Advice of the Ombudsman for Children on the Health (Amendment) Bill 2010

15 June 2010

ombudsman
for children • do leanaí

Contents

Introduction	2
The provisions of the Bill	2
Implications of the Bill – for the Gibbons/Shannon Independent Group	3
Implications of the Bill for the Ombudsman for Children's Office	4
Wider issues affecting children relating to the in camera rule and the sharing of information	5
The need for a mechanism to systematically review child deaths in the State	6
Conclusion	7
Annex A	8
Annex B	11

Introduction

1. The Health (Amendment) Bill 2010 (the Bill) was referred to the Ombudsman for Children by the Minister for Children and Youth Affairs on 14 June 2010. The version of the Bill referred is that of 11 June 2010 at 16.00. The text of the Bill, when published, may of course differ. It is welcome that, despite the urgency of the Bill, it was referred to this Office.

2. The Bill aims to ensure that certain information is furnished by the Health Service Executive (HSE) to the Minister for Health and Children.

3. The advice set out below has been prepared under section 7(4) of the Ombudsman for Children Act 2002. It provides that the Ombudsman for Children may give advice to a Minister on any matter relating to the rights and welfare of children, including the probable effect on children of the implementation of proposals for legislation.

4. The Bill arose from the difficulties in accessing information held by the HSE encountered by the Independent Group established by the Minister for Children and Youth Affairs to examine the deaths of children in care since 2000. It is for this reason, in particular, that the Bill is of interest to this Office.

The provisions of the Bill

5. The Bill is a short one. It inserts a new Part 7A into the Health Act 2004. In outline:

   - S.40B of the Bill obliges the HSE to provide to the Minister information of a kind which he or she has specified or which he or she is likely to consider significant. Essentially, this creates a duty on the HSE to provide certain information as it arises on an ongoing basis.

   - S.40C obliges the HSE to provide the Minister with information or documents that he or she has required.

   - S.40D allows the Minister to share with any person he or she has appointed to conduct an examination or inquiry, documentation or information provided under s.40B or s.40C that the Minister considers may be relevant to the examination or inquiry.

   - S.40E allows the Minister to use information and documents provided to him for the performance of his functions.

   SS.40C and 40D are stated to apply notwithstanding:

   - the in camera rule or

- any enactments or rules of law on non-disclosure or confidentiality or requiring the consent of any person for information to be provided.

By contrast, s.40E contains no similar provision protecting the publication of information or documents. So, for example, if publication would breach the in camera rule, it is not permitted.

Implications of the Bill – for the Gibbons/Shannon Independent Group

6. On 8 March 2010 Minister Andrews announced that he had established an Independent Group to examine the results of completed reviews of deaths of children in care since 2000. Norah Gibbons, Director of Advocacy at Barnardos, and Geoffrey Shannon, Special Rapporteur on Children to the Oireachtas, were appointed to the Independent Group. A chair has yet to be appointed.

7. The purpose of this legislation is to override legal objections perceived by the HSE to the transfer of information or files to the Independent Group. It is important that the Independent Group receives all the information that it needs to carry out its remit. The Bill brings this closer – and is therefore a positive step. However, as Ombudsman for Children I have three concerns.

8. *First*, the Bill allows the Minister to seek information or documents from the HSE. It then allows the Minister to pass to the Independent Group any such information or documents that *the Minister* considers may be relevant to its examination or inquiry. It is not suggested that the Minister would withhold information. But the fact that the Independent Group cannot directly source information and documents, and it is the Minister who determines what is relevant, is regrettable and may weaken public confidence in any report as a result of the Independent Group's work. This Office endorses the view of the Special Rapporteur on Child Protection in his third report, where he states:

> "It is vital that in the future, inquiries into child protection matters and apparent failings in the child protection system are fully independent and statutory so as to ensure their effectiveness as inquiries."[1]

A properly constituted statutory inquiry should have its own means of compelling documents and information, rather than relying on the power of the Minister to do so.

9. *Second*, the Bill only provides for the use of the information and documents furnished by the HSE by the Minister. The Independent Group is not authorised by the legislation to publish any Report it may issue. A properly constituted independent inquiry should be able to publish its own report, rather than the Minister doing so.

[1] See Third Report of the Special Rapporteur on Child Protection, Mr Geoffrey Shannnon, published by the Department of Health and Children in April 2010, at p.64.

10. *Thirdly,* the Bill does not address the issue of documentation or information derived from in camera proceedings which the Independent Group believes, following careful consideration, should be published in the public interest. The use of such information or documentation in a Report by an Independent Group should be possible without the necessity for a court application. But the Bill does not allow the Minister or the Independent Group to do this.

Implications of the Bill for the Ombudsman for Children's Office

11. This Office has a number of preliminary examinations and investigations into cases of child death ongoing.

12. Although the Bill does not deal with the powers of this Office, there are some issues to which this Office wishes to draw attention.

13. In general, we have received full cooperation from the HSE, which has been appreciated. However, in some areas we have encountered pockets of resistance and we have had difficulty with the provision of information and documents.

14. Where we have had difficulties, a number of legal issues have been cited. These include the in camera rule, the law on third party disclosure and issues relating to privilege. This Office is satisfied that it has the powers that it needs to compel information and documents. For example:

- ss.40(6) and (7) of the Civil Liability and Courts Act 2004 mean that the Office is entitled to information and documents notwithstanding in camera rules contained in "any enactment";

- the powers of investigation of this Office also mean that this Office is entitled to privileged documents from the State, as s.14 of the Ombudsman for Children Act 2002 and s.7(4) of the Ombudsman Act 1980 make clear;

- the powers of investigation of the Office also mean that the consent of persons named in documents is not required under laws related to third party disclosure such as data protection law and the law on breach of confidence;

- Moreover, as the Children First guidelines on child abuse make clear, undertakings of secrecy should not be given in child protection work.[2] Issues of breach of confidence therefore should not generally arise in that field.

From a *legal* perspective, this Office therefore does not require similar powers to those given to the Minister in the Bill.

[2] See Children First, National Guidelines for the Protection and Welfare of Children (1999), at para. 5.2.

15. However, this is not to say that in dealing with State bodies issues such as the in camera rule, privilege and breach of confidence do not pose difficulties for this Office.

16. *First*, there is the issue of publication of in camera information in a report following the carrying out of an investigation. While ss.40(6) and (7) of the Courts and Civil Liability Act 2004 entitle this Office to obtain in camera information, it is not clear that this Office can subsequently *publish* that information in an investigation report. This is, in particular, because s.40(9) of the Civil Liability and Courts Act 2004 states that "no such document, information or evidence shall be published." It may be that this Office can apply to the court that heard in camera proceedings for the in camera rule to be lifted. But the law on whether courts have discretion to lift in camera rules is not as clear as it should be – and s.40(9) could potentially be interpreted as leaving the court with no discretion to lift the in camera rule in any event. Moreover, it should not be necessary to make a court application. The basic function of this Office is to promote the rights and welfare of children. As Ombudsman for Children I am statutorily obliged to have regard to the best interests of children. This Office would never seek to publish in camera information without good reason to do so and having full regard to the rights and best interests of children involved.

17. Many of the issues and problems dealt with by the Bill have - at times - been raised by the HSE as reasons for not supplying this Office with information. This has caused significant delay to some investigations. Provision similar to that in the Bill may therefore be *practically desirable*. In particular, while this Bill does not alter in any way the legal powers of this Office, some may argue – however incorrectly – that provision similar to that in this Bill needs to be made in respect of the Ombudsman for Children and that until this happens, certain information cannot be shared with us. Clarifying the law in this area may help to avoid expensive litigation on this issue, with all the delays that this could occasion to the conduct of investigations. This is particularly important given that this Office has received a number of complaints regarding the death of children in care, which are at various stages in the investigation process. Indeed, one such investigation has encountered significant delay because of legal concerns raised by the HSE.

Wider issues affecting children relating to the in camera rule and the sharing of information

18. This Office also believes that a root and branch review of the in camera rule is required, as well as a clarification of the law on sharing of information in the best interests of a child.

19. For example, the jurisdiction of the courts to lift the in camera rule is not as clear as it should be. While, for example, there is High Court caselaw stating that the courts have jurisdiction to lift the in camera rule in adoption, wardship and child care cases[3],

[3] See e.g. Eastern Health Board v Fitness to Practice Committee [1998] 3 IR 399.

there is other High Court caselaw which indicates that it cannot be similarly lifted in family law cases.[4] Also while there has been limited statutory provision made for the lifting of the in camera rule in some cases[5], there are other circumstances where it may be appropriate for it to be lifted without permission of the court. An example would be where in camera documentation indicates that a child may have been abused. It should be clarified that a court application should not be necessary in order to make a referral to the Garda Síochána in such circumstances.

20. There is equally a pressing need for legislation to clarify the law with regard to the sharing of information in the best interests of the child. This Office has found considerable confusion among those working with children as to the law in this area. Legislation would help to bring clarity and certainty in this regard. It is welcome that the Government has committed to such legislation.

21. While it is appreciated that these are not matters which the Bill was ever intended to address, they are nonetheless important issues which will affect children into the future and which need to be taken forward without delay.

The need for a mechanism to systematically review child deaths in the State

22. This Office recommended in April 2007 that consideration be given to the establishment of a mechanism to review systematically child deaths in the State. The purpose of such a review mechanism would be to develop a deeper understanding of why children die in an effort to reduce the number of preventable deaths. In April 2008, this Office also hosted a high level seminar on a child death review mechanism. Following this, in February 2009 this Office published an options paper on Child Death.

23. Since then, the HSE has established a review panel for serious incidents and child deaths, chaired by Dr Helen Buckley. This is a move in the right direction. One of the reasons for establishing this group as part of the HSE, it appears, is to overcome difficulties with the sharing of information and the in camera rule.

24. However, as set out in the Options Paper produced by this Office, there are a number of human rights considerations which apply in the case of child death. These are set out in the Annex to this advice. Article 2 of the European Convention on Human Rights requires that investigations into the deaths of children in the care of the State be independent, both institutionally and in practice. While establishing a group under the auspices of the HSE may be a convenient mechanism to overcome difficulties with the sharing of information, it lacks institutional independence. I therefore call for an institutionally independent child death review mechanism and encourage consideration of the approaches set out in its February 2009 options paper.

[4] See e.g. RM v DM [2000] 3 IR 373.
[5] See s.40 of the Courts and Civil Liability Act 2004 and s.3 of the Child Care (Amendment) Bill 2007.

25. In many jurisdictions, Ombudsmen for Children or their equivalents are actively involved with the review of child death. In Wales, my counterpart is an ex-officio member of the Child Death Review Team. In New South Wales the Commissioner for Children runs the Child Death Review mechanism. In New Zealand my counterpart receives all internal case reviews of any child who died in care of the State. This Office stands ready to assist in this regard.

26. It is clear that not all deaths are preventable and that unusual circumstances can lead to tragic outcomes in spite of timely interventions on the part of State agencies. However, some deaths *are* preventable and can provide an opportunity to assess policy and practice relating to how we protect vulnerable children. While this Office recognises the important steps that have been taken in recent weeks and months, more needs to be done to ensure that vulnerable children get the protection that they deserve.

CONCLUSION

This Office is concerned that the development of policies, practices and procedures by public bodies, schools and voluntary hospitals should promote the rights and welfare of children as the overarching principle guiding any of their actions.

The Ombudsman for Children's Office is part of the State's own independent monitoring mechanism. While this legislation addresses a specific problem that has arisen and is welcome to ensure cooperation in that context, it will do little to address the wider culture of cooperation required from public bodies in the context of children's rights.

ANNEX A

Child death – human rights considerations

- Ireland's international human rights obligations must be taken into account when considering how we approach the question of child death review. The provisions of the UN Convention on the Rights of the Child (UNCRC) and the European Convention on Human Rights (ECHR) are of particular importance in this regard.

- Article 6 of the UNCRC requires States Parties to recognise the inherent right to life of every child and ensure to the maximum extent possible the survival and development of the child. In its General Guidelines for periodic reports, the UN Committee on the Rights of the Child – the body that periodically examines the implementation of the Convention in States Parties – has indicated that States Parties should include information on the registration of the deaths of children, the causes of death and, where appropriate, the investigation of and reporting on such deaths.

- Although the UNCRC is not prescriptive about the manner in which child deaths are monitored and reviewed, the UN Committee on the Rights of the Child regards it as an important facet of a State's obligations under Article 6 of the UNCRC and the issue was raised with Ireland during the course of the examination of its most recent State Party report.[6] It may once again be raised by the UN Committee during the course of the examination of Ireland's next periodic report.

- Section 3 of the European Convention on Human Rights Act, 2003 requires every organ of State to perform its functions in a manner that is compatible with the State's obligations under the ECHR. The jurisprudence of the European Court of Human Rights relating to the procedural obligation under Article 2 of the Convention (the right to life) to investigate certain deaths is therefore a key consideration.

- Two strains of jurisprudence around Article 2 are of particular importance in the context of child death review: the indirect responsibility of the State for death and the procedural obligation on the State to investigate cases in which the State's responsibilities under the Convention might have been engaged.

- The European Court of Human Rights has held that, in certain circumstances, Article 2 of the Convention may entail positive obligations to take preventive measures to protect an individual whose life is at risk. It has concluded that for a State's responsibilities to be engaged, the authorities must have known or ought to have known of the existence of a real and immediate risk to life and they must have failed to take measures within the scope of their powers which, judged reasonably, might have avoided that risk. While the Court has indicated that this obligation will not apply in every case, in *Osman v. UK* the Court rejected the UK Government's contention that the failure to act must be tantamount to gross negligence for the State's responsibility to be engaged, finding that

[6] CRC/C/SR. 1182 Summary record of the 1182nd meeting (Chamber B) of the UN Committee on the Rights of the Child, para 65.

such a standard would be inconsistent with the obligation under the Convention to ensure practical and effective protection of Convention rights.[7]

- The Court has also held that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when someone's right to life under Article 2 has been violated. In *Edwards v UK*, the Court held that a State must investigate deaths not only where its agents are directly responsible for deaths but also where the State is indirectly responsible by failing to discharge its duties.[8] In an interesting comment on the possibility of distinguishing between the procedural requirement to investigate deaths where the State was directly as opposed to indirectly responsible, the House of Lords has rejected the view that a lower level of scrutiny was required for the latter. The Lords adjudged that to be directly contrary to the decision of the European Court of Human Rights in *Edwards v UK* and held that systemic failures leading to deaths called for even greater scrutiny.[9]

- Although the European Court of Human Rights has not been prescriptive about the form an Article 2 compliant investigation should take, it has laid out the general principles which should underpin any such investigation. The Court has held that it must:

  • be on the State's own initiative;

  • be independent, both institutionally and in practice;

  • be capable of leading to a determination of responsibility;

  • be prompt;

  • allow for a sufficient element of public scrutiny of the investigation or its results to ensure accountability; and

  • allow the next of kin to participate to the extent necessary to safeguard his or her legitimate interests.[10]

- Systemic problems may, however, contribute to deaths in situations where the State's responsibilities under Article 2 are neither directly nor indirectly engaged. While the State would not be obliged to carry out an Article 2 compliant investigation in such circumstances, the principle of learning from a death in order to prevent another one taking place in similar circumstances still holds. Against this background, consideration should be given to moving beyond the minimum requirements of the ECHR and applying

[7] Osman v UK (1998) 29 EHRR 245.
[8] Edwards v UK (2002) 35 EHRR 19.
[9] R (on the application of Amin) v Secretary of State for the Home Department [2003] UKHL 51.
[10] Edwards v UK, paras. 69-73.

more generally the principle of death review with a preventive focus. This would be in keeping not only with the spirit of the ECHR but also with that of the UNCRC.

ANNEX B

HEALTH (AMENDMENT) BILL 2010

_____

HEALTH (AMENDMENT) BILL 2010

ARRANGEMENT OF SECTIONS

Section

1. Amendment of Health Act 2004.

2. Short title and collective citation.

ACTS REFERRED TO

Health Act 2004	2004, No. 42
Health Acts 1947 to 2009	

HEALTH (AMENDMENT) BILL 2010

Draft of

B I L L

entitled

AN ACT TO AMEND THE HEALTH ACT 2004 TO PROVIDE, IN THE PUBLIC INTEREST, FOR THE FURNISHING BY THE HEALTH SERVICE EXECUTIVE OF INFORMATION AND DOCUMENTS TO THE MINISTER FOR HEALTH AND CHILDREN AND TO PROVIDE FOR MATTERS CONNECTED THEREWITH.

BE IT ENACTED by the Oireachtas as follows:

Amendment of Health Act 2004.

1.___The Health Act 2004 is amended by inserting the following Part after Part 7:

"PART 7A

FURNISHING OF INFORMATION AND DOCUMENTS

Definition.

40A._ In this Part, "document" means -

(a) a book, record or other written or printed material,

(b) a photograph,

(c) any information stored, maintained or preserved by means of any mechanical or electronic device, whether or not stored, maintained or preserved in legible form, and

(d) any audio or video recording.

Duty of Executive to furnish information.

40B._(1) The Executive shall -

(a) monitor and keep under review occurrences and developments concerning matters relating to its object and functions, and

(b) without delay, furnish the Minister with information regarding _

(i) any such occurrence or development that, in the opinion of the Executive, the Minister is likely to consider significant for the performance of his or her functions (whether under this Act or otherwise), or

(ii) any other occurrence or development that falls within a class of occurrences or developments of public interest or concern that has been specified in writing by the Minister.

(2) The Minister may issue guidelines in relation to the furnishing of information under subsection (1) and if he or she does so, the Executive shall comply with those guidelines.

Requirement to furnish information and documents.

40C._ (1) The Minister may, where he or she considers it necessary in the public interest to do so for the performance of his or her functions (whether under this Act or otherwise), require the Executive to furnish him or her, within the period specified in the requirement, with such information or documents as may be specified in the requirement and are in the Executive's possession or control, and the Executive shall do so without delay.

(2) Nothing contained in an enactment, and no rule of law, which would require obtaining the consent of a person in order for the Executive to furnish the Minister with information or documents under this Part, shall operate to prohibit such furnishing, notwithstanding that no such consent has been obtained.

(3) Nothing contained in an enactment, and no rule of law, relating to the non-disclosure or confidentiality of documents or information, shall operate to prohibit the Executive from furnishing the Minister, under this Part, with information or documents.

(4) Nothing contained in an enactment that prohibits proceedings from being heard in public shall operate to prohibit the Executive from furnishing the Minister, under this Part, with information or documents prepared in relation to, or given in evidence in, such proceedings, whether the proceedings were brought before or after the commencement of this Part.

Minister may share information and documents in certain circumstances.

40D._ (1) Where the Minister has appointed a person to examine or inquire into any matter, and considers that any information or document that has been furnished under section 40B or 40C may be relevant to that examination or inquiry, then the Minister may furnish that information or document to the person concerned, and that person may receive that information or document.

(2) Nothing contained in an enactment, and no rule of law, which would require obtaining the consent of another person in order for the Minister to furnish the person referred to in subsection (1) with information or documents under this Part, shall operate to prohibit such furnishing, notwithstanding that no such consent has been obtained.

(3) Nothing contained in an enactment, and no rule of law, relating to the non-disclosure or confidentiality of documents or information, shall operate to prohibit the Minister from furnishing the person referred to in subsection (1), under this Part, with information or documents.

(4) Nothing contained in an enactment that prohibits proceedings from being heard in public shall operate to prohibit the Minister from furnishing a person referred to in subsection (1), under this Part, with information or documents prepared in relation to, or given in evidence in, such proceedings, whether the proceedings were brought before or after the commencement of this Part.

Use of information and documents.

40E._ (1) Subject to subsection (2), the Minister may use information and documents furnished under this Part as he or she requires for the performance of his or her functions (whether under this Act or otherwise).

(2) Where information or a document has been furnished under section 40B or 40C, nothing in this Part is to be taken to permit publication, in whole or in part, of the information or document if such publication would not otherwise be lawful.

Saver.

40F._ Nothing in this Part is to be taken to limit any power of the Minister to require information from or issue directions to the Executive (whether under this Act or

otherwise), or to affect, except to the extent required by this Part, the functions of the Executive or the Minister.”.

Short title and collective citation.

2.—(1) This Act may be cited as the Health (Amendment) Act 2010.

(2) The Health Acts 1947 to 2009 and this Act may be cited together as the Health Acts 1947 to 2010.