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Ms Mary Culliton
Director of Consumer Affairs
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Oak House
Limetree Avenue
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Naas
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7th January 2008

Re: Ombudsman's Draft Investigation Report – Payment of GAL fees by former Area Health Boards– Ref HB1/05/639R

Dear Ms Culliton,

I refer to letter dated 12th November 07 from Pat Whelan, Director General, Office of the Ombudsman, in connection with the Ombudsman's draft Investigation Report into the complaint by Beacon Guardian ad Litem Services and Irish Guardian ad Litem & Social Work Services and to previous correspondence in this regard.

I would like to draw your attention to The Children's Act Advisory Board which was established on the 23rd of July, 2007 and has been given the remit to *"Publish guidance on the qualifications, criteria for appointment, training and role of any Guardian ad Litem appointed for children in proceedings under the 1991 Act".* The CAAB invited submissions from interested parties to assist them in this task and a Steering Group has been formed to progress the matter. This Steering Group comprises representatives from all stakeholders in this area, including the HSE and the guardians ad litem. Indeed, one of the complainants is a guardian ad litem representative on the Group.

It is my opinion that this is the appropriate forum to address all issues in relation to the guardian ad litem service. When this process has concluded and the appropriate regulatory frameworks for the operation of the service have been put in place to the satisfaction of all parties any legacy issues remaining can then be resolved in an amicable fashion. In the interim the status quo should be maintained.

Before I comment in detail on the draft report I wish to set out the context and circumstances which prevailed in the early 2000's, and which currently prevail, in relation to the provision of services by guardians ad litem. As you are aware no guidelines or procedures were issued in relation to Sections 26(1) & 26(2) of the Child Care Act, 1991 vis a vis regulation, qualifications, appointment, role, conduct, supervision and remuneration of guardians ad litem.

In 2002, for example, there were many service providers operating in the field who, while carrying out the same work, were charging a variety of fees ranging from €50.00per hour to €94.93 per hour for professional time worked; with some charging travel and waiting time at the same rate as for professional time, some charging for it at reduced rates and some not charging for travel time and waiting time. There was a definite upward trend in rates charged and, indeed, one could draw inference that it was open to providers to take advantage of the absence of regulation when setting their fee rates, and in the absence of clarification and interpretation regarding section 26(2), Child Care Act, 1991.

The area health boards were of the view that it would be a dereliction of their duties in relation to financial control, accountability and overall governance to allow different private service providers to charge different rates but for similar work, and in the event of a dispute to ask the Court to decide on costs. It was the view of the area health boards that fees should be charged and paid within a " cost –of-service" framework agreed in advance. The necessity for Court involvement would only arise in the event of a dispute in relation to a bill computed within the agreed fees framework. However, the complainants were of the view that they could charge what they wished and if the health boards disagreed with their bill, they could at their own expense, go to the Court for measurement or taxation.

Obviously, from the health boards' perspective, a 'free-for-all' situation could not be allowed to continue. This was the context within which payment rates were agreed between the 3 former Area Health Boards and Beacon Guardian ad Litem Service, the then largest service provider at that time, at a meeting held in June, 2002. Beacon have subsequently stated that the rates agreed were uneconomic and did not cover the costs of providing the service. I am not aware of any explanation submitted by the providers in this regard. The rates agreed at the meeting were the rates as proposed by Beacon and accepted by the Boards on the recommendation of the then Law Agent. They were not 'negotiated down rates' in any sense. As the attached copy letter from Beacon dated 4th March, 2002 shows (Appendix 1), they were the rates being quoted by Beacon, for several months prior to this meeting, as their prevailing hourly rates.

Given that it is generally accepted that guardian ad litem work is more closely related to social work than to any other discipline and with most guardians coming from a social work background it is interesting to compare the rates agreed at the time for the provision of guardian ad litem services with the prevailing hourly rates for social workers and to further compare the rates currently applicable.

The following tables set out the rates at the mid point of the salary scale for Professionally Qualified Social Workers, Social Work Team Leaders and Principal Social Workers at June, 2002 and at the present time. The tables show the base hourly rate as adjusted in respect of Employer's PRSI, Employer's pension contribution (at 7% of gross salary cost) and a 15% contribution to administration charges (in line with the maximum contribution paid by the HSE to some voluntary providers of healthcare services.).

Rates at December 2001 (applicable in June, 2002 to health board

employees)

Grade	Annual salary at mid point of scale @ 1/12/2001	Hourly rate of pay (Annual salary / 365 x 7 / 33.75)	Employer's PRSI (@10.75%)	Employer's pension contribution (@7%)	Administration charges contribution (@15%)	Revised hourly rate
PQSW	€38,762	22.03	2.37	1.54	3.30	**€29.24**
SWTL	€46,450	26.39	2.84	1.85	3.96	**€35.04**
PSW	€52,007	29.55	3.18	2.07	4.43	**€39.23**

The rates in the table above compare with the rates agreed with Beacon in June, 2002, for the provision of guardian ad litem services at **€82.55** per hour for professional time worked, **€31.74** per hour for travel/waiting time and **€0.635** per mile for mileage incurred.

Rates at June 2007

Grade	Annual salary at mid point of scale @ 1/06/2007	Hourly rate of pay (Annual salary / 365 x 7 / 33.75)	Employer's PRSI (@10.75%)	Employer's pension contribution (@7%)	Administration charges contribution (@15%)	Revised hourly rate
PQSW	€50,124	28.48	3.06	1,99	4.27	**€37.80**
SWTL	€61,634	35.02	3.76	2.45	5.25	**€46.48**
PSW	€69,547	39.52	4.25	2.77	5.93	**€52.47**

The rates in the table above compare with the current HSE approved rates for the provision of guardian ad litem services at **€112.53** per hour for professional time worked, **€43.26** per hour for travel/waiting time and **€0.85** per mile for mileage incurred. It should be noted that the current social work payscales include increases paid in respect of benchmarking which would not apply to private sector payscales or fees.

In all cases the rates paid to GAL's were, and are currently, 100% in excess of the hourly rate paid to a principal social worker.

A fundamental difference between some providers i.e. the complainants and the HSE relates to the interpretation of Section 26(2) of the Child Care Act, 1991. In this case the former Area Health Boards contend that they have control over how much they are prepared to pay in relation to *'any costs incurred by a person acting as a guardian ad litem....'* Also they contend that fees charged by guardians ad litem should generally be standard rates across the service and that there should be a basis for any rates charged; it is not acceptable to pick a rate without being able to explain the composition of such rate.

Further, the Area Health Boards contend that they have an obligation under legislation in relation to resource allocation. In no circumstances, unless obliged by legislation to do so, could a health board spend money in a manner sought by the complainants. It must be emphasised that at all times the Health Services Executive and its precursor, the health board, is charged with spending the taxpayers' money in an economic and cost efficient way and to achieve best value for money. Section 7 of the Health Act, 2004 states:

"The object of the Executive is to use the resources available to it in the most beneficial, effective and efficient manner to improve, promote and protect the health and welfare of the public."

Section 7(5)(d) & (e) states as follows:

"In performing its function, the Executive 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."

In November, 2002 Beacon proposed increasing their fees with effect from 1st January, 2003 as follows:**€90.00.** per hour for professional time worked, **€55.00** per hour for travel/waiting time and **€0.70** per mile for mileage incurred. This represented an increase of 18.7% on the professional rate and 73.2% on the travel/waiting time rate. There was no basis or justification put forward for seeking such an increase.

Mindful of responsibilities to utilise resources in an effective and efficient manner as set out above, the area boards held the view that any increases in payment rates would have to be linked to increases in general funding to the health boards. On this basis a 6% fee rate increase was proposed comprising 4% in respect of the payment of the final phase of the PPF National Wage Agreement in October, 2002 and a 2% general inflation increase. The new rates thus proposed were **€87.50** per hour for professional time worked, **€33.64** per hour for travel/waiting time and **€0.673** per mile in respect of mileage incurred.

This formula has remained as the method used by the former NAHB since then in calculating fee increases i.e. the payment rates are increased each year by means of the application of the relevant National Wage Agreement increases plus the addition of a 2% per annum general inflation increase. The only variation to this policy was in relation to the withdrawal and subsequent reinstatement of payment in respect of travel/waiting time. Both of these decisions were on foot of the application of measurement/taxation rulings in the Courts. I would contend that this methodology in implementing fee rate increases is logical, consistent, reasonable, fair, equitable and transparent. Not only are potential guardians aware of the payment rates at any given point in time but they can predict what those rates will be in the future. These payment policies have proven to be perfectly acceptable to other providers of guardian ad litem services down the years to the extent that neither of the complainants are lead service providers, in terms of volume of work, in the former NAHB area. Also, it should be noted that the complainants and indeed providers are aware in advance of the fees paid by the former Northern Area Health Board & consequently have the option of not

providing a GAL Service, if it is felt that the fees are not reasonable or are uneconomical.

To break the link with national wage agreements would, in the continued absence of a regulatory framework for the service, result in a return to a 'free- for- all' situation with different providers charging different rates for the same work. It could be argued that when benchmarked against the hourly rates paid to social work staff and managers in the HSE, the rates paid to GAL's are excessive and should in fact be negotiated downwards. The achievement of value for money is a requirement of the HSE and must be considered in the context of the GAL service.

The issues raised in relation to the Prompt Payment of Accounts Act are questionable. Because of the unusual nature of the service i.e. Guardians ad Litem are appointed by a third party and not the health board and there is no contract between the service provider and the health board, the former Area Boards were of the view that the Act may not apply. Initial legal advice to the former Area Health Boards indicated that GALs should be paid when the case was finalised. The payment of monthly fees was agreed to facilitate the GALs.

In relation to the Draft Report I would like to make the following direct observations:

Chapter 1.

Background information:

Guardian ad Litem:

Paragraph 1: It is stated that GAL appointments are normally made following an application by the HSE to the Court. I am advised by the Law Agent that approximately 30 – 40% of GAL appointments are made on foot of an application by the HSE, the balance are made on foot of applications from the parents or guardians of the child in question or at the behest of the presiding Judge.

Paragraph 2: It is stated that the complainants are the 2 principal agencies in the country. While I cannot confirm or deny the position nationally I can confirm that the agencies in question are not currently the lead providers in the former NAHB area.

The Complaint:

Paragraph 1:

It is stated that the complainants state that the former NAHB and SWAHB were acting outside of the provisions of the Child Care Act, 1991, in setting down and imposing a health board rate of fees in respect of services provided by them. This is factually incorrect. The original fee rates agreed in 2002 were not health board rates but were the rates proposed by Beacon and accepted by the health boards. What has become the subject of dispute is the methodology used in applying increases to those rates. The methodology applied by the 3 area health boards, by reference to National Wage Agreements and inflation, is, as stated previously, logical, consistent, reasonable, fair, equitable and transparent. The basis for the payment rates charged by the complainants has never been communicated to the health boards. It is stated that the complainants also state that the area boards had repeatedly failed to make application to Court to have disputed fees measured or taxed. This is also incorrect. The former NAHB has never had a difficulty in referring cases for measurement/taxation. References are made elsewhere in the report to the outcomes of particular measurement/taxation proceedings. It should be pointed out at this time that costs can only be

measured or taxed at the conclusion of a case when all of the costs have been incurred. Many of the cases where guardians are appointed are complex cases which can carry on for years. When a case has concluded and costs are to be measured/taxed an instruction is issued to the Law Agent to make the relevant application. It then becomes a matter for the Law Agent to source a date for when the matter can be heard, usually before the Judge who dealt with the case originally. The health board has no control over how long this takes. Equally it may have little or no control over how long it takes for the case to conclude in the first instance.

Paragraph 2:

It is stated that the complainants state that (subsequent to the Director of Consumer Affairs having examined the matter in early 2006) that both area boards had since agreed to refer disputed GAL costs to the court for taxation/measurement at the conclusion of a case. Again, the inference is that the boards were not prepared to do this previously. This was not and is not the case. My comments above refer.

Paragraphs 3 & 4:

In paragraph 3 Sections 26(1) & (2) of the Child Care Act, 1991 are quoted and paragraph 4 follows with the statement that the Ombudsman considered the actions of the area boards in refusing to pay the invoiced rate of fees, and in unilaterally imposing its own level of rates, without the agreement of either service provider, constituted *prima facie* evidence of maladministration. In the first instance there is an inference that Section 26(2) requires health boards to pay the costs as invoiced regardless e.g. whether the costs are charged at €50 per hour or €500 per hour. Our contention is that Section 26(2), particularly when considered in conjunction with the onus placed on health boards under the health acts to utilise their resources in an economic and cost efficient way as set out above, does not preclude health boards from seeking to strike reasonable rates of payment. As already stated, the former Area Boards believe that court involvement would only arise in the event of a dispute in relation to a bill computed within the fee structure. Secondly, as stated previously above, the health boards did not unilaterally impose its own level of rates. The original base rates as agreed with Beacon were the rates proposed by them and accepted by the boards. The area board's basis for applying the National Wage Agreement increases to the agreed base rates is as set out above.

Chapter 2:

Statement of Complaint:

Paragraph 1:

The statements in relation to the imposition of scales of fees by the area boards and delays in referring disputed case for taxation have been addressed above.

Paragraph 2:

It is stated that the complainants state that they sought information with regard to the statutory basis which allows the HSE to impose its rates on them as private service providers. The former NAHB's position on this is as stated in my opening remarks above. The NAHB's policies in relation to the implementation of fee increases were stated clearly to the complainants from the outset at meetings held with them in November and December, 2002 and in correspondence issued at that time. In addition, as the National Review of the Guardian ad Litem Service instigated by the National Children's Office had commenced at this time the complainants were also advised that the NAHB did not propose to pre-empt

any conclusions or recommendations which may be included in the report in relation to payment matters by offering any further payment increases beyond what had been stated. Please see copy correspondence appendices 2 & 3 attached.

When the NAHB ceased and subsequently recommenced to make payments in respect of travel/waiting time on foot of the application of measurement/taxation rulings in the Courts these policy changes, and the basis for them, were communicated promptly to the complainants. Please see copy correspondence appendices 4,5,6 & 7 attached.

Chapter 3

Historical information as to how the complaints arose:

Paragraph 3

It is stated that the payment rates proposed to the boards by Beacon represented subsidised rates which did not cover Beacon's costs. Please refer to my opening remarks on this matter and to the comparison between the hourly rates agreed and the prevailing hourly rates for social work grades.

Paragraph 5

It is stated that the NAHB refused to negotiate or enter into any agreement with the service providers. As stated above, the NAHB's position was clearly stated to the complainants i.e. that it did not propose to pre-empt any conclusions or recommendations which may be included in the report (the National Review) in relation to payment matters by offering any further payment increases beyond what had been stated. The NAHB has frequently stated in correspondence with the complainants that its payment policies were subject to the outcome of the National Review and the application of relevant rulings in the Courts.

Paragraph 7

It is stated that despite repeated requests to meet with them the complainants stated that the Board refused to negotiate with them. It is unclear from this which complainant is being referred to. Apart from ongoing correspondence representatives of the NAHB met with representatives from Beacon on 2 occasions over time where the Board's position, as outlined above, was confirmed to them. Indeed, at the present time a recent request to meet with the CEO of Barnardos and representatives from Beacon has been acceded to and the meeting is scheduled to take place on 17th December 2007.

The report further states that the complainant wrote to the NAHB in April, 2003 enclosing outstanding invoices for payment and requesting that contact be made if there was any difficulty with them. It is stated that this correspondence was ignored. There were difficulties relating to invoices submitted in respect of a particular case arising from the fact that the appointed Guardian had left the employ of the Agency and was not available to clarify certain matters. This difficulty was resolved in July, 2003 through negotiation between the Law Agent and the Agency's solicitors. However I accept that the matter could have been dealt with more promptly and this is regretted.

Paragraph 8

TEXT DELETED

TEXT DELETED

Paragraph 9

This refers to the implementation of further fee increases by the NAHB for 2004 on the same basis as previously viz. through the application of the relevant National Wage increases plus a 2% general inflation increase. It is stated that the complainants objected to the increases proposed and that their objections were not entertained. The NAHB's position was that these increases were consistent with the policies already notified to the complainants and that we were still awaiting the outcome of the National Review. This was fully advised to the complainants.

Paragraph 10

It is stated that the complainants wrote to a named official in February, 2004 and April, 2004 formally seeking payment in full of outstanding invoices, but received neither acknowledgements or replies to any of these letters until May, 2004. While payment in respect of a proportion of the invoices submitted was processed in February, 2004 the NAHB accepts that the correspondence should have been responded to more promptly. The letter to the complainant issued in May, 2004 included an apology for this delay (Appendix 8 refers).

Paragraph 12

TEXT DELETED

Paragraph 15

This relates to the notification by the NAHB that responsibility for the processing of guardian ad litem payments was to be devolved to the local community care area offices. It is stated that the complainants held the view that this redirection of invoices to local offices was unsatisfactory and that issues would have to be discussed with different managers in different locations who had no background knowledge of the complainants dealings with senior management over the previous 2 years. In the first instance it should be noted that resolution of service issues is not conditional on central or local processing of invoices. When the function was devolved training was provided for the relevant staff in the local areas and ongoing support is provided from central management. Support is also provided by the board's Legal Services Manager. In addition, invoices submitted for the provision of guardian ad litem services were first of all required to be referred to the relevant Principal Social Worker for certification prior to processing. The complainants had previously complained that this system of invoices being submitted centrally, to be returned to local offices for certification and again to be returned centrally for processing was contributing to added

delays in processing (Appendix 9 refers). The devolution of the payments for GALs was done in the former SWAHB in the context of the reorganisation of the HSE.

Paragraph 16

In the report it is stated that the NAHB wrote to the complainants indicating that it was committed to referring all cases, where fees are disputed, for measurement/taxation at the conclusion of each case. As outlined above already, this has always been the NAHB's position. It is further stated that the Ombudsman understands from the complainants that the NAHB and the SWAHB have failed to refer a number of closed cases where fees are disputed, to the Courts for taxation. This is incorrect. In relation to Irish Guardian ad Litem & Social Work Services a letter was issued on 18th June, 2007 requesting confirmation of which of the former NAHB area cases had concluded, to include confirmation that all fees had been submitted, so that measurement proceedings could be instituted (Appendix 10 refers). No response to this correspondence has been received to date. In relation to Beacon a number of cases are pending, with one having been put back for mention on a number of occasions by mutual consent of both parties in the context of ongoing developments at national level.

Paragraph 19

The report describes a payment of circa €58,000 from the NAHB as being in respect of undisputed invoices and that the agency was now faced with the onerous task of examining the relevant records and invoices going back to 2001. I wish to advise that the payments in question were made on foot of an itemised statement submitted by Beacon in June, 2007. Following the payment a detailed analysis was issued to Beacon, comparing the amounts paid with the amounts quoted on the statement item by item, to facilitate their recordkeeping.

Reference is also made in this paragraph and the next to the Prompt Payment of Accounts Act. As this act relates to payments by prescribed bodies for the supply of services or goods to those bodies its application in relation to the provision of guardian ad litem services is questionable. Guardians ad Litem are not engaged by health boards and do not supply goods or services to them. They are appointed by the Court to provide services to children, and indeed to the Court, in Childcare proceedings and their fees fall to be discharged by health boards in the manner of legal costs.

Chapter 4

Analysis

Most of the points discussed in this section of your report have been addressed at length already above. In relation to matters not previously raised I would like to make the following observations.

Paragraph 4

The report refers to the Senior Counsel's opinion obtained. It should be noted that in the early parts of his opinion he looked at the obligations placed on a health board under the health acts in relation to the performance of its functions. Having examined the matter he concluded that the duty imposed on the HSE by Section 26(2) of the Child Care Act, 1991 to pay any costs incurred by a person acting as a guardian ad litem is a *"function"* of the HSE within the meaning of the Health Act, 2004. Accordingly, the HSE is obliged by the provisions of Section 7(5) of the 2004 Act to have regard, in considering any costs incurred by a person acting as a guardian ad litem, to the need to secure the most beneficial, effective and efficient use of the HSE's resources.

His conclusion that the current rates applied by the HSE were fair and reasonable by virtue of comparison with social work payscales is borne out by my figures, as set out earlier.

Paragraph 6

In the report it is observed that the key issue which has been the subject of dispute is the hourly rate charged for professional time and that there has never been an issue with regard to volume or standard of work done. I would comment that in the absence of any agreed standards in relation to the conduct, role or supervision of guardians the NAHB has never made an issue of these matters. Which is not to say that these are not matters of concern. In the former SWAHB the concern about the performance of a Beacon GAL was raised with Beacon who responded that it was unable to deal with the matter as their GALs were independently appointed by the Court.

Paragraph 8

Comments in relation to the public tendering process while valid are not relevant in this situation. Guardians ad litem are not engaged by the health board, therefore it is precluded from engaging in any such process.

TEXT DELETED

As acknowledged in your report, the 3 Area Boards had initiated such a process in the former ERHA area following on from the agreement of rates of payment with Beacon in June, 2002. When the national review of the service was instigated by the National Children's Office in November, 2002 the Area Boards decided to suspend the local review process, pending the outcome of the national review. The final report of the National Review Group issued in March, 2004, however, no further action has been taken to date on foot of this.

More recently a further HSE lead national engagement process was instigated, chaired by the LH Manager with lead responsibility for Childcare in the Dublin Mid Leinster Region and a number of meetings took place with guardian ad litem service providers nationally. It is totally incorrect to state that the HSE had adopted a rigid approach as the process was only at a very initial introductory

stage before it was suspended. This process was also suspended, on foot of a new legislative initiative in the area.

Chapter 5

Findings

For the reasons outlined above the former NAHB does not accept that it acted in a manner which was improperly discriminatory and contrary to fair or sound administration.

The fees agreed initially were not imposed by the health board. Rather they were those submitted by the provider. The methodology applied to calculate increases was similar to that which applied to pay increases for public servants and to increases for non-pay inflation. Also it was similar to the formula used in the case of providers of services by the voluntary sector and other providers of services on behalf of the health boards. No providers sought or received increases of the magnitude sought by the complainants.

We communicated with guardian ad litem service providers regarding rates of fees, increases etc. Some bills were sent for measurement/taxation and the NAHB had no difficulty whatsoever in using this mechanism.

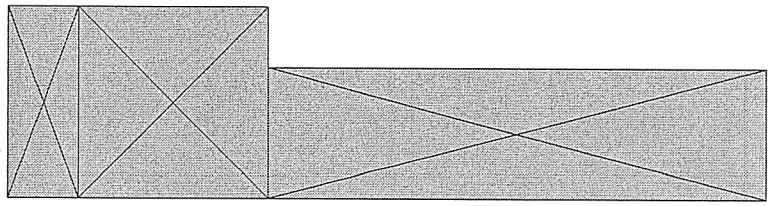
Finally, the contention that the health boards *"neglected to take sufficient account of the interests of the children in question, and is acting in a manner which, in the longer term, is not conducive to improving, promoting or protecting the health and welfare of vulnerable children"* is astonishing and without any foundation whatsoever. This infers that the HSE is breaking the law and that the actions of the former Area Health Boards are having an adverse affect on the duties of the complainants. The service providers state that "... there has never been an issue with regard to volume or standards of work done ...".

TEXT DELETED

Full details are required as to how the Ombudsman reached such a conclusion; there is no reference to such a finding elsewhere in the report. GAL service providers, other service providers, the Courts have never indicated to the area health board or to the HSE that the fees issue had or is currently having such an negative outcome or impact on child care services. This allegation is refuted in its entirety and must be withdrawn. In the event of such a charge being neither capable of being fully substantiated in the final report (which the HSE believes to be the position) nor withdrawn the HSE reserves the right to exercise its rights in seeking full redress for any reputational or other damage associated with this unfair allegation.

I trust the above observations will be taken into account before the report is finalised. If you need any further clarification or information on any of the issues raised please feel free to contact me directly

Yours sincerely,



Pat Dunne
Local Health Manager
North Dublin

Local Health Manager
North Dublin

Enclosures: Appendices 1 – 10 attached.

C.C : T O'Brien, AND,
J Breslin, AND
G O'Neill, LHM, DML
S Kearney, BCM HW