

Capacity Review of the
Office of the
Parliamentary Legal Advisor (OPLA)
of the Houses of the Oireachtas

Foreword

I was commissioned by the Houses of the Oireachtas to carry out a Capacity Review of the Office of the Parliamentary Legal Adviser (OPLA). I have completed the Review and it is attached hereunder.

The Capacity Review arose from the decisions of the Sub-Committee on Dáil Reform to enhance the capacity of the OPLA in the general areas of legal advices on policy for Members and drafting of Private Member Bills. I have set out my view of the capacity of the OPLA as currently resourced and what in my view is required to give effect to the decisions of the Sub-Committee. I would stress that it is difficult to assess with full precision how to resource what would effectively be a new service. I would also stress the importance of my recommendation that a further review of the operation and impact of the new arrangements be carried out no later than 18 months after establishment.

I hope that my conclusions, recommendations and observations will assist in the successful establishment of an important new service in the Houses of the Oireachtas.

I would like to thank the individuals, parties and groups both within and external to the Houses of the Oireachtas with whom I consulted for their time and valuable insights.

I would also like to thank my assistant on the Capacity Review Ms Sinead Ruth O'Brien, Legal Researcher in the OPLA for her excellent contribution to the work of the Review.

Aidan Dunning

13 December 2016

Table of Contents

Foreword	3
Table of Contents	4
Summary Overview	7
1. Origin and Terms of Reference	7
2. Summary Conclusion	8
3. Key Summary Recommendations	8
4. Issues/Observations.....	9
1. The Capacity Review	10
1.1 Introduction	10
1.1 Terms of Reference of the Review.....	11
1.2 Other Relevant Elements of the Report of the Sub-Committee.....	11
1.3 Framework and Work Programme of the Capacity Review.....	11
1.4 Work Programme.....	12
1.5 Implementation	12
1.6 Format of the Review.....	13
2. Capacity Review Conclusions & Recommendations	14
2.1. Introduction	14
2.2. Broad Focus of Conclusions	14
2.3. Overview of OPLA	15
2.4. Library and Research Service (L&RS)	16
2.5. Bills Office	17
2.6. Committee Supports	17
2.7. Capacity Deficits.....	17
2.8. Private Members’ Bills	18
2.9. Changes to Standing Orders	21
2.10. Legal Advices on Policy	21
2.11. Summary	22
3 Recommendations of the Capacity Review	22
3.1 General.....	22
3.2 Specific Recommendations:.....	23
3.3 Library and Research Service	26
3.4 Government Legislation.....	27
3.5 Process of Member Engagement with the New Unit in OPLA.....	28

3.6	Recommended Parameters for Members Engagement with New Unit.....	29
3.7	Issues/Observations.....	30
3.8	Cost and Funding of Recommendations.....	32
Appendix I – Overview of the Office of the Parliamentary Legal Advisor (OPLA).....		1
1.	Introduction	1
2.	Functions and work of the OPLA.....	1
3.	Typical issues.....	2
4.	Committee Advices	4
5.	Freedom of Information and Data Protection Acts	5
6.	Employment Law.....	5
7.	Observation on Service Advices	5
8.	Litigation	6
9.	The Protected Disclosures Act 2014	7
10.	Standing Orders	7
11.	Summary overview of existing capacity.....	7
12.	Resources Recommended.....	10
13.	Library & Research Services	12
Appendix II - Private Members’ Bills/Government Legislation		1
1.	PMB Process.....	1
2.	Scrutiny of PMBs by Bills office	1
3.	Drafting and Initiation of PMBs	3
4.	PMB and Government Bills – 32 nd Dáil	4
5.	Drafting of Government Legislation.....	5
6.	Amendments to Government Bills.....	6
Appendix III – Overview of Private Member legislative drafting services in other jurisdictions		1
1.	House of Commons, Canada.....	1
2.	The Scottish Parliament	2
3.	Northern Ireland Assembly.....	4
4.	National Assembly for Wales	5
5.	Senate of Massachusetts	6
6.	The UK House of Commons	7

List of abbreviations and acronyms

AGO	Office of the Attorney General
DP	Data Protection
ECB	European Central Bank
FOI	Freedom of Information
IR	Industrial Relations
L&RS	Library & Research Service
NGBU	Non-Government Bills Unit
NGO	Non-Government Organisations
OPC	Office of the Parliamentary Council
OPLA	Office of the Parliamentary Legal Adviser
PMB	Private Members' Bill
RaISe	Assembly Research and Information Service

Summary Overview

1. Origin and Terms of Reference

This Capacity Review of the Office of the Parliamentary Legal Advisor (OPLA) in the Houses of the Oireachtas arose from a recommendation in the Final Report of 24th May 2016 of the Sub-Committee on Dáil Reform “that a capacity review of the OPLA should be carried out as soon as possible to determine an appropriate structure in terms of staffing and resources to address all existing tasks and new initiatives envisaged by the Sub-Committee”. The Report of the Sub-Committee decided on a number of new initiatives (see Page 10 of this Review) to improve the service to Members relating to legal advices on policy and to the drafting of Private Members’ Bills.

Apart from the necessity to conduct the Capacity Review (the Review) on foot of the decision of the Sub-Committee on Dáil Reform, the Review is timely in light of the significant change in the 32nd Dáil in the dynamics of the initiation and progression of legislation. Traditionally legislation that has been enacted was initiated as Government legislation. Whilst legislation enacted to date in the 32nd Dáil has been Government Bills, the 32nd Dáil has seen very strong activity in relation to the initiation and progression of Private Members' Bills (PMBs). A significant number of PMBs have passed second stage and been referred to Committees. There is a greater likelihood of PMBs being enacted in the current Dáil.

The Capacity Review has assessed the capability of the OPLA as currently resourced to assist Private Members in the preparation and drafting of PMBs and to provide Members with legal advices on policy matters. The Review has also noted that Private Members have primarily utilised external sources to assist in the preparation and drafting of the very sizable number of PMBs introduced - 400 since 2011 and 59 to date in the 32nd Dáil.

2. Summary Conclusion

The summary conclusion of the Review is that the existing remit of the OPLA fully absorbs the current resources of the Office and it does not have the capacity to undertake the additional tasks required by the decisions of the Sub-Committee on Dáil Reform. This conclusion and the specific resource recommendations arising from it assumes that there will be a significant demand by Members for the enhanced capacity proposed. The policy research services which are provided by the Library & Research Service (L&RS) of the Houses also need to be aligned with an enhanced capability for the OPLA in the legal advisory and drafting areas to provide a strong support for Members in the three areas which are crucial for fit for purpose legislation – policy formulation, legal soundness and quality drafting. The Review also concludes that the arrangement for engagement by Private Members with the OPLA needs to be more structured to ensure easier access to the enhanced OPLA services by Members.

3. Key Summary Recommendations

The Review sets out the Recommendations in some detail (on pages 22-30) and the following are the key Recommendations of the Review;

- A new dedicated Private Members Unit should be established in the OPLA to provide legal advices on policy and legislative drafting services for Private Members of Dáil Éireann (i.e. all Members who are not Ministers or Ministers of State) and for Members of Seanad Éireann; the Unit should also provide legal advices on policy to Oireachtas Committees and assist Private Members during scrutiny of their Bills by Committees; the new OPLA Unit should be closely aligned with the policy research capacity in the Library & Research Services.
- Three new senior level posts - two Legal Advisory Counsel and one Parliamentary Draftsman should be created, assigned to the new Unit and filled via open competition; the post of Head of the enhanced OPLA should be regraded to Assistant Secretary and filled via open competition.
- The existing and underutilised (due, Members state, to historic lack of information about its existence) outsourced drafting service in the Houses of the Oireachtas should be enhanced through the contracting of one additional drafter and an increase in the budget for the Service.

- The new OPLA Unit should be available to assist Members from policy concept stage through all legislative stages to enactment; an agreed Protocol should be put in place covering all issues relating to the operation of the new Unit and Members engagement with it.
- The Protocol should include a requirement that Private Members seeking drafting assistance for a Private Members' Bill should draw up a policy paper setting out the intention of the Bill and the measures proposed to be included in the Bill.
- Private Members should retain the option to prepare and draft a Private Members' Bill using their own external services; consideration could be given as to whether the proposed OPLA Unit could exercise a legal and drafting due diligence of all such Bills prior to their introduction.
- The new Unit will cost in the order of €0.5m in a full year which should be funded from the existing multi-annual (2016-2018) allocation of €369m for the Houses of the Oireachtas.
- There should be a formal review of the operation and impact of the new Unit and related arrangements no later than 18 months after full implementation of the Recommendations.

4. Issues/Observations

Attention is also drawn to certain Issues/observations which arise from the Conclusions and Recommendations and which are set out at paragraphs 3.7.1 to 3.7.6 on pages 30/32.

1. The Capacity Review

1.1 Introduction

The Final report of the Sub-Committee on Dáil Reform was adopted by the Sub-Committee on the 24th May 2016. The Sub-Committee, which is chaired by the Ceann Comhairle is comprised of a cross-party group of TD's elected to the 32nd Dáil in the General Election of 26th February 2016. The Report of the Sub-Committee was subsequently endorsed by Dáil Éireann on 26th May 2016.

As part of its deliberations the Sub-Committee considered the role of the Office of the Parliamentary Legal Advisor (OPLA) and decided (pages 14/15 of the report of the Sub-Committee) that the following new initiatives should be introduced in relation to the OPLA.

- ***A new drafting service to be amalgamated with the existing work of the OPLA.***
- ***A team of suitably qualified lawyers, together with support staff, could assist Members with their draft Bills, with production of an Explanatory Memorandum and, possibly with amendments to those Bills.***
- ***This project could involve a short, Cross-Departmental scoping exercise with the Office of the Parliamentary Counsel (in the Office of the Attorney General) in order to ensure the same approach and standard as Bills produced by Government.***

The Sub-Committee also recommended that the OPLA should be established on a statutory basis to underpin its independence.

It is understood that the primary rationale for these recommendations was firstly a concern expressed by Members of the Sub-Committee that Non-Ministerial Members of the Dáil had inadequate independent support from the Services of the Houses in relation to the provision of legal advice on policy matters, including matters where the Government put forward policy propositions to the House based on legal advice available to the Government which Members considered they could not independently test. Secondly, Members considered that, notwithstanding an outsourced drafting service (of which awareness by Members was stated to be low) by the Houses, there was insufficient drafting capacity available to draft Private Members' Bills (PMBs).

1.1 Terms of Reference of the Review

In order to advance their measures the Sub-Committee recommended that “a capacity review of the OPLA should be carried out as soon as possible to determine an appropriate structure in terms of staffing and resources to address all existing tasks and new initiatives envisaged by the sub-Committee”. It was agreed that these parameters for the Capacity Review as set down by the Sub-Committee should be the Terms of Reference of the Review. The Capacity Review was initiated in August 2016 but its detailed work did not commence until mid-September 2016.

1.2 Other Relevant Elements of the Report of the Sub-Committee

There are other elements in the Sub-Committee’s report which impact on the subject matter of this Review. In the section dealing with the establishment of the Business Committee of Dáil Éireann there are references to the treatment of draft legislation in the overall context of the management of Dáil Business and it is recommended that increased time be provided to Private Members’ Business and a percentage of that increased time be dedicated to PMBs. This has already happened.

Under the heading of Legislative Process in the Report of the Sub-Committee, separate emphasis is placed on the need to enhance assistance to Members in the drafting of Bills, in the context of the Report noting that, “because of the composition of the 32nd Dáil it is likely that more PMBs will progress beyond second stage.” In the section dealing with the Legislative Process the Report also states that “private members, parties or groups need to be clear about the intention of draft legislation before approaching drafters (drafters have no role in the development of policy)”. In this context the Report recommended the continuation of the current outsourced drafting service and that its existence be publicised more widely. The Report also envisages the extension of Pre-Legislative scrutiny (currently confined to Government Bills) to PMBs, “as it would assist in improving the standard of the final text” but, only when OPLA has sufficient resources.

1.3 Framework and Work Programme of the Capacity Review

The issues considered by the Capacity Review and the work programme it pursued were consistent with its Terms of Reference, the specific recommendations of the Sub-Committee in relation to the OPLA and also took full account of other relevant elements of the Sub-Committee’s Report as referred to above. The Capacity Review accordingly set its broad task as encompassing an analysis and assessment of the following issues:

- The current workload and capacity of the OPLA (and other support services of the Houses as deemed necessary).

- The current level of legal advices on policy and drafting support services provided by the Houses to non-Government Members as well as the provision of policy research assistance.
- Assessment of historic trends and the likely foreseeable demand for legal advisory and drafting services arising, inter alia, from the expectations in relation to PMBs as set out in the Sub-Committee's Report as referred to earlier.
- The process for the formulation, initiation, drafting and progression of Private Members' Bills, taking account of recent changes in Standing Orders and in allocation of time for Private Members' Bills.
- Drafting of conclusions and recommendations.

1.4 Work Programme

The Capacity Review engaged in a detailed work programme. This involved extensive consultation, including with the following stakeholders.

- Political groupings in the Houses of the Oireachtas
- The Head of the OPLA and its staff.
- The Library and Research Service (L&RS) of the Houses
- Management and Officials in the Houses of the Oireachtas
- Certain Government Departments and the Office of the Attorney General, including the Office of the Parliamentary Counsel.
- In addition, the Review examined practice in Parliaments in certain other jurisdictions and held briefing and clarification conference calls with Parliamentary officials in some of these jurisdictions.

The Review engaged in an extensive round of meetings and conference calls. It also made an Interim presentation to the Sub-Committee on Dáil Reform.

Seanad Éireann

Whilst the Review was commissioned on foot of the Report of the Sub-Committee on Dáil Reform it is considered that the recommendations of the Review should also encompass and be applied to Seanad Éireann.

1.5 Implementation

The Report of the Sub-Committee on Dáil Reform amounts to a radical agenda for change and reform. The Sub-Committee remains in existence and it is understood that the agenda is viewed as a

dynamic and flexible one capable of future adaptation, and with a medium term horizon for full implementation. This principle equally applies to the recommendations in this Review. It is therefore suggested that the recommendations in the Capacity Review be implemented incrementally, be kept under ongoing review and that their impact be formally reviewed in 18 months time from initial implementation.

1.6 Format of the Review

The following Chapter sets out the Conclusions of the Review and the resultant Recommendations. Three appendices with more detailed outline of the analysis which has informed the Conclusions and Recommendations are included which cover the following areas.

- Appendix I – Overview of the Office of the Parliamentary Legal Advisor (with some material related to other Services in the Houses of the Oireachtas)
- Appendix II – Private Members’ Bills/ Government Legislation
- Appendix III – Overview of Private Member legislative drafting service in other jurisdictions

2. Capacity Review Conclusions & Recommendations

2.1. Introduction

The relevant initiatives decided by the Sub-Committee's Report on Dáil Reform effectively comprise the following:

- A drafting capacity should be established in the OPLA for the drafting of Private Members' Bills.
- The OPLA should be enhanced to enable an independent legal advisory service for non-Government Members on policy matters (including legislation) to be put in place.
- The legal advisory service should encompass legal advices on policy which underpins Private Members' Bills (PMBs) as well as policy issues arising from Government proposals including Government legislation.
- An objective that PMBs should be of the same quality as Government Bills and a recognition that the policy intent of PMBs must be clearly worked out before submitting drafts to the legislative drafters.
- A Capacity Review of OPLA should be carried out to put forward recommendations to ensure that the Office can deliver on the initiatives set out in the Sub-Committee's Report as well as maintaining its existing service.

2.2. Broad Focus of Conclusions

The key broad areas of focus in relation to the conclusions which inform the specific recommendations of the Capacity Review are:

- The capacity of the OPLA to discharge its existing remit/workload and the additional work areas (e.g. drafting service, legal advices on policy) and associated additional supports required by the Sub-Committee's Report as set out above: related issues are the role and capacity of other relevant Services of the Houses, notably the Library and Research Service (L&RS) to input into the additional supports, and the most appropriate structure to best discharge the new supports.
- How the additional supports to be put in place can be structured to maximise benefit for Members in terms of legal advices on policy matters and in quality drafting services to assist in production of Private Member Bills that meet their policy objective and are fit for purpose for enactment.

2.3. Overview of OPLA

The Office of the Parliamentary Legal Advisor (OPLA) was established in the year 2000 to provide an independent legal advisory service to the Houses and the Administration Services of the Oireachtas. Initially and for a number of years the OPLA had minimal resources. Consequent on an increase in its workload the OPLA has experienced a significant increase in staffing resources in recent years. There was an approved staffing complement of 4 in 2011 and currently the approved complement is 12 of which 8, including the Head of the Office are Barristers or Solicitors. This increase in resources has coincided with a significant increase in the workload of the Office and in the complexity of the cases it has dealt with. This is set out in more detail in Appendix I.

In summary, there has been a significant increase since 2011 in the workload of the Office across all headings including both Parliamentary (notably advices to Committees) and Corporate areas. Apart from litigation and legal advisory services provided to Committees, the Office has also experienced a significant increase in the number and complexity of corporate legal advices. These include advices in areas such as Employment Law, Protected Disclosures, FOI and Data Protection. In addition, the Office has had to handle Solicitor Services for three major High Court Cases in recent years – the Office has a complement of two Solicitors. These cases are of major importance to Parliament. They have placed major demands on the Office, and two of the cases which are ongoing, will continue to do so, before any new cases are factored in.

The current work of the Office mainly relates to legal matters arising from the Administration of the Houses and the operation of Parliament and its Committees. Historically it has not engaged in the provision of legal advices on policy matters, including those arising in the context of draft legislation. The recent past has however seen a trend whereby legal queries related to some PMBs have been addressed to and dealt with by the OPLA. The Office has no legislative drafting capacity. There is a limited outsourced drafting capacity available for drafting of non-Government Bills but it has a small Budget which has been under-utilised since inception. This service is now administered by the OPLA (it was formerly administered by the Bills Office).

There is an issue whether some of the volume of referrals in corporate areas could be reduced by the relevant sections dealing directly with the matter. There are Protocols in place in relation to the referral of cases to the OPLA from the general administration service of the Houses and the Committees. These Protocols lay down strong ground rules as to when the OPLA should be consulted and the process for doing so. The operation of these Protocols should be reviewed and the outcome should be reflected in a comprehensive new Protocol which will, in any event, be necessary to underpin any new arrangements arising from this Review. Overall, however, it can be anticipated

that the current range of the Office's work will continue and may indeed expand further. Whilst the increase in staffing resources should place the OPLA in a position to discharge its future workload based on its existing remit, it does not have the capacity to absorb the additional work areas envisaged by the Sub-Committee on Dáil Reform.

2.4. Library and Research Service (L&RS)

The work undertaken by the Library & Research Service (L&RS) is of relevance to the Capacity Review. The L&RS has an approved Full Time Equivalent (FTE) staffing complement of 41 but the current serving complement is 33 FTEs. Apart from providing Library, Information and Records Management Services, the L&RS also provides a comprehensive Research and Analysis Service including a dedicated Legislation Analysis Service and more general Research Services to Committees and Members. The L&RS research arm is a multi-disciplinary team of professionals with expertise across a range of disciplines, including law, economics, public administration and social science.

In relation to legislative analysis the focus of the L&RS is on assisting Members in their scrutiny of Government Bills. It assists Committees in their pre-legislative scrutiny of the General Schemes of Government Bills and also Members in their contributions on Government Bills. In the latter regard the L&RS produces a Government Bill Digest for Members in advance of Second Stage which apart from an overview of the Bill also details stakeholder comments and gives an objective view of the potential implications of the Bill. The L&RS has also provided direct policy research assistance in the formulation of a limited number of Private Members' Bills. It may also be the case that research undertaken by the L&RS would assist a Member in drafting a PMB but this may be an independent outcome of a more general research request. Overall as with the OPLA in relation to legal advices and drafting, the L&RS currently provides limited direct research support to Members who are formulating and drafting PMBs. The L&RS has a number of researchers with legal qualifications. There is 1 senior researcher and 7 researchers in the L&RS all of whom have a legal qualification, including some of whom have a barrister or solicitor qualification. These personnel undertake legal research. They do not provide formal legal advices or opinions nor do they draft legislation.

2.5. Bills Office

The Bills Office oversees the day to day administration of the legislative process whether in respect of Government Bills or Private Member Bills. They have a central role in the scrutiny of Bills and amendments to Bills by reference to Standing Orders. The role of the Office includes advising on the compatibility of PMBs with the requirements of Standing Orders. It does not, however have a formal legal advisory or drafting capacity, although it can offer advice to Members in the latter regard especially in relation to amendments to Government Bills.

2.6. Committee Supports

Much of the business of the Oireachtas is now conducted through the Committees. Some 26 Committees have been established in the 32nd Dáil. The majority of them are sectoral Committees which deal with the work of individual Departments. There are also some cross-cutting Committees e.g. European Union Affairs. Apart from policy oversight and scrutiny the Committees are also responsible for the pre-legislative scrutiny of Government Bills and detailed scrutiny at Committee and Report stages of a Bill.

The Committees in the House have supports available to them, primarily through the Clerk to the Committee. Each Committee also has a dedicated policy adviser. The Committees are however, very reliant on the L&RS for research assistance both in relation to policy and legislation. They have no dedicated legal advisory or legislative drafting capacity.

2.7. Capacity Deficits

As detailed in Appendix I, the capacity deficits in the OPLA in the context of the requirements of the Sub-Committee Report on Dáil Reform are in the legal advices on policy and drafting areas. The OPLA does have significant experience in the provision of legal advices across a wide and diverse range of issues mostly in the corporate services areas. There is little experience of provision of legal advice on public policy whether in a legislative context or otherwise, although there has been a recent increase in the number of such advices in the context of PMBs. The greater challenge facing the Office is in the area of drafting capacity as there is no drafting capacity within the OPLA. Legislative drafting is a very specialised skill. Consultation with the Office of the Parliamentary Draftsman (OPC) in the Office of the Attorney General and international practice indicates a training period of several years before a newly qualified drafter is deemed ready to draft substantive legislation without supervision. As already noted, the Houses of the Oireachtas do have a contract with two outsourced drafters to provide drafting services for Private Members' Bills. This contract expires at the end of February 2017. This outsourced model enables readymade access to

experienced drafters, including potentially suitable internationally based drafters. The Review engaged with the two outsourced drafters and is of the view that the outsourced model has the capacity, suitably enhanced and overseen by the OPLA, to deliver significantly more PMB drafting.

2.8. Private Members' Bills

A key objective of an enhanced OPLA is to provide greater assistance to Members in drafting PMBs. Appendix II outlines the process and practice in relation to Private Members' Bills. An assessment of the likely volume and progression of PMBs is also necessary in the context of the Review.

Notwithstanding the historic absence of in house policy legal advisory and drafting support there has been a very significant number of Private Member Bills introduced since 2011. Over that period some 400 PMBs have been introduced of which just two have been enacted. In previous Dáil terms, of mainly majority Governments, most PMBs were defeated at Second Stage or lapsed or were not pursued. There is a significant change in the situation as regards progression of PMBs in the current Dáil.

The table below illustrates the position as regards introduction and progression of legislation (PMB & Government) in the current Dáil.

Table 2.1 – Bills introduced during the current 32nd Dáil (commenced 10th March 2016) as at 1st December 2016

Year	2016
PMBs Introduced	59
Government Bills Introduced (new)	20
Acts (originating from PMB)	0
Acts (originating from Gov. Bill)	9
PMBs Defeated at second stage (Dáil)	4
PMBs (including legacy) Passed second stage and Referred to Committee	14
PMBs passed second stage, but pending referral to Committee	5
PMBs Lapsed & Withdrawn	0

Source: The Bills Office

There are a number of features of note from the above table as compared with the previous Dáil as follows:

- 59 PMBs have been introduced to date as opposed to 28 in the first year of the previous Dáil; Whilst the number increased in the later years in the previous Dáil, the figures to date

suggest a significant trend increase in the number of PMBs; The additional time for PMBs (see paragraph 2.9 below) will facilitate this trend.

- Unlike in the previous Dáil where the vast bulk of PMBs were either defeated at Second Stage or were lapsed and withdrawn, the significant majority of PMBs in the current Dáil have passed Second Stage and have been referred to Committee; this includes the new pre-Committee scrutiny stage as provided for under a new Standing Order (see paragraph 2.9 below).
- The number of Government Bills introduced is comparatively less by reference to the average of 2011 – 2016 or the first year (2011) of the 31st Dáil; to some degree this reflects the delay in formation of a Government. The legislative programme published by the Government in late September does, however, indicate a strong pipeline of future legislation.

The change from previous experience, in a situation where the Government is in a minority, underlines the strong prospect in the 32nd Dáil of PMBs proceeding through the various legislative stages and to enactment. This in turn highlights the importance of ensuring the policy robustness and technical quality of such legislation. It is important that draft legislation, from whatever source should be fit for purpose. It must have a solid policy basis (as distinct from the policy orientation which is a matter for the sponsor), be legally sound and be well drafted. Enactment of legislation which may not meet the policy objectives of its sponsors, which gives rise to unintended consequences, which is incapable of being implemented, and/or which is legally unsound must be avoided. The Government has the weight of the Permanent Executive and the Office of the Attorney General to seek to ensure this in respect of its legislation. This points to the need for independent Oireachtas resources of an appropriate level to help Members produce good quality Private Member Bills. It is also important that any such additional resources in the Houses are structured in the best way to achieve this.

Whilst, some PMB sponsors have utilised the policy research facility of the Library and Research Service (L&RS) of the Houses to help formulate policy to underpin PMBs, most underpinning policy research and subsequent drafting has been arranged by Members themselves from external sources, in some cases with the assistance of concerned interest groups. As noted earlier the outsourced drafting facility has also been greatly underutilised; of the 400 PMBs introduced since 2011 only 20 were drafted by the outsourced drafters.

The main pre-introduction hurdle which PMB's have had to clear is scrutiny by the Bills Office, which primarily involves examination to ensure that they do not offend the Standing Orders of the initiating House. In the case of Dáil Éireann this includes the Standing Order which provides that a Private Members Bill may not have as its main object the imposition of a charge on the people (i.e. a tax) or the appropriation of public money. It is understood that there is no data on the number of PMB's which have been definitively ruled out of order on grounds of non compliance with Standing Orders and that there are instances where a Bill originally ruled out of Order was subsequently published after the sponsor amended/deleted the offending section.

Historically, PMBs have tended to be non-complex Bills, sometimes prepared at short notice to address a single current or live policy issue or to amend existing legislation. PMBs would generally not have been subject to the same detailed process of policy formulation and legal due diligence as Government Bills (See paragraph 3.4 below).

Some jurisdictions (see Appendix III for more details) e.g. Scottish Parliament and Northern Ireland Assembly, have processes in place which set a high test before a PMB can receive drafting assistance and/or be introduced¹. In Scotland the number of PMBs introduced in 2011-2016 was 13 of which 6 were enacted. In Northern Ireland over the same period 11 PMBs were introduced and of those, 5 were enacted.

The Sub-Committee on Dáil Reform did not recommend any change to the process for introducing and processing of PMBs. Accordingly, the proposals in the Review are on the basis that the right of a Member to introduce a PMB and to have access to any enhanced services that may be made available is unchanged. Equally the right of any Member to develop and draft a PMB without any recourse to assistance from the services of the Houses is unchanged. The importance of maintaining the rights of Members in these regards was stressed in consultation. Members did however, also, express strong support for the enhancement of the OPLA resources. It was also stressed that the Office, as enhanced, must continue to be a wholly independent Office. Proposals are set out below in relation to the framework within which the enhanced assistance would operate.

¹ In contrast the Federal Parliament in Canada and the State of Massachusetts, for example, have systems more similar to Ireland.

2.9. Changes to Standing Orders

Some significant changes have already been made in the current Dáil to the Standing Orders dealing with Private Members' Bills. The amount of time for Private Members' Business has been increased by 100% and the weekly access of the various political groupings to that time has also been increased. There are now three weekly Private Members' Business slots on every sitting Tuesday, Wednesday and Thursday – the latter is specifically for PMBs or Committee Reports and the former could accommodate two PMBs i.e. it is now possible any week to have Second Stage Debates on three PMBs.

A second change is that a new Standing Order has been introduced to provide that where a PMB has passed 2nd Stage and been referred to the relevant Committee, the Committee may decide to have detailed pre-Committee stage scrutiny of the Bill. If the Committee does so decide it is required to report back to the Houses on the Bill before it is allowed to proceed to Committee Stage. The new step should help to identify any deficiencies in the PMB and prepare it for enactment. It can be expected that Ministers and Departments will play an active role in this new pre-Committee stage and subsequent formal Committee stage scrutiny. An enhanced OPLA Service could have an important role in providing Members with independent assistance in such a process.

2.10. Legal Advices on Policy

The Report of the Sub-Committee on Dáil Reform emphasised the need for the House to have a source of independent legal advice on policy matters, whether arising from legislation or otherwise. In discussions, concern was raised that non-Government Members had no strong facility to give them an independent view on legal advices which, for instance, might underpin Government policy stances, whether in draft legislation or otherwise. The view was therefore articulated that apart from providing legal advices in the formulation of PMBs, the capacity of the OPLA to provide legal advices on policy to non-Government Members more generally needed to be increased. It is difficult to assess the extent to which the demand for such advices will arise apart from in the context of the preparation of PMBs. The expectation is that the demand from Members will be significant encompassing legal issues arising from the drafting and the progression of PMBs as well as advices relating to Government policy and legislation. Any such facility should also be available to Committees both in relation to legislation which they are scrutinising and policy consideration generally.

2.11. Summary

- The Sub-Committee on Dáil Reform has decided on certain initiatives to enhance legal advisory and drafting services for Members.
- The OPLA does not at present provide legal advisory services on policy matters on a significant or structured scale and has no drafting capacity.
- The current and prospective workload of the OPLA will fully utilise the existing capacity of the Office.
- The L&RS provides a significant research and legislative analysis service; the current focus of the legislative analysis service is almost exclusively on assisting Members in considering Government legislation, whilst the research service does provide assistance to some Members who are formulating PMBs.
- There is an outsourced drafting service available which is not fully utilised.
- A substantial number of PMBs have been introduced in the 32nd Dáil and a significant number have passed Second Stage and been referred to Committee: this is a significant change on previous practice and underlines the strong prospect of PMBs being enacted in the current Dáil.
- Enactment of deficient legislation must be avoided and in a situation where Private Members' Bills have a much greater prospect of being enacted it is appropriate that high quality supports are made available in the areas of policy research, legal advices on policy and drafting that will assist in the production of legislation that is fit for its intended purpose.
- There have been an increasing number of queries relating to PMBs in recent times addressed in an ad hoc way both to the OPLA and the L&RS; a formal and easily accessible structure needs to be put in place.

3 Recommendations of the Capacity Review

3.1 General

The Recommendations set out below are framed on the basis, in line with the initiatives decided by the Sub-Committee, that an important new capacity for non-Government Members of the Dáil, and for Seanad Members is being established. The Recommendations involve additional resources, funded by the Oireachtas, to enable Private Members to better draft their own legislation and to have access to independent legal advices on policy. Members need to recognise and accept that the new supports represent real added value for them. This places a strong onus on the new Unit to gain

that recognition and acceptance. Over time the new capacity, under the guidance of Members, may have the potential to play an important role in engaging with the Executive, both on the policy and legal sides, in the processing of Legislation by the Houses.

In terms of supports to achieve the objective of better assistance to Members in the area of PMB drafting and legal advices on policy generally, the key Service of the Houses is the OPLA. The L&RS also has an important role to play. It is apparent that Members in the current Dáil have become more conscious of both the OPLA and the L&RS in relation to seeking assistance and advice on PMBs. In the context of proposed additional resources the process for accessing these supports within the Houses should be placed on a more formal footing. This is designed to provide Members with a specific roadmap for accessing such services and to provide clarity for the Administration of the Houses as to how such supports should be made available.

The Recommendations set out below deal with resource and structural issues and are also to some degree relevant to the Business of the Houses. In total they represent a significant enhancement of the capacity of the OPLA. If they (or a variant) are adopted it is also strongly recommended that implementation be kept under ongoing review, and, in any event, a formal review be undertaken after a period of no longer than 18 months after full implementation. This test and trial approach will enable the demand for the enhanced services to be assessed and their impact to be evaluated.

Approval and implementation of the Recommendations will be a matter for the Houses of the Oireachtas. In this context significant work will need to be undertaken by the Houses to flesh out in greater detail the specifications for the various Recommendations. In addition consideration will have to be given to related matters, notably the process of engagement by Members with an enhanced OPLA capacity and any other consequential issues arising.

3.2 Specific Recommendations:

A new dedicated Unit, reporting to the Head of the OPLA, should be established in the Office of the Parliamentary Legal Adviser (OPLA) to provide legal advices on policy and a legislative drafting service for non – Government Members of Dáil Éireann (i.e. all Members who are not Ministers or Ministers of State) and Members of Seanad Éireann. This Unit should also provide such services as requested by Oireachtas Committees. It should also be available to assist Private Members in the new Pre-Committee Stage scrutiny now in place for PMBs which pass Second Stage and in the Committee and Report Stage scrutiny. It is recommended that this Unit should have its own distinct title – Private Members Unit (in the OPLA) is suggested.

Specifically the new Unit should provide the following services.

- Legal advices to non-Government Members of Dáil Éireann , Seanad Éireann Members and Committees, in relation to all policy and legislative matters whether in respect of Government or Private Members measures or initiatives.
- Quality legislative drafting services for Private Members' Bills.
- In conjunction with the Library and Research Service the provision of policy research services, relating to specific legal advisory and legislative supports being requested – in this way an integrated and easily accessible service will be available to Members covering the three critical legislative preparation areas of policy research, policy legal advice and legislative drafting. (See below for details of how the OPLA/L&RS structure should operate).

It should be stressed that policy formulation will continue to be a matter for the Private Member.

To address the capacity deficits, already discussed in the context of meeting the requirements of the Sub-Committee, and to ensure that the existing and prospective workload of the OPLA continues to be discharged, the following specific additional resources are proposed. It is stressed that it is very difficult to be precise as to the level of additional resources required. This will depend on the additional work in the new Unit and the complexity of this work. It is assumed that there will be significant and sustained take up of the new supports, such as to justify the additional resources and expenditure proposed. The grading structure proposed for the new posts reflects the need to access senior and experienced persons with the skills to provide the necessary level of service from the outset.

- A. Two new senior positions of Advisory Counsel should be created in the OPLA at a level (Principal Officer grade) above the existing OPLA Legal Advisory grade (Assistant Principal). These positions should be assigned to the new Unit. They should be filled via open competition and a core requirement should be a legal qualification of Barrister or Solicitor and demonstrated capability with appropriate experience in the provision of high level public policy legal advices both generally and in the context of drafting of legislation.
- B. One new position of parliamentary draftsman should be created again at a level (PO grade) above the existing OPLA Legal Advisory grade (it is also proposed that the outsourced drafting scheme remain in place and be enhanced). This position should also be assigned to the new Unit. It should be filled via open competition and the core requirements should be Barrister or Solicitor qualification and demonstrated capability with appropriate experience in the drafting of primary legislation (i.e. Bills). Given the specialist nature of this post and the need to attract an experienced drafter some flexibility on remuneration may be necessary.

- C. In light of the substantial and important new functions in the OPLA, additional to the diverse and key functions already discharged by the Office, the existing post of Parliamentary Legal Advisor i.e. Head of OPLA should be upgraded from PO to Assistant Secretary which should be filled by open competition in the normal way.
- D. The outsourced drafting service should remain in place and should be expanded through the recruitment initially of one new outsourced drafter and through a significant increase in the current annual Budget of €45,000. The maximum amount of €5,000 per case should be subject to some flexibility on a case by case basis. The fact that the existing contract ends in late February next affords the opportunity to tender for a new contract on the proposed enhanced basis. The new Parliamentary Draftsman post proposed above should quality assure drafts produced by the outsourced drafters.
- E. Two new administrative positions should be created in the new Unit to manage all requests and files from initiation to completion. These positions would be the initial point of contact for all Members' queries in relation to support on legal advices and on drafting PMBs. Grades of Higher Executive Officer or Executive Officer and Clerical Officer would appear appropriate for this purpose. This function will also be important to the smooth working of the relationship between the new Unit and the L&RS – see below. In relation to the L&RS it is probable that some additional research resource would have to be allocated to that Service given the key role it will play in policy research assistance for PMBs.

An alternative approach to the above would be to arrange a secondment scheme with the Office of the Attorney General (AGO). That Office has vast experience of policy advisory work and drafting work in relation to Government Bills. An agreed secondment would have the potential to more quickly put in place in the OPLA, staff with the requisite skills and experience. The AGO already operates a successful secondment scheme of legal advisory staff to Government Departments. Any such secondment scheme would have to be agreed between the AGO and the Houses of the Oireachtas. An issue might arise as to the compatibility of Officers in the AGO being seconded to the Houses of the Oireachtas given their role as legal advisers to and legislative drafters for the Attorney General and the Government. In addition, the AGO have stressed, in discussion with the Review that it has, in any event, no spare capacity for such secondments.

The Review considers that a Secondment Scheme could be put in place with agreement on both sides. The strong view is, however, that it is preferable for the Oireachtas to build up its own capacity, with a view to developing a high calibre independent Unit that is an integral part of the Oireachtas. Development of its own capacity by recruitment through open competition also creates

a wide potential pool of suitable applicants both domestically and internationally. This approach is also in line with the Report of the Sub-Committee on Dáil Reform.

It is recommended, in any event, that close professional ties be established between the new Unit and the AGO/OPC especially in relation to technical matters concerning the drafting of policy advices and legislative drafting. Such contact would be consistent with the recommendation of the Sub-Committee on Dáil Reform that there would be engagement with the Office of the Parliamentary Counsel to improve the standard of PMBs.

It could be argued that the Recommendations should contain provision for development of a general in-house drafting capacity or team. The view of the Review is that the newly recruited experienced drafter supported by a number of outsourced drafters should be sufficient, initially at least. The situation should be kept under review in light of the drafting demands on the new Unit and in the context of a formal review after 18 months. The Review envisages that the new Draftsman to be appointed should be central to the ongoing review of drafting needs and to consideration of the potential of training in the area for other OPLA staff.

It will be particularly important to work out job specifications for the two new advisory counsel. This will effectively be a new block of work and careful consideration is required to ensure that these senior posts deliver real added value.

3.3 Library and Research Service

A key objective of the Recommendations of the Review is the creation of an enhanced and integrated service for Members covering all aspects of policy research, policy legal advisory services and drafting of PMBs. In this context the Review considered the case for transferring the Legislative Analysis Service of the L&RS to be the new OPLA Unit. This would create a strong research capacity within the OPLA to support the policy and legal research underpinning PMBs whilst also allowing the existing L&RS work on Government Bills to continue.

It was made clear to the Review in consultation with Political Groups and more generally that the output of the L&RS as currently constituted was highly valued and of major importance. The Review accepts that a reassignment of the Legislative Analysis Service to OPLA would reduce the research capacity of the L&RS. It is understood the various areas of the Service work closely together in the provision of research work. In addition the residual research work engaged in by the L&RS would still require access to legal research capacity.

The proposed approach is to leave the L&RS intact with current reporting arrangements but to put in place a formal and effective working relationship between the OPLA and the L&RS in a way which would ensure that the policy research work of the L&RS is aligned with the new OPLA Unit.

Accordingly it is recommended that the current Legislative Analysis Service, whilst remaining part of the L&RS, be an integral part of the enhanced capacity and that a precise, effective and formal structure should be agreed between the OPLA and the L&RS to put this in place. This structure should also encompass the output of other areas of L&RS which impact particularly on PMBs. The execution of this arrangement should be kept under ongoing review to ensure that it is effective.

The proposed new administrative capacity for the new Unit will have an important role in directing and managing the relationship between the OPLA and the L&RS for the benefit of Members in the new situation.

3.4 Government Legislation

The Report of the Sub-Committee on Dáil Reform included an objective that the quality of PMBs should be similar to Government Legislation. The production of a Government Bill and its enactment involves an elaborate process. The key elements can generally be summarised as follows:

- Development of a strong policy basis for the Bill involving significant internal analysis and engagement with stakeholders both within and outside of the Government sector
- Legal proofing of the Bill, which will often overlap with the policy development, and involves internal technical and legal consideration in the Department (and Agencies as necessary) and consultation with the Advisory Counsel in the Attorney General's Office.
- Political approval of the General Scheme (Heads) of the Bill by firstly the Minister and then the Government
- Pre-legislative scrutiny of the draft Heads by the relevant Oireachtas Committee.
- Drafting of the Bill by the Office of the Parliamentary Counsel (OPC) in the Office of the Attorney General; this is often a painstaking process which may require review of certain policy elements of the Bill and input from the Advisory Counsel.
- Approval of the Bill as drafted, by the Minister and the Government and subsequent publication and circulation to Oireachtas Members accompanied by an Explanatory Memorandum.
- Enactment via debate and scrutiny of both Houses of the Oireachtas.

In general this process works well in terms of production of a Bill and an eventual Act that meets the policy objectives of individual Ministers and Government that is legally and technically sound and is capable of implementation.

Clearly it is not possible or desirable to seek to replicate in the Houses of the Oireachtas the extensive policy and legal apparatus that inputs into the production of Government Bills. Nonetheless it is considered that the enhanced resource and structure proposed above will make a real difference for Members to promote better quality assured PMBs and assist in promoting the objective of the Sub-Committee in improving the technical standard of PMBs.

The Report of the Sub-Committee on Dáil reform also stated that, “private members, parties or groups need to be clear about (the) intention of draft legislation before approaching drafters (drafters have no role in development of policy).” The proposals in this Review involve the creation of a new senior level drafting position in the OPLA and the extension of the outsourced drafting capacity. They also involve significant enhancement of the policy research and legal advisory services. These latter enhancements can assist Members, parties and groups in meeting the Sub-Committee’s requirement that the intention of legislation submitted to the drafters is clear. It is also recommended that before a Bill is referred to the drafter that the Private Member should be required to produce a paper setting out the intention and proposed measures of the Bill. The new Unit would be available to assist the Private Member in this task and the paper should form the basis of instructions to the drafter.

3.5 Process of Member Engagement with the New Unit in OPLA

The Recommendations outlined above represent an additional commitment of resources. The full year cost to the Exchequer would be of the order of €0.5m. The measures are designed to establish a quality, easily accessible and integrated service at the disposal of Members. Every effort must be made to optimise the use by Members of the service and that this is reflected in realisation of the ultimate impact of better informed Members who in particular have the supports to produce fit for purpose PMBs and to engage in informed debate on the implications of legal policy advices more generally.

Against this background the Review considers it important to set down certain recommended parameters for Members’ engagement with the new Unit in the OPLA. These are matters ultimately for the Houses themselves but the Review considers that they would be helpful to the smooth and efficient operation of the new Unit. A clear roadmap and guidance to assist Members to get best use

from the enhanced service is suggested. Accordingly the following framework is put forward for consideration.

The parameters set out below and other relevant matters that may arise should be codified in a comprehensive and agreed Protocol which should govern Members engagement with the new Unit.

3.6 Recommended Parameters for Members Engagement with New Unit

- Members and parties to be advised that all requests for assistance relating to (a) policy research (b) legal advices on policy and (c) drafting in respect of a Private Member Bill should be directed to a specific and visible contact point in the proposed new Unit in the OPLA: this would be the new administrative unit.
- In the case of Private Members' Bills and with the assistance of the enhanced resources in the new Unit, Members and parties should draw up a policy paper setting out the intention of the Bill and the measures proposed to be included in the Bill; consultation with outside stakeholders, including the relevant Minister/Department could be part of this stage.
- This policy paper when finalised, after consultation with the new Unit, shall form the basis of instructions to the drafters; the Unit will assist the Member and party in all consultations with the drafters on the text of the Bill.
- Publication of the PMB should be accompanied by an Explanatory Memorandum; the new OPLA Unit will be available to assist Members in drafting the Explanatory Memorandum.
- Ideally, pre-legislative scrutiny of all PMBs should then take place on publication of the Bill; it is recognised that this may not be possible given the volume of PMBs and Committee work; accordingly the new Standing Order relating to pre-Committee stage scrutiny of PMBs that have passed Second Stage should remain in place.
- The new Unit will be at the disposal of the Members for all stages of the Bill through to enactment.

- Members/parties/groupings will continue to have the right to prepare, draft and introduce PMBs without any resort to the enhanced OPLA services; the services of the new Unit will nevertheless remain at the disposal of such Members but use of the drafting capacity will require the formal presentation of a policy and instructions paper for the drafter; PMBs produced in this way should be required to be accompanied by an explanatory memorandum.
- Where policy legal advisory services only are sought by a Member/party/grouping from the new Unit in OPLA, whether in relation to a PMB or any other issue, including Government related draft legislation or policy, the query should also be directed at the initial point of contact established for the new Unit.

3.7 Issues/Observations

The above Recommendations and Structure give rise to some issues that merit observation:

- 3.7.1 Historically, a very significant number of Private Members' Bills have been drafted and published by parties and Members utilising their own resources and this option will remain open. In the past, utilisation of the Exchequer funded outsourced drafting service has been minimal. Additional resources are being proposed in this Review to assist Members in preparation of PMBs and in the area of legal advices on policy more generally. The resources recommended and accompanying structures are predicated on a significant usage of the new Unit. It is critical that the new Unit is strongly promoted and advertised to Members and that it gains the confidence and trust of Members as is the case with the existing OPLA and L&RS. The utilisation of this enhanced service, and the impact of this utilisation, will be a key element of the Review foreseen after 18 months of implementation.
- 3.7.2 Given the number of PMBs already introduced in this Dáil, the number that have passed Second Stage and been referred to Committee, the likely further increase in the number of such Bills, the expectations of Members as regards progression of Bills, the need to also progress the Government's Legislative Programme, and the ongoing work of the Committees, consideration may have to be given as to how all this legislation and other work can be processed by the Committees. This matter is outside the remit of this Review but it is considered that the enhanced OPLA can play an important role to assist this by facilitating quality assured PMBs from the outset and assisting Members and Committees at

the various stages of the Bills, especially in engagements with Ministers at Committee and Report Stage.

- 3.7.3 As is noted in Appendix III there are inbuilt control mechanisms on the number of PMBs which some Parliaments, notably the Scottish Parliament and Northern Ireland Assembly, have put in place. These can take the form of requiring major formal consultation with stakeholders, allowing only one PMB per Member, requiring cross-party support etc. The Houses of the Oireachtas, similar to some other jurisdictions recognise the right of any Member to introduce one or more PMB. This ensures access by all Members to an important mechanism to place a policy position before Parliament. It also results in a continuing significant number of PMBs, some, perhaps, better drafted than others, in a situation where they have a good prospect to progress beyond Second Stage and will be competing for the finite time of Committees. Consideration could be given to the introduction of a requirement in cases where PMBs are prepared and drafted without recourse to the new Unit, that they should be subject to legal and drafting due diligence by the Unit in advance of introduction.
- 3.7.4 A comprehensive Protocol will have to be put in place and implemented in relation to the operation of the new Unit and the new arrangements generally. This should detail the process for access by Members to the new unit, including specific requirements. An important point to emphasise in this context is that policy formulation is the responsibility of the Private Member but the new Unit can offer strong technical support to ensure that this policy has a sound basis and is translated into an effective Bill. As mentioned elsewhere the OPLA should also review the operation of its existing Protocols as part of this exercise.
- 3.7.5 It is not proposed at this stage to extend the remit of the new Unit to the drafting of amendments to Government Bills as the initial focus should be on PMBs and the provision of legal advices. It is however recognised that amendments are an important mechanism to enable Members to influence Government legislation. The reality is that most substantive and complex legislation across all areas of Departmental responsibility will continue to emanate in the form of Government Bills. Examples of this include the annual Finance and Social Welfare Bills, complex Criminal and Civil Law Bills in the Justice area, major reform of Company law, transposition of complex EU legislation via primary and secondary legislation etc. Private Members and Opposition proposed amendments to such draft legislation is a very important function of the legislature. Therefore once the new OPLA Unit has bedded

down, and in any event as part of the Review after 18 months, consideration should be given to extending the remit of the Unit to amendments to Government Legislation.

- 3.7.6 It is not considered necessary at this juncture to place the OPLA on a statutory footing. It is clear that the OPLA has and will continue to operate as an Office wholly independent of Government and at the service of the Houses of the Oireachtas. The priority should be the implementation of the new arrangements and enhanced capacity as set out in this Review.

3.8 Cost and Funding of Recommendations

It is estimated that the cost of the additional resources will be in the order of €0.5m in a full year. This should be funded from the three year multi-annual provision for the Houses of the Oireachtas. Unlike Government Departments whose allocations are set annually in the Estimates, the Houses of the Oireachtas is allocated a three year Budget provision which is funded directly from the Central Fund. The current three year allocation of €369 million relates to the period 2016-2018. It is understood that the additional funding required will be capable of being accommodated within this allocation.

There is Exchequer assistance available to Political Parties under the provisions of the Electoral Acts and the Parliamentary Activities Allowance. The latter also covers independent Members. Funding is distributed by reference to parliamentary size. Based on material published by the Standards in Public Office Commission (SIPO), it is understood that in total almost €14.6m (excluding carry-over to 2016) has been spent in 2015 by parties and Members under these headings. Allowable expenditure for these allocations includes areas relevant to this Capacity Review – research, policy formulation and legislative preparation. It is understood that spending under the headings of research, policy formulation and legislative preparation is comparatively low – around €1.6m in 2015. It is not recommended that these sources fund the additional costs. It is considered appropriate that the Houses of the Oireachtas, as the Legislature, should have the enhanced capacity proposed, which should be available to all Private Members on the same basis, and that it should be funded from the multi-annual resources of the Houses.

Appendix I – Overview of the Office of the Parliamentary Legal Advisor (OPLA)

1. Introduction

The Office of the Parliamentary Legal Advisor (OPLA) was established in 2000 to provide an Independent legal advisory service to the Houses and the Administration Services of the Oireachtas. The Office was staffed at a minimal level up to recently as the table below indicates. The Office is headed up by the Parliamentary Legal Advisor, currently assisted by seven legal advisors, two legal researchers and two administrators. The Parliamentary Legal Advisor is remunerated at Principal Officer (Standard) scale level whilst the seven legal advisors, including two Solicitors, are remunerated at the Assistant Principal (Standard) scale. The work of the OPLA is at times supplemented by outsourced legal advices. This was particularly pronounced in the recent and special case of the Banking Inquiry, but, overall apart from the necessary use of Counsel in Court cases, resort to outsourcing by OPLA has been insignificant.

Table AI.1 OPLA Staffing Trend 2011-2016

Year	Lawyers	Researchers	Administrators	Total
2011	2	1	1	4
2012	3	1	1	5
2013	5	1	1	7
2014	7	1	1	9
2015	8	2	2	12
2016	8	2	2	12

Source: OPLA

2. Functions and work of the OPLA

The OPLA has indicated that currently the core duties of the Office are to provide legal advice and services to:

- Chairs (Ceann Comhairle and Cathaoirleach) of either House of the Oireachtas in respect of the operation of the Houses;
- Clerks of both houses in respect of the performance by them of their statutory and/or mandatory activities and legal issues arising from their *ex officio* roles (e.g. Registrar of Political Parties; nominating bodies etc.);
- Committees of either/both Houses in respect of remit and legal procedure, all legal issues arising from the subject matter of their hearings and the performance by them of their statutory functions, where appropriate (e.g. Committees on Members' Interests);

- The Houses Commission in support of its functions; and
- The Service (i.e. Administration) and/or Commission in respect of administrative matters and the performance of statutory and/or corporate activities (e.g. statutory interpretation, FOI, procurement issues, employment issues, pensions, data protection, electoral law issues, copyright and review of contracts).

Other duties include:

- Managing the conduct of litigation arising from the performance by Members of their parliamentary functions: matters relating to the Houses and the Committees thereof and/or the Commission.
- Furnishing Members and/or the Service with legal briefings (e.g. on key legal issues and on court judgments) of concern to the Houses and of general interest to create a greater awareness of new legal issues among Members.

3. Typical issues

It is understood that typical issues on which legal advice is regularly requested include:

- Remit of Committees
- Parliamentary Privilege
- Natural and Constitutional Justice in the Parliamentary context
- Data protection and Freedom of Information
- Electoral Law
- Ethics in Public Office Act obligations
- Employment law
- Issues arising from Protected Disclosures Legislation

The following table outlines the trends in the workload of the OPLA in recent years at a global level and across various categories.

Table AI.2 – OPLA Legal Advices (2011-2016)

	Total Advices	Service Advices	Committee Advices
2011	200	125	75
2012	278	181	97
2013	270	174	96
2014	463	289	174
2015	422	336	84
2016*	370	310	62
Total	2003	1415	588

Source: MIF stats

*data to end September 2016

Table AI.3 – OPLA Advice Growth Areas

	2011	2012	2013	2014	2015	2016	Total
Committee Advices	75	97	96	174	84	62	588
Protected Disclosures	0	0	0	5	13	12	30
Litigation and Referred files	3	5	4	6	7	8	33
Freedom of Information	1	14	9	9	27	30	90
Data Protection Issues	4	4	1	7	10	14	40
Employment Law Issues	6	2	11	7	23	31	80
Other Advices	111	156	149	255	256	215	1142
Total	200	278	270	463	420	372	2003

Source: MIF stats

Table AI.2 sets out the overall position as regards advices issued by the Office (2011-2016). This year (2016) is not fully comparable with earlier years due to the dissolution of the Houses arising from the General Election, the period leading to the formation of the Government and, a following period as Committees were established. The figures are broken down as between advices given to Committee and Service type advices. The latter would generally cover advices related to corporate issues.

Table AI.3 sets out the significant growth areas in the workload of the Office. It is noted that there is a significant number of residual advices outside of those referred to in Table AI.3. These residual advices fall under broad and varied headings, including, some which are listed under the heading “Typical Issues” at paragraph 3 above.

More recently and relevant to the subject matter of this Review, the OPLA has received some 30 requests for advices on PMB proposals/ideas. To date, 16 legal advices have been issued by the Office on PMB queries/proposals. Of those, five proposals accompanied by the legal advices prepared in the OPLA, have been sent to an external drafter for drafting. Overall, however, there has been very little OPLA involvement in PMBs introduced in recent years.

At one level, a total number of advices per annum of around 450 since 2014 might not seem onerous for an Office which currently has eight lawyers. However, it is clear from the analysis below that the files referred to the Office have in general become more diverse and complex. They relate to issues which are central to the functioning of both Houses, and to the Administration of both Houses. The OPLA as the sole source of legal advisory services is therefore a key Office in the Houses of the Oireachtas.

4. Committee Advices

Table AI.2 indicates that the number of advices provided to Committees between 2011 and 2014 more than doubled to around 170 in the latter year. The falloff in 2015 and 2016 to some degree reflected the run in to the February 2016 General Election and the reduction in 2016 (to date) largely reflects the delay in Committees being established in the post-election period. It is understood that there has been a pattern of Committees, on foot of their scrutiny remit, being increasingly involved in examination of complex and contentious issues. This has resulted in particular, in some instances of contention from parties whom Committees wish to engage with. This has increased the OPLA involvement in tendering advices to the Committee and the advices in these circumstances often involve complex matters which take more time to finalise. More generally, advices have tended to relate to Committee remit rather than policy issues.

The advices provided by the OPLA to the Committees are crucial to their functioning and indeed the overall functioning of Parliament. A very significant amount of Business in the Houses is now conducted through the Committee system. This has been underpinned by legislation including the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013. This Act has impacted on the work of Oireachtas Committees, for example in relation to the status of witnesses before Committees. It is likely that Committee advices will continue to be a significant element in the work of the OPLA. Indeed this work may increase as the number of Committees in the current Dáil is currently 26 as opposed to 17 in the previous Dáil. The increasing pressure on Committees arising from the much greater number of Private Member Bills being referred to Committees must also be factored in.

Turning to the Services Advices Heading, the data in Table AI.2 and AI.3 also testify to a significant increase in the volume of cases under such headings. These advices primarily relate to issues where line sections in the Houses consider that they require the advice of the OPLA before proceeding.

5. Freedom of Information and Data Protection Acts

It is understood that the OPLA is regularly contacted for advice upon the receipt of Freedom of Information (FOI) requests by the Oireachtas Service. The Review was informed that advices relating to the FOI Act and the Data Protection Acts (DP) arise from both external third parties and internal cases. In so far as third party requests are concerned, the OPLA is now involved to a greater degree and at a much earlier stage of both the FOI and DP processes. Between 2012 and 2015, there was a 107% increase in the amount of FOI related advices provided by the OPLA and the trend has been upward again in 2016. Further to advising the Service in relation to initial requests received, the OPLA also has represented the Service in appeals to the Information Commissioner.

6. Employment Law

The referral of employee issues to external fora, such as the Workplace Relations Commission (WRC), Labour Court and the Courts, is a major and growing work area of the Office. Currently, four out of the seven lawyers of the section are involved in advising the Service in relation to employee issues before the WRC, Labour Court, as well as engaging in certain internal Industrial Relations processes. Since 2015 there have been 10 instances of employees referring matters to external fora, such as the Information Commissioner, Data Protection Commissioner, Rights' Commissioner, Workplace Relations Commission and the Equality Authority. An analysis of the statistics from 2015 show that of the total Services Queries to the OPLA, 27% (92 out of 336) related directly to employee issues. This trend has continued into 2016 with 21% (66 out of 310) of the Corporate Service queries relating directly to employee issues.

7. Observation on Service Advices

The Capacity Review has noted the significant increase in the workload of the OPLA arising from the statutory and employment law factors referred to above. There is an issue as to whether the level of such detailed referrals to the OPLA is warranted but the Capacity Review is not in a position to carry out the review at individual case level necessary to establish this. In the case of the implementation of legislation the expectation would be that, except for very complex cases, the relevant line sections should deal with matters arising without undue referral to the OPLA. FOI and Employment Law are of long standing at this stage and well established case law and precedence should provide strong guidance for sections where such guidance is needed. In addition, *prima facie*, a total referral

of 646 queries in respect of Services advices in 2015 and to date in 2016 seems high. On the converse side many of these issues involve sensitive matters where the Houses administration may be exposed. It is understandable that legal advice would be sought in such instances. In addition, the Houses administration must of course be represented where cases are before external fora. It is also appreciated that the Houses of the Oireachtas as the enactor of legislation in these areas would be especially attentive to compliance on all matters.

There is a Protocol in place which governs the Framework within which advices by other areas of the Houses, including the Committees, should be sought from the OPLA. The issue arises as to whether this Protocol is working well to ensure that queries to the OPLA are optimised and that where line sections in the Houses can deal with an issue, they do so. This would warrant separate study and should be reviewed in the context of the new comprehensive Protocol which will in any event, be necessary to underpin the implementation of the Recommendations in this Review. What is clear, however, is that the workload on the OPLA from all these areas has increased significantly in recent years and significantly limits the ability of the OPLA to take on additional work without additional resources.

8. Litigation

The Review was informed that whilst the volume of litigation files is small, they absorb a disproportionate amount of time especially for the two Solicitors in the OPLA. The OPLA has stressed in particular to the Review the very heavy workload on the Office arising from three recent High Court cases taken against the Oireachtas – two of these are major and ongoing. The two cases which are ongoing are complex and the outcome of each will potentially have serious ramifications for the workings of Parliament. The OPLA has to provide the full solicitor service for these cases from its existing resource of two solicitors. The Review has been informed that these two solicitors are for the most part, handling the two major outstanding High Court cases and unavailable to engage in the provision of other legal advices. When demands arising from the litigation cases are at their peak, during court hearings, for example, the Review has been informed that other Members of the Office are required to assist thereby diverting them from other legal advisory work. Clearly the management of major litigation cases must be a top priority for the OPLA. It is to the credit of the Office that all the Solicitor work involved has been discharged in-house without recourse to expensive outsourcing. While this is an unpredictable area as regards future demands it is a priority work area for which provision must be maintained.

9. The Protected Disclosures Act 2014

The Review was informed that the Protected Disclosures Act 2014, has resulted in very complex advices being sought by various units within the Oireachtas. OPLA involvement has been required both by the Houses of the Oireachtas Service in the management of internal protected disclosures, and by Oireachtas Committees and Members in receipt of disclosures, as prescribed under the Act. The Office has indicated that an analysis of these files shows that the complexity and sensitivity attached to them has resulted in the average time taken to review and advise on them tending to be significantly longer than other cases. This is a new and onerous work area that the OPLA has had to service.

10. Standing Orders

The OPLA is also involved in the drafting of, amendments to, and the interpretation and application of Standing Orders relative to the Public Business of Dáil and Seanad Éireann. The Review was informed that the drafting of these Standing Orders is required within a short time frame and requires an in-depth understanding of both the internal procedural work of the Houses and the relevant legal framework. In addition, the day to day work of the OPLA necessarily involves the interpretation and application of these Standing Orders arising from queries sent to the OPLA. The Review would expect that there is already considerable expertise in the non-legal staff of the Houses of the Oireachtas in relation to the drafting and interpretation of Standing Orders. This should obviate to a degree the need for referral for legal advices. This is an important and sensitive area, however, and it is understandable that requests for legal advices will arise.

11. Summary overview of existing capacity

It is the view of the Capacity Review that whilst the resources of the OPLA have grown significantly, from a minimal base, the Office is required to discharge a growing and complex brief based on the existing level of demand. The existing work of the OPLA is key to the functioning of the Oireachtas in both a Parliamentary and Administrative sense. There appears to be no scope to reduce the areas of activity, although the number of queries/advices within these areas may vary depending on circumstances. The existing resources in the OPLA should be sufficient to continue to discharge its existing remit. Leaving aside the capability deficit there is, however, no spare capacity in the OPLA to absorb the additional work required by the initiatives of the Sub-Committee on Dáil Reform.

It is clear, based on the above, that the OPLA have not engaged to any material degree in the work areas of primary concern to the Sub-Committee on Dáil Reform – legal advisory work on policy and legislative drafting. Accordingly the legal personnel in the Office do not have significant experience of such public policy legal advisory work. Unlike legislative drafting, it is however work which should be well within the capability of the Office to discharge given their qualifications, previous career history and their strong output in other areas which, *inter alia*, require understanding and interpretation of statute law. However the Office as currently constituted and burdened does not have the spare capacity to take on a much enhanced legal advisory role. It is also probable in any event, that the legal personnel in the Office would need more time to come fully up to speed with the demands of a large number of requests for legal advices across a diverse range of policy spheres which would be expected where an enhanced service was made available to Members.

The OPLA does not engage in legislative drafting and has no capacity to do so. Whilst some minimal drafting of non complex Statutory Instruments for the Houses has been undertaken by some OPLA staff, this does not amount to a drafting capacity in the context of drafting legislation. There is a service in place whereby an outsourced drafting service is available to Members of both Houses to draft PMBs. Under the current contract which runs until 26th February 2017 there are two external drafters. The annual budget is just €45,000 for both Houses with a limit of €5,000 per PMB. Even at these low levels the annual Budget for the outsourced drafting service is normally underspent. Of the approximately 400 PMBs introduced since 2011 it is understood that just 20 were drafted by the external drafters.

The Review consulted with the external drafters who indicated a capacity to take on more drafting work. The drafters also noted that Bills referred to them were generally not complex and often revolved around drafting a Bill to deal with a single issue identified by the Member. The Review is satisfied that the outsourced drafters have a capacity to do considerably more PMB drafting work. They will however require more support from the OPLA to engage in more complex drafting. The outsourced model can with necessary visibility to Members, with some enhancement and more support from the OPLA including a quality assurance capacity, comprise a readymade drafting capability for PMBs.

It is of note that in some other jurisdictions Government drafters do some drafting of Private Members' Bills – the Scottish Parliament recently came to an agreement whereby 50% of PMBs will be drafted by Government draftsmen – albeit the Scottish Assembly has historically only had a small percentage of the number of Oireachtas PMBs. Some Parliaments have also a practice of hiring a

small number of retired Government drafters whilst some also outsource the work (as in the Houses of the Oireachtas).

The Capacity Review has engaged with the Office of the Parliamentary Counsel (OPC) in the Office of the Attorney General in relation to the issue of the skills and training required for the position of Drafter. The OPC has a complement of around 34 persons across a number of grades to discharge its remit of drafting of Government Bills. The OPC has underlined in discussions with the Review the very specialist and technical nature of legislative drafting work. They invest considerable time in the training of new and junior draftsmen and have indicated their view that on average a period of several years 'on the job' training is required before a draftsman would be in a position to undertake drafting of substantive Bills without supervision. International commentary and experience confirms the specialist nature of drafting work.

The OPC have also indicated in discussion with the Review that due to its ongoing work programme on Government Bills it does not have any spare capacity which would enable the OPC to second personnel to assist provision of an in-house drafting capacity in the Houses of the Oireachtas. In this context the Review notes that to date in the current Dáil, 20 new Government Bills have been published which is below the trend for previous years. Account must, however, be taken of the delay in Government formation and it is noted that the autumn legislative programme published by the Government does indicate a strong pipeline for future Bills. In addition it is understood that the OPC has a very significant commitment to drafting secondary legislation (e.g. Statutory Instruments).

The Office of the Attorney General has vast experience of policy advisory work and drafting work in relation to Government Bills. An agreed secondment scheme would have the potential to more quickly put in place in the OPLA, staff with the requisite skills and experience. The Review considers that a secondment scheme could be put in place with agreement on both sides. The view of the Review is however that it is preferable for the Oireachtas to build up its own capacity in these areas. Development of its own capacity by recruitment through open competition also creates a wide potential pool of suitable applicants both domestically and internationally.

It is recommended in any event that close professional ties be established between the new Unit and the AGO/OPC especially in relation to technical matters concerning the drafting of policy advices and legislative drafting. Such contact would be consistent with the recommendation of the Sub-Committee on Dáil Reform that there would be engagement with the Office of the Parliamentary Counsel to improve the standard of PMBs.

12. Resources Recommended

It is extremely difficult to quantify the appropriate level of additional resources required. This will depend on the volume of work referred to the new Unit and the complexity of this work. As noted earlier, historically Members have relied on external resources, albeit they did not have a dedicated Unit at their service. The assumption of the Review is that the creation of a named independent and skilled Unit will lead to significant demand by Members for its Services.

The best approach is to seek a balance between making adequate provision to ensure a credible and competent Unit whilst being cognisant that it is effectively a new service for which the level of demand is difficult to predict. Based on the analysis set out above, the Review is satisfied that capacity in the OPLA needs to be provided in the policy legal advisory and drafting areas. It is important that persons with requisite competence and experience in these areas are assigned to the Unit from the outset. In the case of drafting capacity, account then needs to be taken of the view of the Review that an enhanced outsourced model should remain in place.

To ensure that a wide pool of persons of the necessary calibre is attracted, it is recommended that the positions be filled via open competition and appropriately remunerated. In relation to the latter the Review has noted that the Office of the Attorney General has the following grading structure.

Table AI.4 – Office of the Attorney General Grade Structure

Advisory Side of the Attorney General's Office	Office of the Parliamentary Counsel
Director General	Chief Parliamentary Counsel
Deputy Director General	Parliamentary Counsel
Advisory Counsel Grade I	Assistant Parliamentary Counsel Grade I
Advisory Counsel Grade II	Assistant Parliamentary Counsel Grade II
Advisory Counsel Grade III	

Source: AGO

The existing pay scale of the Head of the OPLA falls within the scales of Advisory Counsel grades II (€85k - €99k) and III (€64k-€85k) and the similarly remunerated Assistant Parliamentary Counsel grades I and II. It is significantly below the maximum of Advisory Counsel grade II and Assistant Parliamentary Counsel grade I. The pay scale of the OPLA legal advisors is similar to that of Advisory Counsel Grade III and Assistant Parliamentary Counsel grade II.

Given the recommendation to assign a new Unit in the OPLA, reporting to the Head of the Office and taking account of the scale of the duties and importance of the new Unit and the expansion and complexity of the existing OPLA workload it is recommended that the post of Parliamentary Legal Advisor should be upgraded from PO (standard) to Assistant Secretary (equivalent to Advisory Counsel grade I). As with all Assistant Secretary posts it should be filled by way of open competition.

It is also recommended to ensure that senior persons with appropriate skills and expertise are attracted to the new positions of Advisory Counsel and Parliamentary Draftsman that these positions should be remunerated at a level above the existing OPLA legal adviser grade.

The Review is conscious that these recommendations as regards the level of the posts in question have resource implications. They are informed by the view of the Review that the new Unit must be resourced with the necessary skills from the outset. The Review also notes that in the drafting area it is mainly proposing the extension of the outsourced drafting service.

To address the legal advisory and legislative drafting deficits it is further recommended that:

1. Two new positions of Advisory Counsel should be created in the OPLA at a level (PO grade) above the existing OPLA Legal Advisory grade (AP). These positions should be assigned to the new Unit. They should be filled via open competition and a core requirement should be a legal qualification of Barrister or Solicitor and demonstrated capability with appropriate experience in the provision of high level policy legal advices both generally and in the context of drafting of legislation.
 - In relation to the proposed positions of Advisory Counsel the Review is conscious that this is a new block of work. It is very difficult to be precise as to the level of demand for such work. The expectation is that there will be significant need for legal advices on policy in the context of PMBs, Government legislation and policy consideration and the work of the Committees. The Review is also conscious of the stress placed on provision of this capacity in discussion with political groups. Careful consideration should be given to the detailed job specification for these particular posts.
2. One new position of Parliamentary Draftsman should be created at a level (PO grade) above the existing OPLA Legal Advisory grade. This position should also be assigned to the new Unit. It should also be filled via open competition and the core requirements should be Barrister or Solicitor qualification and demonstrated capability with appropriate experience in the drafting of primary legislation (i.e. Bills). Given the specialist nature of this post and

the need to attract an experienced drafter, some flexibility on remuneration may be necessary in this instance.

3. The outsourced drafting service should remain in place and should be expanded through the recruitment initially of one new outsourced drafter and through a significant increase in the current annual Budget of €45,000. The maximum amount of €5,000 per case should be subject to some flexibility on a case by case basis. The new Parliamentary Draftsman post proposed above should quality assure drafts produced by the outsourced drafters and overall the new Unit (both advisory and drafting) in the OPLA would proactively liaise with both the Members and the outsourced drafters.
4. Two new administrative positions should be created in the new Unit to manage all requests and files from initiation to output. These positions would be the initial point of contact for all Members' queries in relation to support on legal advices and on drafting PMBs. Grades of HEO or EO and CO should suffice for this purpose. This function will also be important to the smooth working of the relationship between the new Unit and the L&RS as referred to below.

13. Library & Research Services

It is acknowledged that feedback from Members and Staff was one of high regard for the work and output of the L&RS as currently constituted. Whilst the Review considered a merger of part (Legislative Analysis Service) or all of the L&RS with the OPLA in the context of the new Unit it does not recommend this because it could disrupt the existing valuable output of the L&RS. The research work of the L&RS, especially the Legislative Analysis Service, must however be closely aligned with the new OPLA Unit. The operation of this arrangement needs to be kept under ongoing review to ensure that it is effective.

Appendix II - Private Members' Bills/Government Legislation

1. PMB Process

Private Members' Bills are an important Parliamentary instrument available to Members and Political Groupings. Standing Orders for both Dáil Éireann and Seanad Éireann provide for the introduction of Private Members (i.e. Non-Government) Bills. Tabling of PMBs is available to all non-Government Members of Parliament, including such Members in Government parties. In practice the vast bulk of Private Members' Bills are Opposition Bills and they have traditionally been taken in Private Members (i.e. Non-Government) time.

In procedural terms Private Members' Bills can be either introduced or presented. There is no limit on the number of Private Members' Bills which a Member may introduce. However, if a Member wishes to introduce a Private Member's Bill they must seek the leave of the House to introduce the Bill proposed to be introduced in Dáil Éireann. Where this is granted, as is generally the case in the current Dáil, then the Member will also move that Second Stage be taken in Private Members' time. Given that Private Members' time is mainly allocated to the Opposition parties based on Dáil representation it may be difficult for a Member to get an early slot for Second Stage of their Bill. The potential time for taking of Second Stage Private Members' Bills has, however, been increased in the 32nd Dáil (see below) with one of the new three weekly slots decided by the Business Committee by way of lottery.

Presentation of a Private Member's Bill is different in procedural terms to Introduction of a PMB. A Parliamentary Group may nominate a Deputy to present a Bill to the House. However, each group may only have one Bill before the House at any one time. Unlike Introduction, Bills that are presented to the House do not need to seek leave of the House to do so. Presentation is seen as a useful mechanism when the Dáil may not be in session and a Parliamentary grouping wishes to table a PMB. The overwhelming majority of PMBs are, however, tabled via the Introduction route.

In the Seanad a Private Members' Bill needs at least 3 signatures for introduction.

2. Scrutiny of PMBs by Bills office

Before a PMB can be Introduced or Presented, the Bills Office in the Houses of the Oireachtas, on behalf of the Ceann Comhairle, must check whether the Bill is in order for initiation. The primary focus of this check relates to the financial implications of the PMBs. Under Standing Orders, Private Members' Bills may not have as their main object the imposition of a charge on the people (i.e. a

tax) or the appropriation of public money. Article 17.2 of the Constitution also provides that no law shall be enacted for the appropriation of revenue or other public money unless the purpose of the appropriation shall have been recommended to Dail Éireann by a message signed by the Taoiseach. If the Bill is to be presented the Bills Office also check that the presenting group does not have another Bill on the Order Paper.

There is no requirement for Pre-Legislative scrutiny of PMBs as is the case with Government Bills: An amendment to the Standing Orders in relation to the processing of PMBs was made in July 2016 and was included in the recently revised consolidated Standing Orders. This amendment provides in relation to a PMB which passes Second Stage that:

- It shall be referred to the relevant Select Committee, and
- The Select Committees to which PMBs are referred shall undertake detailed scrutiny of the provisions of such Bills, having regard to guidelines agreed by the Working Group of Committee Chairmen, and shall report on them to the Dáil prior to Committee Stage consideration; there is a provision that the Select Committee may decide in relation to a particular Bill that detailed scrutiny is not necessary.

Effectively this Standing Order has introduced a form of pre-Legislative scrutiny for PMBs albeit after Second Stage and before Committee Stage. This is an important amendment in terms of facilitating detailed scrutiny of PMBs by Committees and also by the relevant Minister and Department. The PMB must receive a favourable verdict from the Committee scrutiny before it can move to Committee and other stages. It is also of note that consultation with the European Central Bank (ECB) is mandatory in respect of certain draft legislation in the financial services/banking area. One PMB has already been subject to such ECB scrutiny and opinion.

3. Drafting and Initiation of PMBs

The Review engaged with various Parliamentary Groupings to discover how they formulated and drafted Private Members Bills and to discuss supports for PMBs generally. A number of features emerged from these discussions.

- A significant number of Private Members' Bills are drafted, sometimes urgently, to address a particular policy issue of the day or a single issue of interest to a party or Member; these Bills tend to be short and not complex and have generally been formulated and drafted from internal resources available to the Parliamentary grouping.
- In relation to other more substantive Private Members' Bills, some political groupings also indicated that they would have access to internal resources to formulate the underpinning policy stance and to draft the Bill.
- Some PMBs were formulated and drafted on behalf of Members or groups by NGOs / interest groups who wish to advance a particular policy stance which the Parliamentary grouping endorses.
- Recourse to the outsourced drafting service provided by the Houses of the Oireachtas was limited and some groupings indicated that the availability of this service has not had visibility for many Members.
- Historically in a situation where there was a Government majority it was generally expected that the PMB would be defeated so it might not be a major concern if the PMB did not fully address all issues (especially technical, legal or drafting) arising as long as the central policy thrust of the PMB was clear. In this context it is noted that in the previous Oireachtas (2011-2016) just two PMBs of 340 published were enacted.
- In a situation of a minority Government it was acknowledged, as indeed stated in the Report of the sub-Committee on Dáil Reform, that the prospects of PMBs being enacted were much greater than hitherto and this had implications for quality assurance of such Private Members' Bills; there was strong support in any event for an enhancement of in house resources to enable Members access legal advices on policy and produce quality assured Bills.
- There was general acceptance of the Government making amendments to PMBs, provided the central policy thrust of the Bill was preserved.

4. PMB and Government Bills – 32nd Dáil

It is extremely rare for a PMB to be enacted. In the previous Dáil of some 360 PMBs introduced, just 2 Seanad PMBs were enacted. In the current (32nd) Dáil, it is clear that the situation in relation to introduction and progression of PMBs has changed. The following table illustrates the position as regards introduction and progress of Bills (Government & PMB) in the current Dáil.

Table AII.1 – PMBs introduced during the current 32nd Dáil (commenced 10th March 2016) as at 1st December 2016

Year	2016
PMBs Introduced	59
Government Bills Introduced (new)	20
Acts (originating from PMB)	0
Acts (originating from Gov. Bill)	9
PMBs Defeated at second stage (Dáil)	4
PMBs Passed second stage and Referred to Committee (including legacy)	14
PMBs passed second stage, but pending referral to Committee	5
PMBs Lapsed & Withdrawn	0

Source: The Bills Office

Some 59 PMBs have been introduced in the current Dáil. It is clear that the trend for the number of PMBs introduced is upward. This is likely to be accentuated by the additional time for PMBs and by the greater prospect of PMBs progressing in the current Dáil. Some 14 Bills have passed second stage and been referred to Committee and five are awaiting referral. Given the volume of PMBs coming through Second Stage, the need to progress Government Legislation and the normal ongoing work of the sectoral Committees it would seem that it will be a challenge to Committees to process all tasks. This is not a matter for this Review, except to observe that Members who have navigated their PMB through 2nd Stage will presumably wish to avoid undue delay in the process to Committee and later stages.

The increased activity in relation to the introduction of PMBs and the greater prospect of these Bills progressing beyond Second Stage can be viewed as reinforcing the need for strengthened in-house advisory and drafting assistance, as envisaged by the Sub-Committee on Dáil Reform. In the new situation it is important that Members have access to supports in the areas of policy research, legal advices and drafting. This will help to facilitate from the outset that the PMB is fit for purpose in terms of giving legal effect to the policy objective of the Member.

5. Drafting of Government Legislation

The report of the Sub-Committee on Dáil Reform included an objective that PMBs be drafted to the same quality as Government Bills and suggested contact with the Office of the Parliamentary Draftsman to this end. The Review has engaged in an overview of Government legislative process and consulted with the Attorney General's Office/Office of the Parliamentary Counsel, Department of An Taoiseach, Department of Finance and Department of Justice and Equality in that regard. The Review also met with the Chief Whip and Officials from her Office.

There is an elaborate process engaged in before publication of a Government Bill. The Cabinet Handbook specifies the requirements in relation to the preparation of the Heads of the Bill by a Government Department. Well thought out and articulated policy is considered critical to the delivery of good quality Government Bills. If a policy is not fully worked out, the resulting legislation can either fail to achieve the policy objective or have unintended consequences. Frequently, the Department is required to obtain legal advice from the advisory side of the AGO in relation to its policy proposals. The legal advice obtained can influence the nature of the Department's policy approach.

As regards drafting, the policy objectives must be clear to enable the draftsman perform his/her functions. The process of producing a draft Bill generally involves frequent meetings and engagement by the draftsman assigned to the file with the Department (sometimes attended by Advisory Counsel also if legal issues remain to be dealt with). There are often a number of iterations of draft Bills until a Draft is produced with which both the Department and the draftsman are satisfied. Even in the situation of legislation which must be prepared urgently all efforts are made to ensure a proper policy and legal foundation and a quality assured draft Bill.

The above process is backed up by the strong technical and policy expertise available in Government Departments and Agencies and in the AGO and the OPC. The process generally works well and the eventual legislation is generally fit for the intended policy purpose. Notwithstanding the undoubted greater likelihood of PMBs being enacted in the current Dáil the reality is that the vast bulk of complex and substantive legislation across the areas of Departmental responsibility will continue to be Government Bills. These are Bills such as Finance and Social Welfare Bills, Complex Criminal and Civil Law Bills, Company Law Reform, transposition of complex EU law etc. This conclusion does not, however, negate the validity of providing additional resources in the Houses of the Oireachtas to assist Members in the preparation and drafting of their Private Members' Bills and in the provision of independent legal advices. It is also however clear that to achieve the Sub-Committee's aspiration

that PMBs should aspire to match Government Bills in terms of drafting quality etc. that a significant quality assurance capacity must be available in the Houses of the Oireachtas.

There is a strong resource in the Executive which could be utilised to assist Members in the preparation and drafting of PMBs. It is understood that in the very limited number of cases in the past where PMBs were enacted such assistance was given by the relevant Department to the sponsoring Member. There may also be instances where the sponsoring Member will agree to their Bill being adopted by the relevant Minister on the basis that the Bill is made fit for purpose within a framework where the policy thrust of the Member is preserved.

It is the view of the Review that such cooperation between Member and Government Department can be of mutual benefit and should be encouraged, especially in the scenario where PMBs are more likely to be enacted. The proposed dedicated new OPLA unit can play a role in facilitating this cooperation and in assisting and advising the Member in engagement with the Executive. It is obviously also important that Ministers and Departments are positively disposed towards such engagement.

6. Amendments to Government Bills

Given that Government Bills will likely continue to comprise the bulk of very substantive and complex legislation, amendments to such Bills will continue to be an important device to influence policy available to Opposition Parties and Private Members generally. There is a strong case for including advice on and drafting of such amendments within the remit of the new OPLA unit. This is not specifically proposed in the initial stage of implementation as the focus will be on PMB assistance and provision of legal advices on policy generally. However, it is strongly supported in principle and should be included within the remit of the new Unit as early as is possible.

Appendix III – Overview of Private Member legislative drafting services in other jurisdictions

As part of the Capacity Review process, there was engagement via written material and Conference Calls with Parliaments in a number of jurisdictions to determine how and to what extent legal advices and legislative drafting services are provided to Members of Parliament elsewhere.

Written material was received from 24 jurisdictions. Conference calls were held with six jurisdictions, who are viewed as good comparators with the Houses of the Oireachtas, to enable the issues to be explored in more detail. The Conference Calls were held with the relevant authorities in the Canadian Federal Parliament, Scottish Parliament, Welsh Assembly, Northern Ireland Assembly, UK House of Commons and the US Senate of Massachusetts. This Appendix sets out in summary the understanding of the Review of the position in relation to legal advisory and legislative drafting supports for non-government Members in these institutions.

1. House of Commons, Canada

1.1 Provision of Drafting Services

The House of Commons in Canada, i.e. the lower House of the Federal Parliament has an extensive system in place to provide legislative drafting support to Members of the House. The Legislation Drafting Team which consists of five lawyers, with strong legislative drafting skills drafted in excess of 1,000 PMBs over a recent five year period. It was noted that most PMBs are short and targeted often with a local focus. Amendments to Government Legislation are also drafted by the Legislation Drafting Team.

1.2 Quality Assurance

The Legislation Services Team operate an informal process of due diligence upon receipt of a Bill drafting request. Research and analysis services are available to Members through the Library of Parliament's Parliamentary Information and Reference Service. Members are encouraged to use the Library of Parliament to receive policy and legal analysis (as distinct from legal advice).

The Library also provides Legislative Summaries of most Government Bills before Parliament and Private Members' Bills that have been referred to committee for study.

Once a policy proposal is submitted to the Legislation Services Team by a Member, the Director of the Legislation Services Team will assess whether the request appears to fall within Federal jurisdiction, whether it clearly raises constitutional issues, and whether it is complete – i.e. whether there is sufficient instruction to begin drafting. In some cases where there may be a questionable basis for - or unclear scope of - a bill, it may be agreed between the Director and the requesting Member that the Bill will not proceed until further research is conducted.

1.3 Allocation of Drafting Services

Once the policy quality assurance stage is complete, the Director then assigns the request to a drafting counsel. Sometimes a Member might also be advised that their proposal would be more effective or better served as a Motion rather than as a PMB. Drafting is provided with priority given to Members who have the first opportunity to debate matters (based on a lottery draw that occurs at the start of each session). The Review was informed that some Members may only request one item, some might never request a Bill and others might request dozens. No limits exist; however, the Office attempts to allocate its resources as fairly and as efficiently as possible.

1.4 Enacted PMBs

It is understood that due to the volume of PMBs and the way PMB business is organised in the House many of the PMBs may never be debated in Parliament. Those PMBs that do proceed to debate in the House are subject to relatively restrictive rules as regards times for PMB debate. If a PMB passes in the House it must also secure the approval of the Senate. It is understood that the overall impact is that comparatively few of the very large volume of PMBs introduced are actually enacted.

2. The Scottish Parliament

2.1 Provision of Drafting Services

The Standing Orders of the Scottish Parliament prescribes a two-step process before a Member can introduce a Bill and access drafting services. The Member is required to publish a consultation document following a 3 month consultation process and, to receive the signatures of 18 Members on a cross party basis in demonstration of their support for the Member's proposal. Throughout the process, the consultation document remains a proposal. During the consultation process, the Member publishes their proposal online so that Members of the public can consult and contribute and Government Departments can contribute in that forum also. If the proposal is deemed to be 'fit

for purpose', the Member is then given the right to introduce the Bill and granted access to the drafting facilities provided through the Non-Government Bills Unit (NGBU) of the Parliament.

2.2 Quality Assurance

The NGBU was set up to assist Members in developing their proposals and to help them meet the Bill drafting standards required of them by the Standing Orders of the Scottish Parliament. While Members are not obliged to avail of the NGBU's assistance and are permitted to meet the standards imposed by Standing Orders by other means, the majority of Members do avail of the NGBU services. Legal advice as necessary is provided at an early stage in the process. The NGBU would liaise with the Solicitor's Office in the Scottish Parliament to arrange provision of such advice.

2.3 Allocation of Drafting Services

When the policy work and consultation with stakeholders is complete and the Member's proposal is given the right to be introduced, the Bill is then sent to be drafted. The NGBU has a panel of external drafters to whom Bills are referred for drafting. A Solicitor in the Solicitor's Office in the Scottish Parliament instructs the drafter on the Bill based on instructions from the Member. In the last Parliamentary session (2011-2016), an external panel of six drafters which included some retired Government legislative drafters was used. The NGBU has since arranged to have 50% of PMBs drafted by the panel of external drafters and 50% of PMBs drafted by the Government legislative drafters. The Review was informed that there is a Service Level Agreement in place between the Scottish Parliament and the Government Drafters Office to this effect.

Amendments to Government Bills are drafted by the Legislation Service (equivalent to the Bills Office in the Houses of the Oireachtas) and are not assisted by the NGBU.

2.4 Volume of PMBs Enacted

Over the past 5 years (2011-2016) of the previous parliament, 13 PMBs were introduced and 6 PMBs were enacted. Of the 13 PMBs introduced, 9 were NGBU developed bills drafted by a drafter on the external panel; the remaining 4 PMBs were developed by Members who sourced the drafting capacity elsewhere. In the cases where the NGBU was not directly involved, consultations, including the 3 month process still had to be undertaken as prescribed under Standing Orders.

3. Northern Ireland Assembly

3.1 Provision of Drafting Services

The Legal Services Office of the Northern Ireland Assembly, which has a complement of eight Lawyers, provides legal advice upon request to the Assembly Bills Office in relation to the legislative competence of Private Members' Bills (PMBs) but does not provide a drafting service to Members for PMBs. The Bills Office has in place a contract with external Solicitors – 'Parliamentary agents' – and suitably qualified independent Parliamentary drafters to draft PMBs. The drafting service is limited to one Bill at a time per Member.

3.2 PMB Process

The development of a Bill in the Northern Ireland Assembly is a lengthy process, and can take at least 18 months to complete from the point at which assistance from the Bill Office is first sought by a Member, to introduction of the Bill in the Assembly. Members are advised to limit the topic of a proposed Bill to a single, focussed policy objective that appears to be broadly within the Assembly's legislative competence (the Bill Office may seek legal advice on this matter from the Legal Services Office at the outset). The Assembly Research and Information Service (RaISe) is available to Members to assist them in researching and informing their proposal. The Bill Office facilitates the initial contact between RaISe and the Member seeking to develop their proposal.

Once a Members' initial proposal has been lodged with the Bill Office, the Member is required to engage in a consultation exercise for a minimum period of 8 weeks. In order to access Assembly assistance for drafting the Bill, within four weeks of lodging their initial policy proposal, the Member is required to copy their proposal to the relevant Minister and enquire whether or not the Minister is prepared to take action on the issue (by means of legislation or otherwise) and whether the Minister has been advised of relevant forthcoming legislation by the UK Parliament or by EU institutions in the relevant policy area. In addition, it is strongly recommended to Members that they consult with the relevant Department on the detail of the proposals as set out in their PMB consultation document. The Member is expected to lodge a summary of the consultation responses in the Bill Office and to refine the legislative proposal in light of the consultation, with a final proposal to be lodged in the Bill Office within 6 months of the initial Proposal being submitted.

3.3 Allocation of Drafting Services

Following the consultation process set out above, the final legislative proposal is then submitted for the Speaker's consideration and no access to the drafting service can be guaranteed until the

Speaker grants their approval. Subject to the Speaker's approval, the Bill Clerk will prepare drafting instructions and act as a conduit with the legislative drafter. The Speaker will seek legal advice on whether the final Bill is within legislative competence before allowing it to be introduced.

3.4 Enacted PMBs

During the 2011-2016 Assembly term, ten PMBs were referred to external drafters on the Assembly's framework panel, of which eight were introduced. Three of the eight Bills introduced received Royal Assent (i.e. were enacted). In addition, three privately drafted PMBs were introduced, that is to say that the Member developed and funded the drafting of the Bill without access to Assembly resources. Two of these three PMBs received Royal Assent. PMBs which are prepared and drafted independently must, as with all PMBs, be accompanied by an Explanatory and Financial Memorandum on publication.

4. National Assembly for Wales

4.1 Provision of Drafting Services

The Legal Services Office of the National Assembly for Wales, which consists of 12 qualified solicitors and 2 trainee solicitors, provides legal advice and drafting services to all 60 Assembly Members in addition to the legal services it provides to the Presiding Officer (and her Deputy), the Assembly Commissioners and other internal departments of the Assembly. The drafting service is provided on an ad-hoc basis, with the support of a former Parliamentary Draftsman of the UK Government's Office of Parliamentary Counsel.

4.2 Quality Assurance

When a Member submits a proposal for a Bill the legal advisor advises on whether or not the Assembly has competence to deal with the proposal. Proposals for PMBs are selected by ballot. In the past, such ballots have taken place 2-3 times a year. Once a proposal has been selected, it is a matter for the Assembly to decide whether or not the proposal should get permission to proceed to be drafted. If permission is granted and the proposal for a Bill has been approved by the Assembly, the Member has 9 months to introduce the Bill.

In developing a Bill, lawyer- researcher teams are created and work closely together. The Research Team is made up of 30 individuals from various different backgrounds including statisticians, economists, experts in health, education, transport etc. They not only do research for PMBs but also

carry out research on Government Bills to assist Members. Once finalised the Bill is transmitted to the drafter for drafting.

Once the Bill has been referred to Committee, one legal adviser will support the Member sponsoring the Bill while another legal adviser advises the Committee which is considering the Bill.

4.3 Enacted PMBs

Between the years 2011 and 2016, in the Welsh Assembly, 9 ballots were held for Private Member's Bills, 3 proposals were introduced, and 2 of those were enacted.

5. Senate of Massachusetts

5.1 Provision of Drafting Services

The Senate Counsel's Office in the State Senate consisting of two executive staff and six Attorneys provides both legal advisory and legislative drafting services to Senators of the Massachusetts State Senate. The Review was informed by the Chief Legislative Counsel in the Senate Counsel's Office, that legislative drafting for Senators is a significant part of the work of the Senate Counsel's Office. The Office is responsible for drafting legislation, amendments to Bills and amendments to the Budget for 40 State Senators at their request.

5.2 Quality Assurance

The Senate Counsel's Office operates an informal process whereby a Senator or their Aide would approach the Office with a proposal. Quite often this happens after the Senator or their Aide have already done background research on the proposal (there is no policy research arm in the Senate and the policy of the Bill is entirely at the Senator's discretion). The Office assesses the proposal from a legal standpoint taking account of the existing law. The Review was informed that this can be quite an in depth process, particularly if the proposal is dealing with a complex issue. As each State has its own Constitution, Counsel to the Senate would also vet the Senator's proposal to ensure that it does not offend the State of Massachusetts's Constitution or, the Federal Constitution of the United States of America.

5.3 Allocation of Drafting Services

If the legislative proposal passes the above mentioned informal vetting process, an Attorney in the Senate Counsel's Office would then begin the drafting process. Once the Bill is drafted, it is filed with the Clerk of either branch (i.e. the Senate or the House of Representatives).

5.4 Bill Scrutiny Process

The House and Senate Clerk's Office will then refer Bills to the appropriate Committee for consideration, depending on the subject matter of the Bill.

It is mandatory for each joint-Committee to hold a hearing on every Bill that is submitted to it. These hearings are open to the public and all interested parties may attend and address the Committee. On completion of this stage the Committee issues a report to the Clerk's Office indicating whether the Bill should pass or not.

If a Bill receives an “ought to pass” recommendation, the Bill moves on through the legislative process.

5.5 Volume of PMBs

The Office draft approximately 75-100 Bills per annum for Senators. There are many more Bills drafted privately by Senators but many of these are neither debated nor enacted.

6. The UK House of Commons

Private Members' Bills are considered in the House of Commons only on certain designated Fridays during a Parliamentary term. Government business has precedence in the House of Commons and the majority of Bills considered are Government Bills. There is limited time available for the consideration of PMBs and generally only PMBs with Government and cross-party support are successful. It is understood that the PMB route or PMB time is not used by opposition parties to promote substantive legislation that could for example, relate to significant national policy areas. It is also understood that as a result, the majority of Private Members' Bills that do get enacted are Government backbencher Bills which may be a Government “hand-out Bill” that for one reason or another did not make it onto the Government's legislative programme. These tend to be professionally drafted by Departmental staff.

There are three methods of introducing a Private Members' Bill under the Standing Orders of the Houses of Commons.

- (a) Sessional Ballot: This method involves 20 names of Members of Parliament (MP) being selected by ballot, with 13 Fridays on which the selected MPs can debate their Bill.
- (b) The 'Ten Minute Rule' otherwise known as Standing Order 23: Any MP may introduce a Bill under the so-called 'Ten Minute Rule'. To qualify to introduce a Bill under the Rule, the MP in question must be the first person to notify the Public Bill Office on the Tuesday or Wednesday

morning fifteen working days prior to the date they wish to introduce their Bill. Only one notice will be accepted by the Public Bill Office from any one Member on a given Tuesday or Wednesday.

- (c) Presentation: Members may, after notice, present a Bill without previously obtaining leave from the House. By this method, the Member formally introduces the bill but does not speak to support it. It is understood that PMBs are rarely enacted via this route.

6.1 Provision of Drafting Services

There is no dedicated unit in the Westminster House of Commons to assist Members in the preparation and drafting of Private Members' Bills. It is understood that the team of Clerks in the Commons Public Bill Office can give some assistance. This team can also assist Members in preparing/drafting amendments to Government Bills.

6.2 PMBs Enacted

Data from the House of Commons indicates that in the 2015/2016 Parliamentary year 6 PMBs were enacted. The majority of these PMBs are introduced via the ballot system.

