A Report by the Ombudsman following an investigation under section 4 of the Ombudsman Act 1980

in relation to a complaint about the payment of Guardian Ad Litem fees by the Health Service Executive to two private service providers, (Beacon Guardian Ad Litem Services and The Irish Guardian Ad Litem & Social Work Services).

An investigation by the Ombudsman under Section 4(2) of the Ombudsman Act 1980
July 2008

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Eexecutive Summary

This investigation arises from complaints made by two private entities (providing guardian ad litem services for children at the appointment of the Courts) against the Health Service Executive (HSE) concerning the failure of the HSE to pay the service providers' fees at the rates invoiced. In the case of two former area health boards (the Northern Area Health Board and the South Western Area Health Board), the HSE imposed fee rates on these private service providers from 2003, without their approval or agreement. As a result of this action, according to the complainants, they have encountered severe financial difficulties in covering their service costs. The other HSE areas around the country pay the service providers at the rates invoiced so the practice of imposing HSE rates is confined to the two former area boards which are the subject of this complaint. This practice highlights inconsistency in the application of the relevant provisions of the Child Care Act 1991 throughout the HSE nationally.

Prior to 2003, it was the practice for guardian ad litem service providers to negotiate mutually acceptable fee rates with individual health boards; these agreements meant that rates were held at a certain level for an agreed period of time. However, in 2003 the two area health boards concerned decided that any increase in fee rates would have to be linked to increases in general funding to the health boards. On this basis, the two area boards introduced a formula for rate increases which was linked to the National Wage Agreement and general inflation. They continued to apply this formula to the fees they paid to the service providers despite the fact that there is no legislative basis which allows the HSE to impose fee rates on private guardian ad litem service providers appointed by the Courts.

A guardian ad litem (GAL) is an independent professional person, usually a qualified social worker, who is appointed (under the Child Care Act 1991) to represent the wishes and interests of a child in specified court proceedings. GALs are appointed by the Courts; they are not employees of, nor are they contractors to, the Health Service Executive. There is no nationally agreed scale of fees for GALs; the services are provided on a private market basis by a number of individual GALs and by a small number of agencies.

Although the GAL is independent of the parties to the court proceedings, the fees of the GAL are paid by the HSE in accordance with the Child Care Act 1991.

Section 26(2) of the Child Care Act 1991 provides that GAL costs "shall be paid by the health board concerned" and it further provides that the HSE "may apply to the court to have the amount of any such costs or expenses measured or taxed". The key issue raised by the complainants (the GALS concerned) was that, in circumstances in which the fees they sought were not being paid and where the HSE effectively imposed its own fee levels, the HSE declined to apply to the Courts to have the fees issue settled. According to the complainants, in cases involving disputed fees and where the GAL service had concluded, the HSE simply closed these cases having paid the GALs at HSE imposed rates. The sole mechanism for settling these disputes was an application to the Courts but, under the Child Care Act 1991, such an application could be made only by the Health Service Executive. Thus, where the HSE declined to apply to the Courts in such cases, it was not open to the GALs to do so themselves.

The complainants questioned the HSE's legal entitlement to determine the rates at which they received payment given that they were private agencies, acting in an independent capacity, following appointment by the Courts. They sought to discuss the matter with the HSE in an attempt to resolve the issue but, despite lengthy correspondence, the HSE rates continued to be imposed on the service providers. Requests were made by the service providers to the HSE either to pay them at the rates sought or to refer the rates for taxation to the Courts; but the HSE did neither and the service providers said they found it increasingly difficult to cover their costs.

In an effort to resolve the difficulty, my staff met with the HSE Manager with responsibility for child care issues nationally; he agreed to meet with GAL service providers around the country with a view to reaching an agreement on fee rates. Unfortunately, no general agreement was reached on foot of these meetings. The GALs claimed that the HSE adopted a rigid approach at that time. As I say in my investigation report, with the benefit of hindsight, perhaps the services of a mediator might have been beneficial in reaching a mutual agreement in the matter. In the meantime, from the GALs' perspective, they continued to be underpaid by the HSE for their services.

The HSE has defended its actions in imposing fee rates and says that it was obliged to act in a financially prudent manner and to use the resources available in the most beneficial and cost effective way to improve, promote and protect the health and welfare of the public. It obtained legal advice which, it says, stated that the HSE was not alone entitled but obliged to fix the fees of the GALs at a reasonable level, taking into account the qualifications of the particular GAL in question. While I agree that Section 7 of the Health Act 2004 requires the HSE to act in a financially prudent manner, the HSE does not have the legal right to impose fee rates on GALs who, it must be remembered, are Court appointees rather than HSE appointees. It seems to me that, in taking this line, the HSE is acting to the detriment of the GAL service which is an essential service for the protection and promotion of the welfare of vulnerable children.

Arising from my investigation of these complaints, I have made a number of recommendations. These include:

> that the HSE pay outstanding accounts in closed cases at the rate invoiced by the service provider and that interest be paid in line with the Prompt Payment of Accounts Act 1997;
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> that, in ongoing cases, fees be paid at the invoiced rates with respect to duly authorised invoices, at agency rates, or refer the cases, on completion, to the courts for measurement/taxation, if the rate is disputed;
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> that a "Time and Trouble" payment of €10,000 be paid to each of the two service providers;
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> for the future, that the HSE engage more openly with the GAL services with a view to agreeing fee rates; that where there is disagreement there should be reliance on mediation and, where this is not successful, there should be an expeditious application by the HSE to the Courts to have the costs "measured or taxed".

The HSE has declined to accept these recommendations and the matter is now one for the Houses of the Oireachtas.

Chapter 1

Background information:

Guardians Ad Litem:
A Guardian Ad Litem (GAL) (Guardian at Law) is an independent professional person (usually a social worker) who is appointed to represent the wishes and interests of a child in specified court proceedings. In the context of the Health Services Executive (HSE), GAL appointments are normally made following an application by the HSE to the Court, when a child has been removed from the care of its parents into HSE care. GAL appointments can also be made on foot of applications from the parents or guardians of the child in question, or at the behest of the presiding Judge. GALs are appointed by the Courts and are not employees of the HSE.

Although the GAL is independent of the parties to the court proceedings, the fees of the GAL are discharged by the HSE, in accordance with the Child Care Act 1991. There is, currently, no state organised GAL service in operation in this country, and services are provided on a private market basis by a number of individual GALs, and a small number of agencies. (The complainants are the two principal agencies in this country namely:- the Irish Guardian Ad Litem and Social Work Services, and Beacon Guardian Ad Litem Services (a non-profit making organisation)). There is no nationally agreed scale of fees chargeable by individuals and agencies, and the service is not formally regulated. While there are variations in respect of charges, fee structures are broadly similar between these two agencies.

The Complaint:

The two agencies mentioned contacted my Office in March, 2005 to complain that two former area Health Boards, the Northern Area Health Board (NAHB), and the South Western Area Health Board (SWAHB), (now incorporated within the HSE and known as HSE - Dublin North, and HSE - Dublin Mid-Leinster respectively) were acting outside 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. [The former East Coast Area Health Board (ECAHB) had also acted in a similar manner, but to a much lesser extent, as the volume of work in that particular area was relatively light]. The service providers claimed that the two area boards complained of, having paid them at reduced area board rates and not at those invoiced, had repeatedly failed to make application to Court to have the disputed fees measured or taxed, as provided for in the legislation. They pointed out that, in contrast, all other area boards around the country paid the fees at the level of rates invoiced.

As it is normal practice for my Office to advise complainants to pursue matters through the designated complaints process, in the first instance, the complainants were advised to contact the former Director of Complaints and Appeals within the HSE. The Director examined the complaint and responded to the service providers in March, 2006, indicating that the HSE was a public body, and was obliged to operate within its budget.

The Director also indicated that there was nothing precluding an area board/ HSE from setting rates, and that the only legal remedy for resolution of fee issues remained the taxation/measurement provisions of Section 26(2) of the Child Care Act 1991. The complainants were advised that both area boards had since agreed to refer disputed GAL costs to the court for taxation/measurement at the conclusion of a case. Neither agency was satisfied with this response. They stated that the practice of making payment at reduced rates (i.e. area board rates) was seriously affecting the running of both agencies. Accordingly, they approached my Office again, requesting that the matter be examined further.

The provisions of the Child Care Act 1991 with regard to the appointment of a GAL state:

> **Section 26(1):**- "If in any proceedings under Part IV or VI the child to whom the proceedings relate is not a party, the court may, if it is satisfied that it is necessary in the interests of the child and in the interests of justice to do so, appoint a guardian ad litem for the child".
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> **Section 26(2)**:- "Any costs incurred by a person in acting as a guardian ad litem under this section shall be paid by the health board concerned. The health board may apply to the court to have the amount of any such costs or expenses measured or taxed".

I considered that 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. I decided to carry out a formal investigation into the complaints made. Both the Irish Guardian Ad Litem and Social Work Services and Beacon indicated that the actions of the area boards had brought about a situation whereby they were owed substantial arrears in respect of their services, both with regard to closed cases which had remained unpaid, and ongoing cases, which are still being paid at HSE rates.

Chapter 2:

Statement of Complaint

The following is the Statement of Complaint which was forwarded to the HSE for comment:

Section 26 (1) of the Child Care Act 1991 provides for the appointment of a guardian ad litem by the courts. Section 26(2) states

> "that any costs incurred by a person in acting as a guardian ad litem under this section shall be paid by the health board concerned".

It also states that the health board may apply to the court to have the amount of any such costs or expenses measured or taxed. Both agencies state that, apart from two areas within the Health Service Executive (HSE), they have not experienced difficulties with any other health board areas with regard to their rates being paid in full for acting as guardians ad litem or in having disputed cases referred to the courts to be taxed or measured. They contend, however, that since 2002, they have experienced difficulties with the former Northern Area Health Board (NAHB) and the former South Western Area Health Board (SWAHB), both of which they claim have refused to pay their rates, as invoiced. Instead, they say that both of these Area Boards have imposed their own scale of fees on them, which are lower than those invoiced, and have delayed in referring disputed cases to the court for taxation.

The complainants say that they have sought information with regard to the statutory basis which allows the HSE impose its rates on them as private service providers. The complainants contend that, not withstanding the provisions of the Health Act, 2004 which obliges the HSE to secure the most beneficial, effective and efficient use of resources, there is no legal basis which allows the HSE to impose rates on them. Recently, they say that the HSE wrote to them requesting that all future invoices be submitted to them at HSE rates.

Chapter 3

Historical information as to how the complaints arose:

During the examination of these complaints, I looked at how the practice of paying fees had developed within the two Area Boards (NAHB and SWAHB) complained of, and the service providers, since 2000. The former Eastern Regional Health Authority (ERHA) was comprised of the Northern Area Health Board (NAHB), the South Western Area Health Board (SWAHB), and the East Coast Area Health Board (ECAHB). As I understand it, between 2000 to 2002 there were problems associated with the payment of invoiced fees from each of the three former ERHA Boards. However, the volume of casework within the former ECAHB was rather low, and this Area Board is not the subject of complaint as part of this investigation.

The fees charged by GALs are broken down between professional fees per hour, mileage rates per mile incurred, and travel/waiting time. Prior to 2002, it was the practice within the area boards for GALs to submit their invoices to the Board's Law Agent. Their fees were discharged by the Law Agent initially, and then withheld for clarification when claims for travel/waiting time and mileage were presented. Early in 2002, arrears which had built up in respect of GAL claims were discharged, and interim payments were made based on 70% of the invoiced amounts. These interim payments were subject to a maximum limit of €63.49 per hour in respect of professional time worked, and €0.63 in respect of mileage incurred, with no payment being made for travel/waiting time. These interim payment rates were not acceptable to the two complainants. Beacon (the largest service provider at that time), said that the fee offered by the area Boards did not meet the costs of providing the service.

In May 2002, Beacon proposed a higher scale of payment rates which would apply until 1 January 2003, which actually represented subsidised rates (rates which did not fully cover the cost of the service provided by Beacon, but which included a payment for travel/waiting time). The Law Agent recommended acceptance of Beacon's proposal to the area boards in June 2002. Beacon also agreed, with considerable reluctance, that interim payments would be subject to a retention of 25% by the HSE, pending the conclusion of individual cases. These new payment arrangements were subsequently imposed generally on all service providers. It was agreed in June 2002 that these rates would be applicable until January 2003, in anticipation that new rates would be forthcoming which would more accurately reflect Beacon's ongoing costs.

In November 2002, a review of GAL services was commenced by the National Children's Office. The terms of reference of this review included an examination of the funding arrangements and costs associated with the service. The NAHB decided to suspend the local review process pending the outcome of the national review. However, although the review recommended that a scale of charges be developed by an independent regulatory authority, as the primary payment model for GALs based on a nationally agreed standard with service providers, no actual payment rates were set by the Review Group which issued its report in March 2004. In December 2002, the three area boards met with the service providers, and the consensus approach between the area boards ended with the

SWAHB entering into a one year agreement with the Irish Guardian Ad Litem and Social Work Services. The NAHB refused to negotiate or enter any such agreement, according to the service providers, and decided that any increases in GAL fees in that area would be made in line with general wage increases.

The NAHB applied a 6 % increase to the subsidised rates previously agreed with Beacon. Both sets of complainants wrote to the NAHB, requesting clarification with regard to the statutory basis which allowed the Board to set and impose GAL rates. They requested the NAHB to either discharge their invoices at current rates, or to make application to the Court to have their fees measured or taxed, as provided for under Section 26 of the Child Care Act 1991. The Board advised the service providers that it had adopted this policy following a recommendation from its Law Agent. It advised that, as health boards did not receive specific funding for the discharge of GAL fees, any increases would have to be linked to increases in general funding levels. On foot of this development, the Service Co-ordinator of the Beacon Service drew up a statement in December, 2002, which was served in all cases before the courts in the ERHA region in which Beacon was involved. The purpose of the statement was to apprise the court in respect of payment issues which might have an impact on further provision of services. The statement drew attention to the history of difficulties with payments for GALS within the ERHA region. It also stated that, ultimately, the service would have to be withdrawn from cases within the ERHA region unless agreement could be reached on the rates issue.

Despite repeated requests to the NAHB to meet with them, the complainants stated that the Board refused to negotiate with them. The complainants wrote again to the NAHB in April 2003 enclosing outstanding invoices for payment, and requesting that contact be made if there was any difficulty with them. The correspondence from the complainants was ignored. The complainants indicated that they were reluctantly forced to accept the rates set down by the NAHB, such was their concern for the survival of their service. They advised the NAHB that they were reserving the right to seek full payment of their rates at a later time.

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In January 2004, the NAHB notified service providers that fees would be increased that year on the same basis as in 2003, that is, through the application of the relevant National Wage Agreement increases, and a 2% general inflation increase. The policy of non-payment in respect of travel/waiting time continued within the NAHB area. Beacon advised the NAHB that it proposed to increase its fees with effect from 1 January 2004. These increases were not accepted by the NAHB. The service providers wrote to the NAHB objecting to Board rates being imposed on them, which they felt was unfair. The payments which they were receiving did not cover the cost of providing the service. Their objections were not entertained.

In February 2004, the complainants were formally advised that all future invoices should be sent directly to a named official within the NAHB who would deal with them, and not to individual local area offices, as had been the practice. The complainants wrote to this

named official in February and twice in April 2004, formally seeking payment in full of outstanding invoices, but received neither acknowledgements nor replies to any of these letters, until May 2004.

At that stage, the official responded indicating that payments would continue to be made at NAHB's rates, with incremental increases made in accordance with the Sustaining Progress National Partnership Agreement. The complainants responded once again outlining the provisions of Section 26 (2) of the Child Care Act 1991, which provides for the discharge of Guardian fees.

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In September 2004, the Irish Guardian Ad Litem and Social Work Services notified the area boards that it proposed to increase its fees with effect from the start of that month. The NAHB responded in November 2004 refusing to accept this rate increase, indicating that fees had been increased at the beginning of the year through the application of the National Wage Agreement increases, and an increase for general inflation. The SWAHB also responded in November 2004 advising the service provider of the rates which it was prepared to pay. The service provider wrote back indicating that the imposition of rates by the area boards was not acceptable, and advised that it was always open to discussion with each area board, as it had done in the past.

The complainants requested the area boards to pay all invoices in full, at agency rates, or to make an application to the courts under Section 26 of the Child Care Act 1991 to have the fees measured or taxed. However, the SWAHB insisted on imposing its own set of rates on the service providers, and requested that invoices be sent to the local area health offices for processing. The NAHB also advised service providers that, on foot of advice from its Law Agent, it was discontinuing the practice of withholding 25% of each invoice until the conclusion of each case, and that future payments would be made in full at the Board's approved rates.

The NAHB also advised that it was reverting to a previous arrangement whereby invoices would be submitted to local offices, rather than to the named official centrally. The complainants held the view that this redirection of invoices to local offices was most unsatisfactory, given that the issues of dispute remained unresolved. These issues would now be required to be discussed separately and repeatedly with at least four other health board managers in different locations around the city who had no background knowledge of their dealings with senior management over the previous two year period. The complainants continued to express their dissatisfaction with the situation, and called again upon the NAHB and the SWAHB to either discharge the invoices, as submitted, or to make application to the Courts under Section 26 (2) of the legislation if the Board disputed the rates being sought.

In March 2005, 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. Yet, despite this assurance, my understanding from the complainants is that the

NAHB and the SWAHB have failed to refer a number of closed cases where fees were disputed, to the Courts for taxation.

In February 2007, for the first time, three closed cases (one relating to the NAHB, and two relating to the SWAHB) involving the Irish Guardian Ad Litem Service, which had taken almost two years (from May 2005) to be referred for taxation, were withdrawn by the HSE on the day of the hearing before the Taxing Master. The HSE decided to pay the rates sought by that agency in full, along with agency costs.

The current arrangement is that both service providers invoice the HSE at agency rates, but they only receive payment at the level of rates set by the area boards. Beacon advised my Office that it had held discussions with the SWAHB in 2006, and understood that agreement had been reached with that area board that Beacon rates (i.e. €130 per hour professional time and €60 per hour travel/waiting time) would be paid going forward. Payments had commenced at these rates. However, in July 2007 the Local Health Manager for the SWAHB with responsibility for child care issues, issued an e-mail to the other four Local Health Managers within the SWAHB area, advising them that revised rates were to be paid. These revised rates were pitched at the same level as those in payment within the NAHB. The notification to the Local Health Managers stated that in all instances where guardian services submitted rates above those revised rates, that the revised rates were to be paid, and that on the finalisation of the case, an application was to be made to the court to have the additional amount measured or taxed in accordance with Section 26(2) of the Child Care Act 1991.

When Beacon contacted the SWAHB in relation to the changes, it advised the agency that Beacon rates had mistakenly been paid. Beacon has claimed that it has not received any payments since July 2007 in respect of invoices submitted to the SWAHB. It did, however, receive a payment in the region of €58,000 from the NAHB in respect of **undisputed** invoices dating back to 2001. The agency has stated that, while it welcomed the payment, it was now faced with the onerous task of checking the relevant records and invoices going back to 2001. Beacon has indicated that it has had to employ staff who are trained in the area of credit control to deal with the difficulties associated with the payment of agency invoices. The agency has also asserted that the NAHB does not issue payment to them until a number of invoices are submitted, and then payment is grouped at HSE rates, without interest for late payments, as provided for under The Prompt Payment of Accounts Act 1997.

The Prompt Payment of Accounts Act 1997 requires those bodies, which fall within its remit, to pay for the supply of goods or services by the "prescribed payment date". The prescribed payment date is the date specified in a written contract, and if there is no written contract, or if the payment date is not specified in the written contract, payment must be made within 30 days of receipt of the invoice or date of supply, whichever is the later. If payment is not made
by the due date, the body must pay an interest penalty on the amount outstanding. The interest penalty cannot be waived by the supplier.

Beacon has stated that the average length of waiting time for payment varies from under 30 days to several months in some instances, and that they do not receive interest on late payments from either the NAHB or the SWAHB. The other area boards around the country tend to pay within the 30 days, and interest is paid in respect of any late payments. Both set of service providers have stated that, while they have always been willing to negotiate with the
area boards over the years, and have managed to do so with some success with the SWAHB (and the ECAHB), they have found it impossible to negotiate with the NAHB. The Irish Guardian Ad Litem Service has decided to withdraw from the provision of GAL services, and is not taking on new referrals.

Chapter 4

Analysis:

The main focus of my examination of these complaints is the system governing the payment of fees for GAL services. In examining the complaints made by both service providers, I must have regard to the legislation which governs the manner in which the GAL service operates.

As outlined previously, the relevant legislation is the Child Care Act 1991, which provides for the appointment of GALs by the Court, and which also states that their costs **shall** be paid by the health board concerned. The intention contained in the legislation, in my view, is relatively clear in that it is health boards (currently the HSE) which must finance the service. It further states that the health board may apply to the Court to have the amount of any such costs or expenses measured or taxed. This allows the HSE scope to challenge the rates being sought by GALs, if it considers that it is being overcharged. There is no provision in the Child Care Act 1991 which states that the HSE may set and impose its own scale of fees on GALs, who have been appointed by the Courts to oversee the interests of children. I have been unable to source any legislation which makes such a provision. In the absence of such a provision, the actions of the HSE, in setting and imposing its own scale of fees is, in my opinion, contrary to fair and sound administration.

When my Office originally queried the practice which appears to have developed initially within the NAHB, (and subsequently adopted by the SWAHB), I received a copy of the Law Agent's advice. This advice, dated 7 June 2006, stated that

> "the payment of the guardian ad litem's fees is a duty imposed on the HSE". It further stated that "the Health Act, 2004, which dealt with the establishment of the HSE in the transfer of functions from the health board system, provided that the object of the Executive was 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."

The Law Agent went on to state that the HSE was not alone entitled, but was obliged to fix the fees of the guardians at a reasonable level, taking into account the qualifications of the guardian in question. While there is a general provision in the Health Act 2004 (Section 7) which requires the HSE to act in a financially prudent manner, it appears that the above advice from the Law Agent goes far beyond the intention of the legislation. Moreover, it is evident that the area boards, (which were replaced by the HSE in 2005), are acting to the detriment of the GAL service providers in carrying out their court-appointed functions. This to my mind is not conducive to improving, promoting or protecting the health and welfare of vulnerable children.

In September 2007, the NAHB obtained a senior counsel's opinion in the matter which stated that it would be very difficult to form any view as to what would be an appropriate rate of payment to someone acting as a GAL. It further stated that, as many of the GALs

appointed by the courts are social workers, and that as the current rate of payment exceeded the mid- point of the salary scale for a social worker, then there was a rational basis to conclude that the rate currently paid by the HSE was fair and reasonable. The senior counsel acknowledged that he "could not put the matter any further as he did not know enough about the services actually provided by the guardians ad litem, or the level of commitment required by them." However, he stated that he believed that the question of the costs to be allowed to a GAL would be dealt with by reference to the pre-existing case law.

He further stated that the HSE has no control over what the GAL does, nor does it have any control over the manner in which the GAL carries out his or her functions or how long it takes to carry out any piece of work. He said that it was, therefore, “logical that the guardian ad litem should have the onus on proving that the relevant costs were reasonably incurred in the performance of the duties of a guardian ad litem.” He concluded that it was his opinion that the approach taken by the HSE was correct.

As I understand it, the key issue which has been in dispute between the service providers and the HSE since 2002 relates to the actual hourly rate charged for professional time. The service providers state that there has never been an issue with regard to the volume or standard of work done, and that time sheets are always submitted along with invoices, which detail the number of professional hours spent on each case.

I can readily accept that in discharging its duties, and in purchasing goods and services, the HSE is obliged to use its resources in the most beneficial, effective and efficient manner consistent with its objective to improve, promote and protect the health and welfare of the public. But, I do not accept that the HSE is entitled to unilaterally decide what the rate of the payment should be for a particular range of goods or services including those provided by the GAL service. In commenting on a draft of this report, the Local Health Manager for North Dublin stated that a fundamental difference between the complainants and the HSE related to the interpretation of Section 26(2) of the Child Care Act 1991. He stated that the former area 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*. He added that fees charged by guardians should generally be standard rates across the service and that there should be a basis for any rates charged, and that it was not acceptable to pick a rate without being able to explain the composition of such rate. He said that the area boards contend that they have an obligation under legislation in relation to resource allocation, and that in no circumstances, unless obliged by legislation, could a health board spend money in a manner sought by the complainants. He also said that the methodology in implementing fee rate increases was logical, consistent, reasonable, fair, equitable and transparent. However, the service providers indicated that they had never been asked to provide a composite breakdown of the rates which they were seeking, and would have been happy to provide it had they been requested to do so.

(A copy of the Local Health Manager's written response to a draft of this report is attached at **Appendix A**).

Speaking generally, clearly, a supplier of goods or services would refuse to trade with a public body if that public body unilaterally fixed the rate of payment at a level which was unacceptable to the particular supplier. Of course, the public tendering process, among other things, brings openness, transparency and fairness to the business of purchasing goods and services by a public body. It also helps the public body to achieve cost efficiency and effectiveness by assessing competitive market rates for the particular goods or service. But, at the end of the day, there is agreement between the supplier and the public body in relation to the rate of payment and other conditions that should apply. If either side defaults on the terms and conditions, the contract may be terminated or, in extreme cases, litigation may ensue to enforce its terms.

The relationship between the HSE and the GAL service is unique in the following respect. The GALs are appointed, not by the HSE, but by the courts, but yet it is the HSE which has the statutory responsibility of meeting the costs incurred by the GALs, albeit with the authority to apply to the courts to have the amount of such costs measured or taxed. The HSE has emphasised the need to ensure that its resources are used in an effective and efficient manner, and I accept that, like all public bodies, it has an obligation in this regard. However, for their part, the GAL service providers are entitled to fair and reasonable treatment in relation to the recoupment of their costs from the Health Service Executive.

It seems to me that in the interests of fair and sound administration, the HSE needs to engage more openly with the GAL service providers in relation to its approach to the recoupment of costs incurred. Specifically, and in the interests of good administration, one possible approach would be for the HSE, at the most relevant senior level, to firstly prepare and publish guidance notes, in conjunction with the service providers, setting out its outline policy in relation to the recoupment of GAL costs, for example, what type of expenses are admissible, how claims should be made, vouching arrangements etc. Secondly, the HSE should agree with the service providers a scale of agreed charges to apply either nationally, regionally or locally, as appropriate. Thirdly, in the event of a dispute about a particular invoice, the HSE should attempt to resolve the matter by consultation with the relevant GAL and in accordance with procedures provided for in the Prompt Payment of Accounts Act 1997. Finally, in the event of continued disagreement, the HSE should refer the matter for taxation as expeditiously as possible.

Since 2002, the NAHB has assumed authority for setting GAL rates within its area. The SWAHB has followed suit, despite repeated opposition from both sets of complainants. The correspondence which I have viewed between the service providers and the area boards shows that the service providers constantly sought clarification as to the legal basis which allowed them to set down and impose rates and terms upon them. Even though the complainants strongly objected to this practice, the Area Boards failed to refer closed cases, where the rate had been disputed, for taxation. (Under the legislation, it is the health board alone which may refer disputed costs to the Court).

In commenting on a draft of this report, the Local Health Manager for North Dublin stated that the former NAHB has never had a difficulty in referring disputed cases for

measurement/taxation, but the evidence available to me does not substantiate the Local Health Manager's view. Indeed, I note that the Local Health Manager wrote to the Irish Guardian Ad Litem & Social Work Service in June 2007 seeking to establish the up to date position in respect of closed cases within the former NAHB area, which he said was to enable measurement proceedings to be instituted in line with a previous commitment given. I fully accept that the actual cost of referring a case for taxation can be rather substantial, and may far exceed the disputed GAL costs. This may have been a deterring factor for the area boards in the past, and from a value for money viewpoint, but it was all the more reason why meaningful and fair negotiations should have been undertaken with the service providers with regard to the rates issue.

When the complainants initially approached my Office, I felt, in fairness to both parties, that the best approach going forward would be for the HSE and the service providers to come together and to negotiate around the rates issue, as had been done successfully with the SWAHB in the past. I advised the former Director of Complaints for the HSE that I would not construe any efforts by it to agree rates with GALs as constituting maladministration. However, I also made it abundantly clear that I would consider any unilateral decision to pay only a proportion of the costs sought as falling short of fair and sound administration.

I considered that if agreement could be reached between the parties, in the absence of any pre-existing nationally agreed scale of fees chargeable, then, in my view, this would have represented progress for both sides. On foot of my suggestion, the Local Health Manager with responsibility for child care issues nationally, agreed to meet with service providers around the country but, unfortunately, no general agreement could be reached with regard to the rates issue. The complainants felt that although the meeting was helpful, and while they were amenable to negotiating the rates issue, the HSE had adopted a rigid approach. In hindsight, it would appear that the services of a mediator may have been of some assistance in reaching a mutual agreement in this matter. However, the historical issue still remained as to whether the area boards had the authority to set and impose GAL fees, in the absence of consultation or agreement, with the service providers since 2002.

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It would appear that the majority of health boards around the country applied the correct interpretation of the Child Care Act 1991 and paid the rates sought by the appointed guardians without question. However, the area boards which are the subject of this investigation, applied HSE rates and terms on private service providers without prior agreement with them which, in my view, was contrary to fair and sound administration. While it appears that the SWAHB did, from time to time and in respect of certain cases, negotiate and agree rates with both sets of service providers, it appears that the NAHB refused to enter negotiations, and from 2003 refused to discuss the issues with either agency.

Chapter 5

Findings:

I find that the HSE (through the two former area health boards - the NAHB and the SWAHB), in setting and imposing a fee structure on GALs in the absence of their agreement, has acted in a manner which is improperly discriminatory and contrary to fair or sound administration by virtue of the following actions/inaction:-

> failing to engage with the complainants in a constructive and proactive manner with a view to reaching agreement with regard to the fee structure;
>
> failing to respond to GAL requests for clarification as to the legal basis for imposing fees, or to seriously consider the objections of the GALs in this regard;
>
> failing to refer the costs in disputed cases to the court for taxation/measurement as provided for in the Child Care Act 1991;
>
> allowing arrears of GAL fees to accumulate over an extended period of time, (including undisputed amounts), which has seriously impacted on GAL services.

I also find that, in adopting the above approach to these issues, the HSE (through the two former area health boards) has neglected to take sufficient account of the interests and welfare 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 those children who are most vulnerable in our society.

In commenting on a draft of this report, the Local Health Manager for North Dublin took issue with the above finding, describing it as "astonishing and without foundation whatsoever". He added that

> "in the event of such a charge being neither capable of being fully substantiated in the final report 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."

[Deleted]

Also, in Chapter 5, I refer to a statement by the Service Co-ordinator of the Beacon Service, drawn up in December 2002 which was served in all cases before the courts in the ERHA region in which Beacon was involved. The statement drew attention to the history of difficulties with payments for GALS within the ERHA region. It stated that, ultimately, the service would have to be withdrawn from cases within the ERHA region unless agreement could be reached on the rates issue.

Chapter 6

Recommendations:

I wish to make the following recommendations to the HSE which I consider to be fair and reasonable, and which take account of the legal provisions in the Child Care Act 1991:-

In relation to the **Irish Guardian Ad Litem and Social Work Services** (which is not taking on any new referrals):

1(a) that the HSE pays, at agency rates, all duly authorised outstanding invoices, in respect of cases which have been closed, with interest as provided under the Prompt Payment of Accounts Act 1997;

(b) that payment be made with respect to duly authorised invoices for ongoing cases at agency rates (given that the HSE accepted those rates in February, 2007), and that interest be paid in respect of any late payments in accordance with the Prompt Payment of Accounts Act 1997;

(c) that a "Time and Trouble" payment of €10,000 be made to the agency in recognition of the effort expended by it in the pursuit of its complaint since 2002.

In relation to the **Beacon Guardian Ad Litem Service**:

2(a) that the HSE pays, at agency rates, all duly authorised outstanding invoices, in respect of cases which have been closed, with interest as provided under the Prompt Payment of Accounts Act 1997;

(b) that payment be made with respect to duly authorised invoices for ongoing cases, at agency rates, or refer the cases, on completion, to the courts for measurement/taxation, if the rate is disputed;

(c) that a "Time and Trouble" payment of €10,000 be made to the agency in recognition of the effort expended by it in the pursuit of its complaint since 2002;

(d) for the future, I recommend that the HSE engage more openly with the GAL service providers in relation to its approach to the recoupment of costs incurred. In that context, it should prepare and publish guidance notes, in conjunction with the service providers, setting out its outline policy in relation to the recoupment of GAL costs, for example, what type of expenses are admissible, how claims should be made, vouching arrangements etc. The HSE should agree with the service providers a scale of agreed charges to apply either nationally, regionally or locally, as appropriate, and in the event of a dispute about a particular invoice, the HSE should attempt to resolve the matter by consultation with the relevant GAL and in accordance with procedures provided for in the Prompt Payment of Accounts Act 1997. Finally, in the event of continued disagreement, the HSE should refer the matter for taxation as expeditiously as possible.

While I am mindful of past difficulties in agreeing guardian ad litem rates, I hope the HSE will approach this matter proactively, with a renewed sense of commitment, which takes on board my findings and recommendations in this report. In order to assist it in putting the above new policy arrangements in place, and should it see merit in so doing, the HSE should explore the possibility of appointing an independent mediator to liaise between it and the service providers.

Emily O'Reilly
Ombudsman
July, 2008