Ombudsman's speeches

Executive Accountability and Parliamentary Democracy (26.03.2011)

Address by Emily O'Reilly, Ombudsman and Information Commissioner at National University of Ireland, Galway - Law School Conference

Introduction

Thank you.

It's hard to know where to begin with such a vast topic. However, to start this morning I'd like to set the scene by mentioning two recent stories that caught my attention and that, I hope, tell us something about the difficult issues of executive accountability and parliamentary democracy.

The **first** has to do with recent events in the State of Wisconsin in the United States which have attracted quite a bit of attention. It seems that the current Governor of Wisconsin, a Republican, has it in mind to change State legislation to weaken the position of public sector unions by removing the right of Wisconsin's public servants to engage in collective bargaining. This move was opposed by the minority Democrats in Wisconsin's Senate but it appeared that the Republicans had the numbers to carry the new legislation. The Democrats, however, hit on the ingenious device of absenting themselves from the Senate in the belief that, in their absence, there would not be enough Senators present to meet the necessary quorum. All fourteen Democratic Senators decamped to Illinois as it seems that, had they remained in the State of Wisconsin, they might have been compelled to attend to their duties in the Senate. After three weeks or so the Republicans, not to be outfoxed, redrew the proposed legislation and dropped any provisions to do with State spending while retaining the provisions restricting collective bargaining. The revised legislation no longer required a Senate quorum and was duly passed in the absence of the Democratic Senators. This story took a further twist a week ago when a District Judge put a temporary blocking order on the new law arising from a technical, legal challenge by a Democratic Attorney General. It remains to be seen how this controversy will be resolved.

The **second** story is nearer to home and is recorded in detail in a report published earlier this week by the NGO Access Info Europe. The report has the intriguing title, 'The Secret State of EU Transparency Reforms' and has to do with the proposed revision of the EU's access to information law (Regulation 1049/2001). The NGO campaigns to promote and protect FOI laws in Europe and is concerned that proposed revisions to the current EU access law will dilute existing rights. Access Info Europe set out to establish the positions of the individual EU member states on the proposed revision of the Regulation. Amongst other things, it wanted to establish whether some countries are lobbying against EU transparency as it believes that this type of information should be in the public domain. It would be of particular interest to know if any member states, publicly in support of greater transparency, are in reality lobbying behind the scenes to restrict the existing Regulation. In order to establish the positions of the member states, Access Info Europe decided to rely on the national FOI laws of each of the 27 member states. The request in each case, according to the NGO, was for access to documents, minutes or papers relating to the reform of the EU Regulation. The results of these access requests, as

set out in the report are unfortunately somewhat depressing.

While 11 countries provided some level of information either on their positions and/or on the process of the reform of the EU Regulation, **16 countries did not provide any information**. Of the 16 countries which refused any information, six referred the request to the European Council, six gave a formal refusal and four EU member states did not respond one way or the other. In Ireland's case, according to the Report, the request was handled by the Department of Foreign Affairs which appears not to have given a formal decision and simply referred the NGO to the European Council. On the face of it, and while I have not got the full facts, there seems no basis on which the Department would have been entitled to refer the matter to the European Council and evade the obligation to give a decision (carrying a right of appeal) on the request. Incidentally, Access Info Europe notes rather pointedly that Ireland was the only member state which required the payment of a fee at the point of initial request.

Now the point of the Wisconsin story, it seems to me, is that it tells us something about the variety of styles for conducting business in different parliaments. Irrespective of one's view on the issue of collective bargaining rights, we see a parliament which is combative, ideological and inventive. It may be a somewhat extreme example, but this parliament has caught the attention of many around the globe as well as engaging the attention of its own voters. It may not necessarily go about its business in the most efficient manner, but it certainly seems to be of relevance to the people of Wisconsin. On the admission of all of the main political parties in Ireland, it has been a long time indeed since the Dáil or Seanad has had such immediate relevance to the people generally. Indeed, Gay Mitchell, MEP just a few days ago described the Dáil as being on "life-support". For the Dáil and Seanad to be relevant, people need to feel that what is debated there has not already been decided elsewhere and that what is being said might actually influence events.

The point of the second story, on the report, 'The Secret State of EU Transparency Reforms', is that we in the EU, and in Ireland more particularly, have a long way to go in terms of openness, transparency and accountability. It seems to me that these three categories - the trinity of openness, transparency and accountability - travel together. Certainly accountability, in the absence of openness and transparency, becomes very difficult if not impossible. I doubt very much that there is any good reason why we should not know the position being adopted by Ireland in negotiations on the revision of the EU Regulation on access to information. Is Ireland pressing for a more liberal regime? or for a more restrictive regime? or perhaps Ireland has not concerned itself with the question one way or the other? In the absence of answers to these questions, we cannot hold the Government to account, nor can we hold the Minister for Foreign Affairs, nor the Minister for Finance, nor any of their senior officials to account on the matter. Fourteen years after the enactment of our own Freedom of Information Act, it is heavily ironic that Ireland's stance on access to information held by the EU institutions remains, in effect, a secret!

Change on the Way?

The good news I suppose is that we are now at a turning point in how we govern ourselves. The present crisis presents an enormous opportunity for change. It may be trite to say that this is the case - but sometimes even the cliché proves its worth. I am not going to outline in any detail the extent of the political and administrative reforms of government promised in the Fine Gael/Labour Programme for Government 2011 - 2016. I take it that people here will be familiar with the details of the Programme. I take it also that across the political spectrum there is a general acceptance of the need for reform and a general acceptance of the broad thrust of the reforms proposed in the area of government. So, in saying that I wholeheartedly welcome the broad thrust of these proposals I feel am not crossing any particular party political line.

I am particularly encouraged to see that many of the Programme's commitments relating to reform of government reflect an acceptance of concerns raised by myself, and by my predecessor Kevin Murphy, over the past ten years or so. From our work in investigating complaints against the Executive (Government Departments), it has been quite clear that there is a fundamental malaise in our system of government. The mismatch between how government is actually conducted, on the one hand, and the theoretical and constitutional model of how it should be conducted, on the other hand, is glaring. It is not just a question of tidiness; rather, it is a question of having a system of government where the intended checks and balances actually function as they should. The checks and balances have not been working for quite some time

with the result that the Executive has had a free hand to do what it liked, free of any real accountability and free of effective scrutiny from parliament.

In his 2001 report, Nursing Home Subventions, then Ombudsman Kevin Murphy commented as follows:

"The notion that the Oireachtas sets policy, makes the laws and then leaves it to the Executive to implement the laws does not fit with how government operates in practice. The reality ... is that the Government once elected controls the Houses of the Oireachtas with a resulting diminution in the capacity of the Houses to supervise the Executive. For all practical purposes, it is the Government which decides policy; which proposes legislation and ensures its passage through the Oireachtas and, subsequently, in its executive capacity ensures that the laws are implemented."

In a talk I gave about a year ago, I made some very critical comments on the conduct of government in Ireland and, in particular, expressed the view that parliament in Ireland has been side-lined and is no longer in a position to hold the Executive to account. I spoke of the dangers inherent in accepting that parliament is, for the greater part, a charade; and I observed that parliamentarians have in many cases lost the sense of parliament as an independent entity acting in the public interest. While I was quite uncomfortable in having to speak so bluntly, I felt then that this bluntness was necessary.

There is now a general acceptance that these comments were valid and that much of our current difficulties might have been avoided, or at least the scale of our problems would be considerably smaller, had government functioned as it is intended to function.

The current Programme for Government appears to accept this; it says (at Page 19): "We believe that in recent years an over-powerful Executive has turned the Dáil into an observer of the political process rather than a central player and that this must be changed."

The Programme includes an impressive list of commitments to reform and restore our system of government. These proposed reforms deal with the Dáil and how it should function as well as with the Executive and how it can be made more accountable. The Programme links public sector reform to a "commitment from the whole of government to become more transparent, accountable and efficient". The Programme promises "open Government" on the principle that "where there is secrecy and unaccountability, there is waste and extravagance". From my own immediate perspective, there is a welcome commitment to "extend Freedom of Information, and the Ombudsman Act, to ensure that statutory bodies, and all bodies significantly funded from the public purse, are covered".

For these reforms to become a reality, we will need not just a great deal of hard work but also perseverance and even an element of good luck. There will be a need for honest engagement including a willingness to call things as they are. Every reform process faces not just vested interests resistant to change but also a hostility to change based on simple inertia,

For my own part, as Ombudsman and Information Commissioner I am prepared to contribute to this process in any way I can. My comments in what follows - some of which are critical of major institutions of government - are intended as an honest and constructive contribution to the reform process. These comments focus more on the Executive than on the Dáil and they arise from the experience of my Offices in recent years. I am not attempting a comprehensive analysis of the Executive; rather, I am highlighting some particular issues which need to be addressed honestly if we are to make progress.

What is the Executive?

If we're talking about the Executive being accountable then we need to ask what we mean by the term "the Executive". This, it seems to me, is not an easy question. Certainly, it's not one I can hope to answer comprehensively in the next few minutes. Under the Constitution, the executive power of the State is exercised "by or on the authority of the Government"; the Government is "collectively responsible for the Departments of State administered by the members of the Government"; and "the organization of, and distribution of business amongst, Departments of State" is to be regulated by law. The Ministers and Secretaries Act 1924 sets out the legal

framework for the various Departments and assigns areas of responsibility to those Departments. Each Department, under the 1924 Act, is headed by a Minister to whom is assigned "the powers, duties and functions" of the Department. Furthermore, and critically, the 1924 Act provides that each Minister is a "corporation sole". This is the point at which the identity of the Minister as an individual, and a member of the Government, merges with the status of the Minister as a corporate entity.

There is some confusion as to how senior civil servants fit into this picture. At a simple level, the Minister is the head of the Department and is responsible, with his or her Government colleagues, for the all that happens in the Department. In this approach, the obligation on civil servants is to serve the Minister and to be loyal to him or her.

The difficulty with this simple approach is that all too often the loyalty of the civil service is to the Minister as an individual - who is usually an elected TD - rather than to the Minister as a corporation sole. Loyalty to the Minister as an individual means being conscious of the political pressures on the Minister, of the Minister's personal agenda and of the need to protect the Minister. This approach, unfortunately, leads to behaviour which is at odds with accountability. For example, it encourages Departments to be over-cautious about, or even hostile to, the disclosure of any information that shows the Minister in a bad light. It promotes a reluctance to acknowledge that, before making a decision, a Minister might have considered a number of options or that a Minister might have rejected strong advice on an issue. While this may be to over-state the case, this approach promotes a view that the Minister is always right and that it is disloyal to undermine this view.

There is another possibility regarding how senior civil servants fit into the Executive. On this approach, the corporation sole comprises both the Minister (as an individual) and the senior civil servants. In other words, rather than being loyal retainers, the senior civil servants are an integral part of the corporation sole that is the Minister. In this approach, the loyalty and duty of the senior civil servants is owed to the corporate entity rather than to the Minister as an individual. While the Department is personified in the person of the Minister, what is being personified is a corporate entity in which the senior civil servants have duties and obligations rather like the situation with directors of a company.

I appreciate that there is uncertainty about how relationships within the Executive - between Ministers and senior civil servants - should be conducted. I appreciate also that the Public Service Management Act 1997 has done something - though not enough - to clarify these relationships. In the meantime, the Moriarty Tribunal Report earlier this week has brought the issue once again into the public domain. It seems to me that for the Executive to be effective and accountable, the balance should be more in the direction of seeing senior civil servants as an integral part of the corporation sole rather than as external actors there to serve the whim of the individual Minister. This re-balancing may in fact be helped by Ministers being shown less deference within their Departments and, indeed, more generally. There are grounds for believing that, for the future, deference towards Ministers will be moderated.

In short, it seems to me that senior civil servants need to be more assertive in terms of exercising their role within their Departments; they need to focus on serving the Department rather than the Minister as an individual; they need to be accountable for their own actions as part of the Department; and, finally, they need to step back somewhat from the tradition of protecting the Minister at all costs.

Department of Finance

The recent Wright Report on the Department of Finance raised an interesting issue regarding accountability. The Report comments on the paucity of written records of Departmental advice regarding the risks of "pro-cyclicality". The Report observes:

"There are examples of where such advice was tendered in writing. We have also been advised of some important oral briefs that reinforced the Department's concern about pro-cyclicality. But these are not part of the official record. It is not unusual for Finance Departments worldwide to provide much of their background briefing orally. But it is best practice to maintain a formal written record. [...] A written record enhances the accountability of officials to provide advice and forces clarity of thought. It helps to ensure clear internal communications between different areas

of the Department. A record also establishes clear accountability for advice not taken. The lack of a coherent record of budgetary advice represents a major shortcoming in the systems of the Department of Finance."

One cannot disagree with any of this analysis. But what comes next is quite surprising. Wright observes that

"policy advice tendered outside of Cabinet consideration is subject to public disclosure [under FOI]. A public airing of serious policy differences between a Minister for Finance and his advisors could have serious implications for financial markets. At a minimum, it would strain relationships between the Minister and his officials and this would be very damaging to the budgetary process."

Wright goes on to state, as a matter of fact, that "possible Freedom of Information release does limit the written record of non-consensual advice". On this basis, Wright proceeds to recommend that policy advice to the Minister for Finance in the preparation of a Budget should not be releasable under FOI for at least five years.

As presented in the Wright Report, these observations on the negative impact of FOI appear to reflect views from within the Department of Finance. They reflect also, we are told, the views of Secretaries General of some other Departments.

All of this is very dispiriting. It is difficult to accept that very senior civil servants, with years of experience of dealing with legislation, could misunderstand so fundamentally what is actually provided for in the FOI Act. In the case of the Department of Finance, which is the "parent" Department for FOI legislation, such a misunderstanding would be baffling. It must certainly know, as I am blue in the face from repeating, that FOI is not there to do harm and that the Act has more than enough exemptions to protect all of the important interests of the State.

Section 31 of the FOI Act protects specifically the financial and economic interests of the State and of public bodies. That section identifies the type of record which is to be protected and it includes records relating to: rates of exchange or the currency of the State, taxes, revenue, the regulation of banking and insurance, interest rates, foreign investment, property transactions and so on. Section 31 is subject to a public interest balancing test which means that the exemption will not apply if the FOI decision maker finds that, on balance, the public interest is better served by releasing the record than by withholding it.

Furthermore, section 20 of the FOI Act protects the deliberative processes of a public body. This means that, in the Budget context, records can be withheld until such time as the deliberative process is over and the Budget has been decided. This exemption was strengthened in 2003 when a provision was added enabling a Secretary General to certify that a record "contains matter relating to the deliberative processes of a Department of State". Where this kind of certificate is issued, the record must be refused and there is no possibility of release in the public interest.

And indeed there are other exemptions potentially relevant to records held by the Department of Finance.

One can only wonder if the real concern of the Department of Finance is that, under the FOI Act, and except where a certificate under section 20 has been issued by the Secretary General, the ultimate decision on whether an exemption will apply is a decision outside of its own control. Is it the case that the Department is unhappy with the prospect of an outside agency - my own Office as Information Commissioner, as it happens - making the decision on where the public interest lies? If this were the case, it does seem like an intention to evade accountability and, again if this were to be the case, it is the kind of unhelpful attitude that has no place in an Executive that takes accountability seriously.

In any case, it is far from clear that release of records of such advice would have any serious implications (as Wright claims) for the financial markets. As Brendan Keenan put it, rather colourfully, in the Irish Independent:

"This is nonsense of the highest order, and dangerous nonsense at that. What really upsets

financial markets is some people finding things out that other people did not know, and feel they should have."

Finally, the issue of public access to proposal type documents was dealt with in a judgment of the General Court of the EU just a few days ago (Access Info Europe v Council of the European Union Case T-233/09). The context was the refusal of the European Council to disclose the identities of those member states which had made proposals on the revision of the EU Access to Information Regulation. The Court annulled the decision of the Council. Some of what the Court had to say is directly relevant to the issue raised by the Wright Report and is worth quoting:

"If citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information. [...] **By its nature, a proposal is designed to be discussed, whether it be anonymous or not, not to remain unchanged following that discussion if the identity of its author is known. Public opinion is perfectly capable of understanding that the author of a proposal is likely to amend its content subsequently." (emphasis added)**

Department of Justice and Law Reform

There is a major issue of accountability in relation to many of the key areas of activity of the Department of Justice and Law Reform. Much of this deficit in accountability stems from the fact that these key areas of Departmental activity are excluded from investigation by the Ombudsman's Office. As Ombudsman, I do not have jurisdiction to deal with complaints involving:

- the prison service,
- "the administration of the law relating to aliens or naturalisation" (including the area of refugees and asylum seekers).

It would be entirely disingenuous of me to fail to mention that the Department of Justice, traditionally, has not been keen on external scrutiny. It has succeeded in remaining outside of the Ombudsman's jurisdiction, in relation to these very important areas, for the 27 years in which my Office has been in operation. This is despite the fact that these areas of public administration are dealt with by national Ombudsman Offices all over the world and, indeed, are core areas of activity for most Ombudsman Offices. Furthermore, these are areas in which the State interacts with people who are often at their most vulnerable and most in need of the re-assurance of an external and independent complaints investigation agency. Over the past 18 months or so an Ombudsman (Amendment) Bill was being progressed through the Dáil and Seanad but had not been enacted before the recent General Election. Had that Bill been enacted, these areas of activity would have continued to be excluded from the Ombudsman's jurisdiction.

Both I and my predecessors have regularly pointed out that the exclusion of these areas is unwarranted and represents a major flaw in our accountability structures. Most recently, in a document I sent to all the Party Leaders and relevant spokesmen in advance of the General Election, I drew particular attention to this deficit. As is well-known, there has been very considerable unhappiness with the manner in which applications for refugee status have been dealt with over the past number of years. And in my pre-Election document I pointed out that, in the absence of access to the Ombudsman, applicants for refugee status in particular are left with no alternative other than the High Court when they are unhappy with how they have been treated. More than half of all judicial review applications (749 applications in 2009) arise from the refugee application process. High Court action is an extremely expensive form of redress and it is likely that many of these proceedings would not be necessary had the complainants access to the Ombudsman's Office.

I think it is fair to say, without losing the run of ourselves, that involvement with the Ombudsman's Office does promote improved administration for the public bodies concerned. As the Department of Justice has almost no contact with my Office in relation to these excluded areas, it has not been amenable to improvement.

The intentions of the new Coalition Government on this issue are unclear at this stage. I would

very much urge the Government to propose to the Oireachtas that the Ombudsman Act be amended so as to ensure - as in virtually every other developed country - that complaints concerning prisons, naturalisation and the refugee/asylum area can be made to the Ombudsman.

Department of Health and Children

In November last I published a substantial investigation report called 'Who Cares?' dealing with the right to nursing home care in Ireland. The main issue raised in the report was that, while there has been a legal right for the past 30 years to nursing home care, this right has not been met in very many instances. As a result, thousands of older people over the past few decades have been forced to avail of expensive private nursing home care and, in many cases, family members have had to subsidise the costs of this private care. The Report was based on more than 1,000 complaints received by my Office since 1985. I undertook an investigation against the HSE and the Department of Health, jointly, because the problem had persisted for so long, because many older people and their families were suffering serious hardship and because the Department, in particular, had failed to honour many promises to resolve the situation by way of proposing new legislation to the Oireachtas.

This was a difficult and contentious report and, in many respects, it remains unfinished business. This report is relevant this morning to the extent that it revealed several examples of the capacity of that Department to evade accountability on what was, and remains, a matter of immediate and pressing concern to many families in Ireland. I'd like to mention just two of these now.

The first example has to do with the fact that the Department has been aware, for more than two decades, of a serious problem regarding the right to nursing home care and has failed to do anything substantive to deal with that problem. While the Department says it does not agree with the analysis of the legal situation regarding nursing home entitlement proposed by my Office, it has long accepted that the problem must be resolved. Since 2001, and in fact in response to a related report by my predecessor, the Department and the incumbent Minister of the day have been promising to resolve the problem by way of new legislation.

The Who Cares? report documents the explicit promises made, year in and year out, to introduce legislation clarifying issues of health eligibility and, in particular, the issue of the right to nursing home care. In Strategy Statements, Sectoral Plans, Parliamentary Question replies, contributions to Dáil and Seanad debates, contributions to Oireachtas Committees, correspondence to my Office - Ministers, Ministers for State, senior Departmental officials year in and year out made the same promise. For example, as recently as 23 August 2010 the Department wrote to my Office saying:

"Work is ongoing in the Department on a new and modern legislative framework in respect of eligibility and entitlement for health and personal social services."

The fact is that the Department has not been held to account - nor has it itself accounted for - the failure to deal with a serious problem which has been festering for more than two decades and where it has for more than a decade been promising a legislative resolution. Neither the Dáil nor Seanad, nor indeed my own Office, has succeeded in achieving this accountability. I think it is a reasonable proposition to say that, had there been proper accountability mechanisms in place, this problem would have been dealt with a long time ago. And there could yet be very serious financial implications for the State arising from the failure to deal with this problem.

The second example concerns the handling of legal proceedings. More than 300 people have initiated High Court actions against the Department (and against the HSE) seeking to be compensated for having incurred private nursing home costs. The claim is that these costs were incurred because the HSE failed to meet its statutory obligation to provide nursing home care. These cases are very significant in that a judgment in favour of the plaintiff in any one case would be likely to clarify the legal situation, that is, whether or not there is an enforceable obligation on the HSE to provide nursing home care for those who need it. If the answer to this is YES, as I believe is the case, then the State is open to compensation claims from those who have had to take up private care in the absence of public care being made available. So far, none of these cases has gone to hearing and judgment even though many of these proceedings have been in place for several years.

For the purposes of conducting my investigation I sought information from the Department and from the HSE regarding these legal proceedings. I asked for details on the number of cases initiated, on the nature of the claims made and the reliefs being sought. I asked also for information on the general approach to these cases being adopted by the Department. In particular, I sought information on about a dozen cases which the Department had settled. I wanted to know why these cases had been settled, the settlement details and how these cases differed from the 300 or so other cases which had not been settled. All of this is information which the Department is legally obliged, under the Ombudsman Act 1980, to provide to me.

The response of the Department was to refuse to provide any information at all. This refusal extended, rather bizarrely, to information which was already within the public domain. The refusal was done on the pretext that the investigation was not one within my jurisdiction. In effect, the Department was challenging me to go to the High Court to seek an order for compliance with my requirement to provide information. I decided not to take the Court route in order to avoid the unseemly and wasteful spectacle of two public bodies fighting it out in Court at the public expense. I completed my investigation with, for all practical purposes, no co-operation from the Department.

Quite apart from the impropriety of the Department refusing to co-operate with, and indeed actively resisting, my investigation, its actions raise major issues of accountability. What we have is a situation where

- some plaintiffs have succeeded, at least partially, with their claims;
- public money has been spent on these settlements though the extent of this expenditure is not known;
- there is no way of knowing why these particular plaintiffs should have succeeded while other plaintiffs, presumably with broadly similar cases, have not succeeded;
- on the face of it, some plaintiffs are being treated more favourably than other plaintiffs;
- furthermore, the successful plaintiffs are being treated more favourably than the thousands of others, affected by the State's failure to provide nursing home care, who have not taken legal action;
- it appears it is the intention of the Department that details of these settlements will never be disclosed.

The Department is not prepared to account for any of its actions in the conduct of this litigation. It was no comfort for me to know that the Department took the same line with the Dáil and Seanad whenever the issue of the nursing home problem, and the related litigation, was raised. On a number of occasions since 2005 Oireachtas members have sought information and explanations on these matters either from the Minister or from senior officials. The standard line of reply was that, as legal cases are pending, the Minister or the official, regrettably, could not give information.

It is a measure of the disregard in which the Dáil and Seanad are held that this kind of refusal to give information would be tolerated. It seems to me, also, that it is a measure of the extent to which the Department of Health lacks understanding of the importance of its being held to account that it, apparently, sees no problem in its adopting this approach. For the future one can only hope that this approach will not be tolerated.

Legal Advice and Accountability

I sometimes wonder if public bodies are too prone to being led by their legal advisers and if there is a feeling out there that, where the body is acting on the basis of legal advice, then it cannot be faulted. Public bodies may sometimes forget that being accountable for their actions (or inactions) includes accountability for actions taken in compliance with legal advice. I think this is a very important point (a) because there have been some quite unacceptable actions taken by public bodies on foot of legal advice and (b) because the legal advisers are generally not directly accountable to the public or to the Oireachtas for their own actions.

I appreciate that public bodies may be damned if they fail to seek legal advice and equally

damned if they act on legal advice. The issue ultimately is one of responsibility and of accountability. 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.

I have first-hand and unhappy experience myself of being at the receiving end of actions of public bodies driven by legal advice. And here again, my experience with the Department of Health in the case of the investigation leading to the Who Cares? report is relevant. As I describe in that report, my Office was dealt with by the Department in a legalistic and confrontational fashion such as seems to be typical of the adversarial way in which legal matters are frequently dealt with in Ireland. I understand that the Department was acting on the advice of the Attorney General's Office.

The Office of the Attorney General is a Constitutional office with the role of "adviser of the Government in matters of law and legal opinion". I do not propose to make any comment on how that Office conducts its affairs. However, I think I can comment on how Departments choose to make use of AG or other legal advice. Ultimately, it is Departments and Ministers - not the AG or other legal advisers - who must account for their handling of litigation, and for their approach to issues with a legal dimension. For example, the decision of the Department of Health to refuse to provide details to the Dáil and Seanad (and subsequently to my Office) on the nursing home litigation may well have been based on legal advice; but responsibility for that decision rests squarely with the Department.

A related concern I have is that public bodies frequently claim to be acting on the basis of legal advice but refuse to disclose the content of that legal advice. There can sometimes be an unreasonable and unwarranted invoking of legal privilege. One is then left in the position that the public body cannot be held accountable because the advice on which it claims to be acting is not disclosed. As I mentioned earlier, there cannot be real accountability in the absence of relevant information. There is not time now to discuss this in any detail, but I think Departments and other public bodies should be much more open to waiving legal privilege in the interests of accountability.

Conclusion

The message I would like to convey is that for the Executive to be truly accountable, Departments of State need to change their behaviour. Relationships within Departments need to change with senior civil servants, in particular, seeing their duty and loyalty as being to the corporate Department rather than to the personality (that is, the Minister) who heads the Department. There needs also to be a shift in the manner in which some - and I stress some - Departments engage with the Dáil and Seanad as well as with agencies such as the Ombudsman's Office. This shift should be in the direction of giving the fullest possible information and co-operation rather than a practice of acting primarily with a view to protecting the Minister or the interests of the Department rather than the public interest.

Thank you

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