

Our Reference : HB1/05/0639R

23 October 2008

Professor Brendan Drumm
Chief Executive Officer
Health Service Executive
CEO's Office
1st Floor
Dr Steevens' Hospital
Dublin 8

FOR THE PERSONAL ATTENTION OF PROFESSOR DRUMM

Dear Professor Drumm,

Ombudsman Investigation - Guardian ad Litem Service

I refer again to correspondence concerning my investigation of a complaint against the Health Service Executive (HSE), received from the Irish Guardian Ad Litem and Social Work Services and Beacon Guardian Ad Litem Services about the payment of *guardian ad litem* (GAL) fees. I refer in particular to the letter of 14 October 2008 from the HSE's solicitors, BCM Hanby Wallace. As I understand it, this letter is in response to the invitation (contained in my letter of 26 September 2008) to the HSE to elaborate on the reasons why it believes my investigation was *ultra vires* the Ombudsman Act 1980; this invitation was issued on the basis that any views expressed by the HSE could be reflected in the report which I will be making to the Oireachtas arising from the failure of the HSE to accept the findings of my investigation and from its refusal to implement my recommendations. In reporting to the Oireachtas I will append a copy of the HSE's letter of 14 October 2008. However, I think it is important that I should respond directly to the content of that letter - as well as dealing with it in my report to the Oireachtas - not least because it misrepresents the actual investigation process and suggests that my Office was somehow unreasonable and inflexible in its conduct of the investigation.

Before dealing with the ten specific points raised in your letter of 14 October 2008, there are some general comments I must make. It is important to remember that my function as Ombudsman is to investigate alleged instances of maladministration, to report on my findings and, as necessary, make recommendations to remedy any adverse effects suffered. I do not make legally binding decisions and it remains open to a public body - as the HSE has done in

the present case - to reject my recommendations. The HSE's letter of 14 October 2008 refers to instances in which "the Ombudsman has made a determination" and proposes that it will draw the attention of any relevant court to these determinations. This is to misrepresent what the Ombudsman does and it would be entirely inaccurate to characterise the Ombudsman's findings and recommendations as "determinations".

While I am required to abide by fair procedure in the conduct of an investigation, this requirement is conditioned by the fact that my Office is not a decision making tribunal. I am satisfied that my Office's investigation procedures comply with the requirements of fair procedure and, in some respects, go beyond what is strictly necessary.

Thus it is entirely untrue to say, as does your letter of 14 October 2008, that my Office failed to "afford [the HSE] an opportunity to explain ... the problems of law that had been identified" with my investigation report. In accordance with our standard investigation procedures, the HSE was given a copy of my draft investigation report and invited to make whatever comments it wished before the investigation would be finalised. Any reservations that the HSE had regarding the conduct of the investigation, or any view that I might have been acting beyond my powers, should have been expressed at that point. The only detailed communication on such matters, in fact, is the HSE letter of 14 October 2008 which was some 11 weeks after I had sent you my completed investigation report. Your recent letter also suggests that my decision to report on this case to the Oireachtas might have been different had the HSE been given the opportunity to state the basis for its view that the investigation was somehow flawed. I can tell you that, notwithstanding my decision to report to the Oireachtas, I would be prepared to change that decision in the event that the HSE (even at this late stage) had produced credible evidence or argument that my investigation report was flawed. As explained below, in relation to the ten specific points raised, I am not persuaded that the investigation report is flawed.

Point 1

There appears to be a suggestion that my investigation report somehow breaches the *in camera* rule and represents an interference with the operation of the courts in relation to cases dealing with children.

There is no basis whatever for the view that my report breaches the *in camera* rule and I reject any suggestion that it does. As I understand it, it is a contempt of court for any person to disseminate information emanating or derived from proceedings held *in camera* without prior judicial authority. There is nothing in my report which might be construed as disseminating information emanating or derived from proceedings held *in camera*. The report does not identify any particular child, any particular court proceedings, or any of the parties to any particular court proceedings. Neither is there any basis for the view that the report somehow interferes with the operation of the courts in relation to cases dealing with children. What the report does identify is the refusal of the HSE to engage realistically with the two GAL service providers or with the courts in order to resolve fee disputes with the service providers. To this extent, the report should be seen as in support of the courts in so far as it recommends that the HSE should engage with the courts regarding GAL fees in a manner envisaged by the Child Care Act 1991.

Point 2

The HSE contends that the subject matter of this investigation is a matter proper to the Ombudsman for Children and thus that it is not within the jurisdiction of my Office to investigate. It is important to recall that the complainants in this investigation are two GAL service providers and that the alleged adverse effects are suffered by these service providers. While it is true that the HSE actions, as I say in my report, may have adverse consequences for children in a general sense, they are not affected directly. In any event, I understand that the Ombudsman for Children declined to investigate this matter when approached by the two service providers.

Point 3

The point here appears to be that my Office does not have jurisdiction on the basis that the matter at issue is one which remains within the jurisdiction of the courts. This approach is to misrepresent what my Office has done in this investigation. Firstly, as explained earlier, my Office has not made any determination in any legal sense in relation to the matters at issue. Secondly, one of my key findings is that the HSE failed to engage with the courts on the matter of the fees due to the service providers; and my final recommendation is that, where normal negotiation and consultation fail, the HSE should refer fee disputes for resolution by the courts as envisaged in the legislation.

Point 4

The HSE contends that my Office employed an incorrect statutory test of "maladministration" both in initiating and concluding the investigation. While I am not quite sure what this might mean, I would make two points:

- my Office initiated the investigation following a preliminary examination in which it appeared that the action complained of "may have adversely affected a person" and that the action "was or may have been" one captured by one or more of the seven categories contained at section 4(2)(b) of the Ombudsman Act 1980; these seven categories are sometimes referred to informally as the seven categories of maladministration.
- my investigation findings are expressed in terms of the seven categories contained at section 4(2)(b) of the Ombudsman Act 1980.

Point 5

The HSE contends that the investigation report misinterprets the provisions of the Child Care Act 1991 but fails to say where, or how, this is the case. In the absence of detail, it is not possible to deal with this contention. In any event, one would expect this to have been raised by the HSE in its response to the draft investigation report.

Point 6

The HSE contends that the investigation report misstates the law in relation to the appointment and regulation of a GAL by a court. No detail is given in support of this contention so it is not possible to deal with it other than to note that the report cites verbatim the relevant legal provisions at section 26 of the Child Care Act 1991. And, again, one would expect this to have been raised by the HSE in its response to the draft investigation report.

Point 7 & 8

The HSE contends that the investigation report misstates the law in a number of areas. No detail is given in support of these contentions so it is not possible to deal with them. Again, one would expect these matters to have been raised by the HSE in its response to the draft investigation report. I note again that the report does cite verbatim the relevant legal provisions at section 26 of the Child Care Act 1991.

Point 9

The HSE contends that the investigation report makes unfair references, both directly and indirectly, to a named local health manager and that this is in breach of section 6(6) of the Ombudsman Act. In fact the report does not name any HSE official directly. The report does refer to one designated HSE manager but does so in the context of representing his point of view in response to the draft investigation report. This indirect reference is evidence that, in fact, the provisions of section 6(6) have been followed.

Point 10

The HSE says it cannot lawfully accept my report's recommendations (a) because of "the constitutional principle of the separation of powers" (b) because of the mandatory requirements of the Child Care Act 1991 and (c) because of "the public law duty not to fetter the exercise of statutory discretion". It is difficult to avoid the conclusion that these points are being raised with the intention of creating legal confusion where, in reality, the actual situation is quite straightforward.

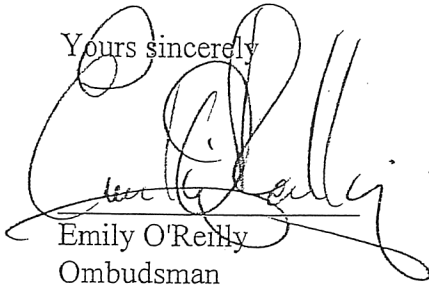
In regard to (a), it is perfectly clear that as my Office does not make binding decisions or legal determinations then there can be no question of any interference with the doctrine of the separation of powers. Put very plainly, my Office has investigated instances of alleged maladministration (using that term in a general sense), has found that the allegations stand up, and has made recommendations to remedy the adverse effects suffered by the complainants. The HSE is free to accept or reject these recommendations. It has chosen to reject them and I, in consequence, have decided to report on this to the Oireachtas. Raising the issue of the separation of powers is, it seems to me, either mischievous or it suggests a serious lack of understanding of what my Office does.

In regard to (b), referring to the mandatory requirements of the Child Care Act 1991, I am at a loss to know what the HSE might have in mind. In regard to (c), it is clear that the HSE retains the discretion to accept or reject my recommendation. A decision either way cannot reasonably be characterised as a fettering of discretion. My comments above in relation to (a) apply also in the context of (c).

I am disappointed that the HSE has decided not to accept my findings and recommendations in this case but I accept absolutely its entitlement to take this position. What I find more difficult to accept is that the HSE should seek to justify its position on the basis of legal points which, as I see it, are ill-considered and generally irrelevant.

In reporting to the Oireachtas I propose to include a copy of your letter of 14 October 2008 as well as a copy of this reply.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Emily O'Reilly', written over a horizontal line.

Emily O'Reilly
Ombudsman