

**REPRESENTATIONS TO THE OMBUDSMAN**  
**BY THE DEPARTMENT OF HEALTH AND CHILDREN**

**20 August 2010**

## I INTRODUCTION

1. Under cover of a letter dated 24 June 2010, the Ombudsman furnished the Department of Health and Children with a *summary* of her draft report in relation to nursing home care for the elderly and requested representations in relation to "the report" within a period of three weeks. As the summary was wholly and utterly inadequate to enable the Department to make meaningful representations in relation to the draft report and as it appeared from the summary that the draft report was, almost in its entirety, critical, either expressly or by implication, of the Department and its officials, the Department requested the Ombudsman to furnish the draft report in its entirety. Following a further request to that effect, certain extracts from the draft report were furnished to the Department under cover of a letter dated 19 July 2010. Despite numerous further requests in writing, the Ombudsman has hitherto refused to furnish the Department with a complete copy of her draft report. That refusal has seriously impeded the Department and its officials in their capacity to make representations to the Ombudsman in accordance with their entitlements under the Ombudsman Act, 1980 (the "*1980 Act*") and in accordance with their fundamental rights to fair procedures and constitutional justice. The gravity of the breaches of the rights of the Department and its officials is brought into very sharp focus when considered in the light of the numerous findings, criticisms and insinuations of the utmost gravity and with no factual, evidential or legal basis whatever which the Ombudsman has purported to make in the extracts from the draft report furnished to the Department. It is also underlined by the fact that, although the Department has at all times been willing to co-operate with the Ombudsman in respect of any investigation within the parameters of the 1980 Act, the Ombudsman has, in multiple respects, pursued an investigation which very significantly exceeds her statutory remit.
2. In these circumstances and for the purpose of seeking to persuade the Ombudsman to provide a complete copy of her draft report to the Department and to afford sufficient time to the Department to respond thereto, the Department makes the representations set out herein to the Ombudsman. For the avoidance of doubt, in the event that the Ombudsman persists in her refusal to provide a complete copy of the draft report to the Department and/or to afford sufficient time to respond thereto, the Department and its

officials reserve their rights, *inter alia*, to make further representations to the Ombudsman in respect of the matters addressed in the extracts from the draft report hitherto furnished to the Department. The Department also wishes to make it absolutely clear that these representations and such further representations as the Department may make are strictly without prejudice to all of the rights of the Department and its officials and that all of their rights are expressly reserved.

## **II THE REFUSAL OF THE OMBUDSMAN TO PROVIDE A COMPLETE COPY OF HER DRAFT REPORT AND TO AFFORD SUFFICIENT TIME TO FURNISH A RESPONSE**

### **(i) Background**

3. Under cover of a letter dated 24 June 2010, the office of the Ombudsman furnished the Department with a summary of her draft report in purported compliance with, *inter alia*, the obligations imposed by section 6(6) of the 1980 Act. The Department was requested to furnish representations in relation to the draft report on the basis of the said summary in the following terms:

*“In accordance with section 6(6) of the Ombudsman Act 1980, the Department is invited to comment on aspects of the report which might be taken as critical of, or adverse to it. The attached document summarises the content of the report and identifies those points which contain criticisms or comments adverse to the Department.*

*Any representations which the Department might wish to make should be received in this office by close of business on Friday 16 July 2010 at the latest.”<sup>1</sup>*

4. In a replying letter dated 2 July 2010, the Department observed that the summary furnished by the office of the Ombudsman referred to nine chapters and, so far as could be judged from the summary, it appeared that the report

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<sup>1</sup> Emphasis added

was, almost in its entirety, critical, either expressly or by implication, of the Department and its officials. The Department continued as follows:

*“In those circumstances, it is perfectly clear that the Department is fully entitled to the entirety of the draft report and not simply a summary. It would be quite impossible for the Department to respond in any meaningful way to the summary which you have in fact provided. We note that section 6(2)(1) of the Ombudsman Act, 1980 provides that in these circumstances the Ombudsman is required to send ‘a statement in writing with the results of the investigation’ to the Department. The statutory discretion must, of course be understood against the Ombudsman’s duty to apply this provision in a constitutional fashion. This duty extends to abiding by the principle of fair procedures and there can be no doubt but that, in such circumstances, the Department is entitled in order to protect its reputation and the good name of the officials who work in it to a full copy of the draft report and not merely the summary.*

*In these circumstances, I respectfully request that you would supply me with a full copy of the draft report. Without sight of the full draft report the Department is not in a position to assess or indicate how long it will take to review the report and provide the requested response but it is clear from the brief summary already furnished that the timescale you had proposed was wholly unrealistic.”*

5. Subsequent events and, in particular, the extracts from the draft report ultimately furnished on 19 July 2010 (following a further letter from the Department repeating its request for a full copy of the draft report so that it could provide the necessary representations) have brought into very sharp focus how critically important it was *not* to accept the summary which the Ombudsman furnished in purported discharge of her obligations under section 6(6) of the 1980 Act and in purported discharge of her constitutional obligations in respect of fair procedures and natural and constitutional justice. In the letter dated 24 June 2010 under cover of which the said summary was furnished, it was stated that the summary was furnished “[i]n accordance with section 6(6) of the Ombudsman Act 1980”. It is a matter of profound concern that the Ombudsman apparently considered that she discharged her

obligations under section 6(6) of the 1980 Act and her constitutional obligations by furnishing that summary and requesting representations within a period of three weeks. When considered in the light of the extracts from the draft report furnished following repeated requests approximately four weeks later, it is manifest that the decision merely to furnish a summary of her report entailed a gross violation of basic rights which are protected by statute and by the Constitution. It is very disturbing that this apparently was not appreciated by the Ombudsman and that, from the outset, the Ombudsman did not furnish a complete copy of her draft report. It is equally disturbing that, even to this day and despite the clear, cogent, reasonable and repeated requests of the Department for a copy of the complete report, the Ombudsman persists in her refusal to provide it to the Department and the concomitant breaches of fundamental rights which that entails.

6. By letter dated 22 July 2010, the Department acknowledged receipt of sections of the draft report but informed the office of the Ombudsman that they were not sufficient to enable the Department to respond comprehensively. The Department reiterated its previous requests for a full copy of the draft report to provide the Department with an opportunity to consider its response in a meaningful way and to make the necessary representations to the Ombudsman. The Department also suggested that the timeframe given to respond was not sufficient and that a deadline of at least 16 September 2010 would be more appropriate.
7. In a replying letter dated 28 July 2010, the office of the Ombudsman rejected the request for a complete copy of the draft report and stated, *inter alia*, as follows:

*“It is important to be clear as to the context in which your Department is being afforded an opportunity to comment, at draft stage, on the Ombudsman’s report. The context is that of compliance with section 6(6) of the Ombudsman Act 1980 and, more generally, with the requirements of fair procedure and constitutional justice. Section 6(6) of the Ombudsman Act 1980 provides that the Ombudsman ‘shall not make a finding or criticism adverse to a person in a statement, recommendation or report under subsection (1), (3) or (5) of this section without having afforded to the person an opportunity to consider the*

*finding or criticism and to make representations in relation to it to him.’ Insofar as the report constitutes the outcome of an investigation, the explicit statutory requirement at section 6(6) applies. Insofar as the report is intended for the Dáil and Seanad, under section 6(7), it is not covered by the explicit requirement of section 6(6); nevertheless, the Ombudsman is happy to comply with the requirements of fair procedure and constitutional justice.*

*In most instances the Ombudsman does provide the public body concerned with a copy of the entirety of the draft investigation report (though without draft recommendations). This has the advantage of satisfying the section 6(6) requirement as well as offering an opportunity to have the facts of the particular case agreed with the body concerned. It also assists the Ombudsman to make recommendations which flow logically from the report and which are proportionate having regard to the maladministration and adverse effect where this is established in the particular case.* The approach to systemic or ‘own initiative’ investigations can be different. This may well be the case where, for example, the focus is on the procedures, practices and policy considerations attaching to a particular scheme or schemes and on the general implications for complaints relating to such a scheme or schemes, rather than on the identification of maladministration, adverse effect and appropriate redress arising from a particular decision of a public body. *In all cases, the main consideration is the need to meet the requirements of section 6(6) and of fair procedure and constitutional justice.*

*The consultation process is not intended to offer the public body concerned an opportunity to provide a critique on the entirety of the Ombudsman's report in advance of the report being finalised.* In this instance, your Department is free to comment publicly or otherwise on the final report. Indeed, the Ombudsman considers that such comments could make a useful contribution to public debate on the report's subject matter.

*The Ombudsman is quite satisfied that the material already provided to your Department satisfies the requirements of section 6(6) and of fair*

*procedure and constitutional justice. The Ombudsman will not, therefore, be acceding to your request for a copy of the complete draft report.*

*As regards the timeframe for the Department to make representations in relation to the report, the Ombudsman cannot agree to further extend this to ('at least') 16 September 2010. The initial deadline was 16 July 2010 and this was subsequently extended to 16 August 2010. The Ombudsman is willing to extend this deadline by one week to Monday 23 August 2010. This deadline will not be extended further so the Department should ensure that any representations should be made by close of business on that date.<sup>2</sup>*

8. In a replying letter dated 5 August 2010, the Department stated that the manner in which the office of the Ombudsman was conducting the nursing home charges investigation was most unsatisfactory. In this regard, the Department first reiterated that the Department has a clear legal and constitutional entitlement to have access to the entirety of the draft report and that it is not sufficient simply to provide an extract or extracts from the report. The Department observed that, as the draft report is largely directed at the Department, it cannot meaningfully avail of its statutory entitlement in section 6(6) of the 1980 Act to make representations in respect of that draft report without sight of it in its entirety. The Department stated that section 6(6) must be construed in the light of the obligation to abide by fair procedures when carrying out its statutory functions, a factor of particular relevance here given the extent of the State's constitutional duty to vindicate the good name of persons whose reputation may be affected by criticisms contained in the report which would ultimately form part of the public record of the State. The Department stated that all of this was underscored by the provisions of section 6(8) which state that such a report is absolutely privileged. The Department observed that this naturally presupposes that the highest levels of procedural fairness will have been adhered to by the office of the Ombudsman prior to publication. The Department stated that that made the failure to release the entirety of the draft report all the more surprising. The Department requested the office of the Ombudsman to make the entirety of

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<sup>2</sup> Emphasis added.

the draft report available by 13 August 2010 and sought a period of six weeks to study the draft and prepare a response.

9. In a replying letter dated 6 August 2010, the office of the Ombudsman again refused the request to furnish the full draft report. The office of the Ombudsman informed the Department that the content of the draft report which had not been provided to the Department consists, *“for the most part”, of “suggested legal analysis of relevant health service legislation”, “a historical summary of complaints relating to long-stay care received by the Ombudsman (much of which has featured in earlier reports from the Ombudsman)”, and “some commentary on governance issues generally”*. The office of the Ombudsman asserted that *“[w]hile this material may be of interest to the Department in a general sense, none of it constitutes material which might be regarded as affecting adversely the interests of the Department”*. It stated that *“[i]n due course, the Department may wish to comment on this material; but this will be in the context of making its contribution to whatever debate may be generated following the Ombudsman’s report to the Oireachtas.”* It stated that the Ombudsman was quite satisfied that the material already provided to the Department met the requirements of section 6(6) of the 1980 Act, as well as the requirements of fair procedures and, accordingly, *“she will not [...] be acceding to [the] request for a copy of the complete draft report”*.
10. In a replying letter dated 12 August 2010, the Department noted, with considerable regret that, despite a further request to provide the full draft report, the Ombudsman continued to refuse to provide access to same. The Department stated that it was at a loss to understand why engagement by the Ombudsman’s office with the Department on the issues arising in the investigation could, in the Ombudsman’s view, apparently only take place after the report had been published. The Department observed that fair procedures require the Ombudsman to engage with the Department during the course of the investigation and before finalisation of the report. The Department noted that the office of the Ombudsman had not engaged with the Department in relation to the issues arising in the investigation and that, in the circumstances, it was all the more incumbent on the Ombudsman to provide the full report so that the Department could see the full case being made by the Ombudsman and be in a position to address those issues on a



proper and fair basis. Having regard to the indication which the office of the Ombudsman provided in respect of the contents of the parts of the draft report which had not been furnished, the Department requested formal confirmation that there was nothing in the redacted contents which is critical or adverse to the Department's interests. The Department continued as follows:

*“Notwithstanding the foregoing, the Department is still firmly of the view that the other redacted content has, at the very least, to be of a nature that it sets the context for the other material which has been provided by the Ombudsman and which is stated to be adverse to the Department's interests. It is also relevant to the Ombudsman's understanding of and approach to the issues dealt with in the materials furnished. Those issues cannot be completely segregated from the remainder of the report which has not been furnished. On that basis alone, it is submitted that the redacted material should also be furnished. Failure to do so hampers the Department in its ability to deal with and properly address the adverse criticisms that are contained in the material which has been provided.”*

11. The Department also requested an extension of time for delivery of observations to Monday, 13 September 2010.
12. In its replying letter dated 13 August 2010, the office of the Ombudsman refused to provide an extension of time for making observations and refused to furnish a full copy of the draft report. The office of the Ombudsman added that the Department's understanding of what is required by fair procedures in the context of the particular report differs from that of the Ombudsman's office.
13. By letter dated 18 August 2010, the Department noted the Ombudsman's repeated refusal to provide the full draft report and also the refusal to extend time for the making of submissions. The Department also took issue with the contention of the Ombudsman that the Department had been allowed eight weeks to make submissions and that this was very reasonable in circumstances where the extracts from the draft report were only furnished four weeks previously, the Ombudsman refused to furnish the full draft report and the Ombudsman refused to extend the time for making representations.

The Department stated that the failure to provide the full draft report was hampering the Department in its ability to respond to the issues raised and reiterated its request for an extension of time within which to make representations.

**(ii) The statutory and constitutional duties of the Ombudsman**

14. It is respectfully submitted that the correspondence and matters addressed above disclose a fundamental misunderstanding on the part of the Ombudsman of her statutory and constitutional obligations regarding fair procedures and natural and constitutional justice. In these circumstances and for the purpose of seeking to persuade the Ombudsman to take the necessary steps in that regard, even at this stage, the nature and extent of those obligations insofar as material to the approach hitherto adopted by the Ombudsman are addressed in some detail.
15. At the outset, it is appropriate to refer to the relevant provisions of the 1980 Act. Section 6(6) of the Act provides that *"[t]he Ombudsman shall not make a finding or criticism adverse to a person in a statement, recommendation or report under subsection (1), (3) or (5) of this section without having afforded to the person an opportunity to consider the finding or criticism and to make representations in relation to it to him."*
16. Section 8(1) of the 1980 Act provides that *"[a]n investigation by the Ombudsman under this Act shall be conducted otherwise than in public"*.
17. Section 8(2) of the 1980 Act provides as follows:

*"Where the Ombudsman proposes to carry out an investigation under this Act into an action he shall afford—*

*(a) any Department of State, or other person specified in Part I of the First Schedule to this Act, concerned, and*

*(b) any other person who appears or, in a case where a complaint in relation to the action has been made to the Ombudsman, is alleged, to have taken or authorised the action,*

*an opportunity to comment on the action and if a complaint in relation to the action has been made to the Ombudsman, on any allegations contained in the complaint.”*

18. The requirements of the statutory provisions noted above must be considered in the light of and in accordance with the requirements of the Constitution and, in particular, the duties of the State to defend and vindicate the fundamental rights of the citizen which are protected by the Constitution.
19. Article 40.3.1 of the Constitution provides that “[t]he State guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen”. The personal rights protected by Article 40.3 include the rights to natural and constitutional justice, the right to fair procedures and the right to one’s good name / reputation. Natural justice encompasses, *inter alia*, the requirement to hear the other side or *audi alteram partem*. As Hogan and Whyte note, “the basic principle underlying *audi alteram partem* remains that a person affected by, or with an interest in the outcome of, an administrative decision has the right to have adequate notice of this decision and to be given an adequate opportunity to make his case before that administrative body”.<sup>3</sup>
20. In McDonald v. Bord na gCon,<sup>4</sup> the Supreme Court stated that “in the context of the Constitution, natural justice might more appropriately be termed constitutional justice and must be understood to import more than the two well-established principles that no man shall be judge in his own cause and *audi alteram partem*.” In East Donegal Co-op v. Attorney General,<sup>5</sup> the Supreme Court stated that “the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice”.<sup>6</sup> The

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<sup>3</sup> Hogan and Whyte (eds.), *Kelly, The Irish Constitution* (2003) at 640.

<sup>4</sup> [1965] IR 217.

<sup>5</sup> [1970] IR 317.

<sup>6</sup> *Ibid.* at 341. (Emphasis added).

Court stated that “[i]n such a case any departure from those principles would be restrained and corrected by the Courts.”<sup>7</sup>

21. In McCormack v. Garda Siochana Complaints Board,<sup>8</sup> the High Court (Costello P.) explained that constitutional justice imposed a *constitutional duty* on a decision-making authority to apply fair procedures in the exercise of its statutory powers and functions:

*“It is now established as part of our constitutional and administrative law that the constitutional presumption that a statute enacted by the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. It follows therefore that an administrative decision taken in breach of the principles of constitutional justice will be an ultra vires one and may be the subject of an order of certiorari. Constitutional justice imposes a constitutional duty on a decision-making authority to apply fair procedures in the exercise of its statutory powers and functions.”<sup>9</sup>*

22. The decision of the Supreme Court in Haughey v. Moriarty<sup>10</sup> is also instructive. In that case, the plaintiff challenged the validity of certain discovery and production Orders which the respondent Tribunal made against various financial institutions in relation his bank records without having afforded notice to him of the intention to make those orders. The Supreme Court upheld the challenge and quashed the Orders on the basis that the Tribunal had failed to comply with the requirements of constitutional justice and fair procedures. Having regard to the manner in which the Ombudsman has purported to discharge her statutory and constitutional obligations in respect of fair procedures and natural and constitutional justice, it is appropriate to refer to the reasoning of the Supreme Court *in extenso*. In explaining the reasoning of the Court, Hamilton C.J. stated, *inter alia*, as follows:

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<sup>7</sup> *Ibid.* at 341. (Emphasis added).

<sup>8</sup> [1997] 2 IR 489.

<sup>9</sup> *Ibid* at 499 – 500. (Emphasis added).

<sup>10</sup> [1999] 3 IR 1.

*“While the Tribunal is entitled to conduct the preliminary stage of its investigations in private, and to make such orders as it considers necessary for the purposes of its functions, that does not mean that in the making of such orders, it was not obliged to follow fair procedures.*

*In the making of such orders the Tribunal had in relation to their making all such powers, rights and privileges as are vested in the High Court or a judge of that court in respect of the making of orders.*

*Fair procedures require that before making such orders, particularly orders of the nature of the orders made in this case, the person or persons likely to be affected thereby should be given notice by the Tribunal of its intention to make such order, and should have been afforded the opportunity prior to the making of such order, of making representations with regard thereto. Such representations could conceivably involve the submission to the Tribunal that the said orders were not necessary for the purpose of the functions of the Tribunal, that they were too wide and extensive having regard to the terms of reference of the Tribunal and any other relevant matters.*

*Such a procedure was not adopted in this case and the learned trial judge held that in the making of such orders the Tribunal did not act in accordance with the requirements of fair procedures.*

*The Court is satisfied that the trial judge was correct in his findings that the orders sought to be impugned herein made by the Tribunal were made in contravention of the requirements of constitutional justice and that fair procedures were not adopted by the Tribunal in the making of such orders.*

*Such failure was not remedied by the insertion in such orders of the provision that the person to whom the order was directed or any person affected thereby had the right to apply to the Tribunal to vary or discharge that order.*

*This is particularly so having regard to the circumstances of this case,*

*the nature of the orders made and the time scale within which compliance therewith was ordered.*

*There may be exceptional circumstances, such as a legitimate fear of destruction of documents if prior notice was given, where the requirements of fair procedures in this regard may be dispensed with. No such circumstances exist in this case.*

*Each of the plaintiffs is entitled to the benefit of fair procedures and the Court is satisfied that the learned trial judge erred in differentiating between the rights of the first plaintiff and the remaining plaintiffs.*

*The trial judge refused, as a matter of discretion, to quash the said discovery orders stating that:-*

- (i) the Tribunal had acted bona fide;*
- (ii) the plaintiffs had now an opportunity of airing their legitimate complaints;*
- (iii) it would be pointless to declare void the discovery orders and force the Tribunal to embark on a new and cumbersome procedure before it would be able to get back whatever bank accounts it now has.*

*While this approach by the trial judge may enjoy the attractiveness of being pragmatic and, indeed, realistic, it does not have regard to the seriousness of the breach of the plaintiffs' right to fair procedures and the courts' obligation to defend and vindicate the constitutional rights of the citizen.*

*The vindication of such rights requires that the impugned orders of discovery made by the Tribunal other than in accordance with fair procedures be quashed and that the Tribunal be deprived of the benefit of such orders and the Court will so order.*

*The following statement made by Ó Dálaigh C.J. in the course of his judgment in In re Haughey,<sup>11</sup> is particularly apt:-*

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<sup>11</sup> [1971] IR 217 at 264.

*‘The provisions of Article 38.1 of the Constitution apply only to trials of criminal charges in accordance with Article 38; but in proceedings before any tribunal where a party to the proceedings is on risk of having his good name, or his person or property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution, the State, either by its enactments or through the Courts must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights.’*<sup>12</sup>

23. In I. v. Minister for Justice, Equality and Law Reform,<sup>13</sup> the High Court (Clarke J.) held that *“an inquisitorial body is under an obligation to bring to the attention of any person whose rights may be affected by a decision of such a body any matter of substance or importance which that inquisitorial body may regard as having the potential to affect its judgment”*.<sup>14</sup> Having referred to *“the substantial obligation to afford a party whose rights may be affected an opportunity to know the case against them”*, Clarke J. emphasized that *“whatever process or procedures may be engaged in by an inquisitorial body, they must be such as afford any person who may be affected by the decision of such body a reasonable opportunity to know the matters which may be likely to affect the judgment of that body against their interest”*.<sup>15</sup>
24. There is no doubt that the Ombudsman is required to act in accordance with fair procedures and natural and constitutional justice in respect of the investigation and preparation of the report at issue and that the obligation pursuant to section 6(6) of the 1980 Act must be interpreted in accordance with those constitutional requirements.<sup>16</sup> It is clear from the material furnished

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<sup>12</sup> Emphasis added.

<sup>13</sup> [2005] IEHC 150.

<sup>14</sup> Emphasis added.

<sup>15</sup> Emphasis added. See also, e.g., M.Q. v. Gleeson [1998] 4 IR 85; Ramseyer v. Mahon [2006] 1 IR 216; and Ezani v. Minister for Justice, Equality and Law Reform [2005] IEHC 478.

<sup>16</sup> In this context, see as regards the Financial Services Ombudsman the decisions of the High Court and the Supreme Court in J & E Davy (t/a Davy) v. Financial Services Ombudsman [2008] IEHC 256. See also National Maternity Hospital v. The Information Commissioner [2007] 3 I.R. 643 where the High Court (Quirke J.) stated as follows:

by the office of the Ombudsman that the Ombudsman intends to make findings and criticisms of the utmost gravity in respect of the Department and officials who work in it. In these circumstances and having regard to the matters addressed in the correspondence with the office of the Ombudsman, it is difficult to understand why the Ombudsman has hitherto refused to comply with the basic prerequisite of fair procedures and natural and constitutional justice of providing a complete copy of the draft report to the Department and an adequate opportunity to make representations in relation thereto.

25. On the basis of the material furnished, the parts of the draft report which the office of the Ombudsman has refused to provide to the Department include:
- (i) the Introduction to the report;
  - (ii) chapter 3 which apparently concerns “*statistical data on the number of public and private long-stay beds in the State*” and “*consideration of the various providers of and options for long-stay care and how long-stay care is funded and accessed*”.
  - (iii) sections of chapter 4 concerning historical summaries of “*issues relating to long-stay care, including the Ombudsman’s response to such issues that have arisen over the years and illegal charging of medical card holders*” and the response of the Ombudsman to the Travers Report.
  - (iv) a section in chapter 5 which contains an analysis of the relevant provisions of the Health Act, 1970 and follows the (misplaced) criticism of the allegedly “*convoluted*” legal interpretation of the Department;
  - (v) a further section, under the same heading, which appears after the (misplaced) assertion of the Ombudsman that the allocation of resources Defence “*does not in fact apply*”;
  - (vi) a section under the heading “*Analysis of judgments handed down by the Courts regarding provisions of the Health Act 1970*”;
  - (vii) a section in chapter 7 under the following heading: “*Analysis of the provisions of the Nursing Home Support Scheme Act 2009 by*

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*“The review required by the revisions of s. 34 of the Act of 1997 was intended to be inquisitorial rather than adversarial in nature. The procedures to be adopted by the Commissioner in respect of such reviews are entirely within her discretion provided that they do not offend recognised principles of natural and constitutional justice....”*



- reference to the Ombudsman's interpretation of its provisions and correspondence between this Office and the Department*"; and
- (viii) the apparent "*Discussion of the role of the Attorney General as Public Interest Guardian*" in chapter 8.

26. Having regard to the foregoing and the failure of the Ombudsman even to furnish extracts from the draft report until the Department insisted on being furnished with the draft report and not merely the wholly inadequate summary initially furnished, there is an understandable concern on the part of the Department that the parts of the draft report which the Ombudsman has hitherto refused to furnish to it are not merely "*of interest*" to the Department, as the Ombudsman contends, but that they also contain findings, comments and/or statements which are or may be adverse to the interests of the Department and/or the HSE, officials who work in those State agencies and the taxpayers of the State. In any event, it is absolutely clear that consideration of those parts is essential in order to have a complete understanding of those parts of the report which do contain express findings and/or criticisms adverse to the interests and rights of those persons and bodies. In particular, they are essential to provide the context in which those findings and/or criticisms are to be assessed and, thus, to afford an adequate opportunity to the Department to respond to them. As Black J. in observed in The People (Attorney General) v. Kennedy:<sup>17</sup>

*"A small section of a picture, if looked at close up, may indicate something quite clearly; but when one stands back and views the whole canvas, the close-up view of the small section is often found to have given a wholly wrong view of what it really represented. If one could pick out a single word or phrase and, finding it perfectly clear in itself, refuse to check its apparent meaning in the light thrown upon it by the context or by other provisions, the result would be to render the principle ejusdem generis and noscitur a sociis utterly meaningless; for this principle requires frequently that a word or phrase or even a whole*

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<sup>17</sup> [1946] IR 517. (This passage was adopted by Henchy J. in the context of the interpretation of Article 34.3.3 of the Constitution in People (DPP) v. O'Shea [1981] IR 412).

*provision which, standing alone, has a clear meaning must be given quite different meaning when viewed in the light of its context.”<sup>18</sup>*

27. More recently, in J&E Davy (t/a Davy) v. Financial Services Ombudsman,<sup>19</sup> the High Court (Charlton J.) held where an Act indicates that a copy of a complaint ought to be furnished to a party statutorily required to answer it, it was unfair that the letter of complaint was singled out as an indication of what had to be responded to, and that the supporting appendices / exhibits were excluded. That decision was upheld on appeal. In explaining the reasoning of the Supreme Court, Finnegan J. stated, *inter alia*, as follows:

*“The requirement to afford fair procedures arises under Article 40.3 of the Constitution. A basic requirement of fair procedures is to be made aware of the complaint which is being made and to have an opportunity to present a defence...*

*[...]*

*The seriousness of the matter being considered and of the consequences of the same are relevant as the requirements of natural justice may vary with the particular facts and circumstances of the case. There can be no doubting the seriousness for Davy of the complaint in terms of its reputation and the seriousness of the consequences having regard to the nature of the order made requiring Davy to purchase the Bonds from the Credit Union.*

*In the present case having regard to the serious nature of the complaint and the serious consequences likely to flow from the same and having regard to the express statutory provision I am satisfied that Davy ought to have been furnished not just with the letter of the complaint but with the appendices attached to the same. However diligently a complaint is summarised there is a real danger that some nuances may not be apparent from the summary or that the tone of the complaint will be lost and that in consequence any reply may be inadequate. I am not*

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<sup>18</sup> *Ibid.* at 536.

<sup>19</sup> [2008] IEHC 256.

satisfied that to furnish the letter of complaint but not the appendices meets the requirements of the Act or of fairness.<sup>20</sup>

28. When the refusal of the Ombudsman to furnish a complete copy of her draft report to the Department or to afford sufficient time to make representations is considered in the light of the matters addressed above (including the extremely damaging and misplaced findings and criticisms contained in the sections of the draft report furnished) and the authorities to which reference has been made, it is, with respect, manifest that the Ombudsman has failed to act in accordance with her statutory and constitutional duties regarding fair procedures and natural and constitutional justice.
29. In its correspondence with the Department, the office of the Ombudsman has sought to defend the manner in which the Ombudsman has purported to comply with the said duties by asserting that “[t]he Ombudsman does not make decisions which are legally binding; she makes findings and may also make recommendations...”.<sup>21</sup> The position of the Ombudsman in this regard is, with respect, seriously misplaced. It reflects a line of argument which has been resoundingly rejected by the courts on numerous occasions. For instance, in the recent case of de Búrca v. Wicklow County Manager,<sup>22</sup> the High Court (Hedigan J.) rejected an argument that a report of the respondent in relation to an alleged failure on the part of a town councillor to declare a personal interest in an application in respect of the county development plan was legally sterile and did not affect any person’s legal rights as follows:

*“It is well established that formal reports or other investigative determinations reached by public bodies may be subject to judicial review in certain circumstances. The fact that a report such as that in the present case is portrayed as a mere fact-finding exercise does not, of itself, prevent it from impacting upon the rights of the parties involved.*

[...]

*As a public representative, the reputational rights guaranteed to the applicant by Article 40.3.2° of the Constitution maintain particular*

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<sup>20</sup> Emphasis added.

<sup>21</sup> See the letter from the Office of the Ombudsman dated the 25 September 2009.

<sup>22</sup> [2009] IEHC 54.

importance. It seems to me that, following the publication of the report, much of the criticism which was levelled against her in the print and audiovisual media was unfair and vitriolic. The findings of the report, especially its criticisms of her, were at the foundation of this assault on her reputation.

The fact that the criticisms contained in the report now form part of the public record of the State serves only to amplify the ramifications for her, in particular should she wish to continue her career in public office. To allow such undue criticism of a conscientious local councillor to go unconsidered on the basis that it is of no consequence, or that it has no implications, would in my view involve a kind of legal fiction with potentially far-reaching consequences for the public service as a whole. In my view, therefore, the report did have material implications for the applicant.<sup>23</sup>

30. Similarly, in the seminal case of Maquire v. Ardagh,<sup>24</sup> Hardiman J. rejected the argument that the findings of an Oireachtas Committee Inquiry into a fatal shooting by members of An Garda Síochána were “legally sterile”:

“...no ordinary person hearing that a parliamentary committee had found as a fact that a named person had unlawfully killed another would be expected, by anyone other than a small minority of lawyers, to reflect that that of course was merely a matter of opinion. It is true that even the most adverse imaginable finding of fact or conclusion by the sub-committee will not amount to a conviction and will not determine any person’s rights and liabilities in civil law and will not expose him to any penalty or liability. But that is not the same as saying it has ‘no’ effect. Not merely is it conceded that it would have effects: these effects would sound, inter alia, in the area of the affected person’s constitutional rights.<sup>25</sup>

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<sup>23</sup> Emphasis added.

<sup>24</sup> [2002] 1 IR 385.

<sup>25</sup> Emphasis added.

31. The judgment of the High Court in de Róiste v. Judge-Advocate General<sup>26</sup> also merits note in this context. In that case, the Court (Quirke J.) rejected an argument that an inquiry into the reasons for the Applicant's dismissal from the Defence Forces could not be regarded as simply an inquisitive process and therefore un-amenable to judicial review. In this context, Quirke J. had regard, in particular, to the aspersions which could be cast on the conduct and character of an individual in such a report. Having referred to the passage from the judgment of Hardiman J. in Maquire noted above, Quirke J. continued as follows:

*"The instant proceedings concern a process established by statute by the government of a sovereign State. It was conducted by a statutory personage entitled 'The Judge-Advocate General'. The process was concerned directly with matters relating to the reputation and good name of the applicant. The report which resulted from the process was adopted on behalf of the government and published. It is inescapable that the findings and conclusions resulting from the process had the capacity to affect the applicant's reputation and good name whether favourably or adversely. He enjoys the right to a reputation and a good name. That right is constitutionally protected. I am satisfied that since the process undertaken directly concerned matters relating to the applicant's reputation and good name, its findings and outcome affected his constitutionally protected right to his reputation and good name. Accordingly, he had a legitimate, fundamental significant interest in the process and is entitled to seek the relief which he has sought in these proceedings."<sup>27</sup>*

32. It is notable that, in its letter dated 28 July 2010 to the Department, the office of the Ombudsman confirmed that "[i]n most instances the Ombudsman does provide the public body concerned with a copy of the entirety of the draft investigation report (though without draft recommendations)".<sup>28</sup> Moreover, it was acknowledged that "[t]his has the advantage of satisfying the section 6(6) requirement as well as offering an opportunity to have the facts of the

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<sup>26</sup> [2005] 3 IR 494.

<sup>27</sup> Emphasis added.

<sup>28</sup> Emphasis added.

*particular case agreed with the body concerned*".<sup>29</sup> It was also noted that "[i]t also assists the Ombudsman to make recommendations which flow logically from the report and which are proportionate having regard to the maladministration and adverse effect where this is established in the particular case."<sup>30</sup> It is a matter of deep concern to the Department that the Ombudsman has hitherto been willing to forego the significant – and conceded – benefits of complying with statutory and constitutional obligations in respect of fair procedures in order to publish a report according to a particular timeframe, irrespective of whether the report is well founded, irrespective of whether the report and investigative process violate fundamental rights protected by statute and the Constitution and irrespective of whether it is in excess of her jurisdiction to do so.

33. It is imperative that the Ombudsman fully appreciates the nature and significance of the fundamental rights protected by the Constitution which are affected by her investigation and draft report. It is incumbent upon the Ombudsman, as a body established by statute, to act in accordance with her statutory and constitutional obligations. Moreover, it is very difficult to understand what interest the Ombudsman is purporting to serve by acting otherwise than in accordance with those obligations. The Ombudsman asserts that the parts of the draft report which she has refused to furnish to the Department are not adverse to or critical of the Department. Notwithstanding that confirmation, the parts of the excluded text which are indicated in the draft extracts already furnished and the manner in which the Ombudsman has purported to comply with her obligations regarding fair procedures to date (including the failure of the Ombudsman even to furnish extracts from the draft report until the Department insisted on being furnished with the draft report and not merely the wholly inadequate summary initially furnished) give rise to understandable concern on the part of the Department in respect of the parts of the draft report which the Ombudsman has refused to furnish. In any event, the headings and indications of the excluded text in the extracts from the draft report furnished suggest views of various issues on the part of the Ombudsman which are fundamental to the entirety of the report and which are wholly at variance with the views of the Department in relation

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<sup>29</sup> Emphasis added.

<sup>30</sup> Emphasis added.

to those issues. Moreover, as indicated above, consideration of the excluded parts is essential in order to have a complete understanding of those parts of the report which do contain express findings and/or criticisms adverse to the interests and rights of those persons and bodies. In particular, they are essential to provide the context in which those findings and/or criticisms are to be assessed and, thus, to afford an adequate opportunity to the Department to respond to them.

34. The manner in which the Ombudsman has acted to date begs a profound question as to why the Ombudsman persists in refusing to disclose the complete draft report to the Department. The Ombudsman asserts in the extracts from the draft report furnished that the “*primary objective*” of the report is “*to encourage some serious thinking on whether our current governmental arrangements are, in fact, as healthy and resilient as they might be*”. If that truly is the case, why is the Ombudsman so steadfastly opposed to having a genuine engagement with the body and its personnel who are the subject matter of the report? Is it because the analysis / findings / comments / criticisms in the sections of the draft report which the Ombudsman refuses to disclose to the Department are so weak and insubstantial that their disclosure to the Department prior to publication might enable them to be exposed as fundamentally flawed in various respects, thereby undermining the core legal thesis of the Ombudsman and basis for the report? Is it because the Ombudsman is, in fact, more concerned about publishing the current draft report – with all its unfair, misplaced and damaging findings, innuendo and criticisms – than promoting the “*serious thinking*” in relation to the subject matter thereof which might actually emerge if the Ombudsman complied with her legal obligations and genuinely engaged with the Department and its personnel? Is it because the Ombudsman does not actually care whether her report is accurate and contains fundamentally wrong statements such as the statement that the “*HSE, acting apparently in consultation with the Department, proposes to confine the benefits of the NHSS to those who fall within the age group served by its Older Person Services and, accordingly, to exclude from the Scheme all persons under the age of 65 years*”? Is it because, far from seeking to encourage discussion and “*prompt some genuine questioning*”, the Ombudsman is intent on pursuing a particular agenda and is seeking to stifle discussion and analysis which is at variance with that agenda?

35. It is obvious from the extracts of the draft report furnished to the Department that the concerns indicated above are far from fanciful. The fundamental plank upon which the extracts of the draft report furnished to the Department rest is the Ombudsman's thesis about what the Ombudsman considers to be "*the key legal issue*", namely, "*whether people have an enforceable legal right to be provided by the HSE with nursing home care*". Although the Ombudsman disclaims any "*superior understanding of the law*", it is obvious from the extracts from the draft report furnished that the Ombudsman has, in fact, purported to assume a supra-judicial role, which involves, *inter alia*:
- (i) summarily reviewing and purporting to analyse the factual and legal issues in proceedings which are pending before the Courts but without the inconvenience of lawyers or the "*somewhat arcane rules of behaviour which apply in court*";
  - (ii) determining that a particular issue is the "*key legal issue*" in those proceedings, regardless of whether it in fact is so and regardless of the nature, extent or significance of the other legal issues which emerge from the pleadings in those proceedings;
  - (iii) determining that State agencies have decided to ignore the law by adopting a "*convoluted interpretation [of the law] over the simple interpretation on the grounds that the simple approach is the more expensive one*";
  - (iv) relying upon complaints which, it is conceded, were not investigated by the Ombudsman and found to be accurate;
  - (v) relying upon complaints which have not been notified or brought to the attention of the Department during the course of the investigation and which it has not had an opportunity to examine or to comment upon;
  - (vi) relying upon one complaint as "the centrepiece" of a chapter of the report notwithstanding that litigation in respect of that complaint is currently before the High Court, this being in clear breach, *inter alia*, of Section 5(1)(a) of the Ombudsman's Act 1980.
  - (vii) purporting to adjudicate on the merit of the *perceived* position of State Defendants in respect of, *inter alia*, the issue which the Ombudsman considers is the "*key issue*" in the proceedings;
  - (viii) purporting to articulate, and adjudicate upon the merit of, the defences of the State Defendants in those proceedings;



- (ix) purporting to determine whether the State Defendants should be defending the proceedings at all and criticizing them, (directly, indirectly and by innuendo) for doing so, notwithstanding their clear entitlement to do so and the pronouncements of the Supreme Court in this context;<sup>31</sup>
- (x) purporting to investigate “*the manner in which this litigation is being handled by the State agencies*” despite having confirmed to the Department that “*the Ombudsman is not investigating the conduct of the litigation*”;
- (xi) purporting to direct the manner in which the State should be defending particular proceedings (including, but not limited to, “*adopt[ing] a neutral approach*” to the litigation, “*waiving legal privilege*” and “*agreeing to voluntary discovery of documents*”);
- (xii) purporting to determine whether the plaintiffs in those proceedings are entitled to succeed in their respective claims; and
- (xiii) ultimately concluding *in the absence of any evidential foundation whatever* that the relevant State agencies, their servants and agents are not acting in the public interest, are not *bona fide* defending actions against the State and/or are abusing the process of the Courts.

36. The current approach of the Ombudsman involves doing all of the above regardless of, *inter alia*, jurisdictional limitations and without furnishing to the State agencies affected the entirety of the draft report which purports to substantiate the Ombudsman’s position, including those parts of the report which purport to support the core legal thesis of the Ombudsman upon which the overwhelming bulk of the draft report is based. Thus, as noted above, the Ombudsman has refused to provide: (i) a section in chapter 5 which contains an analysis of the relevant provisions of the Health Act, 1970 and follows the

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<sup>31</sup> See, e.g., *per* Hardiman J. in Sinnott v. Minister for Education [2001] 2 IR 545. Hardiman J. stated that, insofar as the judgment of the High Court could be read as critical of the decision on the part of the State Defendants to appeal, he demurred. Hardiman J. stated that, where an appellate jurisdiction exists “*it is the right of every party, the State itself no less than the humblest citizen to invoke it*”. Hardiman J. added that “[*it is also inappropriate in any case to embarrass or criticize a party for having exercised his right of appeal*”. In that regard, Hardiman J. noted that there had been “*public comment of this sort in connection with the present case*”. These observations apply *a fortiori* when the comments / criticisms are made by a statutory body which is acting in excess of the jurisdiction which the Oireachtas conferred upon it.

(misplaced) criticism of the allegedly “*convoluted*” legal interpretation of the Department; (ii) a further section, under the same heading, which appears after the (misplaced) assertion of the Ombudsman that the allocation of resources Defence “*does not in fact apply*”; and (iii) a section under the heading “*Analysis of judgments handed down by the Courts regarding provisions of the Health Act 1970*”. Of course, if it ultimately transpires that these parts of the draft report of the Ombudsman are misplaced and that the plaintiffs in the proceedings against the State Defendants are not entitled to the reliefs sought, the core thesis of the Ombudsman and the fundamental basis for her report are fatally undermined. Is it for these reasons also and because of the agenda the Ombudsman apparently wishes to pursue that, apart from breaching the statutory and constitutional rights of the persons and bodies concerned, the Ombudsman is so implacably opposed to providing them with “*an opportunity to provide a critique on the entirety of the Ombudsman’s report in advance of the report being finalised*”?

37. On any analysis of the extracts of the draft report hitherto furnished to the Department, it is obvious that the Department is entitled as a matter of law – including as a matter of *constitutional law* – to receive, consider and make representations in relation to the *entirety* of the draft report of the Ombudsman and not simply certain extracts therefrom which the Ombudsman has selected. The approach hitherto adopted by the Ombudsman utterly fails “*have regard to the seriousness of the breach[es] of the [...] right to fair procedures and the [...] obligation to defend and vindicate the constitutional rights of the citizen*”.<sup>32</sup>
38. It is clear from the matters addressed above that the issues raised by the Department are of profound significance and are firmly rooted in well established principles of law in accordance with which the Ombudsman is required to act. There is no basis whatever for concluding that the position of the Department in this regard amounts to a failure to cooperate with the Ombudsman or for otherwise criticizing the Department for requesting the Ombudsman to act in accordance with her statutory and constitutional obligations. In this context, it is also appropriate to address the position adopted by the Ombudsman in respect of documentation which is the subject

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<sup>32</sup> See Haughey v. Moriarty *supra*.

of Legal Professional Privilege and, in particular, her fundamentally misplaced findings adverse to the Department on the basis that it did not furnish such documentation to her and/or challenged her jurisdiction to require the documentation. Certain basic legal propositions merit emphasis in this regard.

39. First and foremost, the 1980 Act confers no jurisdiction whatever on the Ombudsman to seek to negative a person's rights in respect of documents which are the subject of legal professional privilege and/or to seek to coerce and/or embarrass a person into waiving or abandoning those rights. It is perfectly clear from the provisions of the 1980 Act that the Oireachtas did not confer any such jurisdiction on the Ombudsman. On the contrary, the Legislature expressly safeguarded the rights of a person, like the Department, to whom a requirement to furnish documentation under section 7 of the Act is addressed: pursuant to section 7(2), such a person is "*entitled to the same immunities and privileges as if he were a witness before the High Court*". Legal professional privilege is one of the privileges which a witness before the High Court is entitled to invoke. It is obvious, therefore, that the Department was (and is) entitled to invoke that privilege in respect of documents which are legally privileged and that it enjoys the full panoply of rights which a witness before the High Court enjoys in that regard. It is equally clear that there is no basis whatever for criticizing the Department for invoking that privilege and exercising such rights.
40. In this context, the judgment of the Divisional High Court in Ahern v. Mahon<sup>33</sup> merits emphasis. In that case, the Mahon Tribunal argued that a tribunal of inquiry under the Tribunals of Inquiry (Evidence) Act, 1921 involved a wholly different process – conceptually, legally and practically – from that of a legal action and, accordingly, the plaintiff was not entitled to invoke litigation privilege. The argument was emphatically rejected by the Divisional High Court which upheld the plaintiff's claims that certain documents were the subject of legal professional privilege and granted orders quashing the determinations of the tribunal which disallowed those claims and required production of the documents. In upholding the plaintiff's claims, the Court had regard to, *inter alia*, section 1(3) of the Tribunals of Inquiry (Evidence) Act

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<sup>33</sup> Unreported, Divisional High Court, 8 May 2008.

1921 which is in almost identical terms to section 7(2) of the 1980 Act. It provides that “[a] witness before any such Tribunal shall be entitled to the same immunities and privileges as if he were a witness before the High Court or the Court of Session.” The Court also had regard to the following analysis in a ruling by the Chairman of the Moriarty Tribunal:

*“48. It has never been doubted by the courts in this jurisdiction that persons before Tribunals of Inquiry are entitled to invoke Legal Professional Privilege on the same basis as parties to proceedings before the High Court.”*

*“53. Having regard to all of the foregoing considerations, the Tribunal is satisfied that it is clear, by virtue of s. 1 of the Tribunals of Inquiry (Evidence) Act 1921 that a party appearing before a Tribunal is entitled to the self same privileges (including Legal Professional Privilege) as a party to litigation before the High Court. Section 1(3) and 1(4), both individually and collectively, constitute ‘privilege preservation provisions’ as described by Passmore.”*

41. Having regard to the equivalence of the “*adjudicatory*” process of an investigation / report of the Ombudsman to legal proceedings, the potential gravity of findings of fact of the Ombudsman and the fundamental human rights (including Re Haughey rights) which at stake, it would clearly be anomalous if the protection of legal professional privilege could not be invoked in the context of such an investigation / report. In this regard, the following passage from the judgment of Hardiman J. in Maguire v. Ardagh<sup>34</sup> is instructive:

*“... in light of the grave consequences which I am satisfied a finding of responsibility in any degree for Mr. McCarthy’s death would carry, I believe that the proposed inquiry can fairly be described as an adjudicatory one. The decision of the Committee in this grave matter is more aptly described as an adjudication than by any comparison with artistic criticism. The Committee claims the right to say to the applicants, if it thinks fit, ‘You should not have shot him’. It says that the*

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<sup>34</sup> [2002] 1 IR 385.

evidence before it will establish 'how the man was shot and who shot him'; having done that 'the inquiry can make a finding of unlawful killing.....'.

...

To be brought by compulsory process before a committee claiming those powers, and to be on risk of that Parliamentary Committee making a 'finding of fact' that a particular person shot the deceased man and that such shooting was an unlawful killing in my view can only be regarded as a form of accountability. The decision after such process of accountability is fairly described as adjudicatory. To point out, as is in any event obvious, that the inquiry '.....cannot find a person guilty of a crime' does not in any way detract from these facts.

My conclusion in this regard is fortified by what I am satisfied is a sound analogy with the contentions made in *Re Haughey*.<sup>35</sup> There, Mr Haughey's claims to the procedural rights he considered necessary, including a right cross-examine, was resisted by the State on the ground that Mr Haughey was a witness only and that a witness in civil proceedings was not entitled to these rights. In dealing with this submission, this Court went behind the form and surface of Mr Haughey's status and considered the reality. Mr Haughey, they found, was a person against whom allegations were being made: indeed, his conduct was the very subject matter of the Committee's examination. Accordingly, he was more than a mere witness: the true analogy was not that of a witness but a party. This decision is undoubtedly both just and correct. Equally, the Garda applicants in this case are the persons whose 'conduct is the very subject matter of the Committee's examination and is to be the subject matter of the Committee's report'. We have already seen how grave and far reaching the terms of that report may be. It is impossible, in my view, to have adequate regard to the applicant's human rights without looking to the real, as opposed to the formal, nature of their position. Indeed, the sub-Committee itself in the documents circulated refer to 'parties and witnesses'. Formally,

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<sup>35</sup> [1971] IR 217, at 263.

there are no 'parties' but in real terms, and in human terms, that is exactly what these applicants are.<sup>36</sup>

42. Similarly, in Ahern v. Mahon, the Divisional High Court stated as follows:

*"Mr. Ahern is a person whose conduct is under examination by the Tribunal. As such, he is entitled to certain fundamental constitutional rights which were identified as far back as 37 years ago in the decision of the Supreme Court in In Re Haughey [1971] I.R. 217.*

*[...]*

*In the present case, Mr. Ahern's conduct is under examination by the committee and he may well feature in the report which the Tribunal will prepare. In such circumstances, Ó Dálaigh C.J. identified "the minimum protection which the State should afford" to Mr. Ahern as:-*

- (a) that he should be furnished with a copy of the evidence which reflected on his good name;*
- (b) that he should be allowed to cross examine, by counsel, his accuser or accusers;*
- (c) that he should be allowed to give rebutting evidence;*
- (d) that he should be permitted to address, again by counsel, the tribunal in his own defence."*

*All of these rights derive from the protection afforded by Article 40.3 of the Constitution to an individual. Those personal rights include the right to one's good name, the right to fair procedures and the right to natural and constitutional justice.*

*[...]*

*The adjudicatory function of a statutory inquiry and the necessity for legal protection in respect of persons who may be affected by such was asserted both in the decisions of this court and the Supreme Court in Maguire v. Ardagh [2002] 1 I.R. 385. The report of a tribunal has the potential to have serious and damaging effects for the persons called before it. That much is accepted by the Tribunal in this case, since it does not contest the entitlement of Mr. Ahern to the rights identified in In Re Haughey.*

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<sup>36</sup> [2002] 1 IR 385 at 671 – 672. (Emphasis added).

*It would, in my view, be anomalous and make little sense if a person to whom Re Haughey rights applies could not assert an entitlement to Litigation Privilege. A person appearing before a tribunal of inquiry and to whom Re Haughey rights apply is to be regarded as being in the same position as a party to High Court litigation and not a mere witness from the point of view of Legal Professional Privilege.*

*In Martin v. Legal Aid Board (Unreported, 23rd February 2007) Laffoy J. said:-*

*'Legal Professional Privilege is usually, but not invariably, in issue in the context of discovery in inter partes litigation, where disclosure to an adversary is at issue. However, it also arises in other contexts, for example, in an inquisitorial process such as a tribunal of inquiry, as happened in Miley v. Flood.'*

*In my view, Litigation Privilege extends to a witness before a tribunal of inquiry whose conduct is under examination and who, as a result, has acquired rights such as those identified in In Re Haughey. Mr. Ahern is such a person.*

*This view of the matter is largely formed by reference to the constitutional entitlements of such a person. But I believe that the view is also supported by reference to decisions from other jurisdictions which do not have constitutional entitlements such as we have in this State."*

43. The second basic proposition of law which merits emphasis is that legal professional privilege is a substantive (as distinct from merely a procedural) right and "a fundamental condition on which the administration of justice as a whole rests."<sup>37</sup> In Fyffes plc. v D.C.C. plc.,<sup>38</sup> the Supreme Court observed

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<sup>37</sup> Per Kelly J. in Miley v. Flood [2001] 2 IR 50. This statement was reiterated in Ochre Ridge Ltd. v. Cork Bonded Warehouses Ltd. Unreported, High Court (Lavan J.) 13 July 2004; and Martin v. Legal Aid Board Unreported, High Court, (Laffoy J.) 23 February 2007. See also Ahern v. Mahon Unreported, Divisional High Court, 8 May 2008 and Fyffes plc. v D.C.C. plc. [2005] 1 IR 59.

<sup>38</sup> [2005] 1 IR 59.

that “[t]he law [...] attaches significant value and accords a high degree of protection to the principle of legal professional privilege.” As Kelly J. noted in Miley v. Flood,<sup>39</sup> “[s]imilar conclusions as to the fundamental nature of legal professional privilege have been reached by courts of other jurisdictions”. For instance, in the Australian case of Carter v. Northmore Hale Davy & Leake,<sup>40</sup> McHugh J. stated as follows:

“Now that this Court [the High Court of Australia] has held that legal professional privilege is not a rule of evidence but a substantive rule of law, the best explanation of the doctrine is that it is ‘a practical guarantee of fundamental, constitutional or human rights’.<sup>41</sup> By protecting the confidentiality of communications between lawyer and client, the doctrine protects the rights and privacy of persons including corporations by ensuring unreserved freedom of communication with professional lawyers who can advise them of their rights under the law and, where necessary, take action on their behalf to defend or enforce those rights. The doctrine is a natural, if not necessary, corollary of the rule of law and a potent force for ensuring that the equal protection of the law is a reality.”

44. Thirdly, it is firmly established that there is no question of balancing competing interests to determine whether documents which are properly the subject of a claim of legal professional privilege can be produced. As the Supreme Court held in Fyffes, “[o]nce [the privilege] is found to exist, there is no judicial discretion to displace it”. Similarly, in R v. Derby Magistrates Court; Ex parte B,<sup>42</sup> Lord Nicholls stated as follows:

“... there is no escaping the conclusion that the prospect of a judicial balancing exercise in this field is illusory, a veritable will-o'-the-wisp. That in itself is a sufficient reason for not departing from the established

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<sup>39</sup> [2001] 2 IR 50.

<sup>40</sup> (1995) 183 CLR 121 at 161; 129 ALR 593.

<sup>41</sup> See AM & S Europe Ltd v Commission of European Communities [1983] QB 878 at 941; Solosky v R (1979) 105 DLR (3d) 745 at 760; R v Uljee [1982] 1 NZLR 561 at 569; Descoteaux v Mierzwinski [1982] 1 SCR 860 at 880; R v Littlechild (1979) 108 DLR (3d) 340 at 347; Geffen v Goodman Estate (1991) 81 DLR (4th) 211 at 232; Maurice (1986) 161 CLR at 490.

<sup>42</sup> [1996] 1 AC 487.



*law. Any development in the law needs a sounder base than this. This is of particular importance with legal professional privilege. Confidence in non-disclosure is essential if the privilege is to achieve its raison d'etre. If the boundary of the new incursion into the hitherto privileged area is not principled and clear, that confidence cannot exist.*"

45. *A fortiori*, a statutory body – whose powers are necessarily limited and circumscribed by the provisions of the legislation which establish it – has no power to displace the privilege.
  
46. The approach of the Ombudsman in respect of documents over which the Department has exercised its entitlement to invoke Legal Professional Privilege is fundamentally at variance with the well established legal principles outlined above. It is equally clear that the proposed adverse findings and criticisms of the Department for having refused to furnish documents to the Ombudsman which are the subject of Legal Professional Privilege are profoundly misplaced. Extraordinarily, those findings include findings of refusals to cooperate with the Ombudsman and breaches of statutory duty in respect of the provision of documentation to the Ombudsman. Moreover, the Ombudsman even appears to have concluded that the position of the Department in this regard and in respect of its jurisdictional challenge were part of a stratagem on the part of the Department and its officials to frustrate her investigation. The Ombudsman states that she *“does not accept that the Department’s [jurisdictional] challenge arises from a genuinely held belief that this particular investigation is being conducted without proper jurisdiction.”* Furthermore, the Ombudsman concludes that *“the challenge and the related failure to cooperate with the investigation constitute a failure to comply with the requirements of section 7 of the Ombudsman Act, 1980”*. Like so many other findings in the extracts from the draft report furnished to the Department, these are truly astonishing findings which have no substance in law or in fact. As the Department observed in its letter dated 18 August 2010 to the Ombudsman:

*“... I confirm that the Department has all times confirmed and reiterated its willingness to co-operate with the Ombudsman in her carrying out of this investigation. This was clearly stated at the preliminary meeting*

*held on 9 July 2009 and in subsequent correspondence from the Department to the Ombudsman.*

*However that co-operation can only extend to an investigation that is being conducted by the Ombudsman which is within the powers and jurisdiction conferred on her by the Oireachtas. She cannot expect to be provided with documentation and information for which she has no legal authority to seek. The Department's assertion of well established rights to legal privilege and confidentiality over certain documentation and information is not a matter which the Ombudsman can or should criticise. To construe the Department's entitlement to rely upon its legal rights in the face of demands from the Ombudsman which are outside her powers and jurisdiction as a lack of co-operation is injudicious, unfair and unjust."*

47. The fundamentally misplaced nature of the findings and criticisms addressed above further reinforces the importance of the request of the Department for a complete copy of the draft report of the Ombudsman and for sufficient time to respond thereto.

### **III CONCLUSION**

48. The Department respectfully requests the Ombudsman not to compound the breaches of rights which have already occurred, to furnish a complete copy of the draft report to the Department by **close of business today** and to afford sufficient time thereafter for the Department to respond and engage in a meaningful way in relation to the extremely serious findings, allegations and criticisms which it obviously contains. The fundamental importance of doing so is brought into very sharp focus when considered in the light of the matters addressed above, including the fundamental rights at issue, the status of the report ultimately published, the privilege that report will enjoy and the permanent and irreparable damage to the good name and reputation of many citizens which will otherwise be caused.

**20 August 2010**

**The Department of Health and Children**