Our Ref: SPI/09/0001

30 July 2009

Mr. Michael Scanlan,
Secretary General,
Department of Health and Children,
Hawkins House,
Dublin 2.

Dear Mr. Scanlan,

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

The Ombudsman has recently decided to undertake an investigation under section 4 of the Ombudsman Act 1980 into the provision of in-patient services under section 52 of the Health Act 1970. This will be a wide-ranging investigation which looks at the actions of the Department of Health and Children, of the Health Service Executive, and of some of the non-HSE public hospitals in providing for patients who are found to require in-patient services on a long-term basis. This investigation is an "own initiative" investigation by the Ombudsman; though it is relevant to explain that it has been prompted by a persistent stream of complaints to the Ombudsman in recent years in which it is alleged that the HSE (including its predecessor health boards), and/or a public hospital acting on behalf of the HSE, failed to provide in-patient services to a person in need of such services on a long-term basis. The Ombudsman is satisfied from her preliminary examination of these individual complaints that the persons concerned have been adversely affected and that the actions complained of may have been taken on the basis of one or more of the grounds identified at section 4(2)(b) of the Ombudsman Act 1980 (copy of provision attached).

The investigation will cover the period since 2001 when the then Ombudsman, Kevin Murphy, made a related report (Nursing Home Subventions) to the Oireachtas. Amongst the issues likely to be dealt with in the course of the investigation are:

- the extent of the entitlement provided for at section 52 of the Health Act 1970;
- the extent to which the HSE (including public hospitals acting on its behalf) has been meeting this entitlement;
- various practices of the HSE (including those of public hospitals acting on its behalf) in situations where patients have not been provided with in-patient services and have, in consequence, had to avail of private nursing home care;
- the actions of the Department of Health and Children in seeking to resolve any lack of clarity regarding the intention of the legislature in enacting section 52 of the Health Act.
1970;

- the actions of the Department of Health and Children and/or of the HSE in response to legal proceedings initiated by or on behalf of patients seeking to vindicate their entitlements under section 52 of the Health Act 1970.

At this stage, the Ombudsman expects that her investigation will culminate in a report by her to the Oireachtas in accordance with section 6(7) of the Ombudsman Act 1980.

Investigation Process

The Ombudsman is most anxious that this investigation will be conducted efficiently, speedily and with the fullest cooperation of the parties involved. For the purposes of the investigation, the Ombudsman will require access to a wide range of records held by your Department; in addition, she will seek written responses from the Department on a number of matters. It may also be necessary to conduct formal, on-the-record interviews with senior people within the Department. In the event that the investigation is likely to result in any "finding or criticism adverse" to the Department the Ombudsman will, as required by section 6(6) of the Ombudsman Act 1980, provide the Department with "an opportunity to consider the finding or criticism and to make representations in relation to it to [her]."

In order to ensure that the investigation proceeds as efficiently as possible, I would be very grateful if you would nominate a senior person in the Department to liaise with this Office. The person nominated should, preferably, be familiar with the issues arising and should have the authority to speak on behalf of the Department or, in the alternative, to ensure that the position of the Department can be ascertained speedily and authoritatively. We would also see this nominated person being of considerable help in identifying and accessing Departmental files which will be relevant to the investigation.

Other than the nomination of a senior person to assist with the investigation, we are not at this stage seeking any specific response from the Department; though the Department is welcome, if it chooses, to make any written submission it wishes and/or to provide any documentation it believes relevant to the investigation. I expect that within the next two weeks we will, in any event, be putting a series of written queries to the Department as well as identifying specific records and types of records to which we will require access.

This investigation is being managed in this Office by Fintan Butler, Senior Investigator (Tel. 6395650 and email <fintan_butler@ombudsman.gov.ie>). I would be grateful if the Department's nominated senior person would make direct contact with Fintan Butler as speedily as possible both to deal with any queries the Department may have and to agree working arrangements for the conduct of the investigation.

Yours sincerely,

Pat Whelan
Director General

[Signature]

[Stamp: 20/2004/1111]

[Stamp: CMM]

[Stamp: 31/07/07]
21st August 2009

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 Health Act 1970)

Dear Mr Whelan,

I refer to your letter of 30 July 2009 re the above matter.

I note that the Ombudsman has decided to undertake an investigation under Section 4 of the Ombudsman Act 1980 into the provision of in-patient services under section 52 of the Health Act 1970. It is understood that the investigation will look at the actions of the Department, the HSE and some non-HSE public hospitals in providing for patients who are found to require in-patient services on a long term basis.

It is also understood that the investigation, an “own initiative” investigation, has been prompted by what the Ombudsman sees as a persistent stream of complaints to the Ombudsman in recent years in which it is alleged that the HSE and institutions acting on behalf of the HSE failed to provide in-patient services to persons in need of such services. I note that the Ombudsman is satisfied that from her examination of these complaints the persons concerned have been adversely affected and that the actions complained of may have been taken on the basis of one or more of the grounds identified at section 4 (2)(b) of the 1980 Act. It is further noted that the Ombudsman has identified certain issues which are likely to be dealt with during the course of the investigation including:

- The extent of the entitlement provided for at section 52 of the Health Act 1970;
- The extent to which the HSE (including public hospitals acting on its behalf) has been meeting this entitlement;
- The actions of the Department of Health and Children and/or the HSE in response to legal proceedings initiated by or on behalf of patients seeking to vindicate their entitlements under section 52 of the Health Act 1970.

I confirm that the Department will of course assist the Ombudsman in the carrying out of any investigation that operates within the parameters of the Ombudsman’s Act 1980 as amended.
It is noted that your letter of 30 July 2009 is not seeking at this stage any specific response, other than the nomination of a contact person, but that the Department can if it chooses make a submission. The Department notes that it is the intention of the Ombudsman to issue a series of written queries to the Department and will identify specific records and types of records in which access will be required. The Department believes that it is necessary at this stage to raise the following issues.

The Department is obliged to point out that in the vast majority of, if not all, cases, where complaints have been made that in-patient services have not been provided, the root cause is that significant resource constraints exist in the provision of medical and health services generally. The Minister and the HSE have the very difficult task of trying to reconcile competing demands for many kinds of health services and making allocations from a limited fund. Increased expenditure on any one service, such as on nursing home care, may have to be at the expense of one or more other worthy services such as primary care, cancer, maternity or mental health services. The Department and the HSE have been and continue to be obliged to act within their budgetary allocations as determined by Government and by the Oireachtas. The Oireachtas has also determined that the discretion in the allocation of those scarce resources, once appropriated to the Department, resides solely with the Minister and, in turn, the HSE. The Ombudsman will, no doubt, be aware of these pressing constraints and the very important and exclusive roles of the Minister and the HSE in this regard.

The Ombudsman will also be aware that a significant body of litigation already exists in respect of complaints of non provision of inpatient services. The Department would be particularly concerned that the proposed investigation by the Ombudsman will not in any way undermine or impinge upon the State's defence of this litigation. The Department believes that there is a real risk that an investigation such as appears to be proposed by the Ombudsman will have a negative impact on the State's conduct of the defence of the litigation.

It is noted that under Section 5 of the 1980 Act the Ombudsman shall not conduct an investigation where the actions being investigated are the subject matter of court proceedings this being subject to the proviso that an investigation may be undertaken where it appears to the Ombudsman that "special circumstances" exist. The Department is not satisfied that the Ombudsman has demonstrated that special circumstances exist that would warrant this investigation.

Indeed bearing in mind the following factors:

- that the primary reason for complaints regarding non provision of in-patient services is due to resources issues, that these are matters exclusively for the Minister and the HSE;
- that the financial circumstances of the State have deteriorated significantly in very recent times thus making the task of the Minister and the HSE in allocating resources even more difficult;
- that the issue that entitlement to in-patient services is subject to resource constraints arises in the pending nursing home litigation and as it involves the interpretation of statutory provisions. It is thus a matter for the Courts rather than one on which the Ombudsman should express a view;
that the extent of the State's obligations under Section 52 is one of the issues which arises for determination by the courts in the existing body of nursing home litigation;
- that the Ombudsman has already conducted an investigation and produced a Report into Nursing Home Subventions;
- that the Oireachtas has very recently passed the Nursing Homes Support Scheme Act 2009 which is intended, inter alia, to address issues raised in that Investigation and Report;
- that the Oireachtas in passing the Nursing Homes Support Scheme Act has already addressed the most pressing issue in the area of inpatient services i.e., the provision of nursing home care;
- and that the Department is actively engaged in drafting a general scheme of an Eligibility Bill which will achieve greater clarity and transparency with respect to entitlement to services;

the Department has difficulty in understanding how the Ombudsman can come to a decision that circumstances exist that would warrant an "own initiative" investigation into these matters at this time. The Department therefore requests that the Ombudsman would set out the special circumstances which she sees as meriting the commencement of the proposed investigation.

The Department is also obliged at this stage and in this context to request that the Ombudsman would supply the Department and the HSE (which sometimes is sued independently of the Department) with the names and details of each of the complainants and details of the complaints upon which the Ombudsman has relied in reaching her aforesaid preliminary view so that the Department and the HSE can ascertain if such complainants have litigation in being. Such information would also be necessary to assist the Department and the HSE in assessing further whether the aforesaid "special circumstances" exist. In any event if the investigation is to proceed it would be necessary that such details be provided to the Department and the HSE so that both parties would be in a position to respond appropriately to the Ombudsman.

The Department therefore requests that the Ombudsman would give careful consideration to the foregoing matters.

The Department nominates Ms Teresa Cody who may be contacted by phone at: 6554366 and email at: teresa_cody@health.ie. Ms Cody will assist in resolving any issues that arise from the foregoing matters.

Yours sincerely

Noel P. O'Sher

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Fintan Butler, Senior Investigator, Office of the Ombudsman
Teresa Cody, Department of Health & Children
Professor B. Drumli, CEO, Health Service Executive
Tom Leonard, Health Service Executive
Our Ref: SPI/09/0001

25 August 2009

Mr. Noel Usher,
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 21 August 2009 to Pat Whelan, Director General. I am replying in the absence of Mr. Whelan. I note that the Department has expressed certain reservations about the Ombudsman's investigation but will co-operate with "any investigation that operates within the parameters of the Ombudsman Act 1980 as amended". I am happy to re-assure the Department that the investigation in question is entirely within "the parameters of the Ombudsman Act 1980 as amended".

The main reservation expressed in your letter concerns section 5(1)(a)(i) of the Ombudsman Act 1980 which, in the normal course, precludes investigation by the Ombudsman of an action in relation to which the person affected by the action has initiated civil legal proceedings in any court; though this general rule may be set aside where "it appears to the Ombudsman that special circumstances make it proper to do so". The Department appears to be of the view that the Ombudsman has invoked this exception to the general rule; and the Department has asked the Ombudsman to demonstrate that "special circumstances exist" which warrant the setting aside of the general rule. In fact, the Ombudsman has not invoked this exception to the general rule and she is not investigating an action in relation to which the person affected by the action has initiated civil legal proceedings in any court. For this reason, there is no question of having to demonstrate that "special circumstances exist".

In the interests of clarity, the Ombudsman's investigation may be characterised as an "own initiative" investigation - in accordance with section 4(3)(b) of the Ombudsman Act 1980 - informed by a series of complaints received over a number of years. The investigation involves dealing with a number of specific complaints by way of intended illustration of the issues to be dealt with in the wider investigation. We have already notified the HSE of the details of these specific complaints and I enclose these details now for the information of the Department. Our understanding is that none of the specific complainants have initiated civil legal proceedings but, if we are incorrect in this, please let us know.

You express some concern that the Ombudsman's investigation may "undermine or impinge upon the State's defence of ... litigation" arising from the non-provision of in-patient services.
A related matter is the Department's position that "the interpretation of statutory provisions ... [is] a matter for the Courts rather than one on which the Ombudsman should express a view". The implication would seem to be that the Ombudsman's investigation might cause certain facts to be brought into the public domain, or draw attention to a particular legal analysis, which might prove helpful to the litigants in question. The suggestion is that the Ombudsman should not proceed with the investigation at this point because of the potential to undermine the State's defence of the litigation. This suggestion is at odds very fundamentally with the statutory role of the Ombudsman which is, acting independently, to investigate the actions of public bodies whether on foot of specific complaints or acting on her own initiative. The implication in the Department's suggestion is that the Ombudsman, in fulfilling her statutory role, should act in a manner which protects the interests of the HSE and the Department to the detriment of the interests of complainants and of the public more generally. Clearly, the Ombudsman cannot accept that this is a correct view of how she should perform her statutory role. As for the Department's position that the Ombudsman should not express any view on the interpretation of statutory provisions, the Ombudsman does not agree: virtually all complaints dealt with by the Ombudsman involve taking a view on how legislation should be interpreted.

You mention also the question of resource constraints and the need to take account of this in any consideration of the provision of in-patient services. The Ombudsman is well aware of the difficulties caused by resource constraints and will certainly have regard in her investigation to these difficulties. I expect, in this context, that the Ombudsman will be considering the manner in which the HSE and the Department acted in the light of resource constraints.

The Ombudsman is now proceeding with the investigation as outlined to the Department on 16 July 2009. Perhaps you would clarify that Ms. Teresa Cody is the Department's nominated person to liaise with us for the purposes of the investigation generally rather than simply for the purposes of "resolving any issues that arise from" your letter of 21 August 2009.

Yours sincerely,

[Signature]

Finian Butler
Senior Investigator
31 August 2009

Mr. Noel Usher,
Department of Health and Children,
Hawkins House,
Dublin 2.

Dear Mr. Usher,

Ombudsman Investigation - provision of in-patient services
(Section 52 Health Act 1970)
Requirements under Section 7, Ombudsman Act 1980

I refer to earlier correspondence regarding this investigation. For the purposes of the investigation we are now requiring, in accordance with section 7 of the Ombudsman Act 1980, the provision of certain information and documentation in one specific area. The details of these requirements are set out below.

Legal Proceedings involving the Right to be Provided with In-Patient Services
We understand that the Department of Health and Children has had legal proceedings initiated against it by individuals (or those acting on their behalf) seeking redress for the expense incurred in having to avail of in-patient services in private facilities in circumstances where those individuals contend that the State had a legal obligation to provide such services. We understand also that in some of these cases, if not in every case, one or more other respondents (for example, the Health Service Executive) were also named in the proceedings.

We understand further that some of these cases have been settled out of court, that some are still being progressed through the courts and that in some cases the proceedings have not been progressed at all.

In relation to all such proceedings initiated since 1 January 2001, we require the following information (which may be given in the form of a single summary document):

- the number of such sets of proceedings issued against the Department of Health and Children;
- whether any of the proceedings have been initiated on behalf of individuals who are/were wards of court and, if so, the names of such individuals as well as the High Court record numbers for the applicants involved;
- the identities of any other co-respondents named in these proceedings and a statement on the extent to which the Department of Health and Children has adopted an agreed response with other co-respondents;
- a general description of the claims being made and of the reliefs being sought;
- a statement of the general approach adopted by the Department of Health and Children in relation to these proceedings to include a description of the outcomes in instances in which
proceedings have been finalised (whether by way of settlement, withdrawal of
proceedings or court judgment);

• in relation to proceedings which have been settled out of court, whether prior to hearing
or in the course of a court hearing, the number of such cases and a description in summary
form of the terms on which these cases were settled;

• a statement on the extent to which information on the Department's response to these
proceedings (including any legal costs and settlement costs) is in the public domain (for
example, in annual reports, in reports of the Comptroller & Auditor General, in response
to parliamentary questions or otherwise in the course of debate in either the Dáil or
Seanad or before any Committee of the Dáil and/or Seanad);

• the legal costs (solicitors, barristers and any costs accountants) incurred by the
Department of Health and Children in dealing with these sets of proceedings (that is, all
of the proceedings);

• the amounts (if any) paid out by the Department of Health and Children by way of
out-of-court settlements as well as the amounts (if any) of the legal costs of applicants
paid by the Department of Health and Children.

In relation to all such proceedings initiated since 1 January 2001, we require the following
documentation (which may be supplied by way of hard copies or electronic copies as best
suits the Department):

• copies of all communications between the Department of Health and Children and the
HSE (or any of its predecessor health boards) in relation to these sets of proceedings;
"communications" in this context is intended to include letters, faxes, email messages as
well as notes of meetings or telephone contacts;

• copies of records of any internal Departmental discussions or communications on how to
respond to the proceedings in question.

In the case of any proceedings which (a) have been settled, whether prior to or in the course
of a court hearing or (b) have been the subject of court judgment, we require the following
documentation (which may be supplied by way of hard copies or electronic copies as best
suits the Department):

• copies of all pleadings in the proceedings in question to include High Court record
numbers, statements of claim, defences, affidavits, notices for discovery (if any) as well
as supporting affidavits, orders for discovery (if any) whether before the Circuit Court,
High Court or the Master of the High Court;

• copies of the actual agreements between the parties in the case of any proceedings which
have been settled out of court.

In relation to any settlement agreements, as mentioned immediately above, it may be the case
that such agreements include a confidentiality clause. In anticipation of any issue this may
raise, it is our very clear view that the inclusion of a confidentiality clause within any such
agreement does not override the duty to comply with a requirement to provide documents in
accordance with section 7 of the Ombudsman Act 1980. It could never be the case that
persons, subject to a statutory obligation to provide documents or information, could enter
into a bilateral agreement to withhold documents or information in a manner which would
frustrate that statutory obligation. It is relevant to point out that the obligation under section 7
of the Ombudsman Act 1980 is placed on "any person" which, in this context, includes any
person who has initiated legal proceedings against the Department of Health and Children or
other parties. However, in any publication by the Ombudsman arising from this investigation,
she would not intend to name or otherwise identify persons who have initiated legal proceedings against the Department or with whom settlements have been made out of court.

The information and documentation covered by this requirement should be provided to this Office by **Wednesday, 23 September 2009** at the latest.

As there is some uncertainty as to whether the powers of the Ombudsman, under section 7 of the Ombudsman Act 1980, require the provision to the Ombudsman of records which are otherwise protected by legal privilege, we are not including in the requirement above that the Department of Health and Children should provide us with copies of any relevant legal advice it has received. However, we are requesting that we be provided with copies of any such advice in order to have the fullest possible understanding of the actions taken by the Department in responding to the legal proceedings in question. In particular, if the Department of Health and Children intends to rely on legal advice received as the basis for any of its actions, but chooses not to inform the Ombudsman of the nature of that advice, then the Ombudsman cannot give any credence to advice which she has not seen. As we understand it, provision by the Department to the Ombudsman of such legal advice, where this is done in the context of the Ombudsman conducting a statutory investigation, would not constitute a general waiver of legal privilege.

**Department Liaison with HSE**

As I am sure you are aware, we have recently served a requirement/request on the HSE for very similar material and in very similar terms. We expect that much of the content of the Department's response to this requirement/request will be very similar, if not identical, with that of the Health Service Executive. In order to minimise the effort required in responding, and assuming the HSE will agree, it is open to the Department to rely on the material provided by the HSE to the extent that the provision of such material (whether information or documentation, or both) would otherwise have formed part of the Department's overall response. However, reliance on the response of the HSE can at best form only a part of the overall response required of the Department as there will certainly be documentation held by the Department which is not held by the HSE and it may be that aspects of the information requirement cannot be met on the basis of the HSE response.

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If you have any query on any aspect of the requirements and request set out above, you are welcome to contact me (Tel. 01-6395650) or my colleague Emer Doyle (Tel. 01-6395608).

Yours sincerely,

[Signature]

Fintan Butler
Senior Investigator
Office of the Ombudsman

cc: Ms. Teresa Cody
11th September 2009

Mr Fintan Butler
Senior Investigator
Office of the Ombudsman
18 Lower Leeson St
Dublin 2

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

Dear Mr Butler,

I refer to your letter of 25 August 2009 re the above matter.

I acknowledge your confirmation that the proposed investigation is not being carried out in reliance on the proviso to Section 5(1)(a) of the 1980 Act, from which it follows that the proposed investigation cannot properly extend to any action coming within the scope of section 5(1)(a).

I have also received your letter of 31 August, which seeks a very substantial volume of documentation and information in connection with the proposed investigation, much of it relating to litigation which has been brought against the Department in relation to the provision of in-patient services to eligible persons. I am also aware that you have previously written to the HSE (who is also a party to such litigation) in similar terms.

In light of the confirmation referred to above, it is not clear to the Department the basis on which material and information relating to this litigation may properly be sought by the Ombudsman, whether from the Department or the HSE, having regard to the clear and mandatory terms of section 5(1)(a). The issue of privilege is addressed further below.
I note your further clarification that the investigation - which you characterise as an "own initiative investigation" in accordance with Section 4(3) (b) - has been informed by a series of complaints received "over a number of years". Similarly, in Mr. Whelan’s letter of 30 July, reference is made to a "wide-ranging investigation" into the actions of the Department, the HSE and certain public hospitals in relation to the provision of in-patient services, covering "the period since 2001." Nine specific complaints are referred to in your letter of 25 August. These complaints, I understand, have been selected as representative of a larger number of complaints which have been made to the Ombudsman.

While not apparent from the very brief synopses provided in respect of these complaints (which are not such as to allow for any meaningful response) the Department understands that many, at least, relate to events which occurred some years ago. The proposed investigation will, it is said, cover the period "since 2001", that is to say a period of some 8 years. Having regard to the provisions of section 5(1) (f) of the 1980 Act, and in the absence of any suggestion that there are "special circumstances" which might warrant disregarding the time-limits in that sub-section (which of course apply to an own initiative investigation also), again it is not clear to the Department on what basis the Ombudsman is entitled to proceed as she has indicated she intends to do.

More generally, the jurisdiction conferred on the Ombudsman by the 1980 Act is particular and limited. That jurisdiction extends, and only extends, to the investigation of specific "actions" (as that term is defined in section 1(1) of the Act), taken in the performance of administrative functions, on one or more of the grounds set out in section 4(2)(b) of the Act. It is also important to observe that that is so whether the investigation is on foot of a complaint or undertaken on the Ombudsman’s own initiative. Section 4(3) (b), to which you refer in your letter of 25 August, does not, of course, expand the parameters of the Ombudsman’s investigative jurisdiction in any way.

Having regard to these provisions, it does not appear to the Department that the Act contemplates or permits the kind of "wide-ranging investigation", apparently into all aspects of "in-patient services", which it has been indicated is sought to be undertaken
here. Nor, in the Department’s view, could the specific complaints which have been identified be considered to justify the extremely broad directions/requests for documentation/information which have been made, quite apart from the prohibition in section 5(1)(a). The fact that the Ombudsman’s jurisdiction is confined to actions “taken in the performance of administrative functions” (emphasis added) is obviously material in this regard also. The directions/requests for documentation/information appear to the Department to go considerably beyond anything necessary to investigate the performance of any administrative function by the Department or the HSE.

As I made clear in my letter of 21 August, the Department is committed to assisting the Ombudsman in the carrying out of any investigation that operates within the parameters of the 1980 Act. However, where – as here – there are grounds for concern as to the basis and scope of the investigation proposed, the Department is entitled to raise those concerns with the Ombudsman. Before seeking to proceed further with the proposed investigation, the Department respectfully asks the Ombudsman to address the issues set out above and, in that context, the Department believes that the Ombudsman ought now to:

(1) identify the specific aspect(s) of the provision of “in-patient services”, and the specific action or actions “taken in the performance of administrative functions” in relation to such services which the Ombudsman is proposing to investigate;

(2) specify the particular ground(s) in section 4(2)(b) which the Ombudsman considers to be relevant to each such action;

(3) explain, insofar as any such actions took place more than 12 months prior to the commencement of the investigation (whenever that was) or (where a complaint was made) prior to a complaint being made, the basis on which the Ombudsman proposes to investigate that action, having regard to the provisions of section 5(1)(f) of the 1980 Act;
(4) explain how the various categories of documentation and/or information sought by the Ombudsman relate to the investigation of the actions identified in (1) above;

(5) give full details of all of the complaints which have been made to the Ombudsman in relation to the provision of in-patient services to eligible persons to which the Ombudsman has had regard in determining to carry out the proposed investigation and/or which may be the subject of that investigation, including (but not limited to) the nine complaints identified in your letter of 25 August. Disclosure of all such complaints is essential so as to enable the Department to confirm that such complaints do not relate to actions which come within the scope of either section 5(1)(a)(i) or (ii).

I must also address the suggestion that my previous letter implied that the Ombudsman should act in a manner which protects the interests of the HSE and the Department to the detriment of the interests of complainants and of the public generally. There is, with respect, no basis for that unfortunate suggestion. As you are aware, the Department, along with the HSE, are defendants in a large number of actions which are currently pending before the Courts. The issues raised in those proceedings are matters for the Courts, not the Ombudsman, to determine. That is, of course, reflected in the provisions of section 5(1)(a) of the 1980 Act.

As a party to proceedings, the Department has the same rights and duties as any other litigant, including the right to legal professional privilege which is a fundamental right of all litigants, and persons who seek legal advice, in this jurisdiction. In your letter of 31 August, you suggest that there is “some uncertainty” as to whether the powers of the Ombudsman under section 7 of the 1980 Act extend to requiring the production of privileged material. The Department does not accept that there is any uncertainty in that respect. Nothing in the 1980 Act suggests that the Oireachtas intended to confer such an exceptional power on the Ombudsman. On the contrary, section 7(2) provides that an addressee of a request is “entitled to the same immunities and privileges as if he were a witness before the High Court.” As the right to
claim legal professional privilege is undoubtedly one of those privileges, it is quite clear that the production of privileged material cannot be required.

The Department was - and remains - of the view that disclosure of privileged and/or confidential material relating to the claims which have been brought against it would be inappropriate and have the potential to impact negatively on its entirely legitimate interest in defending those proceedings in the interests of the taxpayer and to confer an unwarranted advantage on those parties who have chosen to bring proceedings, who could not of course be required to make any corresponding disclosure. That was the only point being made by me in my previous letter.

Before concluding, I must address the suggestion in your letter of 31 August that some adverse inference might properly be drawn by the Ombudsman in the event that the Department was not willing to produce privileged material to her. I wish to make it clear that the Department emphatically rejects that suggestion. I re-iterate that legal privilege is a fundamental right which applies to all persons involved in litigation or who seek and obtain legal advice. The implication that the exercise of that right by the Department would prejudice its position vis a vis the Ombudsman is not only a matter of serious concern to it, but represents a suggestion for which there is no legal foundation whatever.

Finally, I confirm that Teresa Cody is the appropriate contact person in the Department.

Yours sincerely,

Noel F. Usher,
Director

cc Teresa Cody, Department of Health & Children
Professor Brendan Drumm, CEO, Health Service Executive
Tom Leonard, Health Service Executive
Our Ref: SPI/09/0001

16 September 2009

Mr. Noel Usher,
Director,
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 11 September 2009 and to earlier correspondence regarding the above Ombudsman investigation.

In your letter you raise a series of jurisdictional concerns in addition to those raised in your letter of 21 August 2009. It is the Ombudsman's responsibility to be satisfied that she is acting within her jurisdiction and she is satisfied of her jurisdiction in the case of this investigation. However, she has considered the points raised in your letter and her position on the key points is set out below.

Section 5(1)(a) of the Ombudsman Act 1980

The Department asserts that the investigation "cannot properly extend to any action coming within the scope of section 5(1)(a)". This is an unwarranted extension of the exclusion provided for at section 5(1)(a). The provision is intended to exclude the Ombudsman in a situation where a person affected by an action has initiated civil legal proceedings. As we understand it, the objective is that a person with a grievance against a public body, and who has chosen the route of civil proceedings, will be debarred from also using the route of a complaint to the Ombudsman. It is not the case that a person who complains to the Ombudsman cannot have that complaint investigated because some other person, with a similar complaint, has chosen the route of litigation rather than the Ombudsman route. If the Department's assertion were correct, the Ombudsman would for example be debarred from dealing with a complaint from a person refused Jobseeker's Allowance where some other claimant for the same Allowance had initiated litigation on his or her entitlement. The Ombudsman is quite clear that section 5(1)(a) is intended to limit the options of the particular complainant rather than, as the Department appears to assert, limit the capacity of the Ombudsman to deal with a particular issue. It is widely accepted both in Ireland and internationally that an Ombudsman provides an alternative to court action. The
Department's position, if correct, would have the effect of limiting significantly the availability of this alternative.

The Department seeks details of all complaints made to the Ombudsman in relation to the provision of in-patient services; this is so that the Department can be satisfied that none of the complainants is a person who has initiated civil legal proceedings against the Department. As part of our standard screening procedures we check whether complainants have initiated civil legal proceedings in relation to the subject matter of the complaint. We believe that none of our complainants in question here has, in fact, initiated such proceedings. However, if the Department wishes, we will check our list of relevant complainants against the Department's list of those who have initiated litigation in relation to the provision of in-patient services. To do this, we will need to be provided with the Department's list of those who have initiated litigation.

Section 5(1)(f) of the Ombudsman Act 1980

The Department queries the basis on which the Ombudsman is conducting an investigation by reference to complaints which in some cases "relate to events which occurred some years ago". There are two distinct situations here.

The first concerns those individual complainants whose cases are being used for illustrative purposes in the context of the overall investigation. It is true that in some of these cases the action complained of would have been known to the complainant for more than 12 months prior to the making of the complaint to the Ombudsman. In order to investigate such cases, it must appear to the Ombudsman that "special circumstances make it proper to do so". The Department will already be fully aware of the special circumstances which make it proper for the Ombudsman to investigate these cases. However, in order to avoid further unnecessary concerns being raised, we can say that amongst the special circumstances are the following:

- the fact that the type of complaint which has prompted this investigation, concerning failure to provide long-stay care places ("in-patient services"), has been received by the Ombudsman in every year for more than 20 years;
- the fact that these complaints affect elderly people predominantly and that elderly people are less likely to be in a position to articulate grievances and seek to vindicate their rights; and, while it appears litigation has been initiated by or on behalf of several hundred elderly people, there are thousands more who have neither initiated litigation nor complained to the Ombudsman;
- the fact that, despite repeated commitments to do so, the Department of Health and Children has hitherto failed to bring about any clarification on the question of entitlement to in-patient services;
- the fact that legal proceedings, relating to the issue of the right to be provided with in-patient services under section 52 of the Health Act 1970, have not yet resulted in any High Court judgment which clarifies matters.

The second situation is where the Ombudsman decides to investigate on her own initiative - without necessarily having an identifiable complainant - under section 4(3)(b) of the Ombudsman Act 1980. We agree that any Ombudsman investigation involves an action or actions of a public body. A significant element in this "own initiative" investigation is the
extent to which the Department appears to have failed to act in certain important respects with a view to resolving the difficulties manifested in very many individual complaints to the Ombudsman. Inaction is comprised in the Act's definition of "action" and as something which is on-going is not necessarily subject to the 12 month test contained at section 5(1)(f)(ii); but even if it is subject to this latter provision, the special circumstances already outlined above make it proper that the Ombudsman should investigate.

**Provision of Information and Documentation**

It appears to the Department that the documentation and information required to be provided to the Ombudsman "go considerably beyond anything necessary to investigate the performance of any administrative function by the Department or the HSE". Presumably the HSE, as a separate statutory agency, is capable of representing its own position to the Ombudsman.

As you know, under section 7(1) of the Ombudsman Act 1980 it is a matter for the Ombudsman to decide what material is relevant to the conduct of an investigation. Clearly, the Ombudsman must exercise her section 7 powers reasonably and should not, without some clarification, seek material which on the face of it does not relate to the conduct of the particular investigation. On the other hand, public bodies should not unreasonably question the exercise by the Ombudsman of her section 7 powers particularly in circumstances in which the link between the material sought and the subject matter of the investigation is self evident.

It may be that the Department intends to argue that the manner in which it deals with litigation - as opposed to how the Courts will decide the litigation - is outside of the definition of an action "taken in the performance of administrative functions". If this is the Department's position then the Ombudsman rejects it totally. The fact that an action may relate ultimately to a matter which in itself is other than an "administrative function" does not mean that the action is outside the scope of "administrative functions". It is long established, for example, that while the action of creating and maintaining medical records may relate to clinical action they nevertheless constitute action "taken in the performance of administrative functions". On the same basis, actions of the Department taken in the course of dealing with litigation are actions "taken in the performance of administrative functions".

There is no good reason why the Department should be in any doubt as to the relevance to our investigation of the material sought. Accordingly, the Ombudsman expects the Department to comply fully with the requirement for the provision of information and documentation which we sent to you on 31 August 2009.

**Litigation, Privilege and Related Matters**

It appears the Department is seeking to represent the Ombudsman as somehow trespassing on the domain of the Courts. This suggestion is totally unwarranted and appears to be designed to create legal confusion where, in fact, there is none.

In our letter of 31 July 2009 we consciously chose not to require the provision by the Department, as a matter of legal obligation, of material which is otherwise protected by legal privilege. We made this choice in the knowledge that a requirement in relation to such material would be likely to generate dispute and delay. In retrospect, it might have been
better had we, in relation to the Department, expressed the view that the Ombudsman can require from the Department material otherwise protected by legal privilege but that, in this particular case, she was choosing to request such material rather than require its provision.

In any event, in so far as our letter of 31 July 2009 is concerned, our request for the specified material stands.

There is some suggestion in the Department's letter that it is not open to the Ombudsman to comment adversely in the event of the Department refusing her request for access to material otherwise protected by legal privilege. It is a matter for the Department to decide on whether or not to comply with the Ombudsman's request; it can decide to do so or not to do so. However it is somewhat disingenuous to argue that, in making this decision, the Department is in the same position as any ordinary party to litigation. The Department is a party to the litigation in its capacity, under the Constitution, as exercising the executive power of the State, the manner in which it exercises that function is a matter of public interest (not least to the extent that public money is involved in the conduct of the litigation). Choosing not to disclose this privileged material to the Ombudsman means that the Ombudsman will have only a limited understanding of how the Department acted in the conduct of the litigation. This, in turn, will have the consequence of the Ombudsman being restricted in how she performs her statutory functions. There may well be situations in which it might well be acceptable for a public body not to comply with a request from the Ombudsman for material covered by legal privilege; equally, there are likely to be situations in which refusing such a request is not acceptable. It remains a matter for the Ombudsman to take a view on when a refusal is acceptable or unacceptable.

The Department expresses the view that "disclosure of privileged and/or confidential material relating to the claims ... would be inappropriate ...". It is important to be clear that confidential material is not necessarily covered by legal privilege. In particular, while details of the settlements reached with some of the litigants may be subject to a confidentiality agreement, they will not be covered by legal privilege. Under section 7(1) of the Ombudsman Act, the Department is legally bound to provide the Ombudsman with this material - as specified in our letter of 31 August 2009 - irrespective of any view it may hold that disclosure would be "inappropriate".

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The Ombudsman is satisfied that this investigation is one which is warranted, that it is an investigation within her powers to conduct and that it should be progressed as speedily as possible consistent with the normal requirements of fair procedure. The Ombudsman expects the full co-operation of the Department in the conduct of the investigation.

The information and documentation sought in our letter of 31 August 2009 should be provided to this Office by Wednesday, 23 September 2009 at the latest.

Yours sincerely,
Pintan Butler
Senior Investigator

Copy: Mr. Pat Healy, HSE and Mr. Tom Leonard, HSE
23 September 2009

Mr Fintan Butler
Senior Investigator
Office of the Ombudsman
18 Lower Leeson St
Dublin 2

Dear Mr Butler,

Re: Ombudsman Investigation — Provision of in-patient services
(Section 82 Health Act 1970.)

1. I refer to your response of September 16 and to earlier correspondence regarding the Ombudsman’s “own initiative” investigation. I regret to note that your letter does not answer the simple request in the Department’s letter of September 11 that you identify "the specific aspect(s) of the provision of "in-patient services" and the specific action or actions, "taken in performance of administrative functions" in relation to such services which the Ombudsman is proposing to investigate." Specifically, and in addition your letter does not address the points made at indented paragraphs 1, 2 and 4 at pages 3 and 4 of my letter nor does it provide any of the details sought at paragraph 5. The Department is really left no wiser as to the nature and purpose of the proposed investigation, the actions being investigated and, crucially, the extent to which the documents which are sought are of any relevance to the proposed investigation.

2. In your letter you refer to the concerns raised by the Department as being "a series of jurisdictional concerns". The concerns are not confined to jurisdictional issues but also relate to issues of fair procedures. You will appreciate that the Department is entitled, as a matter of elementary fairness, to know exactly the precise remit of the Ombudsman’s investigation and what complaints it must address.
Section 5(1)(a)

3. Turning now to the specific points made, I am bound to say that your response seems to miss the point which I made in the letter of September 11. The Department, of course, accepts that the fact that patient A has litigated point X does not in itself mean that the Ombudsman cannot investigate a complaint (whether on her own initiative or otherwise) in respect of point X which concerns patient B where patient B has not resorted to litigation. There is nothing in my letter which suggests otherwise.

4. The whole point, however, of the objection is that the "own initiative" complaint seems to relate very squarely to matters which are or have been litigated by or on behalf of patients concerning the scope of entitlements under section 52 of the Health Act 1970.

5. I note that you believe that none of your "complainants in question here has, in fact, initiated such proceedings." This seems to suggest that the investigation relates solely to persons who have not commenced proceedings. But if this is so, then it is hard to see why your Office would seek the information which it does in relation to the conduct by this Department of the litigation against it, by other persons, not least because the majority of the information sought appears to relate directly to such litigation. It is not clear to the Department why, for example, the terms of any settlements or the content of legal advice provided in relation to the litigation could have any possible bearing in respect of such complaints.

6. The Department likewise finds it puzzling that, having sought to assure it that none of the complainants have commenced proceedings, you would then go on to argue that "actions of the Department taken in the course of dealing with litigation are actions 'taken in the performance of administrative functions'", thus suggesting that the investigation is, in fact, dealing with persons who initiated court proceedings in respect of their entitlements. This is further underscored by your statement on the final page that our failure to make disclosure of legally privileged material "means that the Ombudsman will only have a limited understanding of how the Department acted in the conduct of the litigation." Why should the conduct of the litigation have any relevance to the complaints
concerning the provision of in-patient services in respect of persons who have not commenced proceedings? Furthermore how can the Department's legal entitlement not to disclose privileged material restrict how the Ombudsman performs her statutory functions when those functions, as acknowledged by you, do not extend to administrative action taken by the Department when that "action" i.e. the administrative action, is (as provided by the Act) "one in relation to which the person affected by the action has initiated in any Court civil legal proceedings." In those circumstances not only is the conduct of the litigation clearly excluded from the Ombudsman's jurisdiction but so also is the administrative action the subject thereof.

7. A further consideration is that when the Department sought details of the complaints (cf. indented paragraph 5 of my earlier letter), it was not merely as suggested by your letter to ascertain if there was litigation in being in respect of any such complaints. It was also to ensure that it knew the nature of the complaints that were now being made. The constitutional requirement of fair procedures requires that the Department (and, for that matter, the HSE) should be entitled to full details of the complaints, including the names of the complainants. This is to enable the Department and the HSE to respond to and answer the allegations being made and, where relevant to address properly the subject matter of the complaints. It seems striking that the Ombudsman should contend that there are as many as one hundred or more complaints against the Department and the HSE, which the Ombudsman states inform her investigation and simultaneously refuses to provide any details of those complaints.

8. The Department has not suggested the Ombudsman is not entitled to form a view as to what documents are relevant to her investigation. As you acknowledge the Ombudsman must exercise her Section 7 powers reasonably and of course must act within jurisdiction. In circumstances where you have not clarified the subject matter of the investigation the link between the material sought and the subject matter of the investigation is not, as suggested in your letter, "self-evident" and the Department is entitled to make a judgement (on the basis of the information requested) on whether the Ombudsman is acting with the powers conferred by Section 7.
9. It is against that background where you have singularly failed to clarify the nature of the complaints or the ambit of the investigation or to provide full details of complaints and complainants that the Department would respectfully repeat its requests at indented paragraphs 1 to 5 of pages 3 to 4 of my earlier letter.

10. The Department does not suggest that the HSE is not capable of representing its own position to the Ombudsman. The Department in its letter of September 11 expressed its view that the documentation and information required to be provided went beyond anything necessary to investigate the performance of the administrative functions that you state the Ombudsman is investigating, namely the administrative functions of the Department and the HSE.

Whether the conduct of litigation comes within the scope of the Ombudsman's jurisdiction

11. As indicated above, the Department understands from your letter that the Ombudsman contends that she is entitled to investigate the manner in which the Department has dealt with the on-going litigation. Indeed, we further understand from your letter that this is in reality the core of the proposed investigation and that your request for documents and information now appear to centre on this.

12. The Department does not accept that the jurisdiction of the Ombudsman extends to matters of this kind. Any such construction would set at nought the limitation contained in section 5(1)(a) and the distinction between the administrative action and litigation explicitly recognised therein. The conduct of litigation is not an administrative function within the meaning of that term in the 1980 Act. The decision as to how legal proceedings should be defended is an executive function of Government within the meaning of Article 28 of the Constitution and for which the Attorney General (who is a named party to the litigation) has responsibility for advising and directing the conduct of that litigation under Article 30.1 of the Constitution. All of this, coupled with the fact that the Attorney General is included in the Second Schedule to the Act, demonstrate that these are matters which are plainly outside the jurisdiction of the Ombudsman.
Provision of Information and Documentation

13. You contend that the Department should not be “in any doubt as to the relevance to our investigation of the material sought.” It is, with respect, impossible to accept this contention given that you say that none of the complaints relate to persons who are thought to have commenced proceedings. As I have already pointed out, in those circumstances it is very hard to see how material which concerns the conduct of litigation involving other persons could possibly be relevant.

Legal privilege

14. In your letters of 20 August to the HSE and 31 August to the Department you expressed uncertainty about the application of Section 7 to documents covered by legal privilege. However in your letter of 16 September you move from the position of uncertainty previously held to an unequivocal assertion that the section applies to documents covered by such privilege. Legally privileged material falls outside the scope of section 7(1) and the Oireachtas never contemplated that the Ombudsman would be entitled even to request, much less demand, such material. Your suggestion that the Ombudsman should be entitled to make the final judgment as to whether the refusal to provide such privileged material is acceptable or not is entirely without foundation. Furthermore the Department does not accept that it is in any different position from any other litigant so far as legal privilege is concerned.

15. In this connection it might be recalled that the courts would never seek to examine privileged material, save where this was a cover for criminal activity or the privilege had been waived, two exceptions which obviously would not apply here. Nor would the courts ever contemplate drawing any inferences from the fact that privilege had not been waived. The Department finds it remarkable that you might even suggest that such an inference might be drawn by the Ombudsman, as this is tantamount to undermining the essence of legal privilege. There is nothing in the 1980 Act which could conceivably warrant such a course of action and any such attempt would be plainly ultra vires.
16. By way of providing clarification on the question of entitlement to in-patient services, it is the Department's view that the obligation under section 52 of the Health Act 1970 to provide in-patient services is subject to the financial constraints brought about by many competing demands for the available resources. The Government and any statutory bodies are constrained in providing services by the resources and budgets available. That the obligation to provide health care services (in-patient or otherwise) must be subject to the resources made available by the Oireachtas to provide those services is also acknowledged in the Health Act 2004 which provides that the Health Service Executive in performing its functions under the Act shall have regard to

"(d) the resources, wherever originating that are available to it for the purpose of performing its functions, and

(e) the need to secure the most beneficial, effective and efficient use of those resources."

17. It has been acknowledged by the Minister that the system of providing in-patient services by way of long term residential care for older people as it has been operated, contains a number of anomalies and inconsistencies. To remedy this, an entire overhaul of the system was required and an entirely new and comprehensive system of long term care support was required. This has now been done. The Nursing Homes Support Scheme Act 2009 was passed in July and parts of the Act have already been commenced. The Minister is committed to the full implementation of the scheme by the end of the year.

The Department considers it to be very unsatisfactory that notwithstanding the concerns it has raised regarding the Ombudsman's jurisdiction and issues concerning legal privilege in respect of the litigation and the wide request of the Ombudsman for information and documentation related thereto the Ombudsman has continued to seek the same information and documentation from the HSE but has singularly failed to copy the Department with such correspondence or to keep the Department informed of such requests. Given that the Minister, Ireland and the Attorney General are co-defendant/respondents with the HSE in respect of most if not all of that litigation and the very clearly stated interest of the Department in the preservation of the integrity of the
defence of that litigation on behalf of the taxpayer and the State it is most improper that the Ombudsman would continue to seek and press for production of such information and documentation from the HSE without any reference back to the Department.

Conclusion

18. In conclusion, therefore, the Department re-iterates its willingness to co-operate with your Office. At the same time, we must respectfully insist that the Ombudsman clarify the nature and extent of the proposed investigation so that we can satisfy ourselves that the documentation sought is relevant and that the investigation is conducted in accordance with proper procedures and within the powers set out in the 1980 Act.

19. In these circumstances I will assume that the deadline of September 23 has been overtaken by events pending clarification of these matters. The Department will, in any event, require some weeks to furnish the relevant documentation following your clarification of the scope and nature of the inquiry.

I look forward to hearing from you.

Yours sincerely

[Signature]

R.O. Noel P. Usher.
Director

cc Teresa Cody, Department of Health & Children
Professor Brendan Drumm CEO, Health Service Executive
Tom Leonard, Health Service Executive.
Our Ref: SPI/09/0001

25 September 2009

Mr. Noel Usher,
Director,
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 23 September 2009 and to earlier correspondence regarding the above Ombudsman investigation. Set out below is the Ombudsman’s response to the points raised in your letter.

Point 1
In notifying the Department of this investigation on 30 July 2009, the Director General of this Office set out the terms of the investigation. The Director General identified clearly that what is being investigated is "the actions of the Department of Health and Children, of the Health Service Executive, and of some of the non-HSE public hospitals in providing for patients who are found to require in-patient services on a long-term basis". In particular, it is clear that in investigating these "actions" a key aspect is the extent to which there has been a failure to act, that is, a failure to provide in-patient services. The Director General also made clear that, based on complaints received over a number of years, the Ombudsman is satisfied (a) that these "actions" have adversely affected people and (b) that the actions "may have been taken on the basis of one or more of the grounds identified at section 4(2)(b) of the Ombudsman Act 1980". The Ombudsman, therefore, is satisfied that all of the statutory requirements for the conduct of an investigation by her, under section 4 of the Ombudsman Act 1980, have been met.

Having identified the actions which are the subject of the investigation, the Director General (in his letter of 30 July 2009) went on to identify some issues likely to be dealt with in the course of the investigation. These were:

- the extent of the entitlement provided for at section 52 of the Health Act 1970;
- the extent to which the HSE (including public hospitals acting on its behalf) has been meeting this entitlement;
- various practices of the HSE (including those of public hospitals acting on its behalf) in situations where patients have not been provided with in-patient services and have, in consequence, had to avail of private nursing home care;
- the actions of the Department of Health and Children in seeking to resolve any lack of clarity regarding the intention of the legislature in enacting section 52 of
the Health Act 1970;

- the actions of the Department of Health and Children and/or of the HSE in response to legal proceedings initiated by or on behalf of patients seeking to vindicate their entitlements under section 52 of the Health Act 1970.

The Ombudsman is satisfied, particularly in the context of an "own initiative" investigation, that this is an adequate outline of the subject matter of the investigation and of the range of issues likely to be dealt with in the course of the investigation. In particular, it identifies actions (where "action" includes "inaction") to be investigated. In the context of an "own initiative" investigation, where there is no specified complainant, it is not necessary to link the actions to particular cases. However, the Ombudsman has chosen nine specific cases for illustrative purposes and the HSE is fully aware of the issues arising in these cases. We have also provided the Department with the details of these cases.

It is a matter for the Ombudsman in any particular case to determine whether documents held by "any person" are relevant to an investigation and should therefore be provided to her Office in accordance with section 7 of the Ombudsman Act 1980. A "person", for example your Department, is not free to decide to reject a requirement under section 7 because it takes the view that the documents sought are not relevant to the investigation. Nor is it necessary for the Ombudsman to justify her decision to seek relevant documents; though in practice, it will generally be self-evident that the documents are relevant.

**Point 2**
The Ombudsman accepts absolutely that fair procedure applies whenever she conducts an investigation. She is satisfied that fair procedure requirements have been met hitherto and that they will continue to be met throughout the investigation. As you know, the requirements of fair procedure depend on the nature of the process being conducted and on the extent to which the outcome may impact on the party concerned. The Ombudsman does not make decisions which are legally binding; she makes findings and may also make recommendations. Furthermore, the Ombudsman's investigative process is inquisitorial rather than adversarial and this allows for dialogue with all of the parties throughout the process. Finally, quite apart from the general requirements of fair procedure, in the event that an investigation is likely to result in any "finding or criticism adverse" to the public body concerned, the Ombudsman is required by section 6(6) of the Ombudsman Act 1980 to provide that body with "an opportunity to consider the finding or criticism and to make representations in relation to it to [her]."

It occasionally happens that a party to an investigation will engage legal advisers who, in some instances, may not be accustomed to an inquisitorial process and act in the adversarial manner to which they are accustomed from court work. This, where it happens, is unfortunate as it brings an adversarial element into the process which is at odds with how the Legislature intended the Ombudsman to carry out her statutory functions.

**Points 3 & 4**
In an "own initiative" investigation there is no specific complainant involved; the action or actions being investigated will generally affect the public generally or that part of the public likely to be affected by those actions. In this case, the actions being investigated affect older
people who need, or may need, long-stay hospital care; the actions also affect the families of such older people. Those individuals who have initiated civil legal proceedings against the HSE and/or the Department (or other parties) are, presumably, acting strictly on their own behalf; it is not correct to regard those litigants as acting on behalf of that wider group of people who complain that they have not had their entitlement to in-patient services met. At the same time, the manner in which these litigants have been dealt with by the HSE and/or the Department is a relevant matter for the purposes of the Ombudsman's investigation - see Point 5 below.

Point 5 & 6
One of the key principles of good administration is that public bodies should treat "like cases in like manner"; establishing whether this principle has been applied is a typical aspect of any Ombudsman investigation. Accordingly, in the present investigation, one of the issues to be considered by the Ombudsman is whether the HSE and the Department have operated on the basis of this principle of good administration. There is a number of angles from which this issue might be considered: for example, whether people in one county or district are treated differently to people from other county or district. And in the context of litigation, it is relevant to establish whether those who have initiated litigation are being treated more or less favourably than those who have not initiated litigation.

There are also other reasons why information on the conduct of the litigation is of relevance to the Ombudsman's investigation: for example, such information is likely to disclose the views of the HSE and of the Department on the issue of whether people have an enforceable right to be provided with in-patient services under the Health Act 1970. However, having an interest in the conduct of the litigation does not mean that this investigation is (as you put it) "dealing with persons who initiated court proceedings in respect of their entitlements".

The Ombudsman does not accept the Department's contention that her powers under section 7 of the Ombudsman Act 1980 do not extend to require the provision of information or documentation regarding litigation. Section 5(1)(a)(i) precludes the Ombudsman from investigating an action in circumstances where the person affected by that action has initiated litigation in relation to the action. This, however, has no bearing on the right of the Ombudsman to require the provision of information or documentation on that litigation in circumstances in which the Ombudsman is of opinion that such provision is required for an investigation properly authorised under the Ombudsman Act. The present investigation is properly authorised under the Ombudsman Act and the section 7 requirement to provide information and documentation relating to the particular litigation is fully within the powers of the Ombudsman.

Point 7
The Department's comments here appear to reflect a view that this investigation is concerned with specific complainants and that, in fairness, the Department should be informed of the identities of these complainants and of the nature of their complaints. This is to misunderstand the nature of an "own initiative" investigation - see reply to Points 3 & 4 above. As regards fair procedure, in addition to the points already made above, the Department can be assured that in the course of the conduct of the investigation it will have ample opportunity to respond (whether in writing or by way of interview) to all of the issues
Points 8 & 9
The Ombudsman does not accept that there is any lack of clarity as to the subject matter of the investigation - see reply to Point 1 above.

Point 10
It is a matter for the Ombudsman to determine what information and/or documentation is relevant to her investigation.

Point 11
Please see the reply under Points 5 & 6 above.

Point 12
In this instance, the Ombudsman is not investigating the Department’s handling of the litigation concerning the right to be provided with in-patient services. This is clear from my comments above, under Point 1. In investigating an action, the Ombudsman is entitled to require the provision of any material which, in her opinion, is relevant to the investigation. This will very often include material which, while not bearing directly on the action under investigation, is nevertheless of relevance to the investigation. Furthermore, the right to require the provision of material under section 7 includes the provision of material concerning actions which, in themselves, may not be subject to investigation by the Ombudsman.

In this context, it is of no great consequence whether or not the conduct of litigation by the Department constitutes an "action taken in the performance of administrative functions". As it happens, the Ombudsman is clear that a public body's handling of litigation is an action "taken in the performance of administrative functions". More importantly, though, in this present investigation the Ombudsman has formed the opinion that material concerning the litigation is relevant to the investigation and that, under section 7 of the Ombudsman Act 1980, she requires provision of this material by the HSE and by the Department.

In referring to the role of the Attorney General (AG), the Department appears to be arguing that the conduct of the litigation constitutes an "action" of the AG rather than an action of the Department. Again, this is of no great consequence as the Ombudsman is not investigating the conduct of the litigation. However, if the Ombudsman were investigating the conduct by the Department of the litigation, she would not accept that the involvement of the AG - as the legal adviser to the Minister - had the consequence of removing the Department from involvement in, and responsibility for, litigation in which it is a direct respondent.

Point 13
Please see the reply under Points 5 & 6 above.

Points 14 & 15
The Ombudsman does not feel that any comment is required.

Points 16 & 17
The Ombudsman welcomes the Department's engagement on these issues which relate to the substance of the investigation. These comments will be considered by the Ombudsman in the course of the investigation and we would expect that the Department will have an opportunity to expand on its comments as the investigation progresses.

The Department expresses unhappiness with the Ombudsman's failure to inform it of the correspondence passing between the HSE and the Ombudsman in relation to this investigation. As a general comment, it is probably fair to say that the nature of the relationship between the HSE and the Department appears to be a matter of some confusion. In this instance the Ombudsman took the view initially that, as a separate statutory entity, it was a matter for the HSE to decide on the extent to which it wished to share information with the Department. It is clear that, for the purposes of these preliminary exchanges, both the HSE and the Department wish to share information and we are happy to copy this letter to the HSE for its information.

**Points 18 & 19**
The Ombudsman has engaged in a very detailed fashion with the very many issues raised by the Department in its letters of 21 August, 11 September and 23 September 2009; she looks forward now to the full co-operation of the HSE and of the Department.

In the circumstances, the Ombudsman is agreeable to extending to **Wednesday, 7 October 2009** the deadline for compliance with the requirements set out in my letter of 31 August 2009. We will be in touch separately with the HSE in this regard.

Yours sincerely,

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Fintan Butler
Senior Investigator

Copy: Mr. Pat Healy, HSE and Mr. Tom Leonard, HSE
30 September 2009

Mr Finian Butler
Senior Investigator
Office of the Ombudsman
18 Lower Leeson St
Dublin 2

Re: Ombudsman Investigation – Provision of in-patient services

(Section 32 Health Act 1970)

Dear Mr Butler,

I refer to recent correspondence regarding the above matter, and in particular to your letter of 25th September 2009.

The Department continues to have real concerns regarding the nature, scope and purpose of the Ombudsman's intended investigation into the provision of in-patient services. Those concerns have not been allayed by your letter of the 25th September, to which the Department will be responding very shortly. As has been made clear, however, the Department is committed to co-operating with the Ombudsman in relation to any matters properly the subject of investigation by her.

I am aware that your office has scheduled interviews for today with a number of social workers in St. Michael's Hospital. I understand that these interviews relate to a specific complaint made to the Ombudsman, particulars of which have previously been notified to the Department and which – on the basis of the information available to the Department to date - the Ombudsman appears clearly to be entitled to investigate. There would therefore appear to be no reason in principle why those interviews should not proceed as scheduled.

Please note, however, that the Department strictly reserves its position concerning any further steps which may be taken by the Ombudsman in furtherance of her intended investigation into in-patient services. As I have said, the Department will be writing shortly in response to your letter of the 25th September but it is anxious that its position be clearly understood at this stage.

Yours sincerely,

Noel P. Usher,
Director

cc Teresa Cody, Department of Health & Children
Professor Brendan O'mumm CEO, Health Service Executive
Tom Leonard, Health Service Executive.
7 October 2009

Mr. Fintan Butler
Senior Investigator
Office of the Ombudsman
18 Lower Leeson St
Dublin 2

Re: Ombudsman Investigation – Provision of in-patient services
(Section 52 Health Act 1970)

Dear Mr. Butler,

I note the position which you have set out in your letter of 25 September 2009. Given that we have both set out our views at length, there is probably little to be gained by my dealing individually with the various points you have made and thus generating yet another lengthy letter. The Department nevertheless wishes to reserve its position in respect of the points you have made in that letter of 25 September 2009. Instead with a view to bringing matters into immediate focus and trying to narrow and if possible to eliminate the differences between us, I propose to summarise the Department’s understanding of: (i) the nature of the Ombudsman’s investigation; (ii) the specific issues likely to be dealt with in the course of the investigation; and (iii) our response to the requests for documentation.

The nature of the investigation
The Department understands that the Ombudsman intends to conduct an own initiative investigation into the conduct of the Department, the HSE and some non-HSE public hospitals in providing (or, as the case may be, failing to provide) for patients who are found to require in-patient services on a long-term basis. At the moment, the Ombudsman is conducting this investigation by reference to nine specific complainants, none of whom have commenced litigation in respect of this issue. The Ombudsman is not investigating any of the court cases concerning this question and nor is there any investigation of the conduct of the litigation in these instances.

On the assumption that the foregoing represents an accurate statement of the ambit of the investigation, then the Department has no difficulty with such an investigation and is happy to confirm that it will co-operate fully within its terms. Indeed, I understand that many of the files concerning the nine illustrative complaints have already been transferred to your office.

The specific issues likely to be raised during the course of the investigation
In your letter of 25 September, referring to the Ombudsman’s earlier letter of 30 July 2009, you helpfully set out some issues likely to be dealt with in the course of the investigation, which I will now review for ease of reference:

i. the extent of the entitlement provided for under section 52 of the Health Act 1970;

ii. the extent to which the HSE (including public hospitals acting on its behalf) has been meeting this entitlement.
iii. various practices of the HSE (including those of public hospitals acting on its behalf) in situations where patients have not been provided with in-patient services and have, in consequence, had to avail of private nursing home care.

These three categories are unproblematic, provided always that the issues are linked to the circumstances of particular patients (whether complainants or otherwise), i.e., to "action[s] taken in the performance of administrative functions" within the meaning of section 4(2) of the Ombudsman Act 1980.

iv. the actions of the Department of Health and Children in seeking to resolve any lack of clarity regarding the intentions of the legislature in enacting section 52 of the Health Act 1970.

The Department cannot accept that these actions fall within the ambit of the 1980 Act. They are not "action[s] taken in the performance of administrative functions" within the meaning of section 4(2) of the 1980 Act. That jurisdictional requirement pre-supposes the exercise of administrative powers and duties in respect of a particular person or persons, especially having regard to the further requirement that the action "has or may have adversely affected a person."

Thus, there is nothing in the 1980 Act which enables the Ombudsman (whether by means of an "own initiative" investigation or otherwise) to conduct a free standing investigation into the Department. Rather, the investigation must always be linked directly to the performance of administrative functions vis-à-vis a particular person or persons.

v. the actions of the Department of Health and Children and/or the HSE in response to legal proceedings initiated by or on behalf of persons seeking to vindicate their entitlements under section 52 of the Health Act 1970.

The Department cannot accept that the defence of litigation initiated by or on behalf of patients or former patients constitutes an "action taken in the performance of administrative functions" as that term is defined in section 4(2). By defending the litigation, the Department was not discharging administrative powers and duties vis-à-vis that person. Rather, it was exercising the executive power of the State and/or the inherent constitutional right which every litigant enjoys to defend litigation which has been commenced against them.

Furthermore, the Ombudsman is precluded from investigating these matters by virtue of section 5(1)(a) of the 1980 Act.

The requests for documentation

The Department notes that the HSE and certain public voluntary hospitals have already complied with requests for documentation which concern the cases of nine individual patients who have not resorted to litigation concerning their section 52 entitlements.

In the event that the Department were required to produce files concerning individual patients, it would, in principle, be prepared to do so provided, of course, it received appropriate notice and details of these complaints (as principles of fair procedure undoubtedly require) and the requests related to relevant material. In addition, the Department has no difficulty with disclosing its views on the issue of whether people have an enforceable right to be provided with in-patient services under the Health Act 1970. Indeed we have already stated our views on this issue in previous correspondence.
Insofar as your request extends to documentation concerning or relating to the litigation, the Department is advised that you have no entitlement to such documentation and that it would be inappropriate to provide the same. This is essentially for two reasons.

First, the vast majority of this documentation (if not, indeed, all of it) was generated during the course of or in contemplation of litigation. It is thus covered by legal professional privilege. That privilege is constitutionally protected and is fundamental to the right of this Department to conduct litigation and to seek and obtain the advice of the Attorney General. There is nothing in section 7 (or elsewhere in the 1980 Act) which suggests that the Ombudsman is entitled to have access to such privileged material. Nor can the Ombudsman override that privilege by contending that the information is “relevant” to her investigation.

Second, the Department notes that the Ombudsman has concluded that the litigation files are “relevant” to the investigation. However, with respect, no valid basis has been set out for that conclusion.

As I have pointed out already, the Department finds it puzzling that you would wish to have access to such files when you expressly contend that you are not investigating those cases nor the conduct of the litigation.

The question of relevance is an objective one and the Department simply cannot accept for a moment that these files are relevant merely because the Ombudsman has subjectively determined that they are.

In the circumstances, the Department is unable to comply with the requirements set out in your letter of 31 August 2009 insofar as it concerns material relating to the litigation.

Yours sincerely,

[Signature]
Noel P. O’Shea
Director

cc Teresa Cody, Department of Health & Children
Professor Brendan Drum, CEO, Health Service Executive
Tom Leonard, Health Service Executive.
Our Ref: SPI/09/0001

16 October 2009

Mr. Noel Usher,
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 7 October 2009. I agree, in view of the position being adopted by the Department, that there is little point in continuing with the present correspondence. However, I think it is proper that I should set out briefly, and for the record, the position of the Ombudsman and her intentions in relation to the completion of the investigation. The position is as follows:

1. The Ombudsman is satisfied that the investigation, as originally envisaged and notified to the Department on 30 July 2009, is a valid exercise of her function and that all of the statutory prerequisites for the conduct of the investigation are met.

2. The Ombudsman is satisfied that her requirement for the provision by the Department of information and documentation constitutes a valid exercise by her of the powers given to her Office by the Oireachtas under section 7 of the Ombudsman Act 1980. This requirement was served on the Department in my letter of 31 August 2009.

3. The Ombudsman is satisfied that the Department’s response to this statutory requirement, as set out definitively in your letter of 7 October 2009, amounts to a refusal to comply with section 7 of the Ombudsman Act 1980.

4. The Ombudsman will, at the appropriate time, report to the Oireachtas on the refusal of the Department to comply with the section 7 requirement.

5. The Ombudsman will now proceed with the investigation, as notified to the Department, notwithstanding the refusal of the Department to provide the information and documentation which she requires.

**Material Sought - Privilege**

The material sought by the Ombudsman comprises two distinct categories, namely, information and documentation. The Department’s position, apparently, is that it is refusing
to provide either information or documentation.

This refusal encompasses a refusal to provide, amongst other things, information

- on the number of relevant legal actions which have been commenced against the Department (in a context in which legal proceedings are conducted in public and such information is, in principle, in the public domain);

- on the number of such actions which have been settled (again, information which is, in principle, already in the public domain);

- on the identities of any co-respondents and the identities of any applicants who may be Wards of Court (once again, information which is, in principle, already in the public domain);

- on the nature of the claims being made and the reliefs being sought (also information which, in principle, is in the public domain);

- on the costs incurred by the Department in dealing with these actions, including legal costs and costs paid by way of settlement (though all of this spending comes from the Exchequer and, ultimately, from the taxpayer).

As regards documentation, the Department is refusing

- to provide copies of any settlements made with any of the applicants (notwithstanding that any payments made on foot of such settlements came from the Exchequer);

- copies of all pleadings by the Department in the context of defending the actions (where such court documentation is, in principle, in the public domain);

- copies of internal Departmental, as well as copies of communications with the HSE, regarding the provision of long-stay care (other than documents covered by legal privilege).

From the outset, the Ombudsman has accepted that some of the material which she seeks from the Department will be protected by legal privilege. For this reason, in writing to the Department on 31 August 2009 this Office distinguished clearly between material which is privileged and material which is not protected by privilege. In the case of the former, the Ombudsman requested that the Department would provide such material; in the case of the latter, the Ombudsman invoked section 7 of the Ombudsman Act 1980 and required the provision of such material.

The Department’s principal justification for its refusal to provide the material sought by the Ombudsman appears to be based on its exercise of legal privilege. The Ombudsman does not accept that this blanket claim of privilege is warranted. In particular, and as anticipated by the Ombudsman in our letter of 31 August 2009, she does not accept that the terms of any settlement entered into by the Department will attract legal privilege. Such terms of
settlement neither contain legal advice nor do they constitute confidential communications between a client and legal adviser in contemplation of, or in preparation for, litigation.

Conclusion

In the light of the position as outlined above, it is a matter for the Department to decide if it is willing to lend its full cooperation to the Ombudsman in relation to this aspect of the investigation. Either way, as of now, the Ombudsman is proceeding with the investigation as best she can. To the extent that her investigation may be hindered by the failure of the Department to cooperate fully, she will, if appropriate, comment to this effect in her draft investigation report. In accordance with normal practice, the Department will be afforded the opportunity to make representations to her in relation to any such comments.

Yours sincerely,

_____________________
Fintan Butler
Senior Investigator
23 October 2009

Mr Fintan Butler
Senior Investigator
Office of the Ombudsman
18 Lower Leeson St
Dublin 2

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

Dear Mr Butler,

I refer to your letter of 16 October in response to mine of 7 October.

While having no desire to prolong our correspondence unnecessarily, there is a number of statements in your letter with which the Department takes issue and to which, for the record, it is necessary to respond.

Firstly, and fundamentally, the Department strongly disputes the suggestion that it has refused to comply with section 7 of the 1980 Act. The Department has repeatedly made clear its commitment to co-operating with the Ombudsman’s intended investigation and, in that context, accepts, of course, that it must comply with any lawful requirement arising under section 7.

However, for the reasons which have been explained in detail in my previous letters the Department has pointed out that certain aspects of the Ombudsman’s intended investigation are outside the ambit of the 1980 Act and that the Ombudsman was not entitled to impose requirements for information or documentation in relation to such matters. The Ombudsman is not entitled to extend her functions on the basis that she is satisfied that a requirement for information and documentation constitute a valid exercise by her of her powers when in fact as a matter of law the purported exercise is invalid. In particular, the Department identified important limitations on the Ombudsman’s functions and the consequential limitations on the documentation and information which the Ombudsman was entitled to require. In particular, the Department drew attention, in this context, to the express acknowledgement in your letter of the 26th September 2009 to the effect that the Ombudsman was not investigating the handling of litigation by the Department.
These valid objections cannot be overcome by a reassertion that the Ombudsman is satisfied that her requirement is a valid exercise by her of her powers under Section 7. In such circumstances it is clearly not appropriate to seek to characterise the Department's response as a refusal to comply nor is it fair to state that it is the Ombudsman's intention to so characterise the response in her report to the Oireachtas.

In my letter of 7 October I stated, in particular, that no valid basis had been provided for the view apparently held by the Ombudsman that the litigation files sought by her were relevant to the investigation. It is notable that your letter of 16 October fails to address that issue at all, other than to repeat that the Ombudsman is satisfied that her requirement for the provision of documentation and information constitutes a valid exercise of her statutory powers. I also explained in my letter of 7 October that the question of relevance is an objective one and the subjective opinion of the Ombudsman that documents are relevant is not determinative. In the absence of any further explanation of the basis for that opinion, the Department's position remains as set out in my letter of 7 October. I wish to make it clear, however, that the Department remains willing to provide any further information and/or documentation to the Ombudsman for the purposes of her investigation, subject to it being demonstrated that same is relevant to the issues properly within the scope of that investigation and subject also, of course, to the issue of privilege.

Your letter asserts that the principal justification for the Department's "refusal" to provide the material sought by the Ombudsman relates to its exercise of legal privilege. That is, with respect, a mistaken assertion. Before any issue of privilege arises, the documentation/information sought by the Ombudsman is liable to be produced under section 7 if, and only to the extent that, it is relevant to a matter or matters being investigated by the Ombudsman. As explained above, the Ombudsman has failed to demonstrate any valid basis for contending that the material sought by her, and in particular the litigation files and associated information regarding the litigation, is relevant to any issue being investigated by her on foot of the complaints which have been notified to the Department.

As to the issue of privilege, I have made the Department's position clear in previous correspondence. In this regard the Department notes that you now accept that some of the material requested would in any event be protected by legal privilege and that you are no longer claiming as you did in the letter of the 16th September an entitlement to such documentation.
Contrary to what your letter suggests, the Department never sought to assert privilege over any material which was not in fact privileged and indeed this was made clear in my response of the 7th October where I indicated that the vast majority of the documentation to which your request extended was governed by legal professional privilege. Privilege was not and is not claimed over any information or documentation which was not privileged.

In conclusion, I re-iterate the Department’s strongly-held view that it is not the case that it has failed to comply with section 7 of the 1980 Act, less still that it has “refused” to do so. The Department is committed to fully co-operating with the investigation, subject to the issues of relevance and privilege as outlined above and as stated in my letter of 7 October. The Department has raised legitimate concerns regarding the legal basis of the Ombudsman’s investigation and the Ombudsman’s legal entitlement to the full range of documents sought by her, as it was and is entitled to do. In effect, the Ombudsman has chosen not to address those concerns. That being so, it is not open to her to purport to find a refusal to comply on the part of the Department. The Department reserves its rights in relation to any report which the Ombudsman may seek to make to the Oireachtas which contains such a finding.

Yours sincerely,

Noel P. Usher
Director

cc Teresa Cody, Department of Health & Children
Professor Brendan Drumm, CEO, Health Service Executive
Tom Leonard, Health Service Executive.
Our Ref: SPI/09/0001
11 December 2009

Mr. Noel Usher
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 the above investigation,

One of the issues which the Ombudsman will be considering in her investigation is the extent to which the Nursing Homes Support Scheme Act 2009 amends section 52 of the Health Act 1970. As you know, the Ombudsman's Office has taken the view for some years now that under section 52 of the Health Act 1970 the HSE is required to provide in-patient services (which includes long-stay nursing home type care) to persons with full eligibility and those with limited eligibility (effectively, the entire population). Your Department does not share this view and this difference of position was set out by the former Ombudsman in his presentation to the Joint Oireachtas Committee on Health and Children on 21 June 2001:

"The Department of Health and Children disputes the view that the Health Acts confer a legally enforceable entitlement to hospital in-patient services. It is the view of the Department that the law is unclear as to whether people have a statutory right to be provided with nursing home type care by a health board. The Department argues that the Health Act, 1970 distinguishes between the terms "eligibility" and "entitlement" and that the former, in the context of the Health Act, provides for eligible people to avail of services. However, as the Health Act does not define the manner in which, or the extent to which, in-patient services should be provided, the Department argues that the extent of any health board's legal obligation in this regard is unclear. I do not accept that there is any doubt as to the obligation on health boards to provide in-patient services for eligible people. This is clearly established by Section 52(1) of the Health Act, 1970 which reads ' (2) A health board shall make available in-patient services for persons with full eligibility and person with limited eligibility'."

I note that section 52 of the Health Act 1970 has recently been amended by section 34 (1) of the Nursing Homes Support Scheme Act 2009 which inserts the following after subsection (1):

"(1A) The Health Service Executive may make available long-term residential care services within the meaning of the Nursing Homes Support Scheme Act 2009."

For the purposes of the Ombudsman's investigation, I would be grateful if your Department would state its understanding of how (if at all) the new subsection (1A) qualifies the existing provision at section 52(1) of the Health Act 1970. In her investigation report the Ombudsman is likely, in
particular, to consider whether the 2009 Act amendment has any implication for the obligation on the Health Service Executive to make available in-patient services for persons with full and limited eligibility.

As matters now stand, section 52 of the Health Act 1970 (as amended) — which is a provision carrying the sidenote "Provision of in-patient services" — refers to two apparently separate categories of service, namely, "in-patient services" and "long-term residential care services". The former is defined in the 1970 Act as "institutional services provided for persons while maintained in a hospital, convalescent home or home for persons suffering from physical or mental disability or in accommodation ancillary thereon"; while the latter is defined in the 2009 Act as "maintenance, health or personal care services, or any combination thereof, provided by or on behalf of the Executive [to a person in a nursing home or facility for the elderly]". It is noteworthy that, under section 52 of the Health Act 1970 (as amended), the former is a service which the Executive "shall make available" whereas the latter is a service which the Executive "may make available". The Ombudsman wishes to establish whether, in the view of the Department, the addition of subsection (1A) of section 52 has any bearing on the previously existing obligation to provide in-patient services under subsection (1) of section 52.

I note that the Health Act 1970 is further amended by the 2009 Act with the insertion of the following after section 53

53A.—(1) This section applies where in-patient services (not being long-term residential care services within the meaning of the Nursing Homes Support Scheme Act 2009) are provided to a person in a hospital for the care and treatment of patients with acute ailments (including any psychiatric ailment) and a medical practitioner designated by the Health Service Executive has certified in writing that the person in receipt of such services does not require medically acute care and treatment in respect of any such ailment.

It is our understanding that this provision relates to the imposition of charges on patients in receipt of in-patient services but who are not patients receiving long-term residential care services. In effect, as we understand it, the service category "long-term residential care services" is a sub-set of the wider service category "in-patient services". I would be grateful if you would say whether or not the Department agrees with this view.

In responding to these queries it is open to the Department, should it so wish, to provide copies of whatever discussions it had with the Office of the Parliamentary Counsel to the Government in relation to the objectives and drafting of the provision.

The Ombudsman would appreciate having the Department's response by Monday 11 January 2010 at the latest.

Yours sincerely,

__________________________
Fintan Butler
Senior Investigator
January, 2010

Mr Fintan Butler
Senior Investigator
Office of the Ombudsman
18 Leeson Street
Dublin 2

Re: Ombudsman Investigation - Provision of In-patient Services (Section 52 of the Health Act 1970)

Dear Mr Butler,

I refer to your correspondence of the 14th December 2009 in which you seek clarification on the effect of amendments made to the Health Act 1970 by the Nursing Homes Support Scheme Act 2009.

I consider it would be useful to begin by providing a brief outline of the fundamental changes made by the Nursing Homes Support Scheme Act 2009 ("the 2009 Act") prior to addressing your specific queries.

**Definition of “Long-term residential care services”**

It may be noted that the 2009 Act provides, for the first time, for a definition of “long-term residential care services” (section 3 of the Act refers). The definition seeks to capture what is commonly understood as long-term nursing home care in line with the Government’s policy of establishing a scheme of financial support for all those in need of such care.

The intention of the 2009 Act is to draw a clear distinction between “long-term residential care services” (as so defined) on the one hand and the broad range of services which may come within the term “in-patient services” on the other. “Long-term residential care services” is now a stand-alone concept, rather than a subset of “in-patient services”. Indeed, one of the effects of separating out and defining “long-term residential care services” was to necessitate a new subsection enabling the provision of “long-term residential care services” by the HSE (section 52(1A) of the Health Act 1970 refers). From a legal perspective, a new type of care service had been created by the 2009 Act and the basis for the public provision of that service had to be simultaneously established.

**Amendments to Section 52 and 53 of the Health Act 1970**

You specifically ask whether the insertion of subsection 52(1A) by the 2009 Act has any implication for the obligation on the HSE to make available in-patient services for people
with full and limited eligibility and, in that context, ask that the Department would state its understanding of how (if at all) the new subsection (1A) qualifies the existing provision at section 52(1) of the Health Act, 1970.

As mentioned above, the 2009 Act defines and provides for "long-term residential care services", thereby creating a new care service that is distinct from in-patient services. Following on from this, the amendments made to section 52 and 53 of the Health Act 1970 provide the legal basis for the provision of this new service and for the imposition of charges in respect of it. It may be noted that both of these amendments refer to the Nursing Homes Support Scheme Act 2009 and must be read in conjunction with that Act.

The Nursing Homes Support Scheme is a voluntary scheme of financial support for people in need of long-term residential care. Its basic premise is that each applicant’s ability to meet his or her own care costs is calculated and the State then commits to meeting any outstanding balance subject to the availability of resources. Thus, in the first instance, the responsibility to meet the cost of long-term residential care rests with the individual. This principle is reflected throughout the 2009 Act but is perhaps expressed most explicitly in the definition of State support and in section 14 of the Act.

The definition of “State support” defines it as “a payment...to assist a person in meeting the cost of care services”. Section 14 stipulates the amount of State support which is payable under the scheme by reference to a person’s assessed means and by reference to the following equation:

$$S = T - M$$, where

- $S$ is the weekly amount of State support,
- $T$ is the total weekly cost of the care services in the nursing home chosen by the person, and
- $M$ is the assessed weekly means of the person.

The principle of responsibility for the cost of long-term residential care resting firstly with the individual is also carried through consistently in the amendments made to sections 52 and 53 of the Health Act 1970. The new section 52(1A) states that the HSE "may make available long-term residential care services within the meaning of the Nursing Homes Support Scheme Act 2009.". The word “may” recognises the fact that each person has a responsibility to meet the cost of their nursing home care but also recognises that the HSE, alongside the private sector, is a provider of such care.

The new subsections 53(1A) and (1B) state that, where the HSE provides long-term residential care services, it shall charge for such services in accordance with the Nursing Homes Support Scheme Act 2009. Section 33 of the 2009 Act is the most pertinent section in this regard as it provides that charges may equal but shall not exceed the cost of such long-term residential care services. In other words, a person availing of public long-term residential care services may be charged the full cost of care, notwithstanding that some portion of that cost may be met by means of financial support provided under the Nursing Homes Support Scheme.

In summary then, each individual is liable to meet the full cost of their long-term residential care, although they can apply to the HSE for financial support in respect of this cost in accordance with the terms of the Nursing Homes Support Scheme. In addition to its role as scheme administrator, the HSE can also provide long-term residential care
services and a person can choose to avail of these services. However, where they do so, they are liable for charges in accordance with the 2009 Act and, in particular, section 53 of that Act.

As your letter correctly records, the Department does not accept that section 52(1) gives rise to a legally enforceable, unqualified, obligation to provide in-patient services to persons with full eligibility, still less to “the entire population” as you appear to suggest. That remains the Department’s position. Section 52(1A) (inserted by the 2009 Act) does not affect that position but is wholly consistent with it. Subsection (1A) relates to the new category of service defined by the 2009 Act, namely “long-term residential care services”. The provision of “in-patient” services continues to be governed by section 52(1), subject of course to the provisions of section 53 in relation to charges (as amended by the Health (Amendment) Act, 2005).

You note that section 52(1) uses the term “shall” whereas section 52(1A) refers to “may”. The Department is advised that, as a matter of principle, it is not appropriate to interpret a statutory provision by reference to a subsequently-enacted provision. In any event, the Department’s position as regards section 52(1) is as set out above and the Department does not accept that any difference in terminology as between section 52(1) and section 52(1A) is material in this context.

Insertion of Section 53A within the Health Act 1970

You specifically ask whether section 53A(1) relates to the imposition of charges on patients in receipt of in-patient services but who are not patients receiving long-term residential care services. The purpose of section 53A is to enable the application of charges to people in acute hospital beds who have finished their acute phase of care. The provision allows such individuals to be charged in respect of in-patient services “as if those services were long-term residential care services”. It further provides that such charges shall be determined by the average cost of long-term residential care services provided by the HSE. The rationale underpinning this provision is to remove the incentive to remain inappropriately in an acute hospital bed when long-term residential care is more appropriate. This policy rationale is clearly outlined in the Oireachtas debates on the legislation.

For the reasons already indicated, the Department consider “long-term residential care services” to be a distinct, stand-alone category, rather than a “sub-set” of in-patient services, though, in reality, little or nothing would appear to turn on this point.

I trust that the above clarification is of assistance to you. Please do not hesitate to revert to me if I can be of any further assistance.

Yours sincerely,

[Signature]

Noel Usher
Director
Office for Older People
Our Ref: SPI/09/0001
1 February 2010

Mr. Noel Usher
Department of Health and Children
Hawkins House
Dublin 2

Dear Mr. Usher

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

Thank you for your letter of 8 January 2010 dealing with the interaction between the Nursing Homes Support Scheme Act 2009 and section 52 of the Health Act 1970.

I note your explanation that the 2009 Act creates a new service category ("long term residential care services") which has the effect of reducing the range of the existing category of "in patient services" as defined at section 51 of the 1970 Act. As I understand the Department's position, this development has the effect of removing nursing home care from the scope of "in-patient services" and, in effect, displacing the definition of "in-patient services" provided by the Supreme Court in its 1976 judgment in the *Mcinerney* case. You further explain that, while the State (through the HSE) may provide financial support to those in need of long term residential care services, there is no statutory entitlement for persons who must avail of long term residential care services. You note that, following the 2009 Act, responsibility for meeting the costs of long term residential care services is primarily a matter for the individual concerned.

I expect that the Ombudsman's investigation report will deal with these developments and will represent the position as outlined by the Department. In particular, the Ombudsman is likely to rely on the explanation of these developments as outlined by the Minister (or Minister for State) as the 2009 Act was being taken through the Dáil and Seanad. As the Oireachtas debates on the 2009 Act are quite voluminous, it would be of great assistance to us if the Department could refer us to those extracts from the Dáil and Seanad debates where these developments were outlined to the members of the Houses.

Yours sincerely,

Pintan Butler
Senior Investigator
2nd March 2010

Mr Fintan Butler
Senior Investigator
Office of the Ombudsman
18 Lower Leeson St
Dublin 2

Dear Mr Butler,

I refer to your letter of 1 February concerning the provision of in-patient services (Section 52 Health Act 1970).

I would like to clarify that the policy intention of the Nursing Homes Support Scheme Act 2009 is that each individual is liable to meet the full cost of their long-term residential care, although they can apply to the HSE for financial support in respect of this cost. Financial support shall be provided by the HSE in accordance with the terms of the scheme and the budget provided by the Oireachtas for the purposes of the scheme in each financial year. In other words, the provision of financial support is not a discretionary matter. Rather, the provision of financial support is payable subject to resources and statutorily defined criteria.

You also asked if the Department could refer you to extracts from the Dáil and Seanad debates where developments in relation to defining long term residential care services and entitlement to these services were explained. As you point out yourself, the Oireachtas debates are extensive, and the Department would not wish to in any way confine or otherwise circumscribe your own examination of these records. With this caveat in mind, I think the following overall guidance might be useful. As a rule, with all legislation, the principles upon which a Bill is based, and key developments within it, are generally set out in the Minister’s opening address at the commencement of second stage in both Houses. In the case of the Nursing Homes Support Scheme Bill this was on the 12/13 November 2008 in the Dáil and 10 June 2009 in the Seanad. Committee stage involves going through the Bill section by section so you should be able to find whatever you need by general reference to the sections in the published Bill and numbered list of amendments at that stage (with the caveat that the numbering can change as amendments are accepted or withdrawn). It is difficult to be more specific than this as the discussion on a particular amendment or section can widen outside its scope quite extensively, depending on the participants at committee.

I hope that the clarification and suggestions above will assist the Ombudsman’s office in its work, and I welcome the fact that the Department’s policy positions will be outlined in the Ombudsman’s investigation report.

Yours sincerely

Noel Usher
Director
Office for Older People
Our Ref: SPI/09/0001

June 2010

Mr. Noel Usher
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 the above investigation under section 4 of the Ombudsman Act 1980 into the provision of in-patient services under section 52 of the Health Act 1970. As notified to the Department of Health and Children in July 2009, this is a wide-ranging "own initiative" investigation which looks at the actions of the Department, of the Health Service Executive, and of some of the non-HSE public hospitals in providing for patients who are found to require in-patient services on a long-term basis.

The report has now been drafted and the Ombudsman intends to lay the completed report before the Dáil and Seanad.

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.

Any email communications regarding the report should be sent to Fintan Butler (fintan.butler@ombudsman.gov.ie) and Emer Doyle (emer.doyle@ombudsman.gov.ie).

Yours sincerely,

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Pat Whelan
Director General

cc. Ms. Audrey Hagerty

Letter dated the 24th June 2010 from Mr. Pat Whelan to Mr. Noel Usher
Mr. Pat Whelan  
Director General  
Office of the Ombudsman  
18 Lower Leeson Street  
Dublin 2

Your ref: SPI/09/001

2 July 2010

Re: Ombudsman Investigation – Provision of In-Patient Services (Section 52 Health Act 1970)

Dear Mr. Whelan

Thank you for your letter of 24 June 2010 enclosing a summary of the content of the report which, you say, identifies those points “which contain criticisms or comments adverse to the Department.”

The summary refers to nine chapters. So far as can be judged from this summary, it would appear that the report is, almost in its entirety, critical, either expressly or by implication, of the Department and its officials.

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. This 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 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 time scale you had proposed was wholly unrealistic.

Please also note that the Department further reserves all its rights in this regard.

Yours sincerely

[Signature]

Noel Usher  
Director  
Office for Older People
Mr. Pat Whelan  
Director General  
Office of the Ombudsman  
18 Lower Leeson Street  
Dublin 2

16 July 2010

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

Dear Mr. Whelan

I refer to your letter of 24 June 2010 which informed the Department that a report regarding the above matter had been drafted and that the Ombudsman intended to lay the completed report before the Dáil and Seanad. A summary statement of the draft report was enclosed. The letter indicated that any representations which the Department might wish to make should be submitted by close of business on Friday 16 July 2010.

I also refer to my letter of 2 July 2010 in which I requested that the Ombudsman would provide a full copy of the draft report. The reasons for the Department seeking a full copy of the draft report are set out in that letter and do not need to be reiterated here.

It is noted that while the Ombudsman has acknowledged receipt of my letter of 2 July the Department has not yet received a copy of the full draft report or any indication that it will be furnished or when it will be furnished. It is also noted that you had requested that any representations that the Department may have wished to make upon the report were to be received by Friday 16 July.

The Department obviously wishes to make representations in respect of the report but in the absence of a copy of the full draft report the Department is not in a position to do so.

In the circumstances I respectfully repeat my request that the Department be provided with a full copy of the draft report so that the Department can provide the necessary representations that it wishes to make.

I look forward to hearing from you in due course.
Yours sincerely

Noel Usher
Director
Office for Older People
Our Ref: SPI/09/0001

July 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 recent correspondence to this Office concerning the above investigation.

Please find enclosed 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. These sections are being provided to the Department in accordance with section 6(6) of the Ombudsman Act 1980 and in line with fair procedures.

It should be noted that there may be further minor drafting changes to the report. However, any such changes will not alter its substance.

Any representations which the Department might wish to make should be received in this Office by close of business on **Monday 16 August 2010** at the latest.

Any email communications regarding the report should be sent to Fintan Butler (fintan_butler@ombudsman.gov.ie) and Emer Doyle (emer_doyle@ombudsman.gov.ie).

Yours sincerely,

____________________________________
Pat Whelan
Director General

Letter dated 19th July 2010 from Mr. Pat Whelan to Mr. Noel Usher
Mr. Pat Whelan
Director General
Office of the Ombudsman
18 Lower Leeson Street
Dublin 2

Your ref: SPI/09/0001

22 July 2010

Dear Mr. Whelan

I refer to your letter of 19 July and the attached sections of the draft report on the Ombudsman's investigation into in-patient services (S52 Health Act 1970).

While I welcome the fact that your office has made available sections of the draft report to the Department, it is not sufficient to enable us to respond comprehensively. A summary statement of the draft report was provided to the Department on 24 June and my letters of 2 and 16 July requested that the Department have a full copy of the draft report so that it could make the necessary representations thereon.

I note from the extracts provided to us this week that the report will include a discussion of the role of the Attorney General as public interest guardian but this extract has not been released. We have drawn this to the attention of the Office of the Attorney General and that Office is most concerned that the Attorney General has not been given an opportunity to comment on this material.

I would be very grateful if you could release the complete draft report to this Department to provide it with an opportunity to consider its response in a meaningful way. The Department would also respectfully suggest that the timeframe given to respond on the draft report is not sufficient and I would propose that a deadline of at least 16 September would be more appropriate.

Yours sincerely

Noel Usher
Office for Older People
Our Ref: SPI/09/0001

July 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 22 July 2010.

As you know, the report in question combines an investigation under section 4 of the Ombudsman Act 1980 with a report to the Dáil and Seanad under section 6(7) of that Act.

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

Letter dated 28th July 2010 from OO to Mr. Noel Usher
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.

Finally, you mention references in the draft report to the Office of the Attorney General. The comments in the report concerning the Attorney General are comments in relation to that Office in a general sense; they do not involve any finding or criticism adverse to the current holder of that Office and, thus, are not comments which require to be put to the Attorney General under section 6(6) of the Ombudsman Act 1980 or under the requirements of fair procedure and constitutional justice.

As always, any email communications regarding the report should be sent to Fintan Butler (fintan.butler@ombudsman.gov.ie) and to Emer Doyle (emer.doyle@ombudsman.gov.ie).

Yours sincerely,

Pat Whelan
Director General

Letter dated 28th July 2010 from OO to Mr. Noel Usher
5th August 2010

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

Dear Mr Whelan,

Re: Ombudsman Investigation – provision of in-patient services
Section 52 Health Act 1970

I wish to refer to your earlier letter of 28th July in this matter.

I am bound to say, with respect, that the Department considers that the manner in which your Office is conducting the nursing home charges investigation to be most unsatisfactory.

In the first instance, I re-iterate that the Department has a clear legal and constitutional entitlement to have access to the entirety of the draft report. It is not sufficient simply to provide an extract or extracts from the report. As the draft report is largely directed at the Department, it cannot meaningfully avail of its statutory entitlement in section 6(6) of the Ombudsman Act 1980 to make representations in respect of that draft report without sight of it in its entirety. Section 6(6) must be construed in the light of the obligation to abide by fair procedures when carrying out your 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.

All of this is underscored by the provisions of section 6(8) which state that such a report is absolutely privileged. This naturally pre-supposes that the highest levels of procedural fairness will have been adhered to by your Office prior to publication. This makes your failure to release the entirety of the draft report all the more surprising.

In addition it is noted that the current stance of the Ombudsman’s Office is contrary to its previous practice where, for example, in respect of the Ombudsman’s report on the Nursing Home Subventions, the full draft report was provided to the Department for its observations before the report was published.
Further in this regard I refer you to the following passage in your letter of 28th July:

"Finally, you mention references in the draft report to the Office of the Attorney General. The comments in the report concerning the Attorney General are comments in relation to that Office in a general sense; they do not involve any finding or criticism adverse to the current holder of that Office and, thus, are not comments which require to be put to the Attorney General under section 6(6) of the Ombudsman Act 1980 or under the requirements of fair procedure and constitutional justice."

This admits of the interpretation that the Ombudsman may intend making adverse findings against the Office of the Attorney General "in a general sense", although not of the current Office holder. The Department is entitled to clarity on this and in this regard is entitled to the full report.

In the second place, I must protest at the fact that the Ombudsman has seen fit to make public utterances concerning the investigation, notably at the Nursing Homes Ireland Conference last October and more recently at the MacGill Summer School. Not only is it quite inappropriate that a statutory office holder called upon to exercise quasi-judicial powers under the 1980 Act should make comments in public of this kind, but, putting matters at their lowest, such comments create the potential for perceptions of pre-judgment (or objective bias) on the part of the Ombudsman. Having regard to this it is again absolutely necessary for the Department to see the entire draft report.

Against that background I would hereby request that you would kindly make available the entirety of the draft report by August 13th, 2010. Furthermore, it will be necessary for the Department to have six weeks to study the draft and to prepare its response. You might confirm that you will thus extend the deadline for a response to September 24th. You might further confirm that it is not your intention to make any further public utterances on the matter pending publication of the report.

I look forward to hearing from you.

Yours sincerely

Noé Usher
Director
Office for Older People
Our Ref: SPI/09/0001

6 August 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 57 Health Act 1970)

I refer to your letter to the Director General, dated 5 August 2010, to which I am replying in his absence.

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.

For your information, the content of the draft report which has 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.

While 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. In 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. As mentioned in our letter of 28 July, the Ombudsman will welcome engagement with the Department in relation to the report following its laying before the Dáil and Seanad.
Your recent letter states that "the current stance of the Ombudsman’s Office is contrary to its previous practice where, for example, in respect of the Ombudsman’s report on Nursing Home Subventions, the full draft report was provided to the Department for its observations before the report was published." In fact, this is not correct; in the case of the report on Nursing Home Subventions, the Department was given extracts from the draft report rather than the draft report in its entirety. I enclose a copy of our letter to the Department, dated 11 September 2000, which makes this clear.

You again raise the issue of comments in the draft report concerning the Office of the Attorney General. If it were the case - which it is not - that the draft report contained material which required to be put before the Office of the Attorney General, in the interests of fair procedure, then the Ombudsman would most certainly abide by that requirement. In that event, the Ombudsman would communicate directly with the Office of the Attorney General; the Department of Health & Children would not be involved in that communication. The Department’s capacity to make representations to the Ombudsman, arising from the fair procedure requirement, is not affected by any issue concerning the Office of the Attorney General.

You also raise the fact that the Ombudsman has commented in public on her forthcoming report to the Dáil and Seanad - at a Nursing Homes Ireland Conference last October and more recently at the MacGill Summer School - and you suggest that these comments "create the potential for perceptions of pre-judgment (or objective bias) on the part of the Ombudsman". In both instances, the Ombudsman’s references to this present investigation were made in the course of lengthy and wide-ranging addresses. In so far as they reflected negatively on arrangements for the long-term care of the elderly over the past period of years, it is relevant to point out that the Ombudsman’s comments simply reflected criticisms of past arrangements made in public by the Minister for Health & Children and by Ministers of State in her Department. For example, speaking in the Seanad on 10 June 2009 in the debate on the Nursing Home Support Scheme Bill, Minister of State, Aine Brady commented:

"In short, the present situation is unfair and unsustainable. It is deeply unfair that people of the same means face radically different costs for nursing home care, depending on where they live or whether their nursing home is public or private. It is deeply unfair that one person and his or her family with modest means could face very high bills to pay for care, while another might pay relatively little even though he or she had substantial means and assets. It is deeply unfair and unsettling that so many people and their families had no other option but to sell the family home to pay for care."

In so far as the Ombudsman commented on the present situation following the commencement of the Nursing Home Support Scheme Act, her comments were factual and based on information provided to her Office by the Department in the course of the preparation of the forthcoming report.

As the Ombudsman is quite satisfied that the material already provided to your
Department meets the requirements of section 6(6) of the Ombudsman Act 1980, as well as the requirements of fair procedure more generally. She will not, therefore, be acceding to your request for a copy of the complete draft report. Neither is the Ombudsman prepared to extend further the timeframe within which the Department may make representations in relation to the draft report material provided. Any representations which the Department wishes to make should be received in this Office by close of business on Monday 23 August 2010. After that date, we will proceed with the finalisation of the report which will include the taking into account of representations (if any) made by the HSE and/or the Department of Health & Children.

As always, any email communications regarding the report should be sent to myself (fintan_butler@ombudsman.gov.ie) and to Emer Doyle (emer_doyle@ombudsman.gov.ie).

Yours sincerely,

__________________________________________
Fintan Butler
Senior Investigator
12th August 2010

Mr Fintan Butler  
Senior Investigator  
Office of the Ombudsman  
18 Lower Leeson Street  
Dublin 2

Re: Ombudsman Investigation – provision of in-patient services –  
Section 52 Health Act, 1970

Dear Mr. Butler,

I refer to your letter of 6th August 2010.

The Department notes with considerable regret that despite a further request to provide the full draft report, the Ombudsman continues to refuse to provide access to same.

With regard to the nursing homes subvention report, the Department confirms that the Ombudsman provided more than mere extracts of the draft report in that case when he provided the report with the letter of 11 September 2000, notwithstanding the terms of the letter. The Ombudsman in fact provided the entirety of the draft chapters 1 to 7 of that report excluding chapter 8 which was entitled "Some Reflections". This means that all of the relevant substantive material contained in the draft report was provided except for the Ombudsman’s concluding reflections. The introduction to the report as published specified that the Department had been provided with a draft report for comment. The Ombudsman therefore is refusing to follow a practice adopted by her predecessor to meet the requirements of fair procedures.

The Department is at a loss to understand why engagement by the Ombudsman’s Office with the Department on the issues arising in this investigation can in the Ombudsman’s view apparently only take place after the report has been published. Fair procedures required the Ombudsman to engage with the Department during the course of the investigation and before finalisation of the report.

The Department did take issue with the Ombudsman’s entitlement to investigate matters which the legislation excludes from her jurisdiction. The Department however repeatedly confirmed its willingness to co-operate and engage with the Ombudsman during the course of her investigation.
No such engagement took place during the course of the investigation. There was only one meeting between officials of the Ombudsman's Office and officials of the Department in respect of this investigation and that was by way of a preliminary meeting on the 9th July 2009 before the commencement of this investigation by way of the Ombudsman's Office letter of 30 July 2009. That meeting had been requested by the Ombudsman's Office to discuss a number of issues, only one of which included this particular investigation. It is difficult to understand how an investigation of this nature could be fairly or properly conducted without engagement with the Department.

In circumstances where there has been a clear lack of engagement by the Ombudsman's Office with the Department on the issues arising in this investigation, it is all the more incumbent on the Ombudsman to provide the full report so that the Department is in a position to see the full case being made by the Ombudsman and is then in a position to address those issues on a proper and fair basis.

It is noted that the Ombudsman states that the Department has been provided with every part of the draft report containing material or statements which might be regarded as adverse to the interests of the Department. It is also stated that the content of the draft report which is not being 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 early reports from the Ombudsman);
- Some commentary on governance issues generally."

That we may be entirely clear on this issue, I would ask you to please formally confirm that there is nothing in the redacted contents which is critical or adverse to the Department's interests.

Notwithstanding the foregoing, the Department is still very firmly of the view that the 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 the 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.

The assertion that the Ombudsman's public comments merely reflected those of the Minister for Health and Children and the Minister for State is totally unsustainable. The Ombudsman in carrying out the investigation was, unlike the Ministers, acting in a quasi-judicial position. Such a position precludes prejudgetment or the appearance of prejudgement of the very issues being investigated. The Ombudsman investigation covers a range of issues and the criticisms in the draft Report are wide-ranging and extend way beyond the particular unfairness addressed both by the Minister for Health and Children and the Ministers of State in her Department in the course of the debate on the Nursing Home Support Scheme Bill. In those circumstances where the investigation is ongoing and where the Department's comments have been requested on its draft conclusions these statements are wholly inconsistent with the requirements of natural justice.
The Department notes that the Ombudsman has also refused to extend the timeframe for the submission of observations by the Department and insists that all such submissions should be furnished by Monday 23rd August 2010. The Department considers this to be an unreasonable demand in the circumstances. The Department respectfully requests that in order to enable it to provide the necessary accurate and comprehensive observations that are required to address the criticisms which have been levelled by the Ombudsman in the extracts of the draft report that have been provided to date, that the timeframe should be extended by 3 weeks to Monday 13th September 2010.

Yours sincerely,

Noel Usher  
Director  
Office for Older People
Our Ref: SPI/09/0001

13 August 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 12 August 2010.

It is clear that the Department’s understanding of what is required under fair procedure, in the context of the particular report, differs from that of the Ombudsman’s Office. In the circumstances, there is nothing to be gained for either party by restating what has already been stated on a number of occasions.

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".

Your letter of 12 August 2010 seeks to represent the Ombudsman, in the conduct of the investigation, as having failed to engage with the Department and asserts that this alleged failure is at odds with the requirements of fair procedure. Furthermore, the Department protests its willingness "to co-operate and engage with the Ombudsman during the course of her investigation". The fact is that the Department failed to provide the information and documentation sought by the Ombudsman for the purposes of this investigation. Clearly, the Department did not co-operate with the Ombudsman in the course of this investigation. While the Department may have been willing to co-operate with the Ombudsman on a different investigation, this does not alter the fact that it did not co-operate in the conduct of this particular investigation. In these circumstances the charge, that the Ombudsman failed to engage with the Department in the conduct of this investigation, lacks credibility.

Your letter suggests that the Ombudsman is somehow demanding a submission from the Department by 23 August 2010 and that this constitutes "an unreasonable demand". The
Ombudsman is not demanding a submission from the Department; rather, she is offering the Department the opportunity to make representations to her in line with the requirements of section 6(6) of the Ombudsman Act 1980 and of fair procedure more generally. It is a matter for the Department as to whether it does, or does not, take up this offer to make representations. The Ombudsman accepts that the Department must be allowed a reasonable period of time in which to prepare any submission. By any reckoning, allowing a period of eight weeks for the preparation of a submission is very reasonable.

If the Department wishes to make representations to the Ombudsman it should do so by close of business on Monday 23 August 2010. After that date, we will proceed with the finalisation of the report which will include the taking into account of representations (if any) made by the HSE and/or the Department of Health & Children.

As always, any email communications regarding the report should be sent to myself (fintan_butler@ombudsman.gov.ie) and to Emer Doyle (emer_doyle@ombudsman.gov.ie).

Yours sincerely,

____________________________
Fintan Butler
Senior Investigator
Mrs. Fintan Butler  
Senior Investigator  
Office of the Ombudsman  
18 Lower Leeson Street  
Dublin 2  

18 August 2010  


Dear Mr. Butler  

I refer to your letter of 13 August 2010.  

The Department notes the Ombudsman’s repeated refusal to provide the full draft report and also the refusal to extend time for the making of submissions.  

With regard to the issue of the Ombudsman’s failure to engage with the Department during the course of the investigation and before finalisation of the report I confirm that the Department has all times confirmed and reiterated its willingness to cooperate 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.  

With regard to the issue of an extension of time for submissions it is regretted that you have misconstrued what the Department said in its last letter. The "unreasonable demand" to which the Department was referring was the Ombudsman’s insistence that submissions from the Department had to be furnished by 23 August 2010, a time frame which the Department believes to be unreasonable in the circumstances.
You also go on to state that the Department has been allowed eight weeks to make submissions and that this is very reasonable. This has no basis in reality. The Ombudsman allowed only three weeks from the presentation of the initial summary of the report for the making of submissions by the Department. That summary was clearly inadequate. However it took all of that three weeks before extracts from the draft report were then furnished. Accordingly at most the Department has only five weeks in which to prepare and provide submissions and not eight weeks as asserted in your letter. The extracts provided by the Ombudsman contain serious criticisms which need to be addressed. The failure to provide the full draft report is hampering the Department in its ability to respond to the issues raised. The failure to furnish the full draft report and allowing a period of only five weeks for comment thereon cannot on any account be regarded as reasonable.

Your letter suggests eight weeks for the preparation of the submissions is very reasonable. As we were only furnished with the extracts from the draft report four weeks ago we would therefore reiterate our request for an extension of time as the period allowed, even by your own standard, is inadequate.

Yours sincerely

[Signature]

Noel Usher
Director
Office for Older People

c.c. Ms. Emer Doyle, Office of the Ombudsman
Our Ref: SPT/09/0001

19 August 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 18 August 2010 and to earlier correspondence regarding the making available to the Department of relevant material from the draft version of the Ombudsman’s investigation report.

The Ombudsman’s concern all along has been to ensure that, while meeting the requirements of fair procedure, her report is laid before the Dáil and Seanad with the minimum of further delay. With a view to being as helpful as possible, this Office suggests that the Department might make representations at this stage, by close of business on **Monday 23 August 2010**, with the option to make further, or more detailed, representations within the following two weeks, that is, by close of business on **Friday, 3 September 2010**. Representations made by 23 August 2010 will be taken fully into account by the Ombudsman in finalising her report. Representations made after 23 August 2010, and before 3 September 2010, will be taken into account to the greatest extent possible having regard to the state of finalisation of the report at the point when further representations are received. In any event it will be possible, should the Department so wish, to publish the entirety of the Department’s representations on the Ombudsman Office website in conjunction with the publication of the investigation report.

While this offer is being made in good faith, and with a view to being helpful, the Ombudsman is satisfied that her approach all along has been reasonable and in full compliance with the requirements of fair procedure.

As always, any email communications regarding the report should be sent to myself (fintan.butler@ombudsman.gov.ie) and to Emer Doyle (emer.doyle@ombudsman.gov.ie).

Yours sincerely,

Fintan Butler
Senior Investigator
Mr. Fintan Butler  
Senior Investigator  
Office of the Ombudsman  
18 Lower Leeson Street  
Dublin 2

20 August 2010


Dear Mr. Butler

I refer to previous correspondence, including my letter dated 18 August 2010.

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 and has imposed a deadline of Monday, 23 August 2010 for representations from the Department. While maintaining this deadline the Ombudsman has by letter dated 19 August 2010 now conceded a period of two weeks for the making of further submissions if the Department so wishes but this is so heavily qualified as to be wholly inadequate and critically the Ombudsman still has not furnished the full draft report.

The conduct of the Ombudsman in this regard 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.

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 in the attached document 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 in relation to the breaches by the Ombudsman of, *inter alia*, their statutory and constitutional rights to fair procedures, and that all of their rights are expressly reserved.

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 return and, in any event no later than 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 manifest when considered in the light of the matters addressed in the attached representations, 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.

Yours sincerely

[Signature]

Noel Usher
Director
Office for Older People

*cc* Ms. Emer Doyle, Office of the Ombudsman
By e-mail and courier

23 August 2010

Mr Fintan Butler
Senior Investigator
Office of the Ombudsman
18 Lower Leeson Street
Dublin 2

Re:  Ombudsman Investigation – provision of in-patient services – Section 52
Health Act, 1970.

Dear Mr. Butler,

I refer to previous correspondence, including your letter dated 19 August 2010 which was sent in reply to ours of 18 August 2010.

It is with regret that the Department notes the Ombudsman still refuses to make available the full draft report.

It is noted that the Ombudsman also still insists that the Department's submission must provide the representations it wishes to make by today Monday August 23. A concession appears to be made that more detailed representations may be submitted in the following two weeks, however this concession is so qualified as to render it totally inadequate and meaningless. Indeed the purported concession is such that the Ombudsman stretches her concept of fair procedures to extraordinary limits in that it is stated that while representations may be provided they will only be taken into account "having regard to the state of the finalisation of the report at the point when further representations are received". In other words no matter how valid or probative the Department's further representations may be they will be disregarded if the internal logistics of the Office of the Ombudsman regarding the speed of production of the Ombudsman's Report so require.

This is most unsatisfactory and disconcerting.

In the circumstances the Department must once again reiterate its request that the Ombudsman provide the full report and that a reasonable time frame be allowed for the making of meaningful submissions.
In any event having regard to the preliminary observations submitted to you on Friday 20 August one would have thought is was now plain beyond any doubt whatsoever that fair procedures and proper exercise by the Ombudsman of her statutory functions would require that the full report and a reasonable time frame for a response thereto should now be provided immediately.

Yours sincerely

[Signature]
Noel Usher
Director
Office for Older People

Cc Emer Doyle