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Mr. Fintan Butler  
Office of the Ombudsman  
18 Lower Leeson Street  
Dublin 2  
By Post/Fax: 6395674

**Date: 14 October 2008**

**Our Ref: SK/KL/21875/1 & 22464/1**

**Re: Guardian Ad Litem Services**

Dear Mr. Butler

We write, in the first instance, to thank you for your assistance to us on Friday last, 10<sup>th</sup> October 2008.

We have been instructed by the Health Service Executive to write to you directly in relation to the Ombudsman's Report concerning certain costs arising in child-care litigation before the Courts, and also in relation to the Ombudsman's letter of the 26<sup>th</sup> September 2008 to the Health Service Executive.

We have previously advised the Health Service Executive that this Report was, in our view, *ultra vires* the Ombudsman Act 1980 as amended, and that it was not open in law to them to accept either the findings or recommendations contained in that Report.

We had also advised the Health Service Executive that it was our view that the provisions of section 4 of the Ombudsman Act 1980 were sufficiently broad, should the Ombudsman have exercised her discretion to permit them to do so, to afford them an opportunity to explain to her the problems of law that had been identified.

It is in this context, and with this intent, that the Health Service Executive wrote to the Ombudsman's Office in the terms set out in their letter of the 15<sup>th</sup> September 2008. The Health Service Executive took the view at that time that it not merely had an entitlement, but also an obligation, to try to bring these concerns to the Ombudsman's attention.

We wish to make clear that we do not seek, nor intend, to in any way interfere with the separate legal advice that is available to the Ombudsman in this matter.

The letter of the 26<sup>th</sup> September 2008 makes clear that the Ombudsman emphatically rejects the suggestion that there is any question of the Report being *ultra vires*. The Ombudsman has also decided to make a "special report" under Section 6 of the Ombudsman Act 1980 concerning this

matter for inclusion in her annual report to the Oireachtas, and she has invited the Health Service Executive to make a further submission to her which she will include in that special report.

It is perhaps unfortunate that the Ombudsman has made these decisions before she had an opportunity to consider the legal basis of the concerns brought to the attention of the Health Service Executive. In the ordinary way one would expect that these matters would have been considered before such decisions were made.

Nevertheless, we are grateful that the Ombudsman is willing to accept an outline of these legal concerns, albeit that they can no longer influence the Report in this matter.

There is a cardinal principle on which I think we can both agree and it is that no person, including a statutory agency, is above the rule of law. In relation to the Report the concerns that the Health Service Executive had wanted to bring to the Ombudsman's attention were not matters of evidence, as suggested in her letter of the 26<sup>th</sup> September 2008, but problems of law that were highlighted by us to the Health Service Executive, and these included that:

1. The Ombudsman does not have the jurisdiction in the manner asserted in this statutory investigation because to do so would be to impermissibly interfere with *in camera* court proceedings in breach of the Child Care Act 1991 as amended and the constitutional principle of the separation of powers.
2. The Ombudsman does not have jurisdiction to conduct this statutory investigation, even if it existed, by reason of the provisions of Section 12(1) (c) of the Ombudsman for Children Act 2002.
3. The Ombudsman does not have jurisdiction in the manner asserted in this statutory investigation because of the continuing jurisdiction of the Courts in relation to these specific cases under the provisions of the Child Care Act 1991 as amended and the inherent jurisdiction of the Superior Courts where it arises.
4. The statutory test of "maladministration" employed by the Ombudsman in both initiating, and concluding this investigation is not in law the correct statutory test although it can be found in the statutory models of Ombudsmen in other countries.
5. The Ombudsman in the Report has misinterpreted the provisions of the Child Care Act 1991 as amended.
6. The Ombudsman in the Report has misstated the law in relation to the appointment and regulation of a guardian-ad-litem by a Court.
7. The Ombudsman has misstated the law in relation to proceedings under the inherent jurisdiction of the High Court and the quite separate and distinct statutory proceedings under the Child Care Act 1991.
8. The Ombudsman has misstated the law in relation to the measurement and taxation of costs under the inherent jurisdiction of the High Court, and in statutory proceedings under the Child Care Act 1991.

9. The manner in which the Ombudsman in the Report makes both direct, and indirect, reference to Mr. Patrick Dunne, local health manager, is particularly unfair to him, and also appears to be in breach of the provisions of Section 6(6) of the Ombudsman Act 1980.
10. The recommendations contained in the Report cannot lawfully be accepted by the Health Service Executive because of the constitutional principle of the separation of powers, the mandatory requirements of the Child Care Act 1991 as amended and the Health Act 2004 as amended, and the public law duty not to fetter the exercise of statutory discretion (especially in the context of Court proceedings).

While this list should not be considered as exhaustive, it is a clear indication that there are serious legal concerns involved here. While we fully accept the entitlement of the Ombudsman to act on her own legal advice we do not want a situation to arise where a decision taken by the Health Service Executive is considered by the Courts to be a Contempt of Court. We have a duty to ensure, as best we can, that in our legal advices the Health Service Executive complies with the rule of law and that it does not take any step that might be open to the suggestion that it had compromised, or otherwise interfered with, the administration of justice by the Courts.

As the matter is closed from your standpoint we intend, as a result, to make an application to the District Court in each of the cases where the Ombudsman has made a determination to inform the Court concerned of the present situation. We also intend to make the Ombudsman a notice party to these applications, and we will ensure that she has notice of the day and the time when those applications are to be made. We will also take the same steps in relation to any matter involving the High Court before that court.

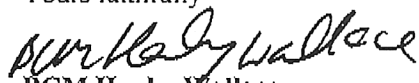
Subject to any directions, or Orders, of either the District Court, or the High Court, we then intend instituting proceedings under Order 84 of the Rules of the Superior Courts seeking appropriate relief in relation to the Report.

The time at which the Ombudsman exercises her statutory power to make a special report to the Oireachtas is of particular importance in this context. We have advised the Health Service Executive that the delivery of the Ombudsman's special report to the Oireachtas could have the unintended consequence of limiting their entitlement to have this matter resolved by the Courts concerned. This surely is something to be avoided.

We remain of the view that this matter could have been more appropriately resolved had the Ombudsman exercised her discretion not to conclude this process as she has.

We would be grateful to hear from you at your convenience.

Yours faithfully

  
BCM Hanby Wallace