Gagging the Ombudsman?

Aftermath of an Investigation by the Ombudsman of the Health Service Executive

A Report to the Dáil and Seanad
under section 6(7) of the Ombudsman Act 1980

Office of the Ombudsman
July 2010

PN A10/0895

“... it is my conclusion not only that these events proved utterly futile, in the sense of having no tangible outcome, but regrettably that it was never the intention of the HSE that they would serve any useful purpose.”

“… the HSE undertook what appeared to be a deliberate attempt to prevent publication of the investigation report.”

Introduction & Summary

Between July 2008 and June 2009 the Health Service Executive (HSE) caused my Office to become embroiled in a bizarre series of events which involved significant financial and other costs and which, ultimately, resulted in no tangible outcome. These events, insofar as any purpose was ever clear, appeared to concern the safeguarding of court proceedings under the Child Care Act 1991.

These events arose against the background of the HSE having refused to accept my findings and recommendations following the investigation of two related complaints (details below). Dealing with matters raised by the HSE in the course of this period involved the deployment of considerable staff resources and the incurring of significant financial costs arising from lengthy court proceedings in which the HSE caused my Office, and some other parties, to become involved. Upwards of €150,000 of public money may have been spent on legal costs in the course of these events with no benefit of any kind resulting. Furthermore in November 2008 the HSE, by way of a threatened High Court injunction, caused me to withhold from the Dáil and Seanad a special report which I had prepared (and which was already printed) in relation to the complaint investigation.

Looking back with the benefit of one year's distance, it is my conclusion not only that these events proved utterly futile, in the sense of having no tangible outcome, but regrettably that it was never the intention of the HSE that they would serve any useful purpose. The HSE contends that its actions were at all times governed by legal advice and were taken out of respect for the law and the courts. Unfortunately, I find it very difficult to accept that this was in fact the case. The best that can be said for the HSE's behaviour is that it was guided by an ill-judged reliance on legal advice resulting in what, on the face of it, amounted to a failure in balanced decision making; the worst that can be said is that the HSE's behaviour may have been a calculated and measured attempt to prevent the publication by my Office of an investigation report which was critical of the HSE's actions.

At the outset, I wish to make it perfectly clear that my Office respects fully the status and independence of the courts and has no intention of behaving in a manner that might suggest disrespect for the courts or, indeed, amount to contempt of court. In addition, in the case of court proceedings under the Child Care Act 1991, my Office accepts unequivocally the need to respect the integrity of such proceedings and to protect from any disclosure the identity of any child who is, or has been, the subject of such proceedings. It may seem odd that the holder of a statutory office would find it necessary to make such a statement; it should be self-evident that this is the case. Unfortunately, I feel it necessary to say this explicitly in view of the HSE's representation of the actions of my Office as somehow disrespectful of the courts and unmindful of the reporting restrictions which apply in the case of proceedings under the Child Care Act 1991.

The purpose of this report is to inform the Dáil and Seanad of the facts of what transpired during 2008 - 2009 and to comment on the appropriateness of the HSE's behaviour in relation to my Office. In conjunction with the laying of this report before the Houses, I

am publishing on my website, www.ombudsman.gov.ie, some of the key items of correspondence passing between the HSE and my Office during the period in question.

The HSE has had an opportunity to comment on a draft of this report and made a lengthy submission in relation to it (copy of letter available at www.ombudsman.ie). The HSE submission does not contain anything of substance not already available to me while preparing the draft report. Unfortunately, this HSE submission continues the pattern of inaccuracies, mis-representations and irrelevancies which were a feature of the experience described in this report. It is not realistic to attempt to identify these in any detail but, to take just one example, the submission in its opening paragraph states that the first it knew of this report was on 17 June 2010 when my Office invited it to comment. In fact, my Office informed the HSE on 21 December 2009 (by way of a letter to its CEO), and in very explicit terms, of my decision to prepare "a report for the Oireachtas, under section 6(7) of the Ombudsman Act 1980, which will deal with events relating to [my] investigation of complaints received from two service providers regarding the manner in which the HSE handled the payment of Guardian Ad Litem fees". Following on from this initial letter of notification, there was an exchange of correspondence with the HSE dealing with issues arising in the course of preparing this report. It is difficult to know whether this level of inaccuracy is deliberate or simply a matter of carelessness; either way, it typifies the nature of the experience my Office has had throughout the events described in this report.

Original Investigation

On 23 July 2008 I wrote to the HSE with the results of an investigation, just completed, arising from complaints made against it by two agencies which provided guardian ad litem services. Guardians ad litem represent the interests of minors involved in court proceedings and are appointed by the courts under the Child Care Act 1991; responsibility for meeting their fees is a matter for the HSE rather than for the courts. The complaints had to do with payment arrangements between the HSE and the agencies. The agencies complained that two of the former health boards (now the HSE) had been paying the guardians at rates which were not agreed and, when agreement could not be reached about these rates, the HSE had failed to refer the cases back to the courts to have the costs "measured or taxed". What is significant here is that the facility to refer back to the courts [under section 26(2) of the Child Care Act 1991], in order to have guardian costs “measured or taxed”, is available only to the HSE; the agencies did not have the right to refer the fees dispute back to the courts.

This was a fairly routine investigation which, in the normal course, would not have attracted a great deal of attention. My findings were concerned with the manner in which the HSE had engaged, or failed to engage, with the agencies with a view to resolving the dispute about fees. In particular, I was critical of the HSE for its failure to refer the costs issues back to the relevant courts to be "measured or taxed" in circumstances where the agencies could not refer the matter to the courts and where negotiations had not resolved the dispute.

The investigation of these complaints followed normal practice in my Office. This included a series of contacts with the HSE, the provision of a draft of the investigation report with an opportunity to comment on the proposed findings and, following careful consideration of the HSE's response to the draft report, completion of the report with its findings and recommendations. This detail is relevant only in as much as it establishes that the HSE had ample opportunity, over an extended investigation period of twelve months, to raise any legal or jurisdictional concerns it might have had. During that lengthy period it raised no such concerns.

In the event, the HSE refused to accept the findings and recommendations of my investigation report and this is outlined further below. However, following on from this refusal, the HSE undertook what appeared to be a deliberate attempt to prevent publication of the investigation report. This campaign involved misrepresentation of the contents and implications of the report as well as the initiation of court proceedings which ran for seven months before their eventual striking out by the court.

“I find it difficult to avoid the conclusion that the HSE has chosen to misunderstand the nature and the implications of my investigation report.”

Rejection of Report by HSE

On 15 September 2008 the CEO of the HSE informed me that he had received legal advice that **"the final draft of the Report of the Ombudsman is ultra vires the Ombudsman Act 1980 as amended and that it is not open to the HSE in law to accept the findings or the recommendations contained in that final draft".** However, the CEO did not give any explanation of how, or why, my report was, in effect, illegal. In my reply of 26 September 2008 I pointed out that the HSE had not explained the basis for its claim of illegality and I told the CEO that I would, in due course, be reporting to the Oireachtas on the rejection of my findings and recommendations. However, I offered the HSE a further opportunity to elaborate on its reasons for not accepting my recommendations and offered to include such a statement in my report to the Oireachtas. In reply (10 October 2008), the CEO again said that he could not accept my findings and recommendations. The only elaboration as to the grounds for this position was that he had received legal advice **"indicating there are serious legal and technical difficulties".** The CEO did not say what these difficulties were.

On **14 October 2008** (copy of letter available at www.ombudsman.ie) the HSE's solicitors wrote to confirm that it had advised the HSE of certain "problems of law" associated with my investigation; the letter listed ten separate jurisdictional and legal "problems" (in a list stated to be "not exhaustive") which rendered my investigation illegal. In summary form, these were that

1. my report breached the "in camera" rule and represented an interference with the operation of the courts in relation to cases dealing with children;
2. the subject matter of the investigation was a matter proper to the Ombudsman for Children and thus not within my jurisdiction;
3. I did not have jurisdiction on the basis that the matter at issue was one which remained within the jurisdiction of the courts;
4. I had employed an incorrect statutory test of "maladministration" both in initiating and concluding the investigation;
5. the investigation report misinterpreted the provisions of the Child Care Act 1991;
6. the investigation report misstated the law in relation to the appointment and regulation of a guardian ad litem by a court;
7. the investigation report misstated the law **"in relation to proceedings under the inherent jurisdiction of the High Court and the quite separate and distinct statutory proceedings under the Child Care Act 1991";**
8. the investigation report misstated the law **"in relation to the measurement and taxation of costs"**;
9. the investigation report made unfair references, both directly and indirectly, to a named local health manager and that this is in breach of section 6(6) of the Ombudsman Act;
10. the HSE could not "lawfully" accept my report's recommendations (a) because of **"the constitutional principle of the separation of powers"** (b) because of the mandatory requirements of the Child Care Act 1991 and (c) because of **"the public law duty not to fetter the exercise of statutory discretion".**

In addition, the HSE solicitors said that they did not want a situation to arise where a decision taken by the HSE was considered by the courts to be a contempt of court. Finally, they said that the HSE intended to make an application to the District Court to inform the Court of this matter, and to make me a notice party to this application.

This communication was very puzzling as, amongst other things, it reflected a view that in the course of my investigation I had become involved in some fashion in commenting on, or disclosing details of, individual child care proceedings. This was simply untrue. Furthermore, I simply failed to understand why the HSE would be applying to the District Court, what it might have to say to the District Court and, more than anything, I saw no reason whatever that my Office should be made a party to any such proceedings.

These "problems of law", insofar as it was clear what they meant, were relatively easy to discount. Accordingly, on **23 October 2008** (copy of letter available at www.ombudsman.ie) I sent a very detailed response to the HSE in which I dealt with each of the ten matters raised. Some of the key responses are set out below.

On the question of a breach of the "in camera" rule, I said:

> "There is no basis whatever for the view that my report breaches the in camera rule ... As I understand it, it is a contempt of court for any person to disseminate information emanating or derived from proceedings held in camera without prior judicial authority. There is nothing in my report which might be construed as disseminating information emanating or derived from proceedings held in camera. The report does not identify any particular child, any particular court proceedings, or any of the parties to any particular court proceedings. Neither is there any basis for the view that the report somehow interferes with the operation of the courts in relation to cases dealing with children."

As regards the arguments under 10. above, I said:

> "The HSE says it cannot lawfully accept my report's recommendations (a) because of 'the constitutional principle of the separation of powers' (b) because of the mandatory requirements of the Child Care Act 1991 and (c) because of 'the public law duty not to fetter the exercise of statutory discretion'. It is difficult to avoid the conclusion that these points are being raised with the intention of creating legal confusion where, in reality, the actual situation is quite straightforward.
>
> In regard to (a), it is perfectly clear that as my Office does not make binding decisions or legal determinations then there can be no question of any interference with the doctrine of the separation of powers. Put very plainly, my Office has investigated instances of alleged maladministration (using that term in a general sense), has found that the allegations stand up, and has made recommendations to remedy the adverse effects suffered by the complainants.

> The HSE is free to accept or reject these recommendations. It has chosen to reject them and I, in consequence, have decided to report on this to the Oireachtas. Raising the issue of the separation of powers is, it seems to me, either mischievous or it suggests a serious lack of understanding of what my Office does.
>
> In regard to (b), referring to the mandatory requirements of the Child Care Act 1991, I am at a loss to know what the HSE might have in mind. In regard to (c), it is clear that the HSE retains the discretion to accept or reject my recommendation. A decision either way cannot reasonably be characterised as a fettering of discretion. My comments above in relation to (a) apply also in the context of (c)."

I find it difficult to avoid the conclusion that the HSE has chosen to misunderstand the nature and the implications of my investigation report. Furthermore I am concerned that, having allowed itself this misunderstanding, the HSE has felt free to misrepresent that report and its implications. Indeed, it has continued with this misrepresentation to the present day, two years following completion of the investigation report.

Ms. Laverne McGuinness of the HSE recently, in public (Letters Page, *Irish Times*, **3 June 2010** - copy of letter available at www.ombudsman.ie), made the extraordinary claim that acceptance by the HSE of the recommendations of my report would have all kinds of unacceptable implications including that acceptance **"would require the HSE to hand over personal documentation and information (including privileged information) and information prepared in the course of in camera proceedings if requested to do so by the Ombudsman without notice to the people affected".** As a matter of hard fact, these claims have no foundation and are utterly incorrect.

It is a plain fact that this investigation concerned solely the issue of payment arrangements between the HSE and the agencies. In undertaking the investigation, my Office neither sought nor required any information concerning any individual child nor regarding any particular proceedings in any court. My investigation report, therefore, did not deal with the circumstances of any particular child nor with the outcome of any particular proceedings involving a child. Equally, my recommendations had no implications for any particular child nor for any proceedings involving any particular child; neither did the recommendations have any implications for how the HSE might be required to respond to any future investigation of a complaint involving issues to do with child care.

Full details of my recommendations in that case are available in the **investigation report** which I am now publishing on my Office website. In summary, my recommendations were that the agencies be paid outstanding fees, with appropriate interest, that "time and trouble" payments of €10,000 be paid to each of the agencies and that, for the future, the HSE should engage openly with guardian agencies to ensure that such disputes would not arise again. Acceptance of the recommendations required neither more nor less than is

specified in the recommendations. In fact, following its initial rejection of the recommendations, the HSE has in the meantime given effect to them.

Because of my deep concern at this continued misrepresentation of the implications of my investigation, my Office wrote to Ms. McGuinness of the HSE on **17 June 2010** (copy of letter available at www.ombudsman.ie) to once again correct the record on the matter.

Efforts to Resolve Matters

Given the decision of the HSE to reject my recommendations and findings, it was my intention to report this outcome to the Oireachtas. Because such reports to the Oireachtas are rare, both the HSE and my own Office saw the value in attempting to resolve matters without recourse to the Oireachtas. With the assistance of the Department of Health & Children, a three-way meeting involving the HSE, the Department and my own Office was arranged for 31 October 2008. This was a useful meeting at which, from the perspective of my Office, the real matter of concern to the HSE appeared to be one particular finding of my report. This was a finding, stated in general terms, that in adopting its particular approach to the guardian payment issue the HSE was **"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".**

It appeared the HSE's concern was that this general finding might be taken out of context and be construed as suggesting that it was failing in a fundamental way in its statutory obligations to protect children at risk and failing to act in the best interests of children generally. The HSE suggested that some written clarification of what this finding involved might allow it to accept my findings and recommendations. The outcome of the meeting was an agreement to engage in further contact with a view to agreeing a form of words which would clarify that this finding was not intended as a general comment but, rather, one made in the specific context of payment arrangements for guardians ad litem.

Somewhat surprisingly, at this meeting the HSE side did not raise any of the ten legal "problems" identified by its solicitors; nor did it raise directly any other legal issue. My Office had a very clear understanding that the key reason for the HSE's rejection of the report arose from the particular finding mentioned above. The HSE disputes this account of the meeting.

In the two weeks following this meeting my Office had a number of contacts with the HSE regarding a form of words which would ease HSE concerns about the impugned finding. As a result of these contacts, my Office agreed to include in any publication of the investigation report a statement clarifying the meaning of the particular finding. Incidentally, this is a clarification which I am happy to give at this point now that the original investigation report is being published. The agreed wording, drafted by the HSE, read as follows:

"I am happy to clarify these comments and, in particular, to state that it is not my finding that the HSE (either collectively or through any individual staff member) wilfully jeopardised the welfare of any particular child or of children in general. Neither is it my finding that the HSE has failed to discharge any of its core statutory functions in relation to the welfare of children. Rather, my comments are to be understood in the context of my investigation of the complaints I received regarding the operation of the guardian ad litem system. "

“... it was, and remains, quite extraordinary that a public body - in fact the largest public body in the country - would threaten a High Court injunction to prevent the Ombudsman from communicating with the Oireachtas.”

“One of the recurring features of this entire episode …… is the abysmal approach to communication exhibited by the HSE's solicitors.”

Court Proceedings – Injunction Threat

However, within a few days of agreeing on this clarification the HSE changed course. On 14 November 2008 the HSE's solicitors faxed a letter saying they were instructed to seek from me **"an undertaking, that the concluded report will not be delivered to the Oireachtas having regard to the fact that our client has instructed us to make application to the appropriate Court at the first appropriate opportunity in relation to this report".** The HSE solicitors continued that, **in "the unlikely event that [the undertaking] is not forthcoming, it will be necessary for us to bring an application to the High Court on an ex parte basis to restrain delivery of the report to the Oireachtas."**

By any reckoning it was, and remains, quite extraordinary that a public body - in fact the largest public body in the country - would threaten a High Court injunction to prevent the Ombudsman from communicating with the Oireachtas. I found it very difficult, and continue to find it difficult, to understand why a relatively routine Ombudsman investigation report would warrant any kind of court action. I found it particularly unacceptable to be threatened with an injunction, in the event of not agreeing to the HSE demand, in circumstances where the HSE had failed to set out clear grounds as to why the report to the Oireachtas should not proceed and where it had failed to identify any harm which might be caused by the making of the report to the Oireachtas. All of this was compounded by the unexplained resiling by the HSE from a resolution which, as I understood it, had in effect been agreed.

One of the recurring features of this entire episode, during the period September 2008 - June 2009, is the abysmal approach to communication exhibited by the HSE's solicitors. Whether arising from ineptitude or by design, these communications displayed a tendency to convey partial messages only leaving major gaps in content to be guessed at or, by inference, presumed (incorrectly) to be known already by my Office. For much of this period, it remained a matter of guesswork as to what precisely was bothering the HSE, what it wished my Office to do and (as detailed below) what it wished the courts to do.

In any event, on **18 November 2008** (copy of letter available at www.ombudsman.ie) I sent a detailed letter to the CEO of the HSE, marked for his personal attention, seeking to clarify my position and confirming that I would proceed with my proposed report to the Oireachtas. The CEO's very brief reply was to say that these matters were being handled by the HSE's "law agent".

There followed then several exchanges with the HSE solicitors until, eventually, in the second of two letters dated 19 November 2008, some fuller knowledge of the HSE's position emerged. At that point it appeared the HSE was concerned it might have committed contempt of court arising from the disclosure to my Office, in the course of the investigation, of certain information and documentation touching on court proceedings involving children. In addition it emerged that the HSE was taking the view that the publication of some of the content of my investigation report could give rise to a contempt of court arising from a breach of the "in camera" rule.

My initial reaction was, irrespective of the weight to be attached to them, that it was extremely regrettable that the HSE had not raised these issues in the course of the investigation or, indeed, in the months since its completion. As regards the issue of breach of the "in camera" rule, having reviewed the investigation report I was satisfied that none of its contents was such that its disclosure would be a breach of that rule. However, in order to allay the concerns of the HSE, I decided to delete from the report to the Oireachtas those few references which, in its view, contained material whose disclosure might constitute a breach of the "in camera" rule. As it happened, none of this was material which I had specifically sought in the course of the investigation; none of it identified any particular child or any particular proceedings and none of it was critical in terms of the integrity of the investigation process or of the findings and recommendations. Furthermore, I was satisfied then (and remain satisfied) that even had I sought access, for the purposes of the investigation, to material covered by the "in camera" rule, my legal powers are such that the HSE would be required to comply. The HSE, however, disputes that this is the case.

By this stage, in late November 2008, the HSE had initiated proceedings in the District Court to which my Office was made a party. In very broad terms, these proceedings somehow involved the HSE in a declaration to the Court that it had inadvertently breached the "in camera" rule by the provision to my Office of certain material; the implication was that my Office had also breached the "in camera" rule by accepting this material. Furthermore, it appeared to be the HSE position that any process (such as my investigation) which had regard to such material was a flawed process. In addition to the District Court proceedings, the HSE solicitors informed my Office that it would be seeking an adjournment of the District Court proceedings on the basis that it would be initiating judicial review proceedings in the High Court. Not surprisingly, the HSE's solicitors omitted to say what the judicial review proceedings would be about nor did they identify the intended parties to the proceedings.

At that stage I decided with considerable reluctance to involve my Office's solicitors and to engage counsel to represent the Office in whatever proceedings might ensue. I also decided, with even greater reluctance, to abandon my report to the Oireachtas; this was on the basis that were I to inform the HSE of my intention to lay the report before the Oireachtas (as normal courtesy would require) it might proceed with its threatened High Court injunction or, alternatively, in any subsequent court proceedings it would represent my decision to publish as disrespect for the court. I was also very cognisant of the need to keep to a minimum, and ideally to avoid entirely, the incurring of legal costs by two publicly funded bodies in the course of a dispute between them. The proper forum for the airing of any dispute between the Ombudsman and a public body should be before an appropriate Oireachtas Committee.

As there may be some constraints on what I can say in relation to subsequent events in court, even in reporting to the Oireachtas, I have chosen to deal with these events fairly cursorily.

As regards the threatened judicial review proceedings in the High Court, these never materialised. It is reasonable to ask whether this threat was ever meant to be taken seriously or whether, as happens frequently in adversarial litigation, it constituted no more than posturing. Indeed, as will be recounted further below, a separate set of legal proceedings initiated in the High Court by the HSE, and apparently involving related matters to do with the Ombudsman for Children, petered out without an outcome in the sense of any adjudication by that Court.

“... it was never clear what the HSE hoped to achieve...”

“The HSE has not yet, after 14 months, paid these costs. In fact, it has resisted any engagement with a view to my Office collecting its costs.”

“... the HSE should suffer the consequences of its bad behaviour.”

“In short, these proceedings were an utter waste of time and money.”

District Court proceedings

As mentioned, there may be some restrictions on the extent to which I can describe the manner in which these District Court proceedings were conducted by the Executive. It is possible to say, however, that the conduct of the proceedings was characterised by delay, confusion and a failure by the HSE to meet certain directions of the Court. In simple terms, the purpose of the exercise appears to have been to inform the Court that the HSE had inadvertently released information and documentation to my Office, in the course of an investigation under the Ombudsman Act 1980, which (in the view of the HSE) should not have been released without the prior approval of the Court. However, it was never clear what the HSE hoped to achieve through these proceedings as it never identified any specific relief or order which it wished the Court to make.

The HSE stated that it intended to put certain information before the Court, including :

1. the identities of those who had disclosed court and court related documentation and information without court permission;
2. a description of the content of this documentation and information;
3. details of the copying, use, present location and onward disclosure to any third party, without Court permission, of this material;
4. steps taken to redress this situation by any or all of the parties involved.

In relation to 1. above, the HSE provided no identities to the Court.

In relation to 2. above, the HSE provided the Court (and subsequently my Office) with six folders of documentation concerning three separate child care cases; the contents were identical in the case of each child. None of this documentation made any reference to the issues that may have been before the Court in relation to the children in question. All of the documentation concerned, in one way or another, matters to do with the payment of fees to the agencies providing the guardian ad litem service and concerning my investigation of the complaints from those agencies. Only four of the documents even mentioned any one or other of the children concerned; and of these four documents, only one had actually been provided to my Office by the HSE in the course of the investigation. It was clear that these were cases in which the issue of the general fees dispute, between the HSE and the agencies, had been raised. It was equally clear that no issue of substance, in terms of the details of why these children had been the subject of court proceedings under the Child Care Act 1991, arose in these documents. Accordingly, there appeared not to be any issue of possible contempt of court arising from the disclosure of these documents (bearing in mind also that only some of them had been disclosed to my Office in any event).

In relation to 3. and 4. above, the HSE failed to provide any such details or information.

Overall, what appears to be the case is that the HSE, having initiated proceedings with the purpose of informing the District Court of possible inadvertent breach of the "in camera" rule, failed to provide the Court with relevant information to any significant extent. In relation to the one area in which it did provide some information - under 2.

above - the content of the documentation provided contained no information about substantive matters arising in any child care proceedings.

A feature of the conduct of these proceedings by the HSE was its failure to act on undertakings given to the notice parties and to meet directions issued by the Court. For example, the HSE agreed to a request from one of the guardian agencies to identify with particularity what it was seeking from the Court and the basis for the application to the Court. When the HSE failed to do so, it was directed to so by the Court. In fact, it never acted on this direction. Similarly, the Court directed the HSE to deliver its legal submissions by a specified date; but these submissions were never delivered.

When the proceedings came before the Court, for the eighth time, in late May 2009 the HSE again sought to have the matter adjourned. The basis for this adjournment is dealt with separately below. In the event, the Court refused to adjourn the proceedings which were then struck out with costs awarded to my Office and to the other notice party. The HSE has not yet, after 14 months, paid these costs. In fact, it has resisted any engagement with a view to my Office collecting its costs**.** As a result, I have had to ask my solicitors to engage legal cost accountants (thus incurring additional costs to the Exchequer) to pursue the matter. If necessary, collection of these costs will be brought back to the Court for an order to settle the matter.

My Office's legal costs amounted to €52,000 which were paid promptly and represent a direct "hit" on my budget. This is money which could have been spent on something useful which actually enhances the service provided by my Office. It may seem odd that I would pursue the collection of these costs from the HSE in a context where (a) all of the money concerned comes from the Exchequer and (b) where the costs, once collected by my Office, are returned to the Exchequer with no financial advantage to my Office. I think it is very important that the HSE should suffer the consequences of its bad behaviour in the manner in which it conducted these court proceedings. Of course, the ultimate losers are the public generally in the sense that the HSE's funding will have suffered a loss of perhaps €150,000 (taking the costs of all the parties into account) arising from these proceedings. In fact, the full extent of the HSE's own legal costs have not yet been disclosed as, despite a number of requests, it has not provided me with the details of the fees incurred in respect of its Senior and Junior Counsel.

The taking of these proceedings by the HSE has resulted in no benefit of any kind to any party (other than to the lawyers involved). Nothing was decided and nothing was clarified and the proceedings have made no contribution of any kind either to the furtherance of the HSE's child protection functions or to upholding the integrity of the courts. In short, these proceedings were an utter waste of time and money.

Furthermore, given the manner in which the HSE conducted itself in relation to these proceedings - and particularly its efforts to have the proceedings adjourned (see below) - one must question whether the HSE entered into the proceedings in good faith at the outset.

“I expressed to the CEO, in quite blunt terms, my sense of frustration and annoyance…”.

“The HSE makes the case that its actions, …… were taken on the basis of legal advice. It is clear now those actions were futile and a waste of time and money.”

Meeting with HSE Chief Executive

I met with the CEO of the HSE on 22 May 2009 a few days in advance of the hearing date set for the District Court proceedings. The purpose of the meeting, from my perspective, was to seek to persuade the CEO that the HSE should even at this late stage seek to have the District Court proceedings stopped. I expressed to the CEO, in quite blunt terms, my sense of frustration and annoyance at being involved in the proceedings and my strong feeling that the proceedings would serve no useful purpose. I commented also on what I perceived to be unacceptable and inappropriate aspects of the manner in which the proceedings were being conducted, on behalf of the HSE, by its legal team.

The CEO explained that, for his part, he was happy to provide all of the information about the activities of the HSE which it was possible to provide subject only to legal restrictions. He took the view, he said, that while being as transparent as possible, and releasing all the information it is possible to release, could sometimes be painful it was, nevertheless, a key "driver" in transforming the health service. On the question of records disclosing "in camera" type material, he said he had the advice of "eminent senior counsel" to the effect that it was not open to the HSE to release such material to my Office without prior court approval. While this comment was relevant to a quite separate complaint then being considered in my Office, it had no bearing on the investigation of the guardian fees complaint where I neither sought nor required "in camera" type material. The District Court proceedings related solely to the investigation of the guardian fees complaint.

Ultimately, this meeting achieved very little. I came away from the meeting with a question in my mind as to whether, in fact, the HSE at senior management level was making a balanced assessment of the legal advice available to it. In principle I could understand, in circumstances where I had specifically and deliberately required the provision of records disclosing "in camera" type material, that the HSE might dispute my right to such material. Ultimately, in such circumstances, there might be an outside chance of such a dispute ending up in court (though I am quite satisfied that there is no current legal impediment to my Office being provided with such material). What I could not understand, and still cannot understand, is that I should be taken to court in circumstances where I neither sought, nor required, "in camera" type material. And all of this in a context where various regions of the HSE were continuing (and still continue) with the long-established practice of providing such material, on request, to my Office and without any difficulty.

The CEO represented himself as taking a commonsense approach inasmuch as, having been given clear legal advice, he should follow that advice. Not having seen that advice, I cannot comment on its merits nor do I know precisely how it purported to relate to the specific circumstances of my completed investigation. Legal advice is but one element - an admittedly important element - in decision making. It is difficult, in a general sense, to comment on the extent to which any public body should act in accordance with legal advice except, perhaps, to say that legal advisers should not dictate decision making. Ultimately, legal advice is no more than an assessment of how a court is likely to

adjudicate in the event of the particular issue being brought before the court. In taking a balanced approach to the assessment of legal advice, it is relevant to establish whether the issue on which advice has been sought is a pressing matter, one affecting fundamentally the rights and well being of others and so on. In some instances it is proper to ask whether, in the particular circumstances, the issue is of real relevance or, in the alternative, it is more an academic than an actual issue.

The HSE makes the case that its actions, in the aftermath of the completion of the guardian fees investigation, as described above, were taken on the basis of legal advice. It is clear now those actions were futile and a waste of time and money**.** I would hope, in the light of this experience, that the HSE would re-consider its approach to legal advice in terms of deciding to what extent it should determine HSE actions.

Court Adjournment – Related High Court Action

Shortly before the hearing date fixed for the District Court proceedings in late May 2008, the HSE's solicitors asked my Office to agree to an adjournment of these proceedings. This was on the basis, as explained by the solicitors, that a case was to come for hearing before the High Court in early June 2009 **"which engages issues which are almost identical to those arising ... in the present case."** Those issues, it was explained, involved a situation in which the HSE had provided to a statutory body **"materials generated for the purposes of an in camera hearing ... where prior permission for that disclosure was neither sought nor obtained from the Court".** The HSE sought to adjourn the District Court proceedings on the grounds that this "identical issue" would be **"determined authoritatively in the High Court".** As mentioned above, the District Court refused an adjournment of the proceedings and the case was struck out.

At my meeting with the CEO of the HSE I had learned that this High Court hearing involved the Ombudsman for Children as the statutory body to which "in camera" type material had allegedly been provided.

From my perspective, there was no pressing need for such an adjudication as the current law is sufficient to enable the provision by any party of material which is otherwise covered by the "in camera" rule. However, were the matter to be dealt with by the High Court, it would clearly be of relevance to know the Court's adjudication. In fact, I had at that stage a separate HSE complaint on hands in which the provision of such material was a key element in my examination. I had deferred the requirement to be provided with this material pending the outcome of the promised High Court hearing.

In the event, it seems that the High Court proceedings involving the Ombudsman for Children did not, as anticipated by the HSE, go to hearing. Accordingly, the High Court gave no determination on the issue of the right of the Ombudsman to be provided with documentation which might otherwise be covered by the "in camera" rule. Despite its knowledge that I had a direct interest in the outcome of that particular case - after all, the

HSE had informed me of its existence and stressed its relevance to my situation - the HSE failed to inform me that the case did not go to hearing and that the High Court had not given a judgment. My Office discovered this fact in August 2009.

What concerns me about this episode is the possibility that there was a never a realistic prospect of the High Court delivering a judgment as suggested by the HSE that it would. I am not familiar with the full details of this High Court case nor with the form taken by the proceedings. It may be the case that the proceedings were in such a form that a written judgment could not reasonably be expected. I know from my own experience with the HSE that some of its predictions of the likely course of action of the District Court proved quite incorrect. I would be concerned that it may have been somewhat reckless in anticipating how the High Court would choose to deal with the particular proceedings involving the Ombudsman for Children. As with the District Court proceedings into which my Office was unwillingly drawn, it may well be that parties were drawn unwillingly into the High Court proceedings and that, as was my own experience, nothing was achieved other than the incurring of high legal costs - all paid for by the Exchequer.

"… the actions of the HSE which have prompted the recent Health (Amendment) Act 2010 appear to reflect the same rather perverse approach as it demonstrated in its dealings with my Office in the aftermath of my investigation of the guardians' fees complaint."

"… it was a frustrating, wasteful, dispiriting and, ultimately, useless process…."

Conclusions

The issues dealt with this in this report have some resonance with more recent events in which the HSE has, apparently, refused to provide child care records for the purposes of the inquiry being conducted into the deaths of children while in HSE care. This inquiry is being conducted on behalf of the Department of Health & Children by Ms. Norah Gibbons and Mr. Geoffrey Shannon. Arising from this situation, the Minister for Health & Children brought the Health (Amendment) Bill 2010 before the Oireachtas in June of this year. This Bill was given priority in the Dáil and Seanad and was signed into law, as the Health (Amendment) Act 2010, by the President on 3 July 2010.

I understand that the immediate issue of the HSE's capacity to provide information to the inquiry is provided for in law already under the provisions of section 40 of the Civil Liabilities and Courts Act 2004. The HSE does not, apparently, accept that this is the case and has represented the fact of this new legislation having been enacted as evidence that it was correct in its refusal to co-operate with the inquiry. I do not believe that the HSE is correct in this. I understand that the Minister for Health and Children took the opportunity presented by the present impasse to deal with wider matters of information sharing by the HSE with the Department. The Explanatory Memorandum accompanying the Bill explained that its purpose is:

> **"to strengthen the legislative base for the provision of information by the Health Service Executive to the Minister for Health and Children so as to enhance the Minister's ability to fulfil his or her role and functions (including political accountability to the Oireachtas) and to create a ''safe channel of communication'' for sensitive information between the HSE and the Minister."**

Arising from these very recent developments, however, there is one general observation I would make: the actions of the HSE which have prompted the recent Health (Amendment) Act 2010 appear to reflect the same rather perverse approach as it demonstrated in its dealings with my Office in the aftermath of my investigation of the guardians' fees complaint.

I use the word "perverse" advisedly in relation to my own experience. The HSE's actions, as described above, were unwarranted and contrary in the sense that my investigation had nothing to do with "in camera" proceedings other than that the service provided by the complainant agencies involved children who had been the subject of court proceedings. The complaint had to do with money, not with any aspect of the service actually provided to the children or what had happened in court. The HSE zoned in on an issue which was quite irrelevant to my investigation and then used that irrelevant issue as the basis, not just for rejecting my report, but for involving me in the futile and expensive proceedings described above.

The HSE's approach also suggests a major lack of ordinary common sense and a poor sense of priorities. There are many areas of health entitlement in which, at present and

indeed historically, the HSE (and its predecessor health boards) has failed to meet its statutory obligations. These failures span the entire range of health and social services - child protection, dental services and nursing home care for the elderly to mention but a few. In the next few months I will be reporting to the Oireachtas on failures in the specific area of nursing home services for the elderly. It is hard to credit that the HSE would choose to engage my Office on a wasteful and ultimately futile escapade, as described above, when it has so many pressing and very real problems with which it should be engaged. I am not at all persuaded that its actions arose from a genuine belief in the need to show respect for, and to protect the integrity of, the courts.

A striking feature of my experience, as described above, is the extent to which engagement on the issues was delegated by the HSE to its legal advisers. Correspondence from my Office to the HSE was passed on to its solicitors for reply. There were occasions when it appeared that nobody at management level within the HSE was actually aware of all of the developments and, at times, it was difficult to know with whom, within the HSE, matters could be discussed. At times, one wondered whether the delegation of responsibility to the legal advisers was a conscious device to prolong matters and to maintain the confusion which the entire episode was engendering. At one point, the HSE's solicitors expressed irritation that my Office (quite consciously) sought to communicate through the usual official-level channels rather than, as they would have it, confine all communication to the legal channel.

In summary, therefore, it was a frustrating, wasteful, dispiriting and, ultimately, useless process in which the HSE caused my Office to be involved in the aftermath of the completion of the particular investigation in July 2008. I cannot say with certainty that the HSE's behaviour was designed deliberately to block publication of my investigation report; but I can say that this possibility has to be considered.

Emily O'Reilly
Ombudsman
July 2010