Our Ref: SPI/09/0001

30 July 2009

Professor Brendan Drumm
Chief Executive Officer
Health Service Executive
CEO's Office
Dr Steevens' Hospital
Dublin 8

Dear Professor Drumm,

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 the
HSE; in addition, she will seek written responses from the HSE on a number of matters. It
may also be necessary to conduct formal, on-the-record interviews with senior people within
the Health Service Executive. In the event that the investigation is likely to result in any
"finding or criticism adverse" to the HSE the Ombudsman will, as required by section 6(6) of
the Ombudsman Act 1980, provide the HSE 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 HSE 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 HSE or, in the alternative, to ensure that the position of the
HSE can be ascertained speedily and authoritatively. We would also see this nominated
person being of considerable help in identifying and accessing HSE 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 HSE; though the HSE 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 HSE 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 HSE's
nominated senior person would make direct contact with Fintan Butler as speedily as possible
both to deal with any queries the HSE may have and to agree working arrangements for the
conduct of the investigation.

Yours sincerely,

[Signature]
Pat Whelan
Director General
Your Ref: SPI/09/0001

6th 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 have been asked by the Chief Executive Officer to respond to your letter of 30th July 2009 with regard to the above matter.

I have assigned Mr Tom Leonard Local Health Manager with lead responsibility for services for older people to assist your office with the investigation as you have requested.

Mr Leonard has comprehensive knowledge of the elderly services and is in a position to coordinate the HSE response to your office including the requirement for records etc over the coming period. Tom's contact details are as follows: Tom.l.levand@hse.ie. Mob 087-2355268 and I have asked him to contact your office to make the necessary arrangements for follow up.

Yours sincerely,

[Signature]

Pat Healy
A/National Director
Primary, Community & Continuing Care

C.C. Professor Brendan Drumm
Mr Tom Leonard
Our Ref: SPI/09/0001

20 August 2009

Mr. Tom Leonard
Local Health Manager
Kerry Community Services
Health Service Executive
Rathass
Tralee
Co. Kerry

Dear Mr. Leonard,

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

Thank you for taking the time yesterday to visit our office to discuss arrangements for liaising with us, on behalf of the HSE, for the purposes of our investigation. We very much appreciate your stated intention to give us every assistance in providing documentation, information and acting as a general point of reference for us in our dealings with the HSE in the course of the investigation. As agreed, for the duration of this particular investigation we will not abide by the usual procedure of copying all key communications to Ms. Mary Culliton in her capacity as the HSE’s Liaison Officer for all dealings with the Office of the Ombudsman.

Over the next few weeks, and starting with a separate communication today, we will be seeking specific information and documentation from the HSE for the purposes of the investigation. In seeking this information and documentation we are relying on the powers given to the Ombudsman under section 7 of the Ombudsman Act 1980. For the record, Section 7 provides:

7.—(1) (a) The Ombudsman may, for the purposes of a preliminary examination, or an investigation, by him under this Act require any person who, in the opinion of the Ombudsman, is in possession of information, or has a document or thing in his power or control, that is relevant to the examination or investigation to furnish that information, document or thing to the Ombudsman and, where appropriate, may require the person to attend before him for that purpose and the person shall comply
with the requirements.

[...]

(2) Subject to the provisions of this Act, a person to whom a requirement is addressed under this section shall be entitled to the same immunities and privileges as if he were a witness before the High Court.

(3) A person shall not by act or omission obstruct or hinder the Ombudsman in the performance of his functions or do any other thing which would, if the Ombudsman were a court having power to commit for contempt of court, be contempt of such court.

You can take it that any future contacts with you, seeking information or documentation, will arise under section 7 of the Ombudsman Act 1980 but I am sure it will not be necessary to spell this out in each individual instance.

As I mentioned to you yesterday, we are anxious that in complying with our requirements the HSE should not be unnecessarily discommoded. If, from the HSE perspective, any of our requirements under section 7 of the Ombudsman Act 1980 might be met more efficiently on the HSE side on the basis of some adjustment in what we are seeking then we are open to discussion on the matter. While it may not always be possible for us to amend a requirement, we are certainly open to a discussion on whether this is possible. In such a case, you or one of your colleagues should contact us immediately to discuss our options.

As discussed also yesterday, we will communicate with you by email but if, for any reason, you would like a hard copy of a communication to be sent by post then we will be happy to do so.

Yours sincerely,

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Fintan Butler
Senior Investigator
Office of the Ombudsman
Our Ref: SPI/09/0001

20 August 2009

Mr. Tom Leonard
Local Health Manager
Kerry Community Services
Health Service Executive
Rathass
Tralee
Co. Kerry

Dear Mr. Leonard,

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 and in particular to my letter of earlier today dealing, in general terms, with the requirement to provide information and documentation for the purposes of the investigation. We are now seeking information and documentation in one specific area and 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 HSE (including its predecessor health boards) 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 HSE (or one of its predecessor health boards) 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 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 HSE (or any of its predecessor
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 HSE 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 HSE in relation to these proceeding 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 HSE'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 HSE (or by any of its predecessor health boards) in dealing with these sets of proceedings (that is, all of the proceedings);

- the amounts (if any) paid out by the HSE (or by any of its predecessor health boards) by way of out-of-court settlements as well as the amounts (if any) of the legal costs of applicants paid by the HSE (or by any of its predecessor health boards).

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 HSE):

- copies of all communications between the HSE (or any of its predecessor health boards) and the Department of Health and Children 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 HSE discussions or communications on how to respond to the proceedings in question; this is to include records of such discussions and communications within any of the health boards prior to the establishment of the HSE.

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 HSE):

- 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 HSE 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 HSE 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, 16 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 HSE 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 HSE in responding to the legal proceedings in question. In particular, if the HSE 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 HSE 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.

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,

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Fintan Butler
Senior Investigator
Office of the Ombudsman
15th September, 2009

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

Re: Ombudsman Investigation – Provision of Inpatient Services (Section 52) Health Act (1970)

Dear Mr. Butler,

My letter to your Director General on 6th August appointing Mr. Tom Leonard as the HSE nominated contact person for this Investigation refers.

Because of the significance of the investigation for the HSE my attention has been drawn to your correspondence with Mr. Noel Usher Assistant Secretary DoH&C. I have now seen the Department’s latest correspondence to you dated 11th September 2009.

The issues raised by the DOH&C are also directly relevant to the HSE and will impact on our ability to respond to you within the time frame of Wednesday 16th September as specified in your correspondence. Accordingly, I would be grateful if you would please address the issues raised by the DoH&C and also let the HSE have the further information requested by the DoH&C.

I respectfully request your response so as to enable the HSE to consider your correspondence of the 20th August 2009.

Yours sincerely,

[Signature]

Pat Healy,
A / National Director
PCCC Directorate.
Pat.healy1@hse.ie
Our Ref: SPI/09/0001

18 September 2009

Mr. Tom Leonard
Local Health Manager
Kerry Community Services
Health Service Executive,
Rathass,
Tralee.
Co. Kerry

Dear Mr. Leonard,

**Ombudsman Investigation - provision of in-patient services**

(Section 52 Health Act 1970)

I refer to my email letter of 20 August 2009 in which I set out the Ombudsman's requirement for the provision of certain information and documentation relating to litigation in which the HSE is involved and which is of relevance to our investigation. This was a statutory requirement arising under section 7 of the Ombudsman Act 1980. In addition, in that same letter the Ombudsman requested the provision of copies of legal advice received by the HSE in relation to the litigation in question.

The requirement under section 7 was to be met by the HSE by **Wednesday, 16 September 2009** at the latest. You will recall that in a separate email letter to you, also dated 20 August 2009, I dealt specifically with the issue of compliance with the Ombudsman's statutory requirement, saying:

"... we are anxious that in complying with our requirements the HSE should not be unnecessarily discommoded. If, from the HSE perspective, any of our requirements under section 7 of the Ombudsman Act 1980 might be met more efficiently on the HSE side on the basis of some adjustment in what we are seeking then we are open to discussion on the matter. While it may not always be possible for us to amend a requirement, we are certainly open to a discussion on whether this is possible. In such a case, you or one of your colleagues should contact us immediately to discuss our options."

None of the required material has been received to date by the Ombudsman; nor has the HSE requested an extension of time in which to meet the requirement; nor has it contacted us to discuss any adjustment to our requirement or to discuss arrangements for complying with the requirement. Accordingly, the HSE is in breach of the statutory Ombudsman requirement communicated to you on 20 August 2009. I note also that the HSE has not made any response to the Ombudsman's request for access to the relevant legal advice.

Late in the afternoon of 15 September 2009 we received an email from your colleague, Mr. Pat Healy, in which he said that the HSE is aware of certain issues relating to the
Ombudsman's investigation which had been raised by the Department of Health and Children; he noted that these issues are also relevant to the HSE "and will impact on our ability to respond to you within the time frame of Wednesday, 16th September...". Mr. Healy asked that the Ombudsman would address these issues and "also let the HSE have the further information requested by the DoH&C". This Office replied to the Department and copied our reply to yourself and Mr. Healy on 16 September 2009. The Ombudsman is satisfied that our reply of 16 September 2009 answers all of the concerns raised by the Department and that neither the Department nor the HSE has any basis for failing to comply with the statutory requirements she has served on them. (As it happens, the Department's deadline for compliance is Wednesday, 23 September 2009 so there is not any failure to comply on its part.)

I would be grateful if you would let me know, as speedily as possible, whether the HSE now intends to comply with the statutory requirement notified on 20 August 2009 and, if so, when it will comply. In addition, could you also give a clear statement of the HSE's intentions regarding provision of the material requested by the Ombudsman.

Yours sincerely,

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Fintan Butler
Senior Investigator
21st September 2009.

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

Your Ref: SPI/09/0001  

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

Dear Mr. Butler,  

Thank you for your letter of 18th September 2009. With respect, Mr. Pat Healy Assistant National Director, PCCC, made it clear that the issues raised by the Department of Health and Children were also directly relevant to HSE... I do not accept that the HSE is in breach of the statutory requirement. However, given what you have said, for the avoidance of any doubt, I confirm that the HSE does request an extension of time.  

Your reply to the Department of Health and Children of 16th September (which was copied to the HSE) was received by me after close of business on the 16th September 2009. The HSE is carefully considering your most recent correspondence.  

I wish to assure you that the matter is being given urgent attention. The HSE will of course comply with its statutory obligations but does need an opportunity to consider the contents of your latest letter and the significant and important jurisdictional issues that arise.  

You have asked the HSE to give a clear statement of the HSE’s intentions regarding provision of the material requested by you. In all the circumstances, I would be obliged if you would allow the HSE sufficient time to make this statement. The HSE will do so as soon as possible and certainly no later than this coming Friday, 25th September 2009, if not sooner.  

Yours sincerely,  

[Signature]  

TOM LEONARD  
LOCAL HEALTH MANAGER
Our Ref: SPI/09/0001

25 September 2009

Mr. Tom Leonard
Local Health Manager
Kerry Community Services
Health Service Executive,
Rathass,
Tralee,
Co. Kerry

Dear Mr. Leonard,

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

I refer to previous correspondence including your letter of today's date received a short while ago by email. It would seem that the issues being raised by the HSE in relation to the Ombudsman's investigation are, in essence, the same as those being raised by the Department of Health and Children. I attach for your information a copy of our letter to the Department issued this afternoon.

As you will see from the letter to the Department, the Ombudsman is fully satisfied as to her jurisdiction in conducting this investigation and is satisfied also that we have dealt comprehensively with all of the issues raised. As with the Department, the Ombudsman now looks forward to the full co-operation of the HSE in the conduct of this investigation.

In the circumstances, the Ombudsman is agreeable to extending to **Wednesday, 7 October 2009** the deadline for compliance by the HSE with the requirements set out in my letter of 20 August 2009.

Yours sincerely,

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Fintan Butler
Senior Investigator
25th September 2009

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

Your ref: SPL/09/0001

Re: Ombudsman Investigation – HSE provision of in-patient services

Dear Mr. Butler,

The Health Service Executive has now had an opportunity to consider your request for information and documentation concerning the proposed investigation into the provision of in-patient services pursuant to section 52 of the Health Act, 1970. As you are aware, the HSE has been copied with correspondence which has passed between the Ombudsman and the Department of Health & Children concerning this investigation.

Having reviewed the correspondence to date (including the correspondence with the Department) the HSE still does not understand the scope of the investigation or the basis upon which it is being undertaken. The investigation is expressed to be an own initiative investigation not related to instances in which legal proceedings have been instituted yet the information sought from the HSE is directly related to cases where such proceedings have been instituted. This issue has been clearly canvassed in the correspondence of the Department and to date has not been addressed.

With respect, the HSE is concerned that no appropriate jurisdiction has been disclosed in the correspondence to date or otherwise to permit the Ombudsman to conduct an investigation or require the production of the large volume and scope of documentation now sought. The initial request of the HSE was set out in the letter of the 30th July, 2009 and expanded upon in letter of the 6th August, 2009. Thereafter, on the 20th August, 2009, information and documentation were sought in one specific area. That specific area purported to seek the information and documentation concerning legal proceedings which involved the right to be provided with in-patient services. The information sought included requests that the HSE produce statements as to why it had adopted a particular approach and sought documentation including documentation.
dealing with all proceedings initiated since the 1st January, 2001. Thereafter, privileged documentation was requested but not required, while at the same time the Ombudsman reserved the right to note that if this documentation was not provided she might fail to obtain the fullest possible understanding and could not give any credence to advice which she had not seen.

In the letter of the 11th September, 2009 the Department correctly raised issues with the entitlement of the Ombudsman to conduct this investigation and sought specific details as to how the investigation came to be commenced and how it was proposed to proceed with that investigation. Despite further correspondence since that date, the HSE is of the view that the Ombudsman has unfortunately failed to clarify the basis or scope of the purported investigation and has failed to confirm that fair procedures will be adopted in the conduct of the investigation. Without such confirmation the HSE is in a very difficult position. It has emphasised on a number of occasions its intention to co-operate and its respect for the office of the Ombudsman. However, the HSE which has its own statutory obligations must satisfy itself that the Ombudsman is conducting an authorised investigation and adopting fair procedures in conducting the investigation. The HSE needs to satisfy itself that the documentation which is sought is both necessary and relevant and that the information sought is information which the HSE is obliged to provide and falls within the remit of the Ombudsman.

In the letter of the 30th July, the Ombudsman outlined that she proposed to undertake an investigation pursuant to section 4 of the Ombudsman Act, 1980 which would be a wide ranging investigation looking at the action of the Department, the HSE and of some non-HSE public hospitals in providing for patients who are found to require in-patient services on a long term basis. On the 6th August, 2009 the Ombudsman set out that she proposed to investigate the facts of a number of specific complaints. Those complainants were listed in a schedule. Limited information has been provided to explain the basis of this schedule of cases for investigation. The Ombudsman is aware that the HSE needs full information as to the nature of the complaints being made in respect of any of these matters. On the letter of 20th August, 2009, information was sought in one specific area namely legal proceedings involving the right to be provided with in-patient services. It is absolutely unclear what the connection is between the complaints and the legal proceedings. The Ombudsman has clarified in subsequent correspondence that these persons did not institute legal proceedings, yet it is only in respect of legal proceedings that information and documentation are sought in the letter of the 20th August, 2009.

The HSE shares the concerns raised in the correspondence which has emanated from the Department. In particular it is unclear as to why the information is now sought in relation to the conduct of this litigation. How could this information impact upon the alleged complaints made?

The HSE does not accept that the information and documentation sought raises issues concerning the performance of the administrative functions of the HSE. Critically there are a number of cases in being with significant implications for the State and the HSE. The Ombudsman does not appear to have had regard to the scale of the ongoing litigation and the concern that this investigation purports to cut across that litigation without regard to the entitlement of the HSE to defend that litigation as it properly determines having regard to the legal advice available to it. The provision of such information could unjustifiably hinder the HSE's defence of the litigation and confer on the other parties to such litigation an unfair advantage.
The HSE has to have regard to its statutory function. It has a duty to act in accordance with its statutory mandate. Litigation is being conducted and the defence of the HSE is fully informed by the legal advice available to it. If it has to disclose this information to the Ombudsman it is concerned only to do so when satisfied that the Ombudsman has jurisdiction to properly conduct an investigation into this matter.

The matters raised by the Department are of direct concern to the HSE. The HSE is very concerned that the Ombudsman, while appearing to acknowledge the existence of legal professional privilege against production and the entitlement of the HSE to rely upon such privilege, seeks to negate that entitlement by contemplating a potential adverse finding against the HSE arising out of any exercise by the HSE of that right. The HSE is entitled to rely upon legal professional privilege and no adverse consequences can arise from the exercise of that right. Further, in circumstances where the Ombudsman is precluded from investigating any action where the person affected by the action has initiated legal proceedings, then the HSE repeats the concerns which have been raised by the Department as to how the Ombudsman could possibly seek this information having regard to her statutory obligation.

The HSE has not been furnished with full details of all complaints which could form the basis of any investigation. It is essential that the HSE be furnished with this information having regard to the serious potential implications arising out of the investigation which the Ombudsman proposes to undertake. The HSE must have regard to its designated functions in legislation and the requirement particularly in the present circumstances to perform its functions within the remit of the Health Act, 2004, and to secure the correct use of its resources.

The HSE is cognisant of its requirement to furnish information and the deadline imposed by the Ombudsman. I trust the Ombudsman will understand the full nature of the concerns which have been raised by the HSE and why it is imperative that the Ombudsman fully deal with all outstanding issues before the HSE can provide such information and deliver the documentation. The HSE re-iterates its desire to cooperate but is compelled to repeat the concerns which have been raised in the correspondence by the Department that the Ombudsman must clarify the basis of the investigation, its scope and significance and the relevance of the information and documentation sought. To date this information has not been furnished.

I look forward to hearing from you. While I appreciate the deadline imposed I am sure you will understand that it is not possible to comply with such deadline in the absence of a full and comprehensive reply.

Yours sincerely,

TOM LEONARD,
LOCAL HEALTH MANAGER,
KERRY.
7th October 2009.

Mr. Fintan Butler,
Senior Investigator,
Office of the Ombudsman,
18 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 dated 25th September with enclosed letter to DOH&C

I have been copied with a letter dated the 7th October 2009 furnished to you by the Department of Health and Children. I trust that it is not necessary for the HSE to repeat the points made by the DoH&C and the points already made by HSE, but if you wish me to do so then please let me know.

The HSE’s respectful view is that the correspondence from the DoH&C sent to you today sets out the correct position. The HSE adopts the position of the DoH&C regarding the 9 named patients and is, as you are aware, cooperating fully with your office in providing documentation and facilitating interviews where requested. In passing you might please note that the HSE still have concerns regarding the non provision of full details previously requested in respect of complaints including in respect of the 9 complaints referred to above. However we will address these separately with your Office in due course.

Given the stated position of the HSE in its letter dated 25th September 2009, concerning the conduct of litigation and the position again restated by the DoH&C by way of its letter dated 7th October to you, the HSE is unable to comply with the requirements set out in your letter of 20th August 2009 in so far and in as much as they concern material relating to litigation.

Yours sincerely,

[Signature]

TOM LEONARD
LOCAL HEALTH MANAGER
Our ref SPI/09/0001

16 October 2009

Mr. Tom Leonard
Local Health Manager
Kerry Community Services
Rathass
Tralee
Co. Kerry

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

Dear Mr. Leonard,

I refer to your recent correspondence in connection with the above.

Given that the position of the HSE with regard to issues arising from the above, as outlined by you in your recent correspondence, is the same as that adopted by the Department of Health and Children, I have enclosed for your attention, a copy of a letter issued to the Department today outlining the position of the Ombudsman and her intentions in relation to the completion of the investigation.

Yours sincerely

Fintan Butler
Senior Investigator
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,

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Fintan Butler
Senior Investigator
3rd November 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,

We refer to your exchange of correspondence with the Department of Health and Children dated 16th October and 23rd October 2009, which has been copied to HSE.

In common with the Department of Health and Children, the HSE fully disputes any contention that it has failed or refused to comply with its obligations under the Ombudsman Act. With respect, for the reasons set out already and again in its most recent letter by the Department of Health and Children, this is an inaccurate representation of the position of the HSE. Accordingly, the HSE reserves its rights.

Yours sincerely,

[Signature]

MICHAEL FITZGERALD
ACTING LOCAL HEALTH MANAGER
KERRY COMMUNITY SERVICES

HSE South,
Kerry Local Health Office,
Rathass,
Tralee, Co. Kerry.

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Email: MichaelM.Fitzgerald@hse.ie

ENTERED IN COMPUTER
04/11/2009
Our Ref: SPI/09/0001

24 June 2010

Professor Brendan Drumm
Chief Executive Officer
Health Service Executive
Dr. Steeven’s Hospital
Dublin 8

Dear Professor Drumm

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 Health Service Executive (HSE) in July 2009, this is a wide-ranging "own initiative" investigation which looks at the actions of the Department of Health and Children, of the HSE, 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 Dail and Seanad.

In accordance with section 6(6) of the Ombudsman Act 1980, the HSE is invited to comment on aspects of the report which might be taken as critical of, or adverse to, it. The attached document entitled Summary of Investigation Report summarises the content of the report and identifies those points which contain criticisms or comments adverse to the HSE. The attached document entitled Illustration Cases [Draft] provides summaries of and comments on specific complaints made to the Ombudsman.

Any representations which the HSE 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,

Pat Whelan
Director General
cc. Ms. Mary Culliton
Mr. Michael Fitzgerald
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,

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 HSE'.

The document furnished by the Ombudsman, Summary of Investigation Report, does not provide sufficient detail to the HSE to afford it the opportunity to consider the criticisms and make representations. This is a statutory entitlement of the HSE.

It is not possible to provide a meaningful response to the summary document provided. Therefore I would like to request a full copy of the draft report so as
to enable the HSE to exercise its statutory right to consider the report's findings and criticisms and make representations in relation to same.

We are not in a position at this time to ascertain how long it will take to review the full report and provide a response. However from reviewing the summary report it is evident that the timescale proposed was insufficient to provide a meaningful response.

Yours sincerely,

Noel Mulvihill
Assistant National Director
Older Persons

CC: Prof. Brendan Drumm, Chief Executive, HSE.
Mr. Michael Fitzgerald, HSE, Local Health Manager, Kerry.
Ms Mary Culliton, Head of Consumer Affairs, HSE
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 HSE that a report regarding the above matter had been drafted and that the Ombudsman intended to lay the completed report before the Dail and Seanad. A summary statement of the draft report was enclosed. The letter indicated that any representations which the Executive might wish to make should be submitted by close of business on Friday 16 July 2010.

I also refer to letter from HSE of 7 July 2010 in which it was requested that the Ombudsman would provide a full copy of the draft report. The reasons for the HSE seeking a full copy of the draft report are set out in that letter.

It is noted that while the Ombudsman has acknowledged receipt of the letter of 7 July the HSE has not yet received a copy of the full draft report. I refer to our telephone conversation of Thursday 15 July, in which you advised that a full copy of the draft report would be made available after Monday 19 July.

The HSE obviously wishes to make representations in respect of the report but in the absence of a copy of the full draft report the HSE is not in a position to do so before Friday 16 July.

As discussed, the HSE will require adequate time to consider the full draft report, when received, before a response can issue.

I look forward to hearing from you in due course.

Yours sincerely

Noel Mulvihill
Assistant National Director
Older Persons

[Signature]
Our Ref: SPI/09/0001

/ 7 July 2010

Mr. Noel Mulvihill
Assistant National Director for Older Persons
Health Service Executive
Swords Business Campus
Balheary Road
Swords
Co. Dublin

Dear Mr. Mulvihill,

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 Health Service Executive (HSE). These sections are being provided to the HSE 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 HSE 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,

\[Signature\]

Pat Whelan
Director General