

29th September 2010

Mr. Pat Whelan
Director General
Office of the Ombudsman
18 Lower Leeson Street
Dublin 2

Re: Ombudsman Investigation – provision of in-patient services (section 52 of the Health Act, 1970)

Dear Mr. Whelan,

I refer to your letter dated 17 September 2010 and the document enclosed therewith which I received on 20 September 2010. I also refer to the letter dated 17 September 2010 from the Ombudsman to the Minister for Health and Children which was received by the office of the Minister on 20 September 2010.

It is a matter of profound concern that, despite the extensive representations to date of the Department (including the detailed representations of 20 August 2010 and 23 August 2010), the Ombudsman refuses to acknowledge any of the breaches of her statutory and constitutional obligations to afford fair procedures and, on the contrary, as appears from the said letters, *“the Ombudsman takes the view that the requirements of fair procedures have been met fully”* and *“that those portions of the draft report which have not been provided are not covered by the fair procedure requirement”*. That the Ombudsman persists in her views in that regard notwithstanding the representations made by the Department strongly reinforces the view of the Department that the Ombudsman has a seriously erroneous understanding of the statutory and constitutional requirements of fair procedures. It also raises very serious questions about the extent to which the Ombudsman actually has regard to the representations of the Department. In this context, it is also very disturbing to note that the Ombudsman does not accept any of the representations of the Department in relation to her jurisdiction or prejudgment / objective bias.

The concerns of the Department are strongly reinforced by the contents of the document that you forwarded under cover of your letter dated 17 September 2010. That document contains extracts from the draft report of the Ombudsman which the Ombudsman previously refused to furnish to the Department despite its repeated requests to be provided with a complete copy of the draft report. It is absolutely clear from the contents of the document that the extracts from the draft report which the Ombudsman previously refused to furnish should have been furnished to the Department from the outset in accordance with the statutory and constitutional requirements of fair procedures.

As you are aware, under cover of a letter dated 24 June 2010, the Ombudsman initially only furnished the Department 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. In addressing that summary document in its representations on 20 August 2010, the Department observed as follows:

“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.”

The foregoing observations apply with equal force to the extracts from the draft report which were withheld from the Department and which the Ombudsman only furnished under cover of your letter of 17 September 2010. In particular, it is clear from those extracts that, as with the initial summary, it was essential that the Department did *not* accept the initial extracts from the draft report furnished by the Ombudsman 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. This is brought into very sharp focus when the additional extracts are considered in the light of previous assurances which the Ombudsman provided in respect thereof. In your letter of 19 July 2010, you stated that you were furnishing “*the sections of the draft report which might be taken to be critical of or directly bearing on the interests of the Department of Health and Children*”. The clear implication of the foregoing was that *all* sections of the draft report which *might* be taken to be critical of, or directly bearing on the interests of, the Department of Health and Children, were being furnished to the Department under cover of your letter. In response to further correspondence requesting a full copy of the draft report, you confirmed as follows in your letter of 6 August 2010:

“The Ombudsman accepts fully that the requirements of fair procedure apply in relation to the proposed report and that any person whose interests may be affected adversely by the content of the report is entitled to make representations in relation to any proposed adverse comment or findings. All of the content of the draft report which might be regarded as adverse to the interests of the Department has been provided. The Department, therefore, has before it all of the material necessary to enable it represent its position in relation to those aspects of the proposed report which might be perceived as adverse to its interests.” (emphasis added).

In the light of the foregoing and so that the Department could be entirely clear on the issue, I subsequently requested you *“formally [to] confirm that there is nothing in the redacted contents which is critical or adverse to the Department’s interests.”* In your replying letter dated 13 August 2010, you provided that confirmation in the following terms:

“As regards the material from the draft report which has not been provided to the Department, I have already stated (in my letter of 6 August 2010) that it does not constitute ‘material which might be regarded as affecting adversely the interests of the Department.’” (emphasis added).

The contents of the previously withheld extracts from the draft report which you furnished under cover of your letter of 17 September 2010 make it clear that the foregoing confirmation was entirely misleading and without substance. In this context, I note, for example, the following:

- (i) In chapter 1 of the previously withheld extracts, the Ombudsman makes a number of adverse findings in relation to the operation of subvention under the Health (Nursing Homes) Act 1990 and by making reference to the scheme thereby seeks to denigrate the view of the Minister and the Department’s views in respect of the Nursing Home Support Scheme;
- (ii) In Chapter 5 of the previously withheld extracts, the Ombudsman asserts (incorrectly) that *“[t]he Department, itself responsible for the drafting of the legislation, promotes the view of the Health Act, 1970 is so unclear as to result in significant doubt as to what in fact is required to be provided by law”* . The Ombudsman engages in an analysis of what she contends to be the Department’s interpretation of section 52 and what she asserts to be the correct interpretation of that provision and (wrongly) concludes that the Department’s interpretation (as she contends it to be) *“is plausible only where one accepts that the plain language of section 52 [...] should be set aside in favour of an interpretation based on a different and less usual understanding of the meaning of the words of that section”* . The Ombudsman further concludes (again wrongly) that *“there would not seem to be any support for the Department’s interpretation of section 52 which depends upon a reading of the words of the section which is at odds with their ordinary meaning.”*

- (iii) In chapter 7 of the previously withheld extracts, the Ombudsman addresses the Nursing Home Support Scheme Act, 2009, including the position of the Department in respect thereof. Having referred to the "*time and very significant effort*" expended by the Department in the preparation of the legislation, the Ombudsman states that "*it is most unfortunate that the final product does not achieve that level of clarity and certainty which would be to everyone's benefit.*" The Ombudsman also asserts that the legislation "*fails to meet any reasonable test of being comprehensible to the ordinary person*" and that it was drafted "*with no apparent regard for the [Law Reform] Commission's recommendations*".
- (iv) Throughout the previously withheld extracts, the Ombudsman makes statements, assertions and purported findings on matters in respect of which the Department was clearly entitled to make representations at the time that the Department was making representations in relation to the extracts furnished in July 2010.

As indicated above, on two separate occasions, the Ombudsman provided confirmation in writing to the Department that the material she was refusing to provide to the Department "*does not constitute material which might be regarded as affecting adversely the interests of the Department*". That withheld material included the statements noted above.

In the absence of that material and, in circumstances where the Ombudsman steadfastly refused to extend the time period specified by her for making representations, the Department made preliminary representations and substantive representations to the Ombudsman within the time specified by the Ombudsman. If the Department had been furnished with the additional extracts from the draft report prior to the deadline specified by the Ombudsman for delivery of representations, (instead of three and a half weeks thereafter), the Department would, of course, have made representations in relation to, *inter alia*, the numerous statements, assertions and purported findings therein which are or might be regarded as adversely affecting the interests of the Department. The fundamentally misconceived and unlawful approach which the Ombudsman has adopted in respect of the conduct of her investigation prevented the Department from doing so.

Moreover, the acts and omissions of the Ombudsman placed the Department in the invidious position of having to make representations in respect of certain extracts from her report without having sight of other extracts which are manifestly relevant to an assessment of the extracts furnished, including the context in which those extracts and the statements, assertions and purported findings therein must be considered.

It is also impossible, at this stage, to overlook the remarkable statement in your letter that the extracts now furnished are only provided "*to avoid any prolongation of this dispute and to remove the basis for any claim of unfair procedure*". It is clear, therefore, that the Ombudsman did *not* decide to furnish the additional extracts from the draft report because of the requirements of fair procedures or the manifestly well founded representations of the Department in that regard. Indeed, this is further reinforced by the earlier statements in your letter and the letter from the Ombudsman

which were noted above; you and the Ombudsman confirm that the Ombudsman considers that “*the requirements of fair procedures have been met fully*” and “*that those portions of the draft report which have not been provided are not covered by the fair procedure requirement*”.

Moreover, far from providing the additional extracts from the draft report on the basis of her statutory and constitutional obligations to afford fair procedures, the decision to provide them was made to avoid any prolongation of the dispute and “*to remove the basis for any claim of unfair procedure*”.

It is also very disturbing that, despite the detailed representations made by the Department, the Ombudsman apparently considers that its representations regarding fair procedures related exclusively to her refusal to furnish a complete copy of her draft report and that all of her failures to afford fair procedures are somehow cured by the provision, at this stage, of certain additional extracts from the draft report which she previously refused to furnish to the Department.

Furthermore, even if the only breach of the requirements of fair procedures on the part of the Ombudsman related to her refusal to provide a complete copy of her draft report (which is not the case, as is plain from the previous representations of the Department), the Ombudsman continues to act in breach of those requirements because, even to this date, the Ombudsman has not furnished a complete copy of her draft report. The Department has repeatedly sought the full draft report of the Ombudsman in accordance with its statutory and constitutional entitlements. The document furnished with your letter of 17 September 2010 was not the full draft report but, instead, a document that purports to contain “*those portions of the draft report not provided hitherto.*” In view of the nature and extent of the breaches by the Ombudsman of basic rights to date, it is, extremely disturbing that, instead of furnishing a complete copy of her current draft of the report to the Department, the Ombudsman has instead purported to create a document containing extracts of the draft report withheld from the Department when other extracts from the draft report were furnished on 19 July 2010.

Apart from the obvious and entirely avoidable difficulties that presents in seeking to read the draft report as one full document, this approach has resulted in the Ombudsman providing further extracts from the draft report but *not* the entirety of the draft report. For instance, the footnotes to chapter 5 have not been furnished to the Department. Moreover, it is clear that certain text containing footnotes (e.g., the text containing footnotes 1 – 8) has not been furnished to the Department. Furthermore, it also appears that some sections of the first set of extracts have been revised. However, it is not apparent whether all of the revised sections of the draft report have been furnished to the Department. In these circumstances and, particularly in view of the gravity of the breaches by the Ombudsman of the rights of the Department and its officials to date, it is clearly essential that the Ombudsman furnishes one composite document containing the full current draft report of the Ombudsman. Please do so **by return.**

It is also very disturbing that, according to the said letters of 17 September 2010, “[t]he Ombudsman is now proceeding with the finalisation of the report” without having afforded the Department any opportunity to make representations in relation to

the contents of the extracts from her draft report which were only furnished under cover of that letter. These statements in your letter and the letter from the Ombudsman provide further evidence of the fact that the Ombudsman has a fundamentally erroneous understanding of the statutory and constitutional requirements of fair procedures. It is very difficult to understand the value of being furnished with the extracts from the draft report which the Ombudsman previously refused to furnish if the Ombudsman is not proposing to afford an adequate opportunity to the Department to make representations in respect thereof. Please confirm **by return** that, contrary to what is stated in your letter of 17 September 2010, the Ombudsman will not proceed to finalise her report before receiving and considering the additional representations which the Department wishes to make. In addition, please furnish **by return** details of all of the complaints upon which the Ombudsman is proposing to rely in her report.

For the avoidance of doubt, the Department continues to reserve all of its rights and the rights of its officials.

I await hearing from you.

Yours sincerely

Noel Usher
Director
Office for Older People

Our Ref: SPI/09/0001
13 October 2010

Mr. Noel Usher
Director
Office for Older People
Department of Health and Children
Hawkins House
Dublin 2

Dear Mr. Usher,

Ombudsman Investigation - provision of in-patient services
(Section 52 Health Act 1970)

I refer to your letter of 29 September 2010.

The Ombudsman does not accept the charges you have made regarding failure to abide by fair procedure and regarding the conduct of this investigation more generally. The Ombudsman notes that your Minister, purporting to speak on behalf of the Government, made similar charges in her letter to the Ombudsman dated 10 September 2010. In these circumstances, the Ombudsman is proceeding to finalise her report and prepare to lay it before the Dáil and Seanad.

Pending the laying of the report before the Dáil and Seanad, there appears to be no advantage in continuing with this exchange of correspondence.

Yours sincerely,



Pat Whelan
Director General



**Department of
Health & Children**
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22 October 2010

Mr. Pat Whelan
Director General
Office of the Ombudsman
18 Lower Leeson Street
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ACKNOWLEDGED
28 OCT 2010
Office of the Ombudsman

Ombudsman and
Information Commissioner

27 OCT 2010

Received

Re: Ombudsman Investigation – provision of in-patient services (section 52 of the Health Act, 1970)

Dear Mr. Whelan,

I refer to your letter dated 13 October 2010, my letter dated 29 September 2010 and previous correspondence in relation to this matter.

I note that the Ombudsman does not accept any of the representations made by the Department in relation to the failures of the Ombudsman to afford fair procedures. I also note that the Ombudsman rejects the representations made by the Minister in that regard. In this context please note that the Minister was not “*purporting*” to speak on behalf of the Government as you assert. The representations of the Minister were made with the authority and on behalf of the Government. Please also note that my letter of 29 September 2010 was not simply a reiteration of representations previously made but addressed further very significant instances of the ongoing failure / refusal on the part of the Ombudsman to comply with her statutory and constitutional obligations and her ongoing breaches of fundamental rights of the Department and its officials.

I also note from your letter of 13 October 2010 that, notwithstanding all of the representations previously made (including the representations in my letter of 29 September 2010), the Ombudsman is proceeding to finalise her report and to prepare to lay it before the Dáil and Seanad. I also note that the Ombudsman refuses to furnish the full current draft of her report to the Department, that the Ombudsman refuses to afford the Department an opportunity to make representations in respect thereof and that the Ombudsman refuses to afford the Department an opportunity to make representations in respect of the additional extracts from the draft report furnished under cover of your letter dated 17 September 2010. I also note that the Ombudsman refuses to furnish details of all of the complaints upon which the Ombudsman is proposing to rely in her report.

The approach which the Ombudsman has persisted in adopting, despite the representations made, is, to say the very least, extremely disappointing and without precedent. For the avoidance of doubt, I reiterate the representations previously made and I continue to reserve all of the rights of the Department and its officials. As indicated previously, the failures / refusal of the Ombudsman to act within jurisdiction

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and to respect basic statutory and constitutional rights to fair procedures and natural and constitutional justice have obvious implications for the legality of her investigation and any report resulting therefrom.

The approach taken by the Ombudsman is all the more surprising when it appears that the Ombudsman intends to make recommendations in her report. However, no recommendations whatever have been furnished to the Department, whether by way of the wholly inadequate general summary furnished to the Department on 24 June 2010, or with the first set of extracts furnished on 19 July 2010, or with the redacted extracts furnished on 17 September 2010.

The redacted extracts furnished with your letter of 17 September 2010 contain the following statement:

*“Chapter 9
[Draft chapter previously released in full but for any recommendations the Ombudsman may choose to make.]”*

The foregoing suggests that, when those redacted extracts were furnished to the Department, the Ombudsman had not yet drafted her recommendations or that, if drafted, her intention was that she was not going to make them available to the Department. It is, again to say the very least, astonishing – particularly having regard to the extensive representations previously made by the Department – that the Ombudsman is refusing to furnish her recommendations to the Department and that the Ombudsman is denying the Department any opportunity to make representations in respect thereof. The fundamentally misplaced position of the Ombudsman in this regard is clearly contrary to, *inter alia*, the assurance provided in your letter of 17 September 2010:

“... the Ombudsman has now decided to provide the Department with a copy of those portions of the draft report not provided hitherto. Attached you will find the text of those portions of the draft report not released previously.”

It also involves yet another extremely serious breach by the Ombudsman of her constitutional obligation to afford fair procedures and her statutory obligations under section 6(2) of the Ombudsman Act, 1980. As noted previously, section 6(2) provides that “[i]n any case where the Ombudsman conducts an investigation under this Act, he shall send a statement in writing of the results of the investigation to –

- (a) *the Department of State or other person specified in Part I of the First Schedule to this Act, concerned,*
- (b) *the Department of State in which are comprised the business and functions of, or which performs functions in relation to, any person (other than a Department of State) specified in the said Part I to whom a statement is sent under paragraph (a) of this subsection...”*

It is manifest that the obligation to furnish the results of the investigation includes an obligation to furnish the recommendations which the Ombudsman proposes to make as a result of that investigation. Moreover, as section 6(2) applies to “any case where the Ombudsman conducts an investigation”, it is equally clear that the duties it

imposes are applicable to all investigations of the Ombudsman, including "*own initiative*" investigations.

In your letters of 19 and 28 July 2010, it is acknowledged and accepted that the provisions of section 6(6) of the Ombudsman Act 1980 and fair procedures apply to this investigation. As indicated in the Department's letter of 5 August 2010, the obligation under section 6(6) and the obligation to comply with fair procedures in this case are underscored by the provisions of section 6(8) which provides that the Ombudsman's report is absolutely privileged. This naturally presupposes that the highest levels of procedural fairness will be adhered to by the Ombudsman in the conduct of her investigation and the preparation of her report.

The Department is firmly of the view that the Ombudsman has, in the course of this investigation and the preparation of her report failed to comply with the obligations placed upon her by statute and the requirements of fair procedures.

Yours sincerely,



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Noel Usher
Director
Office for Older People