

Our Reference: HB1/05/0639R
18 November 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 my investigation of two complaints against the Health Service Executive (HSE) involving payment of guardian ad litem fees. I refer in particular to the email message of 14 November 2008 from the HSE's legal advisers BCM Hanby Wallace which states that it has instructions "to make application to the appropriate Court at the first appropriate opportunity in relation to [my investigation] report".

The position at present regarding my investigation report, and the HSE's response to it, has become quite confused and I am writing now with a view to clarifying my position on the matter.

Ombudsman Position

My position is that, having received complaints from two guardian ad litem agencies, I investigated those complaints in accordance with the Ombudsman Act 1980. My investigation, in the normal way, culminated in the production of an investigation report which made certain findings and recommendations. I am satisfied that it was within my powers under the Ombudsman Act to investigate those complaints and I am satisfied that the conduct of the investigation was in accordance with the Ombudsman Act as well as satisfying the requirements of fair procedure/constitutional justice. I am confident also that my findings are based on a properly conducted investigation and that my recommendations arise from those findings and are in accordance with the Ombudsman Act.

When I wrote to you on 23 July 2008, with a copy of the completed investigation report, the only issue was whether the HSE would, or would not, accept my findings and recommendations. In the event, following a considerable delay on the part of the HSE, you wrote to me on 10 October 2008 to say that you were not accepting the report's findings and recommendations; you said that this decision was based on legal advice to

the HSE "indicating there are serious legal and technical difficulties" with the report. Subsequently, on 14 October 2008, the HSE's legal advisers BCM Hanby Wallace wrote to my Office to say that it had advised the HSE that my report was "*ultra vires* the Ombudsman Act ... and that it was not open in law to [the HSE] to accept either the findings or recommendations ...". If the BCM Hanby Wallace letter was intended to set out the grounds for its advice to the HSE, unfortunately it failed to do so; the ten points listed in the letter amounted to no more than a series of unsubstantiated assertions.

The present position, therefore, is that while the HSE says it cannot for legal reasons accept my report's findings and recommendations, I do not know what grounds the HSE may have for relying on such reasons. In the absence of knowing the grounds for the HSE's claim, I remain satisfied that my investigation was within my powers, that it was properly conducted and that the findings and recommendations are in accordance with the Ombudsman Act.

While it is a rare event, there is a clear procedure to follow in circumstances in which a public body fails to accept the Ombudsman's findings and recommendations. The procedure, which has been invoked only once before since 1984, is for the Ombudsman to report to each House of the Oireachtas by way of a special report under section 6(5) and 6(7) of the Ombudsman Act. The Ombudsman's reporting relationship is with the Oireachtas. I would expect, following receipt of a special report, that it would be considered by the relevant Parliamentary Committee which would, in turn, report to the Houses. I would envisage that this Committee would invite attendance from myself and from the public body in the course of considering the report. The eventual outcome would be a matter for the Oireachtas acting on the advice of the Committee.

I have already stated that it is my intention in this present case, and in line with the existing procedure, to make a special report to the Oireachtas.

Recent Events

While I was aware that the HSE had certain difficulties with the findings and recommendations of my report, I was quite unclear as to the nature of these difficulties and as to why they had arisen. With the assistance of the Department of Health and Children, a meeting of senior staff from my Office (including my Director General) and senior HSE staff (including the National Director, Primary Community & Continuing Care) took place on 31 October last. In the course of this meeting, HSE representatives focused in particular on the implications of one aspect of my findings and did not raise in any substantial way any of the legal concerns (whether to do with powers or procedures) which previously appeared to be the basis for the HSE's difficulties with the report.

At the meeting of 31 October, it appeared that the HSE's key concern was with the inclusion of the following findings:

"I also find that, in adopting the above approach to these issues, the HSE (through the two former area health boards) has neglected to take sufficient account of the interests and welfare of the children in question,

and is acting in a manner which, in the longer term, is not conducive to improving, promoting or protecting the health and welfare of those children who are most vulnerable in our society."

The HSE's concern, as I then understood it, was that this particular finding might be taken out of context and be construed as suggesting that the HSE was failing in a fundamental way in its statutory obligations to protect children at risk and to act in the best interests of children generally. My staff were happy to clarify for the HSE that this was not what was intended and, indeed, agreed that my Office was prepared to engage with the HSE to agree on a statement clarifying what was intended.

Over the following two weeks, my staff had a number of contacts with HSE staff regarding the wording of a clarification to issue in relation to the particular finding. On 13 November, the HSE emailed my Office a form of words which it suggested might be used in the clarification to be issued by my Office. On that same day, my staff informed the HSE that this form of words was acceptable to my Office. While the HSE had yet to confirm that the matter could be settled on the basis of this clarification, it seemed more likely than not that this would be the outcome. In the event, on Monday 17 November my Office received an email message from the HSE's legal advisers BCM Hanby Wallace (sent late on Friday 14 November) to say that it had instructions to initiate unspecified court action in relation to my investigation report. Pending the initiation of this action, BCM Hanby Wallace sought from me an undertaking that my report "will not be delivered to the Oireachtas...". And in the absence of giving this undertaking, BCM Hanby Wallace said it would apply to the High Court on an *ex parte* basis "to restrain the delivery of the report to the Oireachtas".

I have to say, in the light of all that happened in the previous two weeks, that this was a very surprising development.

In reply to this email message from BCM Hanby Wallace, my Office replied yesterday to say that it was unlikely that I would agree to give the undertaking as sought. I can now confirm that I will not be giving the undertaking sought on your behalf by BCM Hanby Wallace. I wish to inform you also that it is my intention to make a special report on this case to the Oireachtas, in accordance with section 6(5) and 6(7) of the Ombudsman Act, on Thursday 20 November 2008.

I am sending a copy of this letter, for information, to the Secretary General of the Department of Health and Children.

Yours sincerely

Emily O'Reilly
Ombudsman