, in the main, section 102 as currently drafted meets GSOC's needs and that of effective and independent civilian police oversight. There is, however, a lack of clarity regarding the definition of serious harm.

The Garda Commissioner is required to refer any matter that appears to indicate that the conduct of a member of the Garda Síochána may have resulted in the death of, or serious harm to, a person. Serious harm is not defined in the Act and that, on occasion, has led to differences in interpretation between the Garda Síochána and GSOC.

The lack of a definition of serious harm, or from an alternative point of view, the obligation to only refer matters of death or serious harm, has led to a concern in relation to the referral of matters involving alleged rape and sexual assault. Doubt has arisen as to whether such matters can be properly referred under section 102 (1), thereby putting any subsequent criminal and/or disciplinary proceedings at risk.

9.4.3 Solution

We propose that section 102(1) be amended to include "rape and sexual assault".

9.5 Obligation to Investigate Matters under Section 102(2)

The problem is two-fold:

- a) The disconnect between GSOC's obligation to investigate matters under section 102 (2) and the mechanism of examination under section 91 and,
- b) The absence of certainty as to the basis upon which further investigation can lawfully be conducted where no criminal or disciplinary offence has been identified.

Section 102(3) states that if matters are referred by the Garda Commissioner or matters where it appears to the Ombudsman Commission that the conduct of a member of the Garda Síochána may have resulted in death or serious harm, then the matter proceeds as if it were a complaint referred to in section 91; in other words, not an investigation but rather an examination to determine if an investigation should be conducted. Section 91 only allows for matters to be investigated where, following examination, it is recommended that the matter should be investigated under either section 98 (where a potential criminal offence has been identified) or section 95 (where the matter does not appear to involve an offence). Disciplinary matters are therefore investigated under section 95. If GSOC does not investigate the referral, then GSOC is not acting in accordance with section 102(2) which states that GSOC shall ensure that such matters are investigated.

It is common for matters involving death or serious harm to not involve any identifiable elements of a criminal or disciplinary nature. Such instances are problematic within the current Act. GSOC's powers under section 98 can only be exercised for the purposes of investigating possible criminal offences. Where no criminal offence has been identified, GSOC's practice is to proceed under section 95 which relates to investigations of non-criminal matters. So, even when it is evident that nothing of a criminal or disciplinary nature is evident after examination, we must still investigate because of a referral under section 102 (1) or an investigation was opened under section 102 (2) (b). Rather than taking a prescriptive view of section 95, GSOC has needed, for pragmatic reasons, to take a broader view that section 95 applies to all matters other than those which appear to involve offences. However this interpretation is open to challenge and, given the critical nature of the matters which are investigated in this manner, clarity and surety are essential.

9.5.1 Solution

We propose that GSOC be obliged to investigate all matters which would previously have been subject to examination under section 91. This would obviate the need for any examinations.

In practical terms, if GSOC is satisfied in early course that there is no identifiable criminal behaviour or disciplinary misconduct, then the case can be closed in the normal way. In this way, GSOC would set out to investigate incidents and sets of circumstances referred to it by the Garda Commissioner or otherwise coming to our attention through section 102. In line with an earlier proposal at section 4.1, the current focus on designating the investigation either criminal or disciplinary at the outset would be irrelevant.

10. POLICING POWERS

10.1 Policing Powers Exercisable by a Superintendent or Garda of Higher Rank

10.1.1 Problem

Section 98 (2)(c) of the Act vests all the powers of the Garda Inspector rank and above in the Ombudsman Commission, namely the three GSOC Commissioners. It is unclear whether these powers are dependent upon an extant section 98 investigation.

All designated officers of GSOC have the equivalent powers of garda rank in section 98 investigations.

This means for example that requests for search warrants and coronial adjournments can only be made by the Commission.

10.1.2 Solution

We propose a legislative provision to enable GSOC Senior Investigating Officers to exercise these powers subject to internal controls. No change is suggested in the role of the Commissioners in relation to telecom related data.

10.2 Proximity

10.2.1 Problem

On occasion, a GSOC investigation may discover that a person who is not a member of the Garda Síochána has acted in concert with a member in the possible commission of a criminal offence. Although section 98 of the Act has been amended, the statute could make clearer provision for GSOC to investigate civilians in such instances.

10.2.2 Solution

We propose that the Act makes clear provision for GSOC to investigate a matter even if the offence or behaviour concerned may also involve or have involved a person who is not a member of the Garda Síochána.

10.3 Investigating Retired Members

10.3.1 Problem

Once retired, a former garda member is not subject to the Discipline Regulations. Therefore no non-criminal investigations can commence, or where already commenced, continue. It has

been the experience of GSOC that members under investigation have retired, thus bringing matters to an end.

10.3.2 Solution

In other jurisdictions it is permissible to delay the retirement of a member under investigation, including non-criminal investigation. Consideration should be given to such a provision. This would require consultation with interested parties including the Policing Authority.

11. EFFECTIVE INVESTIGATION OF PROTECTED DISCLOSURES

11.1 Anonymity of Discloser

11.1.1 Background

The Protected Disclosures Act, 2014 provides in section 16 for the protection of the identity of the person making the protected disclosure (the “PD”). The protection of the identity of the person making the PD does not apply where disclosure of the identity is necessary for the effective investigation of the relevant wrongdoing concerned.

11.1.2 Problem

Where an investigation is required by GSOC it will, in almost all cases, require that the identity of the person making the PD is disclosed. This is in order to accord with fair procedures and to comply with section 88(3) of the Garda Síochána Act, 2005.

Where a person makes a PD to GSOC, in order to investigate the disclosure, GSOC needs to apply a public interest test. If GSOC considers that investigation of the PD is in the public interest then it can do so. If the person who makes the PD decides to withdraw from the process GSOC may still determine that the investigation should proceed and that the identity of the discloser needs to be revealed without his/her consent to do so.

11.1.3 Solution

We propose a statutory provision confirming that:

1. an investigation commenced by GSOC in relation to a protected disclosure may proceed without the discloser’s consent and may require the disclosure of his/her identity;

or

2. GSOC may abandon the investigation of a PD where it is no longer possible to continue the investigation without disclosing the identity of the discloser and the discloser does not consent to his/her anonymity being waived.

11.2 Mandatory Referrals by the Minister for Justice and Equality

11.2.1 Background

GSOC may receive PDs directly, as a prescribed body, or indirectly via referrals from the Minister in accordance with section 102(5) or section 102(7) of the Garda Síochána Act, 2005 (the Act).

11.2.2 Problem

If the referral of the PD is made by the Minister pursuant to section 102(7), GSOC has a discretion to investigate. If the referral of the PD by the Minister is made pursuant to section 102(5), GSOC is mandated to investigate the referral.

It is not clear why a public interest test should be imposed by GSOC where it directly receives a PD and why a referral of a PD by the Minister pursuant to section 102(5) mandating an investigation would not be subject to such a test. In GSOC’s view this could be perceived as a fettering of GSOC’s independence.

11.2.3 Solution

It would be preferable if GSOC retained a discretion to investigate referrals by the Minister rather than being mandated to do so and that the same public interest test would be applied by GSOC when considering the referral of PDs by the Minister.

11.3 Whether Referrals by the Minister should be Treated by GSOC as Protected Disclosures pursuant to S102 A

11.3.1 Problem

Statutorily, a PD may be referred to GSOC for investigation by the Minister pursuant to section 102(5) or section 102(7). Such a referral does not fall for investigation by GSOC under section 102A of the Act (the provisions relating to investigations of PDs made to GSOC as a prescribed person under section 7 of the Protected Disclosures Act, 2014). This creates an ambiguity for GSOC in relation to the rights and protections afforded to a discloser under the Protected Disclosures Act, 2014 and whether such obligations extend to GSOC as a third party recipient of information relating to a protected disclosure, in particular the requirement to protect the identity of the discloser.

11.3.2 Solution

It would be preferable if this section was extended to cover all protected disclosures either made directly to GSOC or referred to the GSOC.

11.4 Notifications to the Garda Commissioner under Section 88 of the Act

11.4.1 Problem

GSOC is obliged to make certain notifications to the Garda Commissioner in accordance with section 88 of the Act. In relation to protected disclosures, this may result in the identity of the discloser being made known to the Garda Commissioner and the garda member who is the subject of the disclosure.

11.4.2 Solution

It would be preferable if GSOC had an express statutory provision to enable it to delay notifications to the Garda Commissioner where concerns may arise regarding a loss of evidence, witness interference or where notification of the investigation may result in the identification of the discloser where such identification is not necessary, at that stage, to further the investigation.

11.5 Data Protection and Protected Disclosures

There is no specific exemption for disclosure of personal data received by GSOC with respect to PDs.

11.5.1 Solution

It would be preferable, if there was statutory clarity either through an amendment to the Act, the Protected Disclosures Act, 2014 or the Data Protection Acts 1988 and 2003 as to how such data should be treated on foot of a subject access request.

11.6 Deferral of GSOC Investigation

11.6.1 Problem

Having regard to the terms of the Protected Disclosures Act, 2014 a discloser may make an internal PD before making a PD to a prescribed person (pursuant to section 7) or the Minister (pursuant to section 8). By the time the PD is received by GSOC an investigation into the

same subject matter may already be underway. Likewise the discloser may also have complained to other statutory bodies such as the Data Protection Commissioner, who may have an active investigation into elements of the disclosure. This may create difficulties for any GSOC investigation.

11.6.2 Solution

An express statutory provision affording GSOC a discretion to defer the investigation of a matter pending resolution of another process would enable GSOC to better defend its decision-making against potential delay arguments.

11.7 Disciplinary and Criminal Proceedings

11.7.1 Problem

GSOC may receive a PD that has been the subject of a previous internal process e.g. an internal disciplinary investigation. GSOC may decide that a criminal investigation is warranted notwithstanding that there has already been an internal disciplinary investigation. Such a decision may give rise to challenges such as a double jeopardy plea or a breach of rights to constitutional justice plea.

11.7.2 Solution

A statutory acknowledgement that a person may be subject to a multiplicity of proceedings including disciplinary and criminal (that may already have been the subject matter of one process) would assist in defending any challenges in this regard.

11.8 Scope of Investigation into a Protected Disclosure

11.8.1 Problem

The current statutory framework provides for investigation of "the disclosure" if GSOC considers such an investigation to be in the public interest. Where GSOC identifies systemic issues during the course of the investigation it may face challenges as to whether it has the jurisdiction to investigate these matters.

11.8.2 Solution

A statutory amendment to expressly allow for a PD investigation into systemic and related matters raised by the subject matter of the PD would make clear that the GSOC investigation is not limited to the terms of the disclosure made.

11.9 Pre admissibility Enquiries for Protected Disclosures

11.9.1 Problem

There is no provision under the current legislation to make any pre-admissibility enquiries to determine whether the matter disclosed requires investigation and, if so, whether a criminal or disciplinary investigation should be initiated.

11.9.2 Solution

We propose that any statutory provision that is introduced for pre-admissibility enquiries, to determine if and how a matter should be investigated, applies to protected disclosures.

11.10 Exclusion of Certain Matters for Investigation as Protected Disclosures

11.10.1 Problem

Under the terms of the Garda Síochána Act, 2005 GSOC may deal with complaints that pertain to security and intelligence. However, under the provisions of section 18(3) of the Protected Disclosures Act, 2014 such complaints cannot be made to GSOC as protected disclosures.

11.10.2 Solution

A statutory amendment is required to enable GSOC to investigate protected disclosures relating to security and intelligence.

12. FINAL OBSERVATIONS

12.1 Right of Review of Decisions of the Ombudsman Commission

12.1.1 Background

There is no statutory right of review for interested parties to query decisions of the Ombudsman Commission. For members of the public who make complaints to GSOC, the only right of review available is under section 94(10) of the Act i.e. where a complainant is dissatisfied with the results of an unsupervised investigation or with any disciplinary proceedings instituted as a result of that investigation, they can request that GSOC review the matter. This is a very limited form of review. The Ombudsman Commission, in this document, is proposing the removal of section 94. That would mean that no statutory right of the review at all would exist under the Act.

12.1.2 Problem

GSOC has the power to bring the complaints process to a close. This can be done by declaring the complaint inadmissible; by declaring that further investigation is not necessary or reasonably practicable; by deciding not to send a file to the DPP following investigation; by deciding, in cases where the DPP has decided not to prosecute, to take no further action in relation to a complaint. Parties affected by these decisions do not have any right to seek a review. The Ombudsman Commission believes that persons who are dissatisfied with the outcome of their interaction with GSOC should be entitled to seek a review.

A further issue arises in relation to the victims of crime legislation in that the right of a victim to request a review of a decision not to prosecute only applies to decisions made by the Garda Síochána and the DPP. Although GSOC acknowledges that it is not a prosecuting authority, it is our view that a lack of a right of review creates disparity between the rights of victims, not least victims who choose to have their complaint investigated by GSOC and victims who choose to have their complaint investigated by the Garda Síochána.

12.1.3 Solution

We propose that statutory provision be made to allow for a clearly defined review, for stated reasons, of decisions that determine the admissibility of a complaint and all decisions that end the investigative process including decisions made under section 101.

12.2 Section 109 Inquiries

12.2.1 Problem

The scope of what can be inquired into by a judge when conducting a section 109 inquiry might benefit from clarification. In light of the fact that work done by various sections of GSOC overlap each other and affect each other, consideration might be given to extending the scope of inquiries under section 109 to include more than just designated officers.

12.2.2 Solution

We propose consideration be given to amending the Act to provide clarity as to the scope of section 109 inquiries.

12.3 To Enable GSOC to Conduct Joint Investigations with other Agencies

12.3.1 Problem

Issues occasionally come to GSOC's attention which require specialist investigative skills. Because of resource issues, GSOC does not have a full range of specialist skills to deal with every eventuality. In accordance with section 74 of the Act, specialist skills can be engaged commercially. This very often involves time-consuming procurement processes. The expensive, time-consuming option may not be as effective or efficient as cooperating with other agencies who have expertise in the area.

12.3.2 Solution

GSOC should be able to seek to engage in joint investigations into alleged misbehaviour involving garda members where other agencies have the relevant investigative expertise e.g. the Health and Safety Authority, the Revenue Commission or the Data Protection Commission.

12.4 Update Schedule 5

12.4.1 Problem

At present there is a difference between the breaches of discipline set out in Schedule 5 of the Act and those contained in the Garda Síochána Discipline Regulations. While it is GSOC's wish that our investigations take place outside of the Discipline Regulations, it is potentially confusing for members of the Garda Síochána to have two different sets of breaches with which to deal.

12.4.2 Solution

We suggest that consideration be given to aligning these two sets of breaches.

12.5 Closing Cases

12.5.1 Problem

Section 101(7) states that the Ombudsman Commission, if it is of the opinion that the designated officer's report discloses no misbehaviour by a member of the Garda Síochána, shall take no further action in relation to the complaint. This rather blunt section does not facilitate the provision of further updates to interested parties in line with section 103. Nor does it facilitate the making of systemic recommendations that might contribute to learning within the Garda Síochána.

12.5.2 Solution

We propose that section 101(7) be amended to enable GSOC to close the case and to report as the Ombudsman Commission deems appropriate.

13. CONCLUSION

Central to GSOC's ability to carry out its duties and to promote public confidence in the system of police oversight in this country is the concept of GSOC's independence. We believe that GSOC should be reconstituted as a fully independent agency. Such independence would enable GSOC to react more quickly to changing circumstances in terms of recruitment and new legislation. We believe that for the public to have confidence in the system, independence has to be real and obvious.

Among the many changes to our operations that GSOC would like to see in new legislation, three stand out as particularly significant. These are:

- the enabling of more efficient and earlier resolution of less serious complaints;
- the placing of responsibility for all investigations with GSOC and,
- the simplification of the very complicated processes contained in the current Act.

The enabling of more efficient resolution requires a shift of focus away from retribution and punishment of gardaí to intervention and resolution to the satisfaction of all parties. This would mean that the complainant's wishes are central to attempted solutions. In the context of the EU Victims of Crime Directive and the Criminal Justice (Victims of Crime) Act 2017, this would be a welcome shift.

With regard to GSOC taking over all investigations, this is a recognition that the system currently dictated by the Act has not worked over the past 10 years. The logic behind section 94 of the Act was to encourage the Garda Síochána to take responsibility for discipline within the organisation. GSOC does not disagree with that logic and would hope that garda line management would take that responsibility regarding service matters and other forms of resolution. However, our experience has led us to conclude that investigations into complaints by members of the public received by us should not be investigated through the lens of the Discipline Regulations.

The third, very significant, proposal is that of streamlining the investigative process. We are very anxious to reduce the time it takes to bring

investigations to conclusion. This proposal is made in the interests of fairness to all parties.

These proposals, along with the others throughout this document, have huge implications for the resourcing of GSOC. We cannot stress strongly enough that the resourcing is every bit as essential as the legislative change itself.

Finally, the Garda Síochána Act 2005 is a very complicated piece of legislation. The 12 years since its enactment has been a turbulent time for the Garda Síochána and oversight bodies. It has also been a time of significant new legislation reflecting a more modern approach to accountability. We have discussed, with Ministers and officials from the Department of Justice and Equality, the options of amending the 2005 Act or of bringing in a fresh statute that would reflect the learning of the past 12 years. We are of the strong view that the latter option i.e. a new, simplified, stand-alone Act is the right way forward. The overall thrust of our proposals is towards fairness, openness, efficiency and independence. We believe, after 10 years operational experience, that the system needs a radical overhaul and that significant opportunities exist now and should be grasped.

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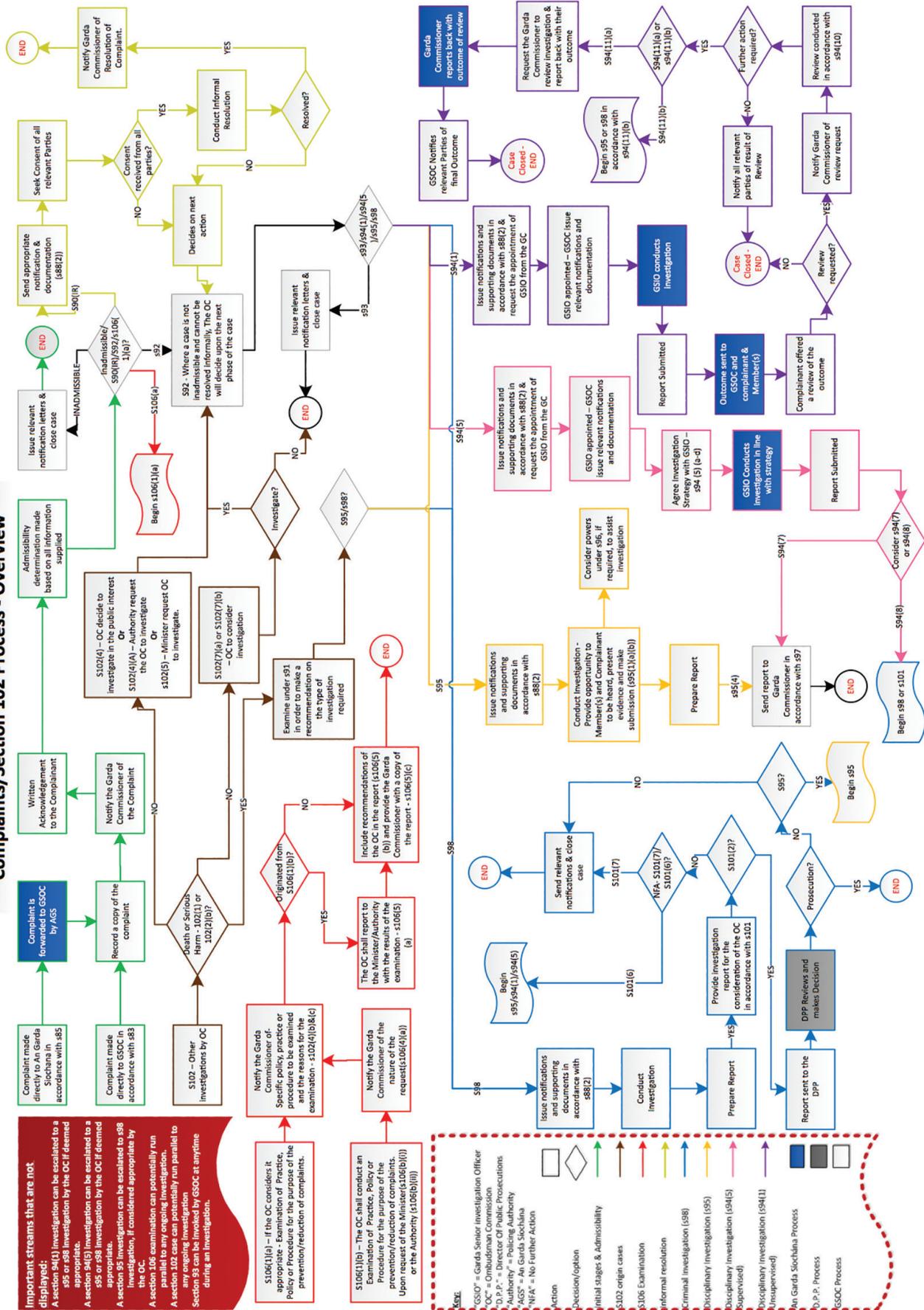
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APPENDIX A - COMPLAINTS PROCESS

Complaints/Section 102 Process - Overview





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