Feidhmeannacht na Seirbhíse Sláinte
Health Service Executive

Comments on the report

Aftermath of an investigation of The Health Service Executive

A Report to the Dail and Seanad under section 6(7) of the Ombudsman Act 1980.

Submitted to the Office of the Ombudsman on 9th July 2010

Introduction

On the 17th June 2010 the HSE was invited by the Office of the Ombudsman to comment by 28th June 2010 on a new report entitled:

> **Aftermath of an investigation of The Health Service Executive**
> *A Report to the Dail and Seanad under section 6(7) of the Ombudsman Act 1980.*

This was the first the HSE became aware that a report had been prepared. The report was not furnished to the HSE and a request issued to the Office of the Ombudsman for a copy of the report which was received on the 1st of July and the time within which to respond was the 9th July.

Preamble
Given the significance of the matters raised in this report, the HSE on 7th July sought an extension of this deadline by 3 working days. The Office of the Ombudsman did not extend the deadline.

The comments outlined below should therefore not be considered the HSE's definitive and final position in relation to this report. It reserves the right to make further and more comprehensive comment on this report at some point in the future.

Introduction
At all stages the HSE has sought to engage openly, transparently and in a constructive manner with the Office of the Ombudsman.

For the purposes of clarity the HSE would like to address some of the key issues raised in the Report and explain why it acted in the way it did in relation to these matters. This may also serve to clarify certain facts.

A chronology of events from the HSE's perspective is also provided to put the position it adopted in the appropriate context so that it can be considered in a fair and reasonable manner.

Section 1

The "Aftermath Report" sets out the Ombudsman's view about the way that the HSE responded to a draft report from 2008 on the Office of the Ombudsman's investigation into a number of complaints from Guardians ad Litem.

1. Why did the HSE not accept the findings and recommendations of the Office of the Ombudsman's investigation into Guardians Ad Litem?

The HSE could not legally accept the findings and recommendations of the early report for a variety of reasons. Ten of these reasons were outlined in the letter dated 14th October 2008 to the Office of the Ombudsman and were referred to again in a letter dated 29th January 2010.

A summary of two key reasons is provided here:

(i) The Office of the Ombudsman is a statutory agency established to investigate complaints in relation to the specific matters set out in Section 4(2)(b) of the Ombudsman's Act, 1980: 4(2)

> Subject to the provisions of this Act, the Ombudsman may investigate any action taken by or on behalf of a Departement of State or other person specified in Part 1 of the First Schedule to this Act (being an action taken in the performance of administrative functions) where, upon having carried out a preliminary examination of the matter, it appears to the Ombudsman-

(b) that the action was or may have been-

(i) taken with out proper authority

(ii) taken on irrelevant grounds,

(iii) the result of negligence or carelessness,

(iv) based on erroneous or incomplete information,

(v) improperly discriminatory,

(vi) based on an undesirable administrative practice, or

(vii) otherwise contrary to fair or sound administration.

The Ombudsman is specifically prohibited by the Ombudsman Act 1980 from investigating matters where the same subject matter is before the courts.

Assessing costs and expenses for Guardians ad Litem in child care cases is a matter for the District Court.

At the time of the Ombudsman's investigation into the Guardians ad Litem's costs and expenses, the matter was being adjudicated upon by the District Court.

We have been advised that if the office of the ombudsman embarks on an investigation of issues that are b efore the courts this constitutes an impermissible trespass into the jurisdiction of the courts and it is inappropriate for the Office of the Ombudsman to adjudicate on something that is clearly the statutory responsibility of the Court.

This is central to the HSE's decision not to accept the findings and recommendation of the report. As a statutory agency it cannot accept a report which runs counter to prevailing laws.

(ii) The report contains personal criticism of a HSE Senior Manager and the conscious and deliberate decision to identify him personally in the final report is particularly unfair to him and damaging to his reputation. The Office of the Ombudsman chose to make its remarks against this person in relation to his submissions on the draft report at a time when he did not have any proper opportunity to defend himself.

2. The Office of the Ombudsman asserts that its recommendations are not binding and in those circumstances the HSE should not be concerned that the investigation is either a breach of the separation of powers or a traverse into the administration of justice.

This is incorrect. The Ombudsman makes recommendations and publishes them. There is a considerable pressure to comply with recommendations which come into the public domain [1].

[1] The English Courts have taken the view that a public body is required to accept findings and recommendations of an Ombudsman unless an application is made for Judicial Review. In *R v Local Commissioner, Ex-Parte Eastleigh Borough Council (1988) 3WLR 116,* Lord Donaldson, Master of the Rolls stated: *"Whilst I am very far from encouraging counsels to seek judicial review on an Ombudsman's report, which, bearing in mind the nature of his office and duties and the qualification of those who hold that office, is inherently unlikely to succeed, in the absence of a successful application for Judicial Review and the giving of relief by the court, local authorities should not dispute an Ombudsman's Report and should carry out their statutory duties in relation to it."*

This proposition was further considered in a case of *R v The Secretary of State for Work and Pensions, Ex-Parte Bradley (2007) EWHC 24T2*, where Mr. Justice Bean in the English High Court, held that the proposition that in the absence of a successful application for judicial review, the findings of the Ombudsman were binding on the public body; "only intended to refer to the findings that maladministration and injustice have occurred and not to the recommendations".

3. Why did the Health Service Executive make an application to the District Court

During the early part of the Ombudsman's investigation, the HSE furnished information in regard to three sets of child care proceedings to the Office of the Ombudsman. The HSE became aware that in doing this it had inadvertently breached the in-camera rule. On advice it believed it could not leave itself in a position where it had breached the sanctity of the in-camera rule and subsequently, the trust of the court. To address this oversight, which it is important to state did not occur due to any action of the Ombudsman, it brought the three matters before the District Court with a view to apologising to the court for breaching the in-camera rule.

A very important area of the HSE's work involves making applications to the District Court to bring children into care. The District Court discharges an essential and recognised constitutional function by supervising this area of child care work. By definition, many of these applications concern the most vulnerable category of persons in the State. Often those persons are not in a position effectively to voice their preferences without assistance, including legal representation. The courts in those cases maintain a very high degree of control and supervision over the procedures that are invoked. At all times, the reports produced by court appointed officers such as Guardians ad Litem remain the property of the court, not the HSE, the child, or the Guardian ad Litem. The HSE has been advised and fully accepts that it cannot use or disclose personal information regarding this category of persons without at the very least first notifying the person concerned and also getting the permission of the Court. The proper functioning of the child care system requires continuous court applications and it is essential that the Health Service Executive fully respects the court procedures and respects the trust that is the necessary starting point for a care application. When the HSE forms the view that it may have breached those rules it is incumbent on it to bring this to the attention of the court regardless of the consequences. The Ombudsman does not appear to concur with this position.

4. Why did the Ombudsman become involved in District Court Proceedings?

In line with appropriate practice in such circumstance the HSE put the respondent parents in the three cases along with the Guardians ad Litem in the three cases and the Office of the Ombudsman, on notice of the applications to the Court. The Office of the Ombudsman was notified as a courtesy in circumstances where there had been a considerable volume of correspondence between the two statutory agencies.

The Office of the Ombudsman did not need to become involved in the District Court proceedings. The decision to become involved is a matter which was decided between the Office of Ombudsman and its legal advisors. The Ombudsman chose to participate in the District Court application that the HSE made but could very easily have chosen not to take part.

While the Ombudsman was informed of that application at no point whatsoever was any order sought against the office, nor was the application brought in order to criticise the office. There was no obligation or requirement that the Ombudsman would attend at Court or incur legal fees. Moreover, at no point in the proceedings was the HSE seeking to persuade the Court that any other party, whether the Ombudsman, a guardian ad litem, or other party, was in breach of any rule of Court or Court Order. It was open to the Office of the Ombudsman to choose not to participate in the District Court proceedings as the Office of the Ombudsman was only a notice party. These proceedings occurred over an extended period for legitimate reasons as outline below.

The respondent parents were notified because they were respondent parties to the original proceedings and they had a right to know what had happened to the court information. The Guardians ad Litem were notified as they had been involved in the original child care proceedings. Equally, there was no obligation on the

Guardians Ad Litem to participate in the proceedings. As it turned out, the three sets of respondent parents chose not to become involved in the proceedings.

5. Did the HSE exhibit ' bad behaviour'?

The Ombudsman suggests that HSE 'should suffer the consequences of its bad behaviour in the manner in which it conducted these court proceedings.

The HSE rejects the suggestion that it behaved badly. For the reasons outlined above the HSE could not legally accept the findings and recommendations in the report. It is regrettable that the HSE's explanation for why it adopted the stance has been portrayed as uncooperative and obstructive.

6. Did the HSE deliberately set out to block publication of the investigation report because the report was critical of the HSE?

No. The HSE could not accept the findings of the report for a series of reasons two of which are outlined above at 1 above. The HSE is concerned that it conducts itself in a lawful manner and its legal advice was that the report could not be accepted as it was legally flawed.

At no point in its dealings with the Ombudsman has the HSE ever acted maliciously or with an ulterior motive or sought to manipulate the legal process to its own ends.

The HSE has no appetite for unnecessary conflict and sought at all times to resolve the issues identified. It is disappointing that this was not possible. The HSE's position, which it is not only entitled, but obliged to take, has been characterised as 'obstructive', 'futile', 'bizarre', 'ill-judged', 'puzzling', 'extraordinary', 'abysmal,' and 'posturing' and an 'utter waste of time and money'. The Ombudsman asserts that the HSE embarked on a deliberate campaign to prevent the publication of the report. It is regrettable that the report is replete with this type of language which gives an impression of lack of balance and objectivity.

The HSE accepts that it can often be criticised, being the largest organisation in the State and the complexity and sensitivity of its work. The HSE does not shy away from criticism, particularly when it is warranted.

7. Why did the HSE not refer the cases to taxation/measurement?

The Guardian ad Litem's costs cannot be taxed because taxation can only occur before the taxing master in the High Court. Statutory child care proceedings are conducted in the District Court.

The option available is to seek to have the District Court measure the costs and expenses of the Guardians ad Litem pursuant to Section 26. This exact exercise was conducted by the court at the request of the HSE in respect of the three cases which were the subject of the complaint to the Ombudsman. The fact that a complaint was also made to the Office of the Ombudsman was not disclosed by the complainant to the court and this represented a material failure of disclosure.

8. The Office of the Ombudsman does not accept that if the HSE was to accept the report that would require the HSE to hand over personal documentation and information (including privileged information) and information prepared in the course of in-camera proceedings, if requested to do so.

The HSE's acceptance of the Office of the Ombudsman's report would require the HSE to accept this assessment of the Office of the Ombudsman's powers. That is not possible as the HSE as a State body must remain within the law. The HSE is an exceptional repository for all kinds of personal and sensitive information. The HSE cannot trade or use that information in a collateral context. The use of that information must be lawful. Much of the material used in *in camera* child care proceedings is produced by Guardians ad Litem. That material is the property of the court that appointed the Guardian ad Litem. It is not the property of the Health Service Executive or the Guardian ad Litem or any other party to the case. More importantly, disclosing information from child care cases affects the right to privacy and the family rights of the children and families concerned. They have a very clear right to be consulted and heard before any decision can be made to disclose their information.

The Office of Ombudsman believes that, and has stated on a number of occasions, it is entitled to receive material covered by the in-camera rule. The Aftermath Report states:

"Furthermore, I was satisfied then (and remain satisfied) that even had I sought access, for the purposes of the investigation, to material covered by the "in-camera Rule", my legal powers are such that the HSE will be required to comply."

9. Is the stance adopted by the HSE overly legalistic and designed to create legal confusion?

The Ombudsman has sought to characterise the position adopted by the HSE and its legal advisors as obstructive and as setting out to deliberately frustrate the investigation in order to shield it from criticism. Nothing is further from the truth.

From the out set, the HSE sought to resolve the issues other than by recourse to the law. In its first substantive letter to the Ombudsman the HSE requested that the Ombudsman would consider exercising her discretion to enable some kind of review of the report. This was rejected. Further requests were made but rejected. This is very clear from the correspondence between the two state agencies in 2008 as outlined below.

In 2009 the HSE instructed its senior counsel to engage with the senior counsel for the Ombudsman in an effort to reach agreement. A working protocol was developed and in fact was relied upon and successfully used by the HSE in a separate investigation. The agreement had the support of both counsel but the Office of the Ombudsman has stood back from this agreement in light of these recent developments

10. Why did the HSE threaten to seek an injunction against the Office Ombudsman in relation to publishing the report and prevent the Ombudsman from communicating with the Oireachtas?.

Because the issues at stake were so serious the HSE needed to satisfy itself that the Ombudsman's report on the Guardian ad Litem investigation was not published before it had the opportunity to notify the District Court that it has inadvertently released in camera information and apologise for so doing.

This was separate to the HSE's acceptance of the finding of the report and the recommendations.

Section 2

Chronology of highlights in relation to the preparation of the Office of the Ombudsman's report on the investigations into complaints by the Guardians ad Litem

2008

HSE receives draft report
In July 2008 the Office of the Ombudsman sent the draft final report of its investigation into a complaint by two Guardian ad Litem services to the CEO of the HSE.

The investigation that led to the preparation of the Report had been ongoing since 2006. The HSE's Consumer Affairs Department had been assisting the Office of the Ombudsman in relation to the investigation.

On receipt a copy was sent to the manager responsible for the area to which the Guardian ad Litem service operated. Given the time of year, where particular personnel are not always readily available, an extension of the time by which a response to the Ombudsman was required was sought. This was provided.

HSE requests consideration of resolution process
The HSE sought an opinion from senior counsel. A response was issued to the Office of the Ombudsman on 15th September 2008 and, given the organisation's concern with the content of the report, it sought to activate any system of internal review that the Office of the Ombudsman might have in regard to its findings and recommendations.

> "If the Ombudsman operates a system of internal review of her findings and recommendations I would be grateful if you could provide details of same as we would wish to consider availing of that process in relation to this particular matter.
>
> I have been advised that the provisions of Section 4(8) and Section 8(4) of the Ombudsman Act 1980 vests ample statutory discretion in the Ombudsman to fashion an appropriate opportunity or process for persons in our position who have been advised that it is not open to them to accept either the findings or the recommendations contained in the final draft of the report of the Ombudsman.
>
> If the Ombudsman does not operate a system of internal review I would be grateful to know what opportunity or process, if any, she may consider making available to us with a view to requesting a full reconsideration of this matter by her. My preference is to consider availing of any opportunity or process that the Ombudsman considers she may be in position to make available."
>
> *(Extract from the letter from the HSE to the Office of the Ombudsman 15th Sept 2010.)*

Office of Ombudsman declines possibility of alternate process
The Ombudsman responded by letter on 26th September 2008 rejecting the HSE's contention that the findings and recommendations were ultra vires or otherwise unlawful as had been suggested by the HSE.

The Office stated that because its recommendations were non-binding there is no requirement for any internal review. (See point 2 above).

The Ombudsman pointed to Section 6(5) and Section 6(7) of the Ombudsman Act of 1980 wherein she indicated that if the Ombudsman is not satisfied with the response of a public body to a recommendation she could make a special report to the Oireachtas. The Ombudsman did not offer any alternative dispute resolution method and instead stated clearly that in light of the HSE's position, the Office of the Ombudsman had decided to make a special report to the Oireachtas.

HSE sets out its concerns via solicitor
On 10th October the HSE wrote to the Office of the Ombudsman expressing its regret that no alternative

method of resolution of the difficulties was available and in those circumstances the HSE indicated that it was instructing its solicitors to deal with the matter on its behalf.

On 14th October the HSE solicitors wrote to the Office of the Ombudsman. In that letter it noted that it is "unfortunate" that the Ombudsman had decided to make a special report to the Oireachtas pursuant to Section 6 before she had heard what the HSE's legal concerns were. In that letter the legal difficulties were clearly set out.

Ombudsman again rejects contention that report is Ultra Vires
In further correspondence from the Office of the Ombudsman to the HSE, the Office of the Ombudsman again rejected the HSE's contention that her investigation was ultra vires.

From this exchange it was clear that there a difference of opinion between the HSE and the Office of the Ombudsman.

HSE requests report held until after District Court hearing
Based on the perceived intention of the Ombudsman to publish the report, the HSE decided that it was compelled to make an application to the District Court to advise and apologise for the fact that, while assisting the Office of the Ombudsman with its investigation, it inadvertently provided the Office of the Ombudsman with information which was closely connected to in camera proceedings. The HSE was concerned that the in camera rule had been breached. The fact that an entire social work file was not handed over is not relevant. It was clear that this situation needed to be remedied before the presiding Judge in Court 20 as the presiding Judge deals with HSE applications on a daily basis and the HSE required to maintain its good standing before the Court

The HSE's solicitors wrote to the Ombudsman on 14th November and indicated that an undertaking was required that the final draft report would not be delivered to the Oireachtas in circumstances where the HSE had instructed its solicitors to make an application to the District Court at the first appropriate opportunity in regard to the breach of the in camera rule.

The solicitors indicated that if there was a difficulty in furnishing that undertaking then it would be necessary for the HSE to bring an application to the High Court to restrain the delivery of the report to the Oireachtas until such time as the matter could be opened before the District Court

Date set by Ombudsman to lay report before Oireachtas
On 17th November 2008 the Office of the Ombudsman wrote to the solicitors for the HSE and stated that the Ombudsman's agreement to "the proposed undertaking is unlikely to be forthcoming". There was further correspondence between the Office of the Ombudsman and the HSE and the Office of the Ombudsman and the HSE's solicitors on 18th and 19th November. The Office of the Ombudsman made it clear that the report would be laid before the Oireachtas on the 20th of November.

In response to this a further very comprehensive letter was sent to the Office of the Ombudsman on 19th November.

The letter stated that "the door to making submissions on this report having been firmly closed by the Ombudsman, the Health Service Executive indicated in its letter of the 10th of October 2008 their law agent would now be taking the lead in the matter."

"The Ombudsman was given proper notice of our intention to re-enter the in camera child cases concerned before the Court responsible for the decisions in relation to the welfare of these children."

The Ombudsman was also specifically notified in that letter that "a decision to deliver her report to the Oireachtas in advance of any judicial determination was likely to adversely impact on our client's right of access to the Courts".

The Office of the Ombudsman was advised that "the Health Service Executive has long experience of the statutory investigation of the Ombudsman Office on a wide variety of matters and that this serious concern has only been raised because it appears that the Health Service Executive, and indeed everyone else involved, may be in contempt of Court. This problem, identified by the lawyers involved, cannot now be ignored. The Health Service Executive has a duty to obey the law and to respect the independence and integrity of the Courts".

The Ombudsman was reminded that the HSE had attended "at meetings to bring home to the Ombudsman the seriousness of the situation in relation to this matter. The account of the meeting of 31st October referred to in the Ombudsman's letter of the 18th of November is, I am instructed, a misinterpretation in so far as it asserts that only one key concern was discussed. In fact, my instructions are that the meeting covered a range of topics including fair procedures and the rights of individuals. In any event the entire meeting was on a "without prejudice" basis. What the HSE did not know, and was astonished to discover, after these meetings were concluded, that the Ombudsman had in fact already published the concluded report to other persons."

It was pointed out to the Office of the Ombudsman that "this is the first occasion on which a public body in Ireland has declined to provide a voluntary undertaking to refrain from taking a discretionary statutory step where the person affected was preparing to make an application to Court".

The letter from the HSE asserted that the Ombudsman's position that she did not understand the legal basis of the concerns was unfair and it was pointed out that "the Health Service Executive has been trying to get the Ombudsman's Office to look again at the legal context of this investigation but despite the fact that the Ombudsman states she is unclear, her office did not avail of this opportunity. These requests have been met with a firm and continuing refusal to reconsider the matter."

District Court hearing 20th Nov

On the 20th of November, the application in regard to the breach of the in camera rule came before the District Court.

The Court was advised by the HSE's Counsel of the concerns. Because the matter was ex-parte, the Judge did not go into the detail of the issue, instead 5th December was fixed as the date by which the parties could be notified and given an opportunity to attend and respond if they so desired.

The Office of the Ombudsman was advised by letter from the HSE solicitors dated 20th November as to what had occurred in Court.

The Ombudsman wrote to the solicitors for the HSE on 20th November and sought to retrospectively rely on the provisions of the Civil Liability and Courts Act of 2004 to explain the handing over of information and documentation touching on Court proceedings involving children.

Office of the Ombudsman decides to withhold report and make deletions

The Ombudsman also sought to describe the delivery of her final report to the two complainant agencies as not constituting a disclosure or publication in the general sense. The Office of the Ombudsman stated that the complainant agencies had been advised of the HSE's view and that the agencies had been advised that any disclosure by them on a matter contained in the investigation report might be construed as a contempt of Court. The Office of the Ombudsman indicated that she proposed to make certain deletions from her report and that she would withhold the laying of her report before the Oireachtas until such time as she had decided which deletions and redactions were appropriate.

Office of the Ombudsman invites HSE to accept report

The Office of the Ombudsman invited the HSE to now accept the findings and recommendations of the report.

The HSE instructed its solicitors to respond. The Office of the Ombudsman was informed that the HSE respectfully disagreed with the legal views adopted by the Ombudsman in particular in regard to the Civil

Liability and Courts Act of 2004. It was pointed out to the Office of the Ombudsman that the Child Care Act was not listed as a "relevant enactment" and therefore the Ombudsman could not rely on the Act to support her actions.

Civil Liability and Courts Act of 2004
The Office of the Ombudsman was informed that even if it did seek to rely on the Civil Liability and Courts Act of 2004 then either it or the complainant should have applied to Court pursuant to the provisions of Section 40 subsection 4 of the 2008 Act for an Order permitting "disclosure of documents, information or evidence". (This is the application that was subsequently made by the HSE in the C case following a request for a social work file covered by the In Camera rule from the Ombudsman in the course of a separate investigation).

The HSE's solicitors informed the Office of the Ombudsman that the legal position was the same on 20th November as it had been on 15th September and reasserted that it was not open in law to the HSE to accept the findings or recommendations.

Return to District Court on 5th Dec
The matter came before the District Court in Court 56 on 5th December. A solicitor appeared on behalf of one of the Guardians ad Litem and a solicitor appeared on behalf of the Ombudsman. The Judge commented that the Ombudsman would not be entitled to any documentation from matters arising in Court 20 and he referred to a recent judicial review wherein the High Court had accepted that reports were generated by the Court and were under the Court's control.

He went on to say that he would not be satisfied that service on a parent could be affected merely by notifying the Law Centre at which they had attended in the past. He said that if necessary the HSE should engage inquiry agents to find the parents. He said the parents ought to be aware what had happened and it was important that the Court would have their views on what would happen. The matter was adjourned to 14th January.

2009

Return to District Court on 14th Jan, 21st January & 30th January
On 14th January the matter was adjourned for one week as the Judge had not been available.

When the matter came before the Court on the 21st of January it was adjourned to the 30th of January. A detailed Notice of Motion was served and the respondent parents and the Guardian ad Litem and the Ombudsman were advised that the HSE "inadvertently gave information to the Office of the Ombudsman which had now believed was a breach of the in-camera rule". The solicitors for the Ombudsman proposed a timetable for filing of documentation with a view to the matter being listed for hearing in March pending the Judge's availability.

Further adjournment was sought by the HSE because it was proving difficult to identify the whereabouts of the respondent parents who had not attended Court in response to a Notice of Motion. The Office of the Ombudsman reluctantly consented to that application.

Beginning of dialogue to resolve matters
In the meantime, Counsel acting on behalf of the HSE and Counsel acting on behalf of the Ombudsman entered into dialogue with a view to agreeing a heads of agreement as to how this particular matter was to be resolved and further as to how future investigations might be managed.

We understand that following this dialogue a common approach was drawn up as follows:

> Set aside report of the Ombudsman of July 2008
>
> Ensure outstanding monies plus interest paid to Guardian Ad Litem's.
>
> Set aside two Section 7 Summonses which had been issued pursuant to the 1980 Act.

General annual report to be placed before the Oireachtas to reflect that a problem was identified, that the parties got together and that the parties resolved the problem.

Future conduct of investigations.

One liaison point of contact

System to ensure timelines, effectiveness and fairness.

Return to the District Court on 20th March

The matter was adjourned from time to time for a variety of reasons, unavailability of the Judge, no response from respondent parents. It came before the Court on 20th March at which stage a hearing date of the 25th and 27th of May was fixed.

Solicitor for Office of Ombudsman proposes resolution

On 25th March the solicitors for the Office of the Ombudsman wrote to the solicitors for the HSE with a view to investigating whether it "might be possible to resolve the issue of the non-payment of fees by agreement between the parties, namely, the HSE, the Irish Guardian ad Litem and Social Work Services and Beacon Guardian ad Litem Services". The Office of the Ombudsman suggested a mediator.

The solicitors for the HSE responded to indicate that they understood Counsel was now instructed for the Irish Guardian ad Litem Service, Counsel was instructed for the Office of the Ombudsman and that there was "broad agreement between Senior Counsel for the HSE and Senior Counsel for the Ombudsman as to the merits of the case and how it could be concluded". The suggestion was made that a further meeting should occur between Senior Counsel and thereafter the kind offer of a meeting would be taken up. The HSE solicitors stated "our client appreciates your client's offer and suggestion and is anxious to work with your client towards a speed resolution of this case".

This suggestion was acceptable to the Office of the Ombudsman and by way of letter of 3rd April they confirmed that "we have contacted our Counsel and asked him to liaise further with the two other senior counsel in the case.

The matter came before the Court on 20th April. Counsel for the Guardian ad Litem indicated that she was anxious to institute judicial review proceedings but was unable to indicate what reliefs she would be seeking. This contention was rejected by the Judge . The Judge directed that the HSE should correspond with the parties setting out:-

1. The Directions and Orders that they were seeking from the Court.

2. The factual basis on which they were being sought.

3. The basis of the jurisdiction and the Court in the case on whether or not it was functus officio. He further directed that the HSE submissions were to be filed in Court by the 6th of May then the other parties would have until the 16th of May to file their submissions and the HSE could file a response if necessary by the 20th of May.

The matter was fixed for hearing on the 25th and 27th of May. The parties were informed by way of letter that the HSE was making no specific application in relation to the Ombudsman or the Guardian ad Litem and they were further informed that what they did or did not do with in-camera documentation was a matter for them to address in any application before the Court.

Suggestion that District Court hearing be adjourned due to similar High Court hearing

On 20th May 2009, solicitors for the HSE wrote to the solicitors for the Ombudsman and the solicitors for

the Guardian Ad Litem. The letter indicated that a case was due to come before the High Court in June and the case involved in camera issues which were "almost identical" to that before the District Court as outlined above. The HSE solicitors were instructed in the similar matter and believed that the case would be heard in June 2009.

The HSE's solicitor suggested that in the prevailing economic climate, it would not be prudent for publically funded bodies to embark on a lengthy hearing in the District Court where an identical issue was pending determination in a higher court. The solicitor suggested that the District Court matter should be adjourned as a High Court Judgment could bring the necessary clarity. It was suggested that in the interim, Senior Counsel would continue their discussions in regard to agreeing a working protocol.

Meeting with HSE
On the 22nd of May 2009, the Ombudsman met with the CEO of the HSE. At this meeting, the CEO set out the position of the HSE as follows:

- Extreme care must be taken when dealing with documentation generated in "in-camera proceedings" a specific statutory exclusion and the rights of others involved.

- Where the HSE is requested to hand over personal information in its possession to other bodies, those to whom the information relates are entitled to know of the request and are entitled to express a view as to whether the information should be provided and as to the proposed use that is to be made of it.

- The CEO was aware that there was no disagreement between Counsel for the HSE and Counsel for the Office of the Ombudsman.

- The CEO was aware that both Senior Counsel agreed that in the future both agencies required to keep lawyers at one remove and that the two the Senior Counsels had discussed the possibility of nominating a liaison person in order to manage future engagements between the two agencies and Counsel for the Office of the Ombudsman suggested the name of a senior HSE executive who would be the appropriate person subject to the agreement of the HSE and the Ombudsman.

Rejection of adjournment
Ultimately, neither the Ombudsman nor the Guardians ad Litem would consent to the District Court proceedings being adjourned. The adjournment application was made in good faith in circumstances where the lawyers for the HSE believed that the High Court would hear and determine an identical issue. It is common knowledge that when proceedings are before a Court, the control of those proceedings vests with the Court. To characterise the fact that the High Court chose not to hear the matter but urged the parties to settle, as a breach of good faith is unfair.

The HSE did not make legal submission to District Court
The HSE accepts that the legal submissions were not made available to the District Court as Senior Counsel was delayed in the High Court on another HSE matter on 25th May and was unable to get to the District Court on time to articulate the reasons for the application to adjourn or indeed, to proceed with the case in circumstances where the adjournment application might be refused.

It is worth noting, however, that the HSE, Senior Counsel had been in regular communication with Senior Counsels on the other side and all the indications were that agreement would be achieved.

Agreement reached at meeting between HSE and Office of Ombudsman
On 2nd June, the HSE's nominated liaison person had a positive meeting with the Office of the Ombudsman. Agreement was reached that in future if material was required by the Ombudsman in the context of an investigation, which was covered by the in-camera rule, then the HSE would issue an application seeking to lift the in-camera rule so that the documentation could be furnished. The liaison

person left that meeting with the understanding that if this working protocol could be adopted then it was unlikely that the report would be published.

Advice of High Court
In July 2009, the High Court took the position that it would be unseemly for two public bodies to be in a public dispute and he indicated that the matter should be settled. In those circumstances, no judgment issued. It is not appropriate to comment on the terms of settlement of the other case, suffice to say the HSE's position in regard to disclosure of material connected with court proceedings remained the same.

Decision by District Court re C Case
In October 2009, the HSE's nominated liaison person was contacted by the Office of the Ombudsman in regard to the *C Case.* In that the case, the Ombudsman was conducting an investigation having received a complaint from foster parents. The Ombudsman sought a copy of the social work file. The social work file contained court and court related material and documentation.

This application came before the court on 6th November 2009. The application was brought pursuant to the Civil Liability and Courts Act of 2004.

The parents of the child concerned had been notified of the application but did not attend court. The Judge having had the application opened to him immediately commented about the importance of the in-camera rule. The Judge had submissions made to him in regard to the Civil Liability Act, Statutory Instrument Number 469/2008, and the amendment of the 1991 Act dealing with the in-camera rule. The Judge took the view that this was such an important issue that it required to be litigated. He felt that because the matter was not argued in front of him, he could not make a decision. He then ruled that the file was to be made available to him and then having reviewed the files, he would make a decision as to whether or not the files should be released to the Ombudsman. He suggested that it might be appropriate to join the Ombudsman as a party to the proceedings and said he would consider that over the course of the adjournment. He requested a copy of the Statutory Instrument of 2008 and the Child Care Amendment Act, 2007.

The social work files were delivered to the Judge and on the 15th of December, he granted the order sought by the HSE authorising the disclosure of the documentation to the Ombudsman. The files were couriered that afternoon to the office of the Ombudsman.

On 21st December, having engaged in the working protocol and provided the office of the Ombudsman with the information and documentation they required, the HSE was surprised to receive a letter from the Office of the Ombudsman advising that a report would now be laid before the Oireachtas.

2010

Further exchange of correspondence
The HSE responded on the 29th of January 2010. In that letter, a number of issues were clarified and the HSE's concerns were recapped. Reference was made to the working protocol and the fact that it had been implemented in the *C Case.*

During March there followed a series of exchanges of letters and subsequently a meeting was arranged to attempt to resolve this process to the satisfaction of both organisations.

That meeting took place in April 2010. It was a useful opportunity for both organisations to express their views but did not result in a specific outcome.

Thereafter, in June 2010, the HSE received notification that the Ombudsman proposed to lay a report before the Oireachtas pursaunt to Section 6(7).