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Joint Committee on Foreign Affairs and Defence
Pre-Legislative Scrutiny of the Defence (Amendment) Bill 2023

April 2024

MEMBERSHIP

The following Deputies and Senators are members of the Joint Committee on Foreign Affairs and Defence of the 33rd Dáil Éireann and the 26th Seanad Éireann

 <p>Sen Catherine Ardagh Fianna Fáil</p>	 <p>Cathal Berry T.D Independent</p>	 <p>Matt Carthy T.D. Sinn Féin</p>	 <p>Barry Cowen T.D. Fianna Fáil</p>
 <p>Sen Gerard Craughwell Independent</p>	 <p>Réada Cronin T.D. Sinn Féin</p>	 <p>Charles Flanagan T.D. Fine Gael <i>Cathaoirleach</i></p>	 <p>Gary Gannon T.D. Social Democrats</p>
 <p>James Lawless T.D. Fianna Fáil</p>	 <p>Brian Leddin T.D. Green Party</p>	 <p>Sen Joe O'Reilly Fine Gael</p>	

	<p>David Stanton T.D. Fine Gael</p>		<p>Sen Diarmuid Wilson Fianna Fáil <i>Leas- Chathaoirleach</i></p>
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CATHAOIRLEACH'S FOREWORD



The Oireachtas Joint Committee on Foreign Affairs and Defence has carried out pre-legislative scrutiny on the General Scheme of the Defence (Amendment) Bill 2023. The Committee met with a range of stakeholders including officials from the Department of Defence, the Defence Forces representative associations and the Defence Forces External Oversight Body. The Committee also invited written submissions from the Association of Retired Commissioned Officers, the Law Society of Ireland, and the Bar of Ireland.

The Joint Committee considers this Bill to be an important step in implementing the fundamental cultural transformation of the Defence Forces. The External Oversight Body in particular will be vital implementing the recommendations of the Independent Review Group report.

The Joint Committee expresses its gratitude to all those who came before the Joint Committee to give evidence and to those who submitted written material. We look forward to ongoing engagement with these stakeholders as work on the transformation of the Defence Forces continues.

The Joint Committee is also very grateful to Mr. Niall Watters, Senior Researcher, Oireachtas Library and Research Service, for the extensive research conducted. It assisted greatly in the production of the Report.

EXECUTIVE SUMMARY

The Joint Committee on Foreign Affairs and Defence examined the General Scheme of the Defence (Amendment) Bill in line with Dáil Standing Order 174A. As part of its pre-legislative scrutiny, the Joint Committee met with stakeholders including officials from the Department of Defence, the Defence Forces representative organizations RACO and PDFORRA, the Irish Congress of Trade Unions, the European Organisation of Military Associations and Trade Unions (EUROMIL), and the External Oversight Body of the Defence Forces. The Joint Committee also received written submissions from the Association of Retired Commissioned Officers, the Law Society of Ireland, and the Bar of Ireland.

The Joint Committee focused its scrutiny on Heads related to the establishment of the External Oversight Body of the Defence Forces and on the Heads that provide for the Representative Bodies of the Defence Forces to have associate status with ICTU. Recommendations of the Joint Committee are set out below.

RECOMMENDATIONS - EXTERNAL OVERSIGHT BODY OF THE DEFENCE FORCES (HEADS 3 TO 24)

1. The Committee recommends that the Bill be revised to take measures to strengthen the autonomy and independence of the EOB. This might complement the existing power of the Minister, noting the Minister's discretion in taking on board or not the recommendations of the EOB, by increasing the autonomy of the EOB to undertake reviews evaluations and related matters etc., without the need to gain Ministerial approval and consent. This might enhance the EOB's ability to carry out its functions independently and effectively.
2. With respect to the membership of the EOB, as it stands this does not seem to fully reflect the recommendations of the IRG, particular in the case of the membership being appointed by the Minister following a process run through the Public Appointments Service (Stateboards.ie), as is the case with the Policing and Community Safety Authority, which is cited in the General

Scheme. There is merit also in extending the membership of the EOB in the manner suggested by the EOB in its evidence to the Committee which will enhance its capacity to carry out its functions.

3. The Committee recommends that the Secretary General of the Department of Defence should not be a member of the EOB. The Committee considers that the inclusion of the Secretary General of the Department of Defence as a member, albeit ex officio, of the EOB risks calling into question the independence and full autonomy of the EOB. The Committee recommends that the Secretary General should be invited to meet with the EOB on a case-by-case basis as the need arises. Similarly, the Representative Bodies of the Defence Forces should be invited to meet with the EOB on a case-by-case basis as the need arises. If the Secretary General is included as an ex-officio member of the EOB, representation on an ex-officio basis should also be extended to the Representative Bodies of the Defence Forces, as in the manner of the previous IMG, especially given the EOBs role in HR matters including promotion.
4. In the course of the Committee's PLS on the General Scheme, it was noted on a number of occasions that the stakeholders feel that there has been a lack of consultation on the part of the Department of Defence and, to date, the EOB. It was noted also that many stakeholders were unaware of the content or the arrival of the General Scheme, despite their position as key stakeholders in the reform process and in some cases objects of various provisions proposed in the General Scheme. It is notable too that the nature of changes that are being sought, based on the IRG's report, cite the need for culture change from that which was evident in some instances leading to the need for the IRG's recommendations. The Committee urges the Department of Defence and the EOB to undertake planned, structured, co-ordinated and meaningful consultations with stakeholders in the development of the Bill. This would also benefit from clear and transparent channels of communication.

There is merit also in providing for such consultation in the provisions of the Bill itself.

RECOMMENDATIONS - ICTU (AMENDMENTS TO THE DEFENCE (AMENDMENT) ACT 1990) (HEADS 25 TO 28)

5. With respect to Head 25, it is not clear that there is sufficient merit in its proposed prohibition of membership of representative associations on the part of the Director of Military Prosecution, the Military Judge or other posts that may be prescribed by the Minister at a future point. The Committee heard evidence that this provision is disproportionate and without parallel anywhere else in the public sector. The Committee also are also concerned that such a prohibition may undermine the spirit of goodwill and constructive engagement fostered in recent years, and in particular arising from the Commission on the Defence Forces. The Committee recommends that the provision be removed.
6. Head 26 also appears to be disproportionate. Moreover, the Head as it stands does not seem to be in keeping with the relevant existing European legal framework and in the Irish case, as cited by the Bar of Ireland and the Law Society in Ireland in their respective submissions to the Committee. The Committee is concerned that the provision may have unintended consequences for the exercise of free expression and assembly and recommends that the Head either be remove or substantially amended to reflect only existing regulations.
7. In respect of Head 28, it is not clear - in its current form - if the Head is necessary and it as currently written may be construed as being disproportionate. There is merit therefore in amending the Head to ensure it serves a legitimate aim and is proportionate.

INTRODUCTION

The Government approved the drafting of the Defence (Amendment) Bill on 10 January 2024. A General Scheme of the Bill was subsequently referred to the Oireachtas Joint Committee on Foreign Affairs and Defence for the purpose of Pre-legislative scrutiny (PLS), in line with Dáil Standing Order 174A. The Joint Committee on Foreign Affairs and Defence (“the Committee”) agreed to undertake PLS in January 2023, with subsequent Committee meetings held on 20 and 27 February 2024. A prior meeting was held with officials from the Department of Defence in respect of the Committee’s consideration of the General Scheme on 20 January 2024.

The Joint Committee would like to acknowledge the forthright and good-faith engagement by all the witnesses. The Committee welcomes the invaluable insight gleaned by the External Oversight Body through the ‘listening’ and consultative aspect of their remit. This aspect of their work is central to the transformation needed of the Defence Forces and is crucial to building trust and confidence. Our Defence Forces are not simply a collection of ranks, but of individuals, of persons worthy of respect simply because of their humanity, not seniority; and it is failure to recognise this has led to many of the difficulties now being dealt with - personal, organisational, reputational.

Overview of the General Scheme of the Bill

The Defence (Amendment) Bill 2023 will be the first of two bills intended to drive forward cultural change in the Defence Forces. The General Scheme of the *Defence (Amendment) Bill 2023*, by amending the *Defence Acts (1954 to 2015)* seeks, among other things, to

- Provide for the establishment of the External Oversight Body of the Defence Forces on a statutory basis;
- Provide a statutory basis, by amending *Defence Act 1954* and the *Defence (Amendment) Act 1990*, for the Minister for Defence to authorise the military

representative associations to associate with the Irish Congress of Trade Unions (ICTU);

- Allow the Minister to preclude certain positions within the Defence Forces from the right to membership of a representative association.
 - Limiting the freedom of expression of members of the Defence Forces
- To make a number of miscellaneous amendments to the Defence Acts to provide for, among other things, the following:
 - Protection of the term “Óglaigh na hÉireann”;
 - Compulsory Random Drug Testing of members of the Defence Forces;
 - Removing the requirement for the Minister for Defence to prescribe rates and scales of pay for members of the Defence Forces;
 - Amending the provisions regarding the re-engagement of enlisted persons (Permanent Defence Forces and Reservists);
 - Director of Military Prosecutions to have power to appoint civilian prosecutors to assist at courts-martial;
 - Conditions on eligibility of appointment as the Ombudsman for the Defence Forces.

The Committee’s analysis focuses on the provisions for the establishment of the External Oversight Body of the Defence Forces on a statutory basis, and the provisions authorising the military representative bodies to associate with the Irish Congress of Trade Unions.

EXTERNAL OVERSIGHT BODY OF THE DEFENCE FORCES (HEADS 3 TO 24)

This Part of the General Scheme examines Heads 3 to 24 which deals in turn with the following: establishment of the External Oversight Body (EOB), the functions and powers of the EOB, membership, eligibility to be a member and terms of membership of the EOB, sharing of information with the Defence Forces, establishment of committees of the EOB, meetings, staff, strategy statements, annual reports, code of ethics, finance/contracts and related matters.

Head 6, “Functions and Powers of the External Oversight Body”, provides for the principal functions and powers of the EOB. The explanatory notes accompanying the Head state that these powers and functions “set out here may require further development as the work of the [EOB] proceeds on a non-statutory basis. As currently drafted the functions...draw on the Terms of Reference of the non-statutory [EOB].”¹. Head 6(1) provides therefore that the EOB “shall oversee, monitor and advise the Minister on the implementation by the Defence Forces of human resource management matters.”

At the Committee’s hearing on February 27 2023, Chairperson of the EOB, Professor Brian MacCraith stated the following in respect of Head 6:

“[H]ead 6 deals with the functions and powers of the external oversight body. With regard to subsection (2), the body considers the complaints process to be one of the key levers in delivering the required cultural change in the Defence Forces. Under its terms of reference, the body is mandated to oversee the management of the existing complaints process within the Defence Forces pending the introduction of a new complaints mechanism. It is also tasked with overseeing the reform of the process of making a

¹ [General Scheme of the Defence \(Amendment\) Bill 2023](#)

complaint of unacceptable behaviour under administrative instruction A7, Chapter 1, and revision of the grievance model to replace the redress of wrongs system. These matters are a priority for the body at this time. It is the view of the body that the current head 6 of the general scheme should make explicit reference to all grievance and complaints policies and processes in the description of the functions and powers of the EOB section.”²

A number of witnesses at the hearings of the Committee on the General Scheme noted that the current text of Head 6 may require further clarification. This was particularly noted in respect of the independence of the EOB and it proposed enhanced status as a statutory body. In this regard, Head 6(3) states that the Minister of Defence “may” consult with the EOB prior to appointing a Chief of Staff and Deputy Chiefs of Staff. Head 6(3) provides that the Minister “may” consult with the EOB in respect commencement of any competition for the promotion of an officer to the rank of Brigadier General. Head 6(10) provides, among other things, that the EOB may, “subject to the approval of the Minister, conduct reviews and make recommendations to the Minister”. Head 6(13) provides that the EOB shall keep the Minister informed of matters relevant to its functions for which the Minister is accountable to the Houses of the Oireachtas. In the General Scheme’s explanatory note accompanying Head 6 state that “as currently drafted, the functions in subsection (1) draw on the Terms of Reference of the non-statutory External Oversight Body.”

Professor MacCraith stated the following at the Committee hearing:

“under head 6. With regard to subsection (10), the body is of the view that it should be given as much autonomy as it requires such that it can review and

² [Joint Committee on Foreign Affairs and Defence debate - Tuesday, 27 Feb 2024 \(oireachtas.ie\)](https://www.oireachtas.ie/en/debates/committees/foreign-affairs-and-defence/2024/02/27/)

report on relevant matters pertaining to the Defence Forces without requiring prior approval from the Minister.”³

At the Committee’s meeting with officials from the Department of Defence on 30 January 2024, in response to a question from a member of the Committee in respect of allowing the EOB’s to undertake its review independently without necessarily seeking the consent of the Minister for Defence, Cathal Duffy, Acting Assistant Secretary in the Department of Defence, stated the following:

“The legislation currently provides that the body seeks the approval of the Minister if it wishes to conduct a review and to make recommendations. That again is something we could reflect on if there was a view it should change. It is important the work of the body reflects what might be seen as the priorities and so forth as opposed to working completely in abeyance.”⁴

Head 8, “Membership of External Oversight Body”, provides that the EOB will have a chairperson and thereafter six ordinary members, making the total membership of the EOB as seven. The proposed membership reflects the composition of the current EOB, but in Head 8(4) sets out the competencies required of one or more members of the EOB. This includes, among other things, experience and expertise relating to the EOBs functions, organisation governance, management or public administration, financial matters, and direct leadership experience of military transformation. It also specifically provides in Head 8(4)(e) for the Secretary General of the Department of Defence to be an ex-officio member.

It should be noted that this differs from the recommendation of the IRG which called, as well as an independent chairperson, five independent members...

“appointed through the Public Appointments Service, with relevant expertise in defence policy; transformation at scale and at a rapid pace; organisational

³ [Joint Committee on Foreign Affairs and Defence debate - Tuesday, 27 Feb 2024 \(oireachtas.ie\)](#)

⁴ [Joint Committee on Foreign Affairs and Defence debate - Tuesday, 30 Jan 2024 \(oireachtas.ie\)](#)

behaviour, including in relation to gender; Ireland's culture, expectations and capacities; and an understanding of/experience in the Irish public service".

The IRG also recommended membership on the part of a "former senior member of an overseas Defence Force or defence department which has successfully undertaken significant transformation" and, the "Secretary General of the Department of Defence", but not on an ex-officio basis as set out in the General Scheme.

A number of Committee Members expressed reservations about the appropriateness inclusion of the Secretary General of the Department of Defence as an ex-officio member of the EOB, raising concerns about whether the inclusion of the Secretary General is consistent with the independence of the External Oversight Body.

At present the General Scheme does not make reference to the public appointments service unlike the text of the IRG's recommendation, but rather Head 8(2) provides for the members to be appointed by the Minister. In this regard, it should be noted that Head 9 – providing for Term of Appointment – in subsection 4 refers to the reappointment of EOB members by the Minister. The explanatory notes for Heads 8 and 9 refer to some of the text being drawn from *Policing and Community Safety Bill 2023*.⁵ Sections 15 and 16 of that Act provide the Minister for Justice to invite the Public Appointments Service to undertake the selection process for appointment as members of *Bord an Garda Síochána*, including its Chairperson. In addition, section 123 provides for a similar process involving the Public Appointments Service to undertake the selection process for appointment as members of the Policing and Community Safety Authority.⁶

At the time of writing, the notice inviting expressions of interest for suitably qualified candidates for consideration for the role roles of Chairperson and Ordinary Members

⁵ [General Scheme of the Defence \(Amendment\) Bill 2023](#)

⁶ [Policing, Security and Community Safety Act 2024](#).

for the board of the Policing and Community Safety Authority is currently live on the StateBoards.ie website.⁷

There were a number of comments made by stakeholder about the membership of the TOB during the Committee's meetings. At the Committee hearing of 20 February 2024, Liam Berney of ICTU stated the following:

“Congress strongly recommends that this be amended to provide for a representative from PDFORRA and RACO in the membership of the oversight body. There are provisions within the legislation to extend the membership of the body and we believe that RACO and PDFORRA should be included in its membership.”

It should be noted in this respect that representative of PDFORRA and RACO were members of the IMG in the past and the EOB's forerunner the IRG, cited ongoing consultation with each representative association.

This view was echoed by the evidence provided at the Committee hearings by the respective representative of PDFORRA and RACO. RACO's representative stated the following at the meeting of 20 February 2024:

“Head 8(4) prescribes the composition of the body and includes the Secretary General of the Department of Defence as an *ex-officio* member. The previous oversight body in the Defence Forces included both general secretaries of the PDF representative associations as *ex-officio* members, along with a member of the Department of Defence and military management, under an independent chair. It is unclear why this has not been replicated in the new oversight body when one considers the continued presence of the Department on the body. Our association seeks the continued membership, on an *ex-officio* basis, of the general secretaries of the associations to ensure

⁷ See [Appointments to the Policing and Community Safety Authority | Minister for Justice - publicjobs.ie \(stateboards.ie\)](https://publicjobs.ie/stateboards.ie), accessed 18/03/2024.

member buy-in and to provide much-needed context and the benefit of the considerable experience and corporate knowledge of over 30 years of effective, constructive representation of the personnel of the Defence Forces.”⁸

At the same Committee meeting, PDFORRA’s representative echoed this point:

“On head 6, PDFORRA notes the proposals within the proposed Bill with respect to the oversight body; specifically, the proposed functions regarding promotion, recruitment and training of personnel. The proposed Bill sets out in general terms that the oversight body will oversee, monitor and advise the Minister on the implementation of HR matters. Additionally, section 2 of the proposed Bill specifically provides that the oversight body will oversee recruitment, matters related to induction, training, performance management and selection for promotion.

The current promotion system within the Defence Forces arises from an initiative taken under the Croke Park agreement by the Department. Moreover, the current system was negotiated between the official side, military management and PDFORRA and voted upon by our members as part of that agreement.

Therefore, PDFORRA would have strong reservations regarding the potential for unilateral action by an external body and the exclusion from any process of our association. It is our considered opinion that our association should be permitted to be an *ex-officio* member of the oversight body. This is a view that we have long held and communicated to the Department.”⁹

⁸ [Joint Committee on Foreign Affairs and Defence debate - Tuesday, 20 Feb 2024 \(oireachtas.ie\)](https://oireachtas.ie)

⁹ Ibid.

Professor MacCraith of the EOB stated the following in respect of its membership under head 8

“[U]nder head 8 dealing with membership of the body. With regard to subsection (1), the body is of the view that the membership should comprise the chair and at least six but no more than eight ordinary members. The change, if accepted, would result in a body comprising a minimum of service and a maximum of nine members. The motivation for the requested amendment is the potential inclusion of further international experts to augments the external advisory role of the EOB as its work evolves”.¹⁰

Moving on a from membership solely, the representatives from RACO made a related point in evidence which underlined the importance of some form of membership, ex-officio or otherwise of the EOB, in the context of its functions:

“Head 6(1) and (2) provide that the new oversight body shall oversee, monitor and advise the Minister on the implementation by the Defence Forces of human resource management matters, including recruitment, training, other than military training exercises, education and performance management, and promotion of members of the Defence Forces. All of the included matters fall within the scope of Defence Forces representation under the Acts. For example, the promotion systems for Defence Forces personnel are negotiated between the representative associations, the Department and military management and voted upon by association members. We require clarity as to the powers comprehended by the actions to “oversee, monitor and advise”. The intent of the oversight body with regard to consultation and engagement with the association in these areas also remains unclear. We sincerely hope the oversight body will assume the vital function of monitoring staffing levels in

¹⁰ [Joint Committee on Foreign Affairs and Defence debate - Tuesday, 27 Feb 2024 \(oireachtas.ie\)](#)

operational and training units, a function formerly carried out by the independent monitoring group.”¹¹

In his evidence, Professor MacCraith made a point along broadly similar lines to that above:

“It is the view of the body that the current head 6 of the general scheme should make explicit reference to all grievance and complaints policies and processes in the description of the functions and powers of the EOB section.”¹²

Recommendations:

- The Committee recommends that the Bill be revised to take measures to strengthen the autonomy and independence of the EOB. This might complement the existing power of the Minister, noting the Minister’s discretion in taking on board or not the recommendations of the EOB, by increasing the autonomy of the EOB to undertake reviews evaluations and related matters etc., without the need to gain Ministerial approval and consent. This might enhance the EOB’s ability to carry out its functions independently and effectively.
- With respect to the membership of the EOB, as it stands this does not seem to fully reflect the recommendations of the IRG, particular in the case of the membership being appointed by the Minister following a process run through the Public Appointments Service (Stateboards.ie), as is the case with the Policing and Community Safety Authority, which is cited in the General Scheme. There is merit also in extending the membership of the EOB in the manner suggested by the EOB in its evidence to the Committee which will enhance its capacity to carry out its functions.

¹¹ [Joint Committee on Foreign Affairs and Defence debate - Tuesday, 20 Feb 2024 \(oireachtas.ie\)](#)

¹² [Joint Committee on Foreign Affairs and Defence debate - Tuesday, 27 Feb 2024 \(oireachtas.ie\)](#)

- The Committee recommends that the Secretary General of the Department of Defence should not be a member of the EOB. The Committee considers that the inclusion of the Secretary General of the Department of Defence as a member, albeit ex officio, of the EOB risks calling into question the independence and full autonomy of the EOB. The Committee recommends that the Secretary General should be invited to meet with the EOB on a case-by-case basis as the need arises. Similarly, the Representative Bodies of the Defence Forces should be invited to meet with the EOB on a case-by-case basis as the need arises. If the Secretary General is included as an ex-officio member of the EOB, representation on an ex-officio basis should also be extended to the Representative Bodies of the Defence Forces, as in the manner of the previous IMG, especially given the EOBs role in HR matters including promotion.
- In the course of the Committee's PLS on the General Scheme, it was noted on a number of occasions that the stakeholders feel that there has been a lack of consultation on the part of the Department of Defence and, to date, the EOB. It was noted also that many stakeholders were unaware of the content or the arrival of the General Scheme, despite their position as key stakeholders in the reform process and in some cases objects of various provisions proposed in the General Scheme. It is notable too that the nature of changes that are being sought, based on the IRG's report, cite the need for culture change from that which was evident in some instances leading to the need for the IRG's recommendations. The Committee urges the Department of Defence and the EOB to undertake planned, structured, co-ordinated and meaningful consultations with stakeholders in the development of the Bill. This would also benefit from clear and transparent channels of communication. There is merit also in providing for such consultation in the provisions of the Bill itself.

ICTU (AMENDMENTS TO THE DEFENCE (AMENDMENT) ACT 1990) (HEADS 25 TO 28)

Part 3 of the General Scheme, Heads 25 to 28, provides for the Representative Bodies of the Defence Forces to have associate status with ICTU for the stated purposes of participation in the negotiation of national pay agreements, to which the public services committee of ICTU is a party. The Representative Bodies were initially provided for under the 1990 Act. However, it is clear from the text of the General Scheme (and the evidence provided at the Committee hearings discussed below) that one basis of the proposed provisions is a legal settlement reached between the Department of Defence and Representative bodies. In this regard, the General Scheme states in the Explanatory Notes for Head 25 the following:

“As part of the settlement of a legal action in 2022, the Courts approved the association, on a temporary basis, of the military representative associations (PDFORRA and RACO) with ICTU. The decision by the Courts was on foot of binding undertakings given to the Courts by the representative associations. As the current arrangements regarding ICTU association are on the basis of a Court settlement, there is a requirement on the Minister for Defence to bring forward legislation to address the matter on a permanent basis.”¹³

Head 25

Thus Head 25 seeks separately from this to deny membership of a representative body on the part of the Director of Military Prosecutions, military judge or “any post as may be prescribed by the Minister”, where the post holder is to be independent in the performance of their functions. Further Head 25 provides that the representative association of the Defence Forces will be independent and will not, without the

¹³ [General Scheme of the Defence \(Amendment\) Bill 2023](#)

In the Committee's hearings, the Department of Defence officials provided the following understanding of this Part of the General Scheme:

“The Minister will have the power to impose conditions when consenting to any such association or to vary or withdraw any consent previously given. This part also provides for a related amendment to section 103 of the *Defence Act 1954*. The amendments reflect the commitment to implement the recommendation of the Commission on the Defence Forces that the PDF representative associations should be facilitated if they wish to pursue associate membership of ICTU, as well as a commitment given in June 2022 as part of High Court settlement with the military representative associations to make such statutory provision. On foot of the High Court cases, the military representative associations were allowed, on a temporary basis, to associate with ICTU pending the introduction of legislation. Undertakings were given at the time by the PDF representative associations not to engage in certain specified activities. The general scheme incorporates the prohibited activities set out in the High Court settlement of June 2022 as an amendment to the *Defence (Amendment) Act 1990*. The prohibited activities will apply to the PDF representative associations representing both commissioned and enlisted personnel. The provisions regarding associate ICTU membership will facilitate the attendance of the PDF representative associations at future national pay talks.

On a related point, the *Defence (Amendment) Act 1990* will also be amended to expressly provide that officers holding certain positions within the Defence Forces shall be prohibited from membership of a representative association. The officers in question are the Director of Military Prosecutions and the military judge. Under the Defence Acts, these officers are required to be independent in the exercise of their functions. They do not form part of the

military chain of command. The provisions are necessary to underpin the independence of these officeholders.”¹⁷

Committee Members expressed concern at the prohibition of some titles from being a member of a representative association, despite suggestions that it was being proposed to copper-fasten the independence of such positions. The Committee Members observed did not seem to apply in the case of equality officers carrying out investigations. In this respect, it was noted that professional competence and terms associated with the posts would preclude partiality on the part of the post-holders.¹⁸

In the Committee’s hearing of 20 February 2024, the ICTU representative made the following observations in respect of Head 25(a):

“The stated justification for head 25(a) is that a holder of one of the specified posts is required to be independent in the performance of his or her functions and if he or she were a member of a military association, this would prejudice his or her independence. For example, a person who is the Director of Military Prosecutions and a member of RACO may be reluctant or unwilling to prosecute another member of RACO. We reject this analysis. To claim that a holder of the specified posts would be deterred from fulfilling his or her duty by virtue of membership of a military association is baseless. To restrict membership is disproportionate and potentially discriminatory. What is more, the Government is required by the end of this year to transpose into Irish law the EU directive on adequate minimum wages. The purpose of this directive is to improve living standards and working conditions. The directive now obliges the State to promote collective bargaining coverage. The directive is very clear that collective bargaining takes place between employers and trade unions. To preclude workers from being members of a trade union flies in the face of the requirements and aims of this directive. In light of the reasons I

¹⁷ [Joint Committee on Foreign Affairs and Defence debate - Tuesday, 30 Jan 2024 \(oireachtas.ie\)](#)

¹⁸ [Joint Committee on Foreign Affairs and Defence debate - Tuesday, 30 Jan 2024 \(oireachtas.ie\)](#)

have set out, congress is firmly of view that the provisions under head 25(a) should be withdrawn.”¹⁹

Speaking to the same Head at that Committee hearing, RACO’s representative made the following comments:

“This is held by RACO to be unnecessary and discriminatory, a point that had been made in detail by RACO to the Department and endorsed by the finding of the Government -appointed adjudicator for our conciliation and arbitration scheme, finding that has been laid before the Oireachtas. The adjudication finding has been provided to the committee. The Department of Defence has appealed this finding, but rather than awaiting the outcome of the appeal, which has yet to be heard, it has moved to enshrine the prohibition in primary legislation, completely ignoring the finding. It should be noted that the Department has provided no evidence that membership of our association has or would ever negatively impact the independence of any appointment holder in the performance of his or her functions”,

and that “RACO strongly believes head 25(a) should be removed in its entirety as it is unnecessary, disproportionate and discriminatory, with no analogous example in the rest of Irish society”.²⁰

PDFORRA’s representative made a similar point in respect of Head 25 in their evidence at the Committee hearing of 20 February 2024:

“while the proposed section purports to limit the ability of certain officers from being members of a representative association, PDFORRA contests that the proposed amendment is too broad and could, if enacted, extend to serving enlisted personnel by virtue of the exercise of the aforementioned provision. PDFORRA believes that the right to freedom of association is a

¹⁹ [Joint Committee on Foreign Affairs and Defence debate - Tuesday, 20 Feb 2024 \(oireachtas.ie\)](https://oireachtas.ie/debate/2024/02/20/joint-committee-on-foreign-affairs-and-defence-debate-tuesday-20-feb-2024)

²⁰ [Joint Committee on Foreign Affairs and Defence debate - Tuesday, 20 Feb 2024 \(oireachtas.ie\)](https://oireachtas.ie/debate/2024/02/20/joint-committee-on-foreign-affairs-and-defence-debate-tuesday-20-feb-2024)

constitutionally protected right under Article 40 of the Constitution. Moreover, it is a fundamental right that should only be limited, where necessary, for the preservation of national security or where it is necessary in a democratic society. In the foregoing regard, the representative associations have existed in law since 1990, and during that period no example can be provided to show that membership of the representative association has compromised either of the foregoing explicit provisions - that of State security or democratic necessity.”²¹

Finally in respect of this Head, Senator Michael McDowell, in attendance at the Committee hearing, read out some pertinent parts of the report of the adjudicator, Daniel Murphy, into the issue of whether the Director of Military Prosecutions could be a member of RACO, which was subject to adjudication or arbitration by RACO and the Department of Defence:

“Denying a person freedom of association in the context of quasi-trade union membership is a very serious matter and, if it were to be denied, I consider that it would be reasonable to expect that the Oireachtas would legislate for it specifically having considered the pros and cons in open parliamentary debate, not that it should arise from secret exchanges between a Government Department and its legal advisors.”²²

“In the circumstances, I conclude that the prohibition on membership of RACO for the Director of Military Prosecutions is not reasonable against the background of all the facts set out above. Therefore, I find Paragraph 25 of the Terms and Conditions of Service for the appointment of the Director of Military Prosecutions which provides that the Director should not be a member of an association established pursuant to Section 2, Defence Amendment Act,

²¹ Ibid.

²² Ibid.

1990 should be deleted from those Terms and Conditions so that the current and any future such Director should be free to be members of RACO.”²³

Head 26

Turning to Head 26, (Insert a new section (2A) into the *Defence (Amendment) Act 1990* to specify activities that an association will be prohibited from undertaking (ICTU)), Committee Members noted that there was the potential for the provision to be used in a manner outside of what it has been drafted for and that the text of the Head was potentially excessive.²⁴

In respect of Head 26, ICTU’s evidence to the Committee makes broadly similar observations:

“Head 26 sets out a number of conditions that PDFORRA and RACO are required to observe if they are to be permitted. on a longer term basis, to associate with the Irish Congress of Trade Unions. In May 2022, an agreement was reached in the High Court that allowed PDFORRA and RACO to associate with ICTU on a temporary basis. Some conditions were attached to that settlement. However, it is our understanding that the conditions set out in head 26(2A)(a) to (j) go far beyond what was agreed in May 2022 and have been described by some as tantamount to a “gagging order” that is hindering the military associations from representing their members. It is clear to us that a significant rewrite of head 26 is required. Indeed, the explanatory notes readily acknowledge that this requires “further development and discussion.”²⁵

Conor King of RACO in his evidence to the Committee echoed this observation:

²³ Ibid.

²⁴ [Joint Committee on Foreign Affairs and Defence debate - Tuesday, 30 Jan 2024 \(oireachtas.ie\)](#)

²⁵ [Joint Committee on Foreign Affairs and Defence debate - Tuesday, 20 Feb 2024 \(oireachtas.ie\)](#)

“[for] head 26, the explanatory notes for this assert that “It is based largely on the terms of the 2022 High Court settlement with the representative associations and requires further development and discussion”. It further states that “Draft prohibition ... (j) [reflects] ... the existing Defence Force Regulation S.6”. This assertion is only partially true in the case of draft prohibition (j). Paragraph 2A(j) of head 26 states that a representative association or a representative of an association “shall not ... make a public statement or comment concerning a political matter [or question or express an opinion on the merits of any policy of the Government or a Minister of the Government or on the merits of the objectives of such policy]”.²⁶

At the same Committee meeting, PDFORRA’s representative stated that in respect of Head 26(2A)(J):

“its ratification would make it unlawful for PDFORRA to express an opinion on the merits of any policy of the Government, of a Minister of the Government or the merits of the objectives of such policy. The legal settlement between PDFORRA and the Department in 2022 provided for PDFORRA to associate with the ICTU and allowed the representative associations to retain the right to highlight failings where we believed they existed. This section, in its current format, would undermine the pre-approved entitlement that the representative associations have had since 1990. Moreover, PDFORRA believes that this section falls foul of Article 10 of the European Convention on Human Rights.”²⁷

Mr. Guinan of PDFORRA in his evidence continued:

“While PDFORRA understands that restrictions on comments of a political nature are necessary and has always adhered to this restriction, what is

²⁶ Ibid.

²⁷ [Joint Committee on Foreign Affairs and Defence debate - Tuesday, 20 Feb 2024 \(oireachtas.ie\)](#)

proposed in this amendment goes far beyond what we believe to be reasonable, proportionate and necessary in a democratic state. We believe that it will, in fact, serve to undermine the institution that is the Defence Forces for those reasons set out above. Consequently, our association would welcome the removal of the aforementioned provision.”²⁸

In a written submission made to the Joint Committee as part of its PLS process on the General Scheme, Mark Garrett, Director General of the Law Society, outlined a number of observations regarding the limitations outlined in Head 26 in that they were concerned that such “limitations on both trade union activities and freedom of expression/assembly are disproportionate in nature and excessively limit the rights of Defence Force representative association members as enumerated in both the Constitution and Articles 5 and G of the European Social Charter”.

Mr. Garrett’s submission makes further related points:

“Defence Force Regulations S.6 are the Statutory Instrument that gives effect to the Defence Amendment Act 1990 and governs, inter alia, the establishment, funding and operation of representative associations in the Permanent Defence Force.

The Defence Force Regulations S6 do not include the additional proposed restriction in Head 26 regarding commentary on Government policy. This is taken directly from the restrictions contained within the Policing, Community and Safety Act 2024 that are placed on the Garda Commissioner, the Director of Community Safety, the Chief Executive of the Policing Authority and the Police Ombudsman when appearing before committees of the Oireachtas.

No such restrictions regarding commentary on Government policy are placed on Garda representative associations. The Law Society submits that members of Defence Force representative associations should enjoy the

²⁸ Ibid

same rights to free expression and assembly as their equivalents in Garda representative associations given the importance of both fields to the continued maintenance of both national and public security.

To impose such restrictions on members of Defence Forces representative associations may have the effect of silencing and frustrating the ability of the associations to advocate for their members on matters that fall within the scope of representation under the existing Defence Forces regulation.”²⁹

Moreover, Mr. Garrett’s submission suggest in particular the following:

“The application of the following line: “shall not question or express an opinion on the merits of any policy of the Government or a Minister of the Government or on the merits of the objectives of such policy” is too restrictive for a representative association and it is submitted that it should be removed.”³⁰

Finally, in respect of this Head, the Bar Association of Ireland’s submission to the Committee’s PLS of the General Scheme makes the following observations:

“The prohibitions in the proposed Head 26 require detailed scrutiny. It is acknowledged that, owing to the unique nature of the Defence Forces and the requirements to maintain Military command and discipline, the activities of the representative associations and of individual Military personnel require some restriction, particularly in relation to matters of politics and public controversy.

“

“...[I]t must also be acknowledged that such prohibitions constitute a very significant restriction on the free exercise of Constitutionally guaranteed

²⁹ Law Society of Ireland, Submission to the Oireachtas Joint Committee on Foreign Affairs and Defence, Re: Submission on the General Scheme of the Defence (Amendment) Bill 2023, 8 March 2024.

³⁰ Ibid

rights, for example the right of citizens to express freely their convictions and opinions and to form associations and unions, which are found in Article 40.6 of the Constitution. They also are a restriction on the free exercise of, for example, the rights to freedom of expression and freedom of assembly and association contained in the European Convention on Human Rights.

It is necessary, therefore, for any such restrictions to be appropriately justified and for them to be proportionate and go no further than is necessary for the legitimate aim concerned.

The Committee's attention is respectfully drawn, in particular, to the restrictions at (i) and (j) of the section proposed in Head 26, which are very far ranging indeed. They would, on their face, seem to prohibit the representative associations from, for example, encouraging their members from participating in a protest or demonstration that ICTU (or any other body) might organise in relation to pay and conditions in the public service generally or for the Defence Forces specifically.

Given the very broad and extensive nature of the proposed restrictions, it is certainly open to question as to whether those restriction go further than what is proportionate and necessary in the circumstances. This is an issue that the Committee may wish to consider as part of its work."³¹

Head 28

In respect of Head 28 in its submission to the Committee, the Bar of Ireland observed that while not disputing that there is a legitimate interest in prohibiting members of the Defence Forces from engaging in political activity, including in being members of a political party or campaigning for political causes, it does note however the following:

³¹ The Bar of Ireland/Law Library, Submission to Joint Committee on Foreign Affairs and Defence on the General Scheme of the Defence (Amendment) Bill 2023, 7 March 2024.

“It is respectfully suggested that the section proposed in this Head would, for example, relating to their pay and conditions or the pay and conditions pertaining in the public sector generally, even if they attended such an event out of uniform.

As with Head 24, it is suggested that the proposals in Head 28 represent a significant restriction on the ability of members of the Defence Forces to exercise rights guaranteed by the Constitution and European Convention on Human Rights. Therefore, it is suggested that the Committee should scrutinise carefully the proposal in Head 28 to ensure that the restrictions proposed serve a legitimate aim and are proportionate.

It may assist the Committee to be aware that a challenge to the restrictions placed on members of the Permanent Defence Force to attend at protests relating to Military pay and conditions, even in civilian attire, is currently before the High Court in the case of *Martin Bright v. Minister for Defence*. The High Court (Sanfey J) has heard the case and the Court’s judgment is awaited.

The Bar of Ireland will not comment on an ongoing case but the Committee may wish to consider the content of the imminently due judgment before contemplating any further legislative intervention in the area.”³²

In response to questions from Committee Members, Mr. Guinan of PDFORRA made the following comments on Head 28:

“We ask for the re-examination of the provision in head 28(d), which states that a member of the Defence Forces shall not “address a meeting of a political organisation or society [or grouping seeking to influence government policy]”. Previously, section 103 stated, “A member of the Permanent Defence Force shall not join, or be a member of, or subscribe to, any political

³² The Bar of Ireland/Law Library, Submission to Joint Committee on Foreign Affairs and Defence on the General Scheme of the Defence (Amendment) Bill 2023, 7 March 2024.

organisation or society or any secret society whatsoever.” It goes on to provide for various things. It has never gone so far as to completely deny members their right to address any group. As I said, we believe that members should be able to address their local hospital cancer care services and to have no fear about that. That is a body which may seek to influence Government policy but it would not be right for members of the Defence Forces to face military charges arising from a simple statement to say their son or daughter is going to this hospital and they do not believe the Government is right to remove this cancer care service.”³³

At the same Committee hearing, ICTU’s representative made a similar comment in his evidence that: “We are further concerned that head 28 places unnecessary and disproportionate limits on individual members of the Defence Forces and, like head 26, it requires development and discussion.”³⁴

In its evidence to the Committee, PDFORRA’s representative made the following comments in respect of Head 28:

“On head 28(1)(d), PDFORRA and its members have always accepted the need for political impartiality; however, this provision limits the ability of members to speak or give an opinion to any political organisation, society or grouping. This provision would, if enacted, make it unlawful for members of PDFORRA to address political groupings on service matters, despite having been registered under the *Lobbying Act 2015*....Furthermore, it would make it unlawful for serving members to attend, should they wish, public demonstrations, either in, or out, of uniform.”³⁵

Recommendation:

³³ [Joint Committee on Foreign Affairs and Defence debate - Tuesday, 20 Feb 2024 \(oireachtas.ie\)](#)

³⁴ Ibid

³⁵ Ibid.

8. With respect to Head 25, it is not clear that there is sufficient merit in its proposed prohibition of membership of representative associations on the part of the Director of Military Prosecution, the Military Judge or other posts that may be prescribed by the Minister at a future point. The Committee heard evidence that this provision is disproportionate and without parallel anywhere else in the public sector. The Committee also are also concerned that such a prohibition may undermine the spirit of goodwill and constructive engagement fostered in recent years, and in particular arising from the Commission on the Defence Forces. The Committee recommends that the provision be removed.
9. Head 26 also appears to be disproportionate. Moreover, the Head as it stands does not seem to be in keeping with the relevant existing European legal framework and in the Irish case, as cited by the Bar of Ireland and the Law Society in Ireland in their respective submissions to the Committee. The Committee is concerned that the provision may have unintended consequences for the exercise of free expression and assembly and recommends that the Head either be remove or substantially amended to reflect only existing regulations.
10. In respect of Head 28, it is not clear - in its current form - if the Head is necessary and it as currently written may be construed as being disproportionate. There is merit therefore in amending the Head to ensure it serves a legitimate aim and is proportionate.

Appendix 1

05 Mar 2024

**Cathaoirleach, Teachtaí Dála, agus Seanadóirí
An Comhchoiste um Ghnóthaí Eachtracha agus Cosaint**

**SUBMISSION TO
THE JOINT COMMITTEE ON FOREIGN AFFAIRS AND DEFENCE
ON THE GENERAL SCHEME OF THE DEFENCE (AMENDMENT) BILL 2023**

Introduction.

1. The Association of Retired Commissioned Officers (ARCO) fully appreciates the invitation from the Joint Committee on Foreign Affairs and Defence to make a written submission, and to contribute to the Pre-legislative Scrutiny process on the General Scheme of the Defence (Amendment) Bill 2023.
2. ARCO welcomes the intention of amending the Defence Acts 1954 – 2020 providing, inter alia, for the establishment of the External Oversight Body of the Defence Forces; providing authorisation for the Defence Forces Representative Associations to associate with the ICTU; and making a number of miscellaneous amendments, including protecting the prescribed Irish title of Defence Forces - “Óglaigh na hÉireann”.
3. On the matters leading and related to the drafting of the Defence (Amendment) Bill 2023, ARCO had been invited to make submissions and attend consultations with;
 - a. The Commission on the Defence Forces (CODF),
 - b. The Independent Review Group - Defence Forces (IRG-DF),
 - c. The Minister for Defence in relation to the drafting of the Terms of Reference for the forthcoming Tribunal of Inquiry ensuing from the IRG-DF Report.

New Part X111 of the Defence Act 1954.

4. The provisions relating to the External Oversight Body of the Defence Forces will be incorporated in the Defence Act 1954 as a new Part XIII as Part 2 and will consist of Heads 3 to 24. ARCO is particularly concerned with certain elements of Heads 6 and 8, which have the potential to adversely affect the authority of the Chief of Staff, and the effectiveness and efficiency of the Defence Forces. Accordingly, these two proposed Heads of the Defence (Amendment) Bill 2023, are the primary focus of this submission.

Amendments to Section 2 Defence (Amendment) Act 1990

5. The implications arising from Part 3 are also material, and ARCO can comment on these if required. ARCO notes that these provisions have been comprehensively addressed by the Defence Forces Representative Associations, ICTU and EUROMIL in their witness testimony to you on 20 Feb 2024.

- a. Head 25 (prohibition on membership of a Representative Association),
- b. Head 26 (prohibitions on activities by Representative Associations) and
- c. Head 28 (prohibitions on activities of a public or political nature).

General Comments

6. ARCO wishes to express its deep concern in respect of the dangerous effects that the Defence (Amendment) Bill 2023 will have on the State's proper and appropriate exercise of Civil control over its armed forces and in maximising its military capabilities and professionalism. ARCO humbly suggests that this Committee frame its pre-legislative scrutiny process around the following well founded internationally accepted benchmarks.

- a. Civil control of armed forces refers to the proper subordination of a professional military to the ends of policy as determined by civilian authority, namely the democratically elected Government.
- b. It falls to the military leadership to maximise military capability, on land, sea and in the air, within the restrictions and constraints demanded by Government.
- c. A military capability is the fusion of a spectrum of components under the command, leadership, and management of the legally appointed commander. Within this spectrum are the areas of human resource management, education, and training, logistics, equipment, organisation, etc.
- d. Proper oversight of the Defence Forces must ensure that military policies and capabilities are aligned with political objectives and resources made available.
- e. Control and oversight of a state's military can be exercised objectively or subjectively. On the one hand an objective approach maximises military professionalism and risks politicisation in seeking political influence.

7. In ARCO's view, the Defence (Amendment) Bill 2023, as set out in part, lacks objectivity, and prescribes subjectively with provisions in the crucial area of human resource management. This diminishes the military leadership in maximising capabilities.

8. Similarly, as the testimony provided by the Defence Forces Representative Associations, ICTU and EUROMIL on 20 Feb 2024, expressing concern over the prohibitions on membership and activities, as part of representation, may render representation for military personnel defunct and have wider industrial relations implications for many other sectors.

9. The exclusion of the Representative Associations and apparently, the leadership of the Defence Forces from the elaboration process of drafting the provisions of the Defence (Amendment) Bill 2023, of which they have direct responsibilities and functions should of itself be a cause of considerable concern to the Joint Committee.

10. ARCO is concerned with Heads 6 and 8 in particular. These two Heads provide for the functions of the External Oversight Body (Head 6) and its membership (Head 8). Both provisions mark one of the most profound policy and policy effect changes since the foundation of the State.

Head 6: Functions and Powers of External Oversight Body

11. **ARCO Position on External Oversight.** ARCO has consistently stated that it welcomes the concept of an Oversight Body. The previous iteration of the External Oversight Body, namely the Independent Monitoring Group (IMG), adopted a collaborative endeavour involving a senior Defence Forces officer, a senior official of the Department of Defence, and the Defence Forces Representative Associations, with an independent Chair. Within the successful and much respected IMG, no one element held dominance over proceedings, deliberations, or outputs. The disbandment of the IMG was a serious policy error.

12. In comparison with the IMG, ARCO notes the complete removal from the External Oversight Body of professional military knowledge and expertise as well as stakeholder voices through the Representative Associations.

13. ARCO notes that Head 6 of the Defence (Amendment) Bill 2023, providing for the establishment of an External Oversight Body, has relied on the Policing, Security and Community Safety Act 2024. Chapter 2 provides for the establishment of a Board of An Garda Síochána (para 11) and the functions of this Board [para 12 (1) to (4)]. There is a broad similarity between these entities in respect of providing for external oversight. Link to Policing, Security and Community Safety Act 2024:

<https://www.irishstatutebook.ie/eli/2024/act/1/enacted/en/index.html>

14. It is instructive to compare the functions assigned to both bodies and the difference in intent.

a. Head 6 (1), of the Defence (Amendment) Bill 2023, whilst recognising the provisions of Section 13 of the Defence Act 1954 which refers to the functions assigned to the Chief of Staff, provides that the External Oversight Body shall oversee, monitor, and advise the Minister on the implementation by the Defence Forces of human resource matters. Subsection (2) lists those matters. These are included in the prescribed functions assigned by the Minister for Defence to the Chief of Staff and the Deputy Chiefs of Staff, Operations and Support,

1) Recruitment, induction, training, other than military training exercises – whatever that means - education and performance management including equality matters.

2) Selection criteria for promotion.

b. By comparison Chapter 2 Head 12 (1) (a), (b), (c), (d), of the Policing, Security and Community Safety Act 2024 assigns inter alia such functions such as

1) To oversee and approve the development of corporate strategy.

2) Promote high standard of corporate governance.

3) To monitor the implementation of organisational performance.

4) To ensure that human resource matters (as listed) comply with best practice.

15. By any measure it is clear that the functions assigned to the External Oversight Body by comparison to those assigned to the Board of An Garda Síochána are considerably more subjectively based rather than objectively based. The inclusion of the terms ‘management matters’ in this Head sub-para (1) and (2) of the Defence (Amendment) Bill 2023 confirms a subjective intent which is absent in the functions assigned to the Board of An Garda Síochána.

16. In addition, the terms of the proposed Defence (Amendment) Bill 2023 cannot be divorced from the Independent Review Group – Defence Forces (IRG – DF) Report which recommended, inter alia that of the External Oversight Body “**holding the leadership of the Defence Forces to account for progress on the culture change programme**” (emphasis added). (IRG - DF Report, Introduction P 9) and cited by officials of the Department of Defence in their witness testimony to the Joint Committee in their opening statement on 30 Jan 2024. In ARCO’s opinion this intent, albeit stating that it being ‘without prejudice to,’ does not sit well with Section 13 of

the Defence Act 1954. Link to Report of the Independent Review Group – Defence Forces:

<https://www.gov.ie/en/publication/4eb09-report-of-the-independent-review-group-on-dignity-and-equality-issues-in-the-defence-forces/>

17. Therefore, ARCO posits that the functions assigned to the External Oversight Body go far beyond ‘oversight’. They provide for a function in the process and implementation of the programme of change. These should properly remain within the professional competence of the relevant military leadership, namely the Chief of Staff and Deputy Chiefs of Staff Operations and Support, subject of course to policy imprimatur, legislative compliance, and best practice in the Defence Forces, as is provided for in the Board of An Garda Síochána.

18. Head 6 sub-para (1) would fully address the requirement for proper oversight if the term ‘human resource management matters’ was replaced by ‘human resource policy matters’, and accordingly ARCO strongly commends its inclusion in the Defence (Amendment) Bill 2023.

19. Head 6 sub-para (2) (a), (b), (c) should be deleted from this Defence (Amendment) Bill 2023 and properly embraced by secondary legislation. These proposed provisions are a gross interference and an impediment to the Chief of Staff in his/her primary function of maximising military capability.

20. In respect of sub-para (2) (d), ARCO has no issue.

21. With regard to Head 6, sub-para (4), as the rank level encompassed by the provision is in the main for a command level appointment, critical to the delivery of military efficiency and effectiveness, the Chief of Staff must have a statutory role in advising on the selection process and criteria relating to the knowledge, ability, and suitability of the officer for promotion.

22. With regard to Head 6, sub-para (5), as the civilian appointed to work directly with the Defence Forces will report to a military officer, the Chief of Staff or an officer appointed by him/her must have a statutory role in advising on the selection process and criteria relating to the knowledge, ability, and suitability of the civilian for such appointment.

Head 8: Membership of the External Oversight Body

23. The provisions of Head 8 can be interpreted as marking a de facto diminution of the functions assigned to the Chief of Staff in Section 13 of the Defence Act 1954. ARCO has previously and repeatedly indicated its concerns on the inclusion of the Secretary General, Department of Defence on the External Oversight Body, and the

exclusion of the Chief of Staff. In ARCO's view, neither should be on this Body if it was to be truly external and independent. ARCO's position has not changed.

24. In ARCO's experience the holder of the appointment of Secretary General as the ex-officio member, will heavily influence the thinking and deliberations of the External Oversight Body. Consequently, in ARCO's view the Secretary General will effectively control the entire Human Resource functions within the Defence Forces. Recalling that civilians have also been appointed to the Defence Forces as the Head of Strategic Human Resources and to drive Transformation adds to these concerns.

25. Furthermore, ARCO submits that the Joint Committee should give very careful consideration to another effect that may not be so apparent from the provisions of the Defence (Amendment) Bill 2023. This is to do with the quality, independence and diversity of advice being delivered to the Minister and by extension to the Government and Oireachtas. ARCO notes that from previous testimony given to the Joint Committee that the External Oversight Body sees its line of reporting through the Department of Defence to the Minister. In effect this means that the considered advice of the Oversight Body will go through the filter of the Department of Defence to the Minister, in the first instance, without any professional military input, but also through the lens of an official, namely the Secretary General, with a significant level of influence at two of the levels of oversight.

26. ARCO submits that when the provisions relating to:

- a. the level of subjective oversight,
- b. the negative impact on military effectiveness and capabilities,
- c. the sidelining of the military leadership, namely the General Staff, from crucial areas of their statutory roles and functions,

are fully considered, they present dangers to the democratic function of Government with the apparent undermining and move from civil control, however subjective it is at present, to one of allowing an unelected official exercise this function. This will, of course, exacerbate the historical dysfunctionality that has long existed in the relationship between the Civil Side of the Department of Defence and the Defence Forces. It will also serve to remove the leadership function from the military leadership of the Defence Forces, reducing it to the status of a subordinate reporting body. This, critically and ominously, is all to be put in place before the introduction of the long overdue legislative provisions that seek to give effect to the recommendations of the Commission on the Defence Forces.

27. By comparison, the membership of the Board of An Garda Síochána, does not include the Secretary-General of the Department of Justice. It furthermore makes provision that whilst the Garda Commissioner shall not be a member of the Board or a committee of the Board, but may, in accordance with procedures specified by the Board or such a committee, attend meetings of the Board or the committee concerned, and may speak, and give advice, at such meetings. [Policing, Security

and Community Safety Act 2024 Chap 2 Para 22 (10)]. This Act also provides for the Board of An Garda Síochána to advise the Minister on appropriate criteria by which the performance of the Commissioner can be appraised. It does NOT hold the Commissioner to account for his/her performance, as is clearly the case recommended by the IRG-DF and clearly codified in the Defence (Amendment) Bill 2023.

28. ARCO posits that, notwithstanding the recommendations in the IRG-DF Report on the composition of the External Oversight Body, that the Secretary General of the Department of Defence should NOT be a member. It would then be truly external, independent, and transparent.

29. RESPECT is at the heart of the matters at issue here, respect for the professional competence and integrity of the leadership of the Defence Forces, and such respect needs to emanate from Government in the first instance. The professional competence of the Garda Commissioner to lead An Garda Síochána is clearly recognised in the Policing, Security and Community Safety Act 2024, whereas, in the case of the Chief of Staff it is denied and undermined by the provisions of the Defence (Amendment) Bill 2023.

SUMMARY

30. ARCO submits to the Joint Committee on Foreign Affairs and Defence that the introduction of the two Heads relating to the External Oversight Body in the Defence (Amendment) Bill 2023, at this time, will have the effect to further weaken the position of the Office of the Chief of Staff in the exercise of his/her functions, duties, and responsibilities as well as in delivering military advice and accountability to Government. It will allow a potentially dangerous transfer of diverse influence and advice, to a singular unelected civil servant. Your consideration of Heads 6 and 8 of the Defence (Amendment) Bill 2023 must include the intent and effects of the Bill from the perspective of whether it strengthens or weakens the State's ability to protect and defend its citizens. In ARCO's view these proposed provisions will further weaken our national defence and the State's capability and in meeting its international obligations.

31. One cannot but help wondering if there has been a paradigm shift where the cultural issues highlighted in the Independent Review Group Report are now seen as being the cause of the demise and near collapse of the Defence Forces and NOT the decades of neglect and underinvestment by successive governments, together with an overly subjective civil control of all matters affecting DF strategic development, military capabilities, readiness, and viability.

RECOMMENDED AMENDMENTS

32. Head 6 sub-para (1) would fully address the requirement for proper oversight if the term 'human resource management matters' was replaced by 'human resource policy matters', and accordingly ARCO would commend its inclusion in the Defence (Amendment) Bill 2023.

33. Head 6 sub-para (2) (a), (b), (c) should be deleted from this Defence (Amendment) Bill 2023 and properly embraced by secondary legislation. They are a gross interference and an impediment to the Chief of Staff in his/her primary function of maximising military capability.

34. In respect of Head 6, sub-para (2) (d), ARCO has no issue.

35. With regard to Head 6, sub-para (4), as the rank level encompassed by the provision is in the main for a military command level appointment, critical to the delivery of military effectiveness, the Chief of Staff should have statutory role in advising on the selection process and criteria relating to the knowledge, ability, and suitability of the officer for promotion.

36. With regard to Head 6 sub-para (5), as the civil servant appointed to work directly with the Defence Forces will report to a military officer, the Chief of Staff or an officer appointed by him/her should have a statutory role in advising on the selection process and criteria relating to the knowledge, ability, and suitability of the civil servant for such appointment.

37. That the Secretary General of the Department of Defence NOT be a member of the External Oversight Body.

APPROVED BY THE EXECUTIVE COMMITTEE ASSOCIATION OF RETIRED COMMISSIONED OFFICERS (ARCO)

Appendix 2

SUBMISSION TO JOINT COMMITTEE ON FOREIGN AFFAIRS & DEFENCE ON THE GENERAL SCHEME OF THE DEFENCE (AMENDMENT) BILL 2023

INTRODUCTION

The Council of The Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,150 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

The Council has prepared this submission in response to the invitation to make a written submission on the General Scheme of the Defence (Amendment) Bill 2023.

GENERAL COMMENTS

Before turning to some of the specific provisions in the Heads of the 2023 Bill, it may be useful to the Committee if The Bar of Ireland makes some general comments for context:

1. The principal Act governing the operation of the Defence Forces is the Defence Act 1954 (“the 1954 Act”). This is one of a group of Acts that are collectively cited as the Defence Acts 1954 to 2015. The 1954 Act has been substantially amended across many different pieces of legislation, some of which have no direct relevance to defence matters at all. This makes the Defence Acts confusing and difficult to navigate. Credit is due to the Law Reform Commission for the excellent consolidated version of the 1954 Act that they maintain, which is an essential resource for legislators, legal practitioners, judges and Defence Forces personnel.
2. Even allowing for the many contemporary amendments to the 1954 Act, it was enacted in a very different time. For example, it could not have contemplated the significant expansion in the scope and scale of employment law in the meantime, which gives rise to confusion around the employment status of Military personnel and the terms on which they are engaged. The 1954 Act also uses gendered language in relation to Military personnel in that “man” is used throughout to refer to enlisted personnel who are not officers.

3. It is respectfully suggested that it would be appropriate for a consolidation and modernisation of the Defence Acts to be considered, rather than further piecemeal amendments to diverse pieces of legislation. This comment is made in the context that the Government proposes to bring forward further legislation this year, arising from commitments relating to Defence policy and the transformation of the Defence Forces. It is now proposed to turn to some of the specific Heads of the 2023 Bill upon which The Bar of Ireland may be able to assist the Committee.

HEAD 8

4. The Bar of Ireland notes the very useful functions proposed to be fulfilled by the External Oversight Body that will be established by Part 2 of the 2023 Bill, building on the important work of the non-statutory External Oversight Body established in 2023.
5. Given the important functions to be performed by the External Oversight Body, it is suggested that it should be a statutory requirement that the chairperson of the External Oversight Body be a retired Judge of the Superior Courts or a barrister or solicitor of at least 10 years' standing. The appointment of a retired member of the Judiciary or senior practising legal professional to the role would assist in ensuring that the levels of independence and rigour required for the External Oversight Body to perform its important work would be achieved.
6. It is also suggested that item (4) of this proposed Head would benefit from specifically stating that the External Oversight Body shall have at least one member having sufficient experience and expertise in employment law (including employment equality law).

HEAD 26

7. The Bar of Ireland notes that the proposal that the representative associations (i.e. PDFORRA and RACO) be permitted to associate with ICTU follows on from well documented legal action by one of the representative associations and undertakings given by the Minister for Defence.
8. The prohibitions in the proposed Head 26 require detailed scrutiny. It is acknowledged that, owing to the unique nature of the Defence Forces and the requirements to maintain Military command and discipline, the activities of the representative associations and of individual Military personnel require some restriction, particularly in relation to matters of politics and public controversy.
9. However, it must also be acknowledged that such prohibitions constitute a very significant restriction on the free exercise of

Constitutionally guaranteed rights, for example the right of citizens to express freely their convictions and opinions and to form associations and unions, which are found in Article 40.6 of the Constitution. They also are a restriction on the free exercise of, for example, the rights to freedom of expression and freedom of assembly and association contained in the European Convention on Human Rights.

10. It is necessary, therefore, for any such restrictions to be appropriately justified and for them to be proportionate and go no further than is necessary for the legitimate aim concerned.
11. The Committee's attention is respectfully drawn, in particular, to the restrictions at (i) and (j) of the section proposed in Head 26, which are very far ranging indeed. They would, on their face, seem to prohibit the representative associations from, for example, encouraging their members from participating in a protest or demonstration that ICTU (or any other body) might organise in relation to pay and conditions in the public service generally or for the Defence Forces specifically.
12. Given the very broad and extensive nature of the proposed restrictions, it is certainly open to question as to whether those restriction go further than what is proportionate and necessary in the circumstances. This is an issue that the Committee may wish to consider as part of its work.

HEAD 28

13. While Head 24 is concerned with the representative associations and their spokespersons, Head 28 is directed at members of the Permanent Defence Force generally. It proposes to amend the 1954 Act in order to extend the prohibitions currently imposed on members of the Defences Forces from engaging in certain activities.
14. It is not disputed that there is a legitimate interest in prohibiting members of the Defence Forces from engaging in political activity, including in being members of a political party or campaigning for political causes.
15. However, it is suggested that the section proposed in Head 28 goes considerably further than that. It proposes that:
 - (1) "A member of the Permanent Defence Force shall not:
 - (a) *without prior authorisation, make, while in uniform, or otherwise identifying themselves as a member of the Permanent Defence Force, a public statement or comment concerning a political matter, or a matter of government policy;*

(b) attend, while in uniform, or otherwise identifying themselves as a member of the Permanent Defence Force, [protests, marches or other gatherings] concerned with:

- (i) a political matter,*
- (ii) a matter of government policy;...*

16. It is respectfully suggested that the section proposed in this Head would, for example, restrict the ability of members of the Permanent Defence Force from attending a protest relating to their pay and conditions or the pay and conditions pertaining in the public sector generally, even if they attended such an event out of uniform.
17. As with Head 24, it is suggested that the proposals in Head 28 represent a significant restriction on the ability of members of the Defence Forces to exercise rights guaranteed by the Constitution and European Convention on Human Rights. Therefore, it is suggested that the Committee should scrutinise carefully the proposal in Head 28 to ensure that the restrictions proposed serve a legitimate aim and are proportionate.
18. It may assist the Committee to be aware that a challenge to the restrictions placed on members of the Permanent Defence Force to attend at protests relating to Military pay and conditions, even in civilian attire, is currently before the High Court in the case of *Martin Bright v. Minister for Defence*. The High Court (Sanfey J) has heard the case and the Court's judgment is awaited.
19. The Bar of Ireland will not comment on an ongoing case but the Committee may wish to consider the content of the imminently due judgment before contemplating any further legislative intervention in the area.

HEAD 38

20. The Bar of Ireland welcomes the proposed amendment under this Head, whereby the Director of Military Prosecutions will have the option of appointing civilian barristers or solicitors to act as prosecutors in courts-martial.
21. We believe that such prosecutions will be greatly assisted by the expertise that our highly qualified members already bring to prosecution work in criminal and regulatory matters in other fora. Expanding the pool of prosecutors will also allow for more timely progression of cases, which is clearly in the interests of justice for all concerned.

CONCLUSION

The Bar of Ireland thanks the Committee, once again, for inviting it to make this submission. We are at the Committee's disposal if we can assist further in the consideration of any of the issues raised in this submission and would be happy to make an oral presentation to the Committee if requested.

Appendix 3

8 March 2024

Submission on the General Scheme of the Defence (Amendment) Bill 2023 From The Law Society of Ireland

Background

The contents of Head 26, which this submission exclusively deals with, are largely based on the terms of a Department of Defence High Court settlement in 2022³⁶ with Defence Force representative associations allowing them to temporarily associate with the Irish Congress of Trade Unions (**ICTU**). As part of this settlement, the Minister for Defence was required to introduce legislation that would change this temporary arrangement into a permanent one that had a concrete legislative basis.

Accordingly, one of the main purposes of the Bill is to provide a statutory footing permitting the Minister for Defence to authorise Defence Force representative associations to permanently associate with the ICTU.

Summary

The Law Society supports the right of members in the Defence Forces to be allowed to join the ICTU and is broadly in favour of the general terms of the High Court settlement as now reflected in the Bill. However, the Law Society has some observations regarding the limitations outlined in Head 26 and is concerned that these limitations on both trade union activities and freedom of expression/assembly are disproportionate in nature and excessively limit the rights of Defence Force representative association members as enumerated in both the Constitution and Articles 5 and G of the European Social Charter.

Head 26: To “Insert a new section (2A) into the Defence (Amendment) Act 1990 to specify activities that an association will be prohibited from undertaking”.

Trade union membership

Head 26 sets out a number of conditions that the Permanent Defence Forces Representative Association (**PDFORRA**) and the Representative Association of

³⁶ ‘Settlement allows soldiers join trade union body ahead of pay talks’ (The Irish Times, 24 May 2022) available at: <https://www.irishtimes.com/news/crime-and-law/courts/high-court/settlement-allows-soldiers-join-trade-union-body-ahead-of-pay-talks-1.4887212>.

Commissioned Officers (**RACO**) are required to observe if they are to be permitted to associate with the ICTU.

Head 26 contains restrictions on trade union-related activities such as the ability to call for industrial action, the encouragement of members to go on strike, and the endorsement of official ICTU positions. In principle, the Law Society agrees that imposing conditions to PDFORRA and RACO ICTU membership is crucial for continued national security and for public safety.

Although the requirements of national security, public safety and military force-readiness dictate that there should be reasonable restrictions on the trade union activities of Defence Force personnel under Articles 5 and G of the [European Social Charter](#), the Law Society is concerned that Head 26's restrictions on trade union activities overall constitute a disproportionate limitation of Defence Force personnel's right to organise under a trade union and should accordingly be amended.

Freedom of expression and assembly

[Defence Force Regulations S.6](#) are the Statutory Instrument that gives effect to the [Defence Amendment Act 1990](#) and governs, inter alia, the establishment, funding and operation of representative associations in the Permanent Defence Force.

The Defence Force Regulations S6 do not include the additional proposed restriction in Head 26 regarding commentary on Government policy. This is taken directly from the restrictions contained within the [Policing, Community and Safety Act 2024](#) that are placed on the Garda Commissioner, the Director of Community Safety, the Chief Executive of the Policing Authority and the Police Ombudsman when appearing before committees of the Oireachtas.

No such restrictions regarding commentary on Government policy are placed on Garda representative associations. The Law Society submits that members of Defence Force representative associations should enjoy the same rights to free expression and assembly as their equivalents in Garda representative associations given the importance of both fields to the continued maintenance of both national and public security.

To impose such restrictions on members of Defence Forces representative associations may have the effect of silencing and frustrating the ability of the associations to advocate for their members on matters that fall within the scope of representation under the existing Defence Forces regulation.

The application of the following line:

“shall not question or express an opinion on the merits of any policy of the Government or a Minister of the Government or on the merits of the objectives of such policy”

is too restrictive for a representative association and it is submitted that it should be removed.

Article 40.6.1 of the Constitution provides for the right to assemble or meet peacefully. While constitutional rights are not absolute any restriction must be narrowly confined and necessary to achieve a specific aim. The Law Society submits that Head 26 is overly broad and could therefore undermine the purpose of these representative associations as independent forums intended to reflect the views and concerns of their members.

Conclusion

I hope that these observations will assist in your consideration of the Bill, and we would welcome the opportunity to engage further if that would be helpful.

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