# INVESTIGATION REPORT

**On a complaint against**

**the Appeals Officer, Health Repayment Scheme, and**

**the Health Service Executive**

**Office of the Ombudsman**

**December 2011**

***In order to protect the identity of the family in this case, all names have been changed***

## Contents

## 1.0 The Complaint

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**1.1** The complaint under investigation in this report arises from the refusal by the Health Service Executive (HSE), and subsequently by the Appeals Officer appointed under the Health (Repayment Scheme) Act 2006, to repay long-stay hospital charges under the Health Repayment Scheme (HRS). The complaint to the Ombudsman was made by Mrs. Collette Byrne, daughter of Mrs. Jean Coffey, who had made an application under the HRS, for the repayment of long-stay hospital charges (known technically as in-patient charges) which she had paid to the Health Board (later the HSE[1]) on behalf of her mother. The payments were made during 2003 and 2004. Her application was rejected initially by the Scheme Administrator acting for the HSE and this rejection was upheld, on appeal, by Mr. Edmund Kent, Appeals Officer[2]. Mrs. Byrne was not happy with these decisions. She took the view that, while her mother had been a resident in a private nursing home during this period, she had been placed there by the HSE in a "contract bed"[3] and that, accordingly, her mother was a public patient on the same basis as if she had been provided for in one of the HSE's own hospitals or homes. For this reason, Mrs. Byrne believed that the payments which she had made were "recoverable charges" as provided for under the Health Repayment Scheme. Mrs. Byrne brought her complaint to the Ombudsman in May 2008.

Unfortunately, Mrs. Coffey died in February 2011, before the completion of this investigation report.

**1.2** Having completed a preliminary examination of the matter, the Ombudsman decided initially to investigate the complaint arising from the Appeals Officer's decision. The investigation focused on whether, with reference to section 4(2)(b) of the Ombudsman Act 1980, the decision of the Appeals Officer was taken on the basis of "*erroneous or incomplete information*" and/or whether it was "*contrary to fair or sound administration*".

**1.3** In examining issues related to the HRS as it affected Mrs. Coffey, it became apparent that the status of the NAHB's arrangement with the private nursing home in which she was

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[1] With its establishment on 1 January 2005, the HSE replaced ten regional Health Boards, the Eastern Regional Health Authority, and a number of other different agencies and organisations. The period in respect of which Mrs. Byrne made the application under the HRS was 2003 and 2004, accordingly at that time, and up to 1 January 2005, she was dealing with the Northern Area Health Board (NAHB). In this report reference is made to the NAHB and to the HSE as appropriate.

[2] An appeals officer appointed under the Health (Repayment Scheme) Act 2006 is subject to the jurisdiction of the Ombudsman by virtue of section 23 of that Act.

[3] Because the supply of public long-stay nursing home beds did not meet demand, public patients were often placed in private or voluntary nursing homes by the relevant Health Board. The Health Board entered into a contractual relationship with the private or voluntary homes in respect of such patients. The bed was paid for by the Health Board, and the patient, in turn, paid charges to the Health Board on the same basis as patients in Health Board institutions. Although they were in private or voluntary homes these patients were public patients, they were referred to as being in "contract beds".

placed was one of the key issues in the case. Mrs. Byrne said that it was her understanding that her mother had been in a public bed which the NAHB had contracted from a private nursing home, while the HSE said that she had been in a private bed in respect of which the NAHB paid a subvention towards the cost of care. Because the issues raised necessitated an investigation of the actions of the HSE, and its agent the HRS Administrator, the Ombudsman's investigation was extended to the Health Service Executive. The Statement of Complaint, as sent to both the Appeals Officer and the HSE, is at Appendix 1. A letter dated 29 November 2009 from Mr. Pat Whelan, Director General of this Office, to the then CEO of the HSE is attached at Appendix 2. In that letter the Director General advised the CEO that the Ombudsman's investigation was extended to the Health Service Executive.

**1.4** In investigating aspects of the case relevant to the HSE, the Ombudsman looked at:

- the involvement of the NAHB in the placement of Mrs. Coffey in a private nursing home in Co. Roscommon as well as the nature of the relationship more generally between the NAHB and the private nursing home;
- whether Mrs. Coffey was placed in the Roscommon nursing home under the care of the NAHB as opposed to being placed there as a private patient;
- the information provided by the HSE to the Scheme Administrator for the purposes of its initial decision on the HRS application as well as the working arrangements generally between the HSE and the Scheme Administrator;
- the information provided by the HSE and/or the Scheme Administrator to the Appeals Officer as well as the working arrangements generally between the HSE/Scheme Administrator and the Appeals Officer.

## 2.0 The Health Repayment Scheme

The Health Repayment Scheme was introduced in 2006 to repay people who had been charged illegally for long-stay hospital care. Prior to 2005, there was no legal basis for imposing charges for hospital in-patient services (which included long-stay hospital care) on people with medical cards, that is, on those with "full eligibility" which is the term used in the Health Act 1970[4]. In practice, and despite the absence of a legal basis for doing so, health boards had long followed the practice of charging medical card patients for long-stay care. The validity of these charges was questioned over the years not least by the Office of the Ombudsman. In 2004 the Department of Health sought the advice of the Attorney General on the matter. The Attorney General advised that the practice was not legally sound and, in December 2004, charges on people with medical cards were stopped.

[4] The 1970 Health Act provides that health boards (now the HSE) must make in-patient services available to people with full eligibility (holders of medical cards), as well as to those who do not have full eligibility. The Act also provides for the imposition of charges for in-patient services.

Legislation intended to render the charges on medical card holders legal, retrospectively, was found to be unconstitutional by a judgment of the Supreme Court in February 2005[5]. The Health (Repayment Scheme) Act 2006 was then enacted to provide for the repayment of charges which had been levied illegally. The legal authority to charge medical card holders for long-stay hospital care, on a current basis, was provided for in the Health (Amendment) Act 2005.

## 2.1 What the Health Repayment Scheme Provides

In brief, the Health (Repayment Scheme) Act 2006 provides that medical card holders who have been charged illegally for long-stay hospital care (in-patient services), will be repaid the charges imposed up to December 2004, plus an amount described as interest, based on the Consumer Price Index. In legal terms, the repayment applies to a "*recoverable health charge*" which is defined in the 2006 Act as follows:

"recoverable *health charge" means that amount which has been paid of*

*(a) a charge imposed on a person with full eligibility under the Health (Charges for In-Patient Services) Regulations 1976 (S.I No.180 of 1976), as in force at any time before 14 July 2005, including as so in force as amended by the Health (Charges for In-Patient Services) (Amendment) Regulations 1987 (S.I. No.300 of 1987), or*

*(b) a contribution, for in-patient services only, required of a person with full eligibility under the Institutional Assistance Regulations 1954 (S.I. No.103 of 1954), as in force at any time on or after the commencement of the Regulations referred to in paragraph (a), including as so in force as amended by the Institutional Assistance Regulations 1965 (S.I. No 177 of 1965);*"

Applications under the HRS had to be submitted before 31 December 2007. At the time of writing this report, the Scheme has effectively been wound up with the exception of a small number of outstanding applications and some appeal cases.

## 2.2 Types of case where repayment was due under the HRS

Health boards had relied on the Health (Charges for In-Patient Services) Regulations 1976 (S.I No.180 of 1976) (as amended) as the legal basis for charging long-stay patients with medical cards. This was problematic in that these regulations explicitly stated that the charging regime did not apply to people with medical cards (full eligibility). Health boards got around this difficulty by deeming people who had full eligibility on entering long-stay care as no longer having full eligibility once they were admitted to long-stay care. The Ombudsman's Office had drawn attention to the illegality of this practice on many

[5] In the matter of Article 26 of the Constitution and in the matter of the Health (Amendment) (No. 2) Bill 2004 [2005] IESC 7 [S.C. No. 524 of 2004]

occasions. It was finally accepted as illegal by the Department in late 2004 and charges on people with medical cards were stopped.

Medical card holders who fell to be repaid these illegally imposed charges fell mainly into two groups. The first and biggest group was those medical card holders who were cared for in long-stay facilities managed directly by the health boards themselves. The second and smaller group was those who, while actually cared for in private or voluntary nursing homes, were public patients who had been placed in a private or voluntary home by a health board, that is, those who were in what were referred to as "contract beds" as described in footnote 3 above.

## 2.3 Types of case where repayment was not due under the HRS

Due to the shortage of public long-stay beds in Ireland, many people with medical cards were forced to take up places as private patients in private nursing homes. In many cases, such patients would have preferred to have been provided for by their health board – not least because the charges applicable would have been affordable and there would not have been a need to borrow or to be subsidised by the wider family.

Many of these people received a subvention from their health board under the Nursing Home Subvention Scheme. That scheme was means-assessed and had a maximum rate payable, the balance being payable by the patient or his or her family. The health board could pay a discretionary "enhanced subvention" in certain circumstances if the person, a family member, or other authorised person applied for it. Although the health board contributed to the cost of the care of people in receipt of a subvention, this did not alter their status as private patients who had a direct contractual relationship with the nursing home in question. Thus, while the health board was making a contribution towards nursing home costs, the patient was legally responsible for the nursing home fees. The subventions paid were, by definition, only a contribution to the overall fees and in all such cases the patient (or the patient's family) had to pay the balance of the fees. These patients did not pay charges to their health boards and thus they were excluded from the Health Repayment Scheme.

The Ombudsman, in her report entitled *WHO CARES? An Investigation into the Right to Nursing Home Care in Ireland* has investigated the plight of older people who, in effect, were forced into expensive private nursing home care because of the inability of their health board (more recently, the HSE) to place them in a public nursing home.

## 3.0 The Circumstances of this Case

Whether or not Mrs. Coffey was a public patient is the key issue in this case. She was resident in a private nursing home from March 2003 to her death in February 2011. If she was placed in a "contract bed" in the nursing home by the NAHB, and charged in-patient charges by the health board, then a refund is due to her under the Health Repayment Scheme. If, on the other hand, she was there under a purely private contract between herself and the private nursing home, albeit in receipt of a health board subvention towards the cost of her care, no refund is due. There was a dispute between the family and the HSE as to which was the case.

The position of the HSE was that Mrs. Coffey was a private and not a public patient. The HSE said that Mrs. Coffey's placement in the private nursing home was a private arrangement and not one for which it was responsible. It said that, like other private patients, Mrs. Coffey was entitled to, and was paid, a nursing home subvention. It said she did not pay charges to the health board and that, accordingly, she fell outside the scope of the Health Repayment Scheme. Both the Scheme Administrator and the Appeals Officer accepted the HSE position and decided that recoverable health charges had not been paid and that, accordingly, no repayment of charges was due under the Health Repayment Scheme.

The position of Mrs. Coffey's family was that their mother was a public patient, that they had no contract with the nursing home regarding fees, that their mother was placed in the nursing home by the health board which had contracted beds in it, and that they were invoiced for hospital in-patient charges by the health board which they paid to the health board. The family said that at no stage did it ever pay nursing home fees to the private nursing home, that the only fees or charges paid were those paid to the health board.

# 4.0 This Investigation

## 4.1 What the investigation looked at

This investigation looked at two things:

1. The actions of the NAHB in arranging the nursing home bed and in arranging payment for Mrs. Coffey's care, and
2. The actions of the Appeals Officer in making his decision to refuse the appeal.

For clarity, this report will present the investigation of the HSE actions first, followed by those of the Appeals Officer.

## 4.2 Process of the Investigation

Statements of Complaint issued both to the HSE (26/11/2009) and to the HRS Appeals Officer ( 28/07/09) (see Appendix 1).

The HSE provided the Ombudsman with some relevant files on the case and also provided various submissions as the investigation progressed. The Appeals Officer also provided a submission to the Ombudsman. All relevant submissions, reports, records and policy documents were examined.

The following people were interviewed in order to gather further information on the case:

**On behalf of Mrs. Coffey**
Mrs. Collette Byrne (daughter)

Mr. John Coffey (son)

**HSE Staff**
Ms Patricia McDermott, Manager, Nursing Homes Support Services

Mr. Pat Marron, General Manager, Central Unit – Primary Community and Continuing Care

**Nursing Home**
EM, Former Manager, Nursing Home Provider (interviewed in a private capacity)

**HRS Appeals Officer**
Mr. Edmund Kent, Appeals Officer

In the course of the investigation Ombudsman Investigators were in telephone contact on a number of occasions with the current operators of the Co. Roscommon nursing home in which Mrs. Coffey lived.

**Right to make representations – Section 6(6) of the Ombudsman Act**

Under section 6(6) of the Ombudsman Act 1980, parties to the investigation were provided with the draft investigation report and afforded an opportunity to make representations in relation to it. Any submissions received were considered in advance of the finalisation of the report.

# 5.0 The NAHB and the Nursing Home – Contracted Bed or Private Arrangement? - The Evidence

## 5.1 Assessed as Needing Long-Term Care

Prior to her admission to long-term care, the late Mrs. Jean Coffey was an elderly woman living in Dublin. She suffered from Parkinson's disease and dementia. She died in February 2011 having lived, since March 2003, in a nursing home in Roscommon. In 2002, Mrs. Coffey was assessed by a Consultant Geriatrician at Beaumont Hospital as requiring long-term in-patient care due to her deteriorating condition. The Consultant informed the Nursing Home Section of the NAHB that Mrs. Coffey's care needs were at the maximum dependency level.

## 5.2 The Public Representative and the Subvention Application

Also in 2002, Mrs. Collette Byrne made enquiries about her mother's entitlement from her local public representative. While at his office she completed a Nursing Home Subvention application form. In a letter from the NAHB in September 2002, Mrs. Byrne was notified that a subvention of €2.79 per day had been approved for her mother and that payment would be made directly to the nursing home on her behalf whenever her mother was admitted to a home. This offer of a subvention was never accepted by the family. In fact, Mrs. Byrne said that she considered the level of subvention inadequate and continued to pursue the matter with the public representative. Her wish was that her mother would be admitted to a public nursing home in Dublin, where she and her family lived.

## 5.3 Nursing Home Provider's Approach to the NAHB

Meanwhile, during 2002, the NAHB had been approached by a private provider of nursing home care, which offered to accommodate 20 people in its Roscommon Nursing Home at a preferential rate. This was in the context of a severe shortage of public nursing home places in Dublin, particularly for people of maximum dependency. The approach to the NAHB was made by EM, then Manager of the nursing home, who was on leave of absence from the NAHB where he had worked as Director of Services for Older Persons prior to taking up the position. EM returned to work at the NAHB in 2004. He is now retired.

## 5.4 Beds at the Roscommon Nursing Home

EM had been employed at the NAHB (or its predecessor) since 1970. He took up his position at the nursing home in early 2002. In his interview with Ombudsman Investigators, he described his role there as promoting the nursing home in Roscommon, which was near completion, as well as promoting nursing homes planned for Kerry and Dublin. He was tasked with selling beds in the homes, particularly in Roscommon. He described a campaign whereby he advertised in the media, as well as canvassing all health boards. He said that he had responses from the Western Health Board (in whose area the Roscommon Nursing Home was located) as well as from the Northern Area Health Board. He agreed that his access to the NAHB was probably facilitated by the fact that he was known to NAHB staff, having worked there previously.

## 5.5 The Arrangement with the NAHB

EM approached the NAHB and offered long-stay beds at preferential rates. As he put it, the nursing home provider operated a system of room sales similar to that practiced by hotels, offering rooms at 'rack' or very low rates. He said that there was an understanding that anyone from Dublin who took up a bed in the Roscommon nursing home could be transferred to Dublin when the proposed Dublin home was built. In the event, the home planned for Dublin was never built.

When asked how the arrangement with the NAHB was made, EM said that he may have met Michael Walsh, Assistant Chief Executive NAHB, Patricia McDermott, Nursing Homes Section, and Angela Walsh, Director of Services for the Elderly, at some point but could not remember details. He said that the nursing home provider and the NAHB agreed a per capita rate in respect of each patient and said that he believed that this amount was not to exceed the maximum subvention payable under the Nursing Home Subvention Scheme, plus the amount of the patient's social welfare pension. He said that a fee of €312 per week had been agreed with the NAHB for the specific group of people identified for this arrangement while a higher rate of €480 per week applied to other residents. At the time, nursing homes in Dublin typically cost about €650 per week. He stated that his understanding of the arrangement with the NAHB was that the fee could not be increased for one year and, furthermore, that this fee level would apply in relation to the places to be offered in the Dublin homes when they were built.

EM said that he was not concerned at the time with whether these were contract beds or whether the resident would be in receipt of a nursing home subvention; but he was clear that the arrangement was that the NAHB would pay the agreed charge, in full, directly to the Roscommon home. He agreed that the arrangement differed from the usual arrangements where a subvention is paid. He agreed that the Roscommon nursing home had other patients in receipt of subvention where the normal subvention arrangements applied. In these cases the subvention was paid by the relevant health board, with the resident or next of kin having overall responsibility for the charges, including meeting any shortfall. He agreed that the arrangements for the NAHB patients gave the impression that these were health board-funded beds and in fact were contract beds. EM agreed that, at the time the arrangement with the NAHB was made, he believed that he had contracted with the NAHB for the placement by the NAHB of some of its patients in Roscommon. He himself did not have any records of the arrangement. EM said that at the time the NAHB would almost certainly have documented all of these arrangements and that the relevant records should be held on file at the Health Service Executive.

## 5.6 HSE's View of the Arrangement made with the Nursing Home Provider

The HSE said that, for the most part, it could not find documentation dealing with the NAHB's arrangements with the home, although it did provide the Ombudsman with some

relevant documentation. Relevant HSE personnel also participated in interviews with Ombudsman staff.

The HSE agreed that the private provider had approached the NAHB and offered it 20 beds at a preferential rate in Roscommon. It agreed also that the rate was decided with reference to the maximum nursing home subvention payable at the time. In the case of these beds, the HSE agreed that an arrangement had been made between the NAHB and the home whereby the NAHB would pay the nursing home fees, in full, directly to the home.

To date the HSE has not identified any contemporaneous records of this arrangement. No records have been found of whom within the NAHB made the decision to respond to the offer, or of how the fees were negotiated, accepted and payment authorised. No records have been identified to show how the arrangement was communicated internally within the health board. One NAHB official interviewed thought that the arrangement might have been approved by the office of the Deputy CEO and communicated to social workers from the Office of the Manager of Services for the Elderly. In any event, the fact that these beds were available to the NAHB, and could be offered to people within its area, appears to have been well known.

A NAHB record shows that it intended to place Mrs. Coffey on a waiting list for long term care and that she would "*be placed in an appropriate bed*" (presumably a public bed) in turn. It also noted that if she were "*eligible for full subvention, she could be considered for a bed in Roscommon*". The Consultant Geriatrician at Beaumont had noted, in late March 2003, when he wrote to the NAHB reiterating Mrs. Coffey's need for long-term care, that Mrs. Coffey's case was one "*we would consider for the nursing home in Roscommon*". In his recommendation he stated: "*the family are aware of the offer of a bed in Roscommon and are liaising with the Public Health Nurse about this".* The evidence is that the beds in the Roscommon nursing home were being offered as an option to people, by the NAHB, in the absence of availability of public beds in the Dublin area.

## 5.7 The Family's Understanding of the Placement in Roscommon

Mrs. Byrne says that she assumed that her mother was a public patient. She told Ombudsman investigators that she was told by the Public Health Nurse, who proposed the home in Roscommon to them, that the bed being offered there was one of 20 beds held by the NAHB in Roscommon. Mrs. Byrne says she was not consulted about the location of the nursing home and did not select it for her mother. When she pointed out that her mother lived in Dublin, and the location of the home would make visiting extremely difficult, she was told that a bed would be available in Dublin within a year. Mrs. Byrne says that the NAHB, and not the family, placed Mrs. Coffey in Roscommon.

Furthermore she says that the NAHB took responsibility for paying the entire cost of care to the nursing home and that the family was invoiced for hospital in-patient charges by the NAHB, which it paid. Neither Mrs. Coffey nor her family paid the nursing home for her care.

This payment of the entire fee by the NAHB, and the invoicing of the patient or family for in-patient charges, was the arrangement which applied to public patients in contract beds in private or voluntary homes. The family's view was, and always had been, that their mother was in a contract bed. Because Mrs. Coffey was a person with a medical card, their view was that the charges imposed were wrongfully charged and that a repayment of these charges under the HRS was due.

The HSE did not provide evidence of any written communication with Mrs. Byrne setting out the reasons for the choice of nursing home or the basis on which Mrs. Coffey's care costs were to be met. Mrs. Coffey became a resident of the Roscommon home on 29 March 2003. The admission form completed on that occasion was the form to be used for contract beds.

Mrs. Coffey's family provided the Ombudsman with a copy of the Contract of Care which the Roscommon nursing home had provided to them. The Contract of Care expressly provides for the fees to be invoiced directly to the Northern Area Health Board. The Contract shows that the normal arrangements in the case of a private patient regarding liability for, and payment of, fees did not apply. The cover letter accompanying the Contract, sent to Mrs. Byrne by the nursing home provider on 7 April 2003, states: "*Pages 9 and 10 [dealing with payment of fees and guarantor for fees in the event that fees not recoverable from Social Welfare/Health Board] of the document are not applicable to you as payment is arranged through the Northern Area Health Board*". The contract is not signed by Mrs. Coffey (as she did not have capacity to do so at the time) nor is it signed by anyone on her behalf. There is a blank space where the signature of the resident should be, and Mrs. Byrne has signed beside the part of the form which reads "*signature of witness*".

The Contract states that the rate per week will be "*maximum subvention plus the resident's pension less comforts*"; it goes on to state "*on transfer to the Finglas Home, the fee is to be agreed upon*". It also states "*the question of the supply of items such as incontinence pads will be agreed between management and the appropriate officer in the Northern Area Health Board*". Mrs. Byrne was specifically asked by the Roscommon nursing home to fill out the form which was "*required by the Health Board*" and to sign the last page (setting out fee arrangement with the Health Board) "*to show that you are aware of this arrangement and the extra to be charged outside this arrangement*".

When it became clear that the nursing home provider would not be in a position to transfer Mrs. Coffey to the proposed home in North Dublin (as building plans were abandoned), and when it announced its intention to raise its fees, the NAHB offered Mrs. Coffey the option of moving to a nursing home in Dublin. Ms Patricia Mc Dermott of the NAHB's Nursing Home Section asked the then manager of the Roscommon nursing home to see if any of the NAHB residents wished to return to Dublin. The family states that the manager mentioned St. Mary's Hospital in the Phoenix Park as the proposed alternative. In her interview, Ms. McDermott denied that St. Mary's was mentioned as a possible alternative; when asked,

she did say that one of the NAHB residents of the Roscommon nursing home had opted to return to Dublin. She explained that that person was moved from Roscommon and placed in a NAHB contract bed in a private nursing home.

During the period December 2004 - December 2005 Mrs. Byrne did not receive any invoices for in-patient charges. This was the period during which charges for public long-stay patients generally were suspended pending resolution of the illegal charges issue. In January 2006 she began to receive invoices again from the HSE Patient Accounts. Between January 2006 and May 2008 she was invoiced at the contract bed rate of €17.14 per day or €120 per week.[6]

In May 2008 (following rejection of her appeal by the Appeals Officer) the daily charge increased to €26.98. When Mrs. Byrne queried the increase, HSE Patient Accounts wrote to her in June 2008 stating that her mother was not in a contract bed but was on "*enhanced subvention*" and, "*there was a special arrangement with Patricia McDermott, Manager, Nursing Home Section*". The response went on to state that, "*It is unusual for us to be invoicing patients other than those that are in a contract bed, but as I mentioned earlier there appears to be a special arrangement made for us to invoice you in this way*". Five years after her mother's admission, therefore, Mrs. Byrne was told that her mother was not in a public (contract) bed but rather that she was in receipt of an enhanced subvention. Mrs. Byrne had not applied for an enhanced subvention for her mother and believed her mother to have been placed in a contract bed.

## 5.8 How Payment to the Roscommon Nursing Home was Arranged at the NAHB

Where the NAHB contracted a bed for a person with a medical card, it paid the private nursing home in full and applied in-patient charges to the patient. These in-patient charges were invoiced to the patient or his/her family by the NAHB's in-patient accounts system based at St. Mary's Hospital, Phoenix Park, Dublin. These arrangements made it clear (a) that the contractual relationship was between the NAHB and the private nursing home and (b) that the patient was being treated the same as if he or she was in one of the NAHB's own long-stay hospitals, that is, in both cases the patient was liable for in-patient charges to be paid to the Health Board. When it was accepted in late 2004 that there was no legal basis for the charging of medical card holders, whether in public or in contract beds, these charging arrangements were suspended until a proper legal basis for the charges was provided.

In Mrs. Coffey's case the NAHB agreed with the Roscommon nursing home that it would pay the full fee, at a rate agreed between them, directly to it. The NAHB then levied in-patient

[6] The charge for long-stay care is provided for in Regulations made by the Minister for Health and Children. The rate in 2005 was €120 per week, or the weekly income of the person less €35; in January 2009 this was increased to €153.25 per week, or the weekly income of the patient less €44.70

charges on Mrs. Coffey through its in-patient accounts system. The NAHB invoices sent to Mrs. Byrne, in relation to her mother, and provided to the Ombudsman, state clearly that the charges in question are hospital in-patient charges. Thus, the family paid charges to the NAHB but made no payments to the nursing home. The Admission Form completed within the NAHB for Mrs. Coffey when she was admitted is a form it used in the case of a contract bed. When this was put to the HSE in the course of this investigation, the HSE said that the form had been used in error, that the person setting up the charges had used the procedures followed for a contract bed "*in error*".

The HSE was asked to explain why, if it regarded Mrs. Coffey as a private patient receiving a subvention, the NAHB charged on the basis of her availing of in-patient services. The HSE said that its Nursing Homes Section gave a direction to Patient Accounts to make the appropriate arrangements on the form used to collect in-patient charges because no other form was available.

When the Roscommon nursing home sought to increase its fees in late 2004, it was the NAHB rather than the family which dealt with the matter. Ultimately it was the NAHB, in a letter dated 1 January 2005, which agreed to pay the revised nursing home fee.

In dealing with the fees issue, in a letter of 11 November 2004 to the home in Roscommon, Ms. Mc Dermott of the NAHB referred to it as having placed "*clients*" at and that it had been agreed that "*the fee*" would be the basic subvention rate plus the client's pension less their personal allowance. Ms. McDermott stated: "*our first clients were admitted … early in 2003*", that the NAHB was disappointed that the Dublin nursing home had not been built and that "*at this stage our clients should be given the opportunity to return to Dublin if they so wish*". She referred to the fact that the Roscommon nursing home had sought "*an increased subvention in respect of the nine NAHB residents in accordance with the revised enhanced subvention scheme"* and commented that *"this is outside the original agreement between [name of nursing home] and the NAHB*". She went on to say that the fee increase was being accepted by the NAHB as a "*discretionary decision … as to move <u>our</u> clients (our emphasis) … would be detrimental to their well being*". She also stated, in granting the increase: "*This decision will apply to existing residents only. Should any additional clients from the NAHB choose to admit to [----- Roscommon*] *the normal rules of subvention will apply*".

When the Roscommon nursing home increased the fee again in October 2006, it was the NAHB, and not the family, which dealt with the issue. The family was not even made aware of the fee increase.

Documentation on the NAHB file related to its agreement to pay increased fees in 2005 and 2006 shows that Mrs. Coffey was assessed as being entitled to an "Enhanced Subvention". There is a form on file, dated 18 October 2006, which is entitled "*Application for Increased Funding under the Health Nursing Home (Amendment) Regulations 1996*". The application

was not made by the family. Mrs. Byrne says that she was not contacted about increased charges, did not make any application for an increased subvention, and was not made aware of this application on her mother's behalf. No documentary evidence has been provided by the HSE to show that Mrs. Byrne had applied for an enhanced subvention for her mother's care.

Under the NAHB Subvention Scheme Guidelines revised in November 2003, it is stated that the enhanced subvention is a top-up payment which may be approved by the Health Board subject to budgetary constraints. It says that to apply: "*The Health Board must be advised in writing that the person in receipt of subvention is experiencing difficulties in meeting fees. The letter can be submitted by the person residing in the nursing home, next of kin, nursing home provider or social worker. The letter must outline the financial reason for the application and nursing home fees applicable*". The guidelines go on to say that "*An 'enhanced' subvention payment will not be considered if an individual owns property or has savings/assets in excess of the disregard outlined in the Nursing Home (Subvention) Regulations 1993*". There is no evidence of an assessment of savings or assets having been done in Mrs. Coffey's case. A further form on the file shows a calculation for in-patient charges for Mrs. Coffey. The form is the one used to calculate charges for people in public and contract beds.

As stated above, when in-patient charges for medical card holders were stopped in 2004, charges in respect of Mrs. Coffey were stopped also. The HSE maintains that this fact does not undermine its argument that what Mrs. Coffey was getting was a subvention (as a private patient) rather than being charged in-patient charges as a public or contract bed patient. The HSE's position is that it paid the fees of a private patient (Mrs. Coffey) directly to the Roscommon nursing home and then reclaimed these fees (less subvention due) from the patient by means of invoices for hospital in-patient charges. The HSE has sought to explain this unusual arrangement on the basis that it was done to facilitate the Roscommon home: "*as the proprietors were new to Ireland and not familiar to the Social Welfare system, it was agreed that HSE would pay them the agreed amount and collect the charge from the client/family".* It went on to say that the only method the NAHB had to do this was to recoup the fees by way of charges issued through its own patient accounts system.

The fact that the NAHB ceased to collect in-patient charges from Mrs. Coffey in December 2004 should not, according to the HSE, be taken as evidence that she was in a contract bed. The HSE has said that, during the period when in-patient charges were not levied (December 2004 – December 2005) Mrs. Coffey remained liable for charges (as she would have been had she been in a subvention bed) but they were stopped because "*Our IT system unfortunately could not generate invoices for these clients (five at the time), therefore no charges were applied until the long stay charges were re-instated.*" The NAHB did not tell Mrs. Byrne at the time that her mother remained liable for the charges. It was not until June 2008, when for the first time the HSE sought to pass on increased fees at the Roscommon

nursing home to the family, that the HSE stated that it regarded Mrs. Coffey as being on an enhanced subvention, as a private patient, rather than occupying a contract bed.

However, it is apparent that the HSE itself continued to have great difficulty in seeing Mrs. Coffey as anything other than a public patient in a contract bed in respect of whom in-patient charges should be levied. As recently as 28 January 2011, Mrs. Byrne received a letter from HSE Patient Accounts stating: "*Our records show that you were nominated as the person responsible for handling Mrs. Jean Coffey's affairs after their [sic] admission to a HSE Contract Bed ...*". The letter went on to request payment "*for the in-patient services provided to Mrs. Coffey*".

## 5.9 Exclusion of the Roscommon nursing home from list provided to Scheme Administrator and Appeals Officer

The HSE contracted with a consortium comprising KPMG and McCann Fitzgerald to administer the Health Repayment Scheme. This consortium, referred to hereafter as the Scheme Administrator, acted as the agents of the HSE for the purposes of the Scheme. A central feature of the working arrangements of the Scheme Administrator was that the HSE provided it (and also the Appeals Officer) with a list of private nursing homes in which the former health boards had contract beds. A medical card holder, placed in a contract bed in a private nursing home and who had paid in-patient charges to the health board, would be entitled to repayment of these charges under the Scheme. During this investigation it emerged that, in compiling its list of private nursing homes with contract beds, the HSE omitted the Roscommon nursing home from the list. This meant that, at first glance, Mrs. Coffey's application under the Scheme would fall to be rejected as it appeared as if there had never been contract beds in the Roscommon home.

It is, however, reasonable to expect that the Scheme Administrator and the Appeals Officer would not rely solely on this list provided by the HSE and that it would assess whatever evidence was provided in cases such as that of Mrs. Coffey. This, unfortunately, did not happen in the case of Mrs. Coffey or of other patients of the Roscommon nursing home.

## 6.0 Analysis – Public or Private Patient?

In this case the HSE sought to argue that Mrs. Coffey's bed at the Roscommon nursing home was not a contract bed; however, the evidence in the case, as presented above, pointed to a different conclusion. It was not disputed that the NAHB entered into an arrangement with the Roscommon nursing home, which offered to make 20 beds available to it at a preferential rate (€312 as against €480 for other residents). The NAHB agreed this rate and approached people in need of long-term care and/or their families, through its staff (Hospital Consultants and Public Health Nurses), and suggested that they consider taking up places at the home. The NAHB then paid the nursing home in full (including negotiating and agreeing increases in fees as they occurred over a number of years) without the knowledge or involvement of the families, and raised charges on the residents under their in-patient charges system. With regard to Mrs. Coffey's particular case, her daughter Mrs. Byrne provided the Ombudsman with copies of invoices for these in-patient charges, and of receipts of monies received. Details on the Patient Accounts Invoices for in-patient charges matched details on receipts issued to Mrs. Byrne and showed that the money was received by the health board.

Given the fact that the Manager of the home at the time of Mrs. Coffey's admission was a NAHB employee on leave of absence, and that he had previously held the position of Director of Services for Older Persons at the NAHB, it was not credible that the administrative arrangements for payment to the home were made due to its lack of knowledge of the Irish system.

In support of its argument that Mrs. Coffey was in receipt of a subvention, the HSE sought to rely on the fact that the family filled in an application form for a nursing home subvention at the office of their local representative, in 2002, and that it was retained on file by the Health Board. That application, made in September 2002, was in respect of a woman who lived in Dublin close to her family and who sought to be accommodated in Dublin. When, in 2003, the matter of a home in Roscommon was raised with the family, the NAHB entered into an agreement with the home to pay the full cost of care. This was clearly a very different proposition, and not one to which the previous application for subvention could be considered to apply. It is the view of this Office that if, at that time (March 2003), the NAHB was minded to apply the subvention to the arrangement, it should have engaged the family, outlining all of the details of the new situation to them, and informing them of their options and entitlements. The family could have chosen to use the subvention at another home. This did not happen. It did not happen because the NAHB, under its arrangement with the home, took responsibility for payment of the entire fee.

The amount of that subvention offered to the family at that time (€2.79 per day) bore no resemblance to amounts paid subsequently by the NAHB to the Roscommon home. An ''Enhanced subvention'' was arranged by the health board when the home increased its

fees, however neither Mrs. Coffey, her family, nor any of the persons who, under the regulations, could have made such an application on her behalf, did so. It appears that the NAHB used this scheme to meet an emerging shortfall due to an increase in the nursing home fee, and that it did so because of its arrangement to cover the fees in full. The family was not informed, and it was not until May 2008, over five years after Mrs. Byrne's admission, that the family was told by the HSE of its view that their mother was on an enhanced subvention, rather than in a contract bed as they had assumed. This coincided with the decision of the Appeals Officer to refuse to overturn the HSE's decision not to repay hospital charges, following which the HSE increased the amount payable by Mrs. Coffey. It is significant that when Mrs. Byrne queried this change, Patient Accounts had to seek clarification from Nursing Home section and that it found it to be a "special arrangement" which Patient Accounts section described as "unusual".

The Ombudsman accepts that the NAHB personnel involved in this case were concerned to make suitable arrangements for Mrs. Coffey and people like her. The NAHB was faced at the time with an inadequate supply of public long-stay places, particularly for people of maximum dependency, and with budgetary constraints. They were concerned with providing care to people in need of it and, in this case, worked towards ensuring that the financial burden was absorbed by the NAHB, and not by the family. Placing patients from Dublin in Co. Roscommon had financial advantages for the NAHB, although one must question the appropriateness of placing elderly patients so far away from their immediate family and friends.

The implications of the HSE's position that Mrs. Coffey was in receipt of a subvention, and not in a contract bed were that the NAHB took on the role of promoting the services of one particular private company by way of introducing its own patients to the company and encouraging them to avail of the services of that company. It further supported that private company by taking on the role of collector of the fees due to the company by some of its private patients. And all of this is in the context that the Manager of the company was a senior NAHB official on leave of absence. Arrangements such as these could not be considered as consistent with good practice and would have posed very serious ethical and professional questions for the Northern Area Health Board.

The HSE's response to the Ombudsman's Draft Investigation Report is set out in Section 10. In brief, the HSE did not contest the draft findings as presented to it, and accepted that Mrs. Byrne was entitled to repayment of the "recoverable health charges".

## 7.0 Application under the Health Repayment Scheme

In September 2006 Mrs. Byrne applied to the Scheme Administrator for a refund of the in-patient hospital charges (Claim number 30855022) which she had paid on behalf of her mother. When submitting the claim form, she supplied evidence of payment of charges. This consisted of copies of receipts for payments made by her to the NAHB Patient Accounts Section, in respect of charges invoiced to her. On 13 November 2007, the Scheme Administrator wrote to her rejecting her claim. Her claim was rejected on the basis that her mother was in a private nursing home which was "*outside the scope of Health Repayment Scheme".* She was also told: "*the charges which you/the patient paid to the nursing home are not long stay maintenance charges which are recoverable under the Health Repayment Scheme*". In fact, Mrs. Byrne had not paid any charges to the nursing home; as described above, the only charges she had paid were in-patient charges levied by the Health Board.

### 7.1 The HSE and the Scheme Administrator

In the course of this investigation, the HSE said that it had given the Scheme Administrator a list of all known relevant nursing homes/residential institutions throughout the country. The list identified each particular home by name, number and location and designated the home as 'Y' (approved or included for purposes of the HRS), ''N' (not approved for purposes of the HRS) or 'C' (a home in which the health board had contract beds). The Scheme Administrator relied on this information to determine a claim.

The Scheme Administrator raised queries in relation to a number of homes listed as not coming within the ambit of the Scheme. When such queries were raised, the HSE sought to clarify individual cases with the Local Health Offices to determine whether or not an accurate designation had been provided in the first place. The verified position was then communicated to the Scheme Administrator who could then rely on the new information in processing any further queries about a particular home. The Roscommon nursing home was designated on the list as not coming within the ambit of the Scheme. As a private nursing home it would have come within the ambit of the scheme only where it had one or more contract beds provided to a health board.

# 8. 0 The Appeals Process

## 8.1 Appeals Officer

The Health (Repayment Scheme) Act 2006 provided for a right of appeal against the decision of the HSE/ Scheme Administrator. The Act provided for the appointment of a barrister or solicitor (of not less than 5 years' standing) to act as Appeals Officer. The Act also required the Scheme Administrator and the HSE to provide the Appeals Officer with assistance and information as he or she "*may reasonably require*" to determine the appeal.

The Act provides[7] further that the Appeals Officer must be independent in the performance of his or her functions but is obliged to comply with guidelines, prepared and issued by the Minister, on the procedure to be followed for consideration of appeals. Furthermore, the Act requires that the Appeals Officer must consider any written or oral submission made by or on behalf of the appellant, the Scheme Administrator and/or the Executive. The Appeals Officer is required to provide a decision, in writing, determining the appeal and to give reasons for the decision made.

## 8.2 Appeal on behalf of the late Mrs. Coffey

Mrs. Byrne appealed the decision of the Scheme Administrator on 3 December 2007 using the official form provided for the purpose. On 12 March 2008, she attended an oral hearing with Mr. Kent, Appeals Officer, and on 19 March 2008 she wrote to him providing him with further information about her mother's case. On 25 April 2008, she received a letter from the Appeals Officer stating that he had "*carefully considered*" the appeal and that he had reviewed the "*regime of charges incurred*". He stated that, having done so, he was satisfied that the charges were not recoverable charges under the scheme. He upheld the decision of the Scheme Administrator to reject the claim.

## 8.3 Ombudsman's Preliminary Examination

Having carried out a preliminary examination of case, the Ombudsman investigator involved wrote to the Appeals Officer, on 25 March 2009, setting out her preliminary view on the issues. It was put to the Appeals Officer that the circumstances of Mrs. Coffey's placement, the nature of the charging regime and the conduct of the NAHB with regard to its offer to return Mrs. Coffey to a Dublin location, supported the view that she had been placed in the bed in the Roscommon nursing home as a public patient, under a contractual agreement. The investigator noted that the unusual arrangements between the Roscommon nursing home and the NAHB did not change the fact that this was a contract between the nursing home and the health board. The Appeals Officer was provided with sample copies of invoices for hospital in-patient charges which had been issued to Mrs. Byrne. The preliminary view of the investigator was that Mrs. Coffey had been provided with in-patient services during 2003-2004 and, as a consequence, that she was entitled to a repayment

[7] Section 16 of the Health (Repayment Scheme) Act 2006

under the Scheme. The investigator asked the Appeals Officer to review his earlier determination in the light of these views.

## 8.4 View of the Appeals Officer

The Appeals Officer, Mr. Kent, did not reply to those preliminary views. The Director General of this Office then wrote to Mr. Kent on 28 July 2009 requesting certain information. In a reply, dated 11 August 2009, Mr. Kent outlined the facts of the case as he saw them and explained his consideration of the facts and his decision.

In this letter the Appeals Officer accepted that the claimant was a person with full eligibility and said that it remained for him to decide if the charges paid were in fact recoverable under the Scheme. It would appear that his decision was strongly influenced by the fact that an application for subvention had been made in June 2002 – nine months prior to Mrs. Coffey's admission to the Roscommon home. He stated:

"*the subvention was paid (the establishment of a private contract of care is a necessary pre-condition to that payment) indicating that a private contract of care was put in place whereby the owner of the nursing home committed to provide the care the patient needed and someone on behalf of the patient committed to pay the fees due (the file indicates that those fees were discharged out of the patient's own income from two pensions)*."

The fact that an application for nursing home subvention had been made in 2002, along with information from the HSE file that a subvention, and subsequently an enhanced subvention, had been paid, was taken as evidence that the arrangement was a private one. This meant that Mrs. Coffey had not been in a contract bed during 2003 - 2004 and that, accordingly, the charges were not recoverable.

In an interview with Ombudsman investigators on 23 October 2009, Mr. Kent provided an account of the administrative processes operated by him, the records examined by him and his contacts with the HSE and the Scheme Administrator for the purposes of dealing with appeals under the Scheme. In considering an appeal the Appeals Officer stated that he takes account of a number of matters including the provisions of the legislation and the information supplied to him, this includes the appellant's file, provided to him by the Scheme Administrator, as well as any new information provided in the course of the appeal. The Appeals Officer said also he has regard to the lists of institutions provided by the Health Service Executive. He explained that the appeal decision is recorded by way of the determination letter issued to the appellant. He said that no internal records or memos are made by him, or his staff, recording the basis for a determination. The Appeals Officer said that he had not kept any record of the oral hearing attended by Mrs. Byrne and her brother Gerard Coffey on 12 March 2008.

The Appeals Officer did acknowledge that there were problems in administering the Scheme due to the lack of records available at the Health Service Executive. In his interview at the Office of the Ombudsman on 23 October 2009, the Appeals Officer remarked:

"*Unfortunately, the scheme administrator can only administer the claim based on the records provided to them by the HSE. What we have found is that those records aren't always of the best. It is I suppose neither the current HSE's fault nor the scheme administrator's fault that in many instances the offer did not comprise the full amount because the records weren't there to support the full amount. It is only when the appellant comes forward with the necessary additional records that the scheme administrator can review it in the light of those records*."

## 8.5 Oral Appeal Hearing

Mrs. Byrne, in her interview with Ombudsman investigators, recalled attending the oral hearing with the Appeals Officer. Her recollection of it was that it was short (about 20 minutes), that the Appeals Officer took no notes, asked few if any questions, and repeatedly told her, and her brother, that their mother was in receipt of subvention and was not entitled to repayment. The Appeals Officer said that he did not recall the oral hearing and that he had not made any notes of it.

Mrs. Byrne said that she recalled asking the Appeals Officer if he was aware that they had received invoices directly from the NAHB, had paid the NAHB directly, and had no contract with the Roscommon nursing home in relation to fees. She recalled that, on hearing this, the Appeals Officer said that he might have to get further information or files from the HSE and said that theirs appeared to be an unusual arrangement. Copies of invoices or receipts for in-patient charges were not provided to the Appeals Officer in the course of the hearing, or with a subsequent letter, as the family believed that the Appeals Officer would have access to all records when he sought further information from the HSE on the case, along with the files.

Following the hearing, Mrs. Byrne wrote to the Appeals Officer setting out again the nature of the relationship between her mother and the NAHB in regard to charges, and the nature of the NAHB's responsibility to her mother, as she understood it. The Appeals Officer issued his determination letter a month later, confirming the rejection of the claim. It was not clear from the letter whether the Appeals Officer had sought or reviewed files or additional information from the HSE or whether he had considered the invoices and receipts.

## 8.6 Basis for Appeals Officer's Decision

At interview, the Appeals Officer stated that the overriding consideration in making his decision in the case of Mrs. Coffey was the evidence that a subvention had been applied for and paid by the Health Board. He stated that payment of subvention was contingent upon the patient making a contract of care with the nursing home and was evidence of the patient residing in the home under a private contract of care. He stated that if subvention

had been paid in this case, in the absence of such a contract, the NAHB would have been in breach of The Nursing Homes (Care and Welfare) Regulations 1993. He relied also on the list of institutions supplied by the HSE and referred to the fact that the Roscommon nursing home was not listed as a home with contract beds.

The Appeals Officer contended that the points raised by the appellants, including their claim that they had no financial dealings with the Roscommon nursing home about fees and that the fees were paid directly by the NAHB, were not relevant. His experience was that many different payment arrangements had applied and he repeated that the crucial issue was that subvention had been paid indicating the existence of a private contract of care.

In his interview he said that there were limitations to the Scheme:

*"… it doesn't, for example provide for the fact that their mum had no option but to go into a private nursing home … we all know … there weren't sufficient public contracted beds available to provide long-term care facilities for public patients … the scheme doesn't provide for the fact that there was no option for her … it doesn't provide for the fact that there was nowhere else that that care could be provided … unfortunately in terms of whether there is an entitlement under this scheme, this is not relevant "*.

There is no record that any query was raised with the HSE either by the Scheme Administrator or by the Appeals Officer about the status of the bed occupied by Mrs. Coffey during the claim administration process or in the course of the appeal. However, another Appeals Officer, in dealing with an appeal by another resident of the Roscommon nursing home who was in similar circumstances to those of Mrs. Coffey, did raise questions.

A second Appeals Officer – Ms Ciara McGoldrick - raised doubts about the decision of the Scheme Administrator to reject a claim on the basis that the patient was the subject of a private contract between her and the home. In an email addressed to the HSE in January 2009, she noted: "*the claimant has furnished invoices and receipts from St Mary's Phoenix Park (Patient Accounts at the time)*". She went on to note: "*interestingly she (patient) was also granted subvention on 19/5/03"* and went on to say "*it seems that these charges are recoverable even though the institution is listed as outside the Scheme. Could you confirm that this is the case*".

The response from the HSE to this query was that the patient was in receipt of subvention, that the provider had "*offered the Northern Area Health Board beds*" and that the subvention plus the person's pension was to cover the cost of care. The response said that it had been agreed that the health board would collect the pension as "*they [providers] were new to the Irish market and not familiar with the social welfare system*".

On 1 May 2009, following an oral hearing in this case, Ms McGoldrick wrote to the HSE saying: "*This is very unusual. The patient was invoiced by the HSE and this suggests that the payments were recoverable. However I understand ... that this was a private bed but the*

*HSE administered the pension deductions on behalf of the nursing home. I would therefore expect to see corresponding payments to the nursing home from the HSE. Please forward me all financial documentation in relation to this patient's maintenance at the nursing home*." In the event, the HSE provided the file of another unnamed patient from the Home in error, which the Appeals Officer described as "*illustrating the issues very well*". She told the HSE "*While it may have been the intention that this patient (Mr. L) had a subvented bed the case is hard to distinguish from a contracted bed. Very basically the patient paid pension to health board towards cost of (the) bed and the HSE made up (the) balance. There are no written agreements to support any arrangement with the home whereby the HB was to collect pension on behalf of the home*".

The implication is that if the NAHB had no formal arrangement to state that it was collecting money on behalf of the Roscommon nursing home, then, in circumstances where it is paying the home in full, the invoices to the patient are charges by the HSE directly to the patient in respect of in-patient care.

No records have been provided to explain how this matter was resolved. The Appeals Officer dealing with the case left and the case was taken over by Mr. Kent. His determination was to confirm the rejection of the claim by the Scheme Administrator.

## 9.0 Analysis – Appeals Process

There were a number of issues which suggested that the arrangements in this case did not fall neatly into one of the administrative categories for the payment of nursing home fees which were provided for by various pieces of legislation and related guidelines.

Because of the peculiar administrative and contractual arrangements involved in this particular case, it is questionable as to whether reliance on the fact that a subvention was applied for and apparently paid (although the precise audit trail for this has not been established) provided a sound basis for the rejection of the appeal.

Given the acknowledged limitations of the HRS, it was not unreasonable for the Scheme Administrator and Appeals Officer to take the payment of a subvention as a starting point. However, in this case it would appear that matters related to the contract of care, invoicing of in-patient charges by the NAHB, the payment of these charges and receipts issued were not investigated fully. Evidence which would have been available on these matters (invoices, and HSE receipts) do not appear to have been available to, or sought by, the Appeals Officer. When such evidence was provided subsequently to the Appeals Officer, in the course of this investigation, he took the view that this did not constitute evidence which warranted a revision of his original decision.

It also appears that the Appeals Officer put the burden of proof, and responsibility for the production of evidence, on the appellant, even though information would have been available to him had he requested it from the Health Service Executive.

In his response to the Draft Investigation Report the Appeals Officer stated that he was satisfied that his decision accorded with the evidence made available to him, and that it was correct in law. More detail on the Appeals Officer's response is set out in the next section.

# 10. Responses to the Draft Investigation Report

## 10.1 The HSE's Response

In its response to a draft of this report (see Appendix 3), the HSE stated: "*The HSE is not contesting the findings of the draft report and accepts that Mrs. Coffey is entitled to repayment of the "recoverable health charges …*".

The HSE accepted that the arrangements made for Mrs. Coffey could not be considered consistent with good practice and pose very serious questions for the HSE area involved. The response contains an apology to Mrs. Coffey's family for any confusion and distress caused by the HSE's administrative processes.

Finally the response points out that the Scheme Administrator and the Appeals Officer acted on information provided by the former NAHB to the HSE Central Unit and that "*based on the information they received, their decisions were correct*". The response states that it is now acknowledged that the information provided to them was incorrect.

The HSE has told the Ombudsman's Office that arrangements have been made for the repayment due to be calculated and paid to the family of the late Mrs. Coffey. The amount due is in the region of €24,000.

## 10.2 Response by the Appeals Officer to the Draft Investigation Report

The Appeals Officer's response (Appendix 4) notes the statement in the Draft Investigation Report that he is subject to the jurisdiction of the Ombudsman pursuant to Section 23 of the Health (Repayment Scheme) Act 2006. He says that he rejects *"that contention, insofar as it contends that the Ombudsman has jurisdiction to conduct an alternative appeal or review the appeal decision*".

It is important to understand that, in investigating a complaint, the Ombudsman does not conduct an alternative appeal or review which displaces the process undertaken by the person against which/whom the complaint has been made. Following an investigation, the Ombudsman may make findings and, where these findings include adverse affect, the Ombudsman may make recommendations to remedy the adverse affect. Making findings and recommendations in these circumstances does not amount to having conducted an alternative appeal or review. In fact, section 4(7) of the Ombudsman Act specifically provides that an investigation by the Ombudsman "*shall not affect the validity of the action investigated or any power or duty of the person who took the action ...*" Thus, in a case such as this, the Ombudsman's findings (and recommendations, if any) do not purport to displace, in any legal sense, the decision already made.

The Ombudsman notes the HSE's statement that it provided incorrect information both to the Scheme Administrator and the Appeals Officer. However, the Appeals Officer is required by the Health (Repayment Scheme) Act 2006 to be independent in the performance of his

functions. Accordingly, while the Scheme Administrator and the HSE were required by section 16(4) of that Act to provide him with "*such assistance and information as the person may reasonably require"* of them *"in order to assist the person to determine the appeal*", the Appeals Officer was not limited to relying on information provided to him. As an independent office holder, it was incumbent on him to question information on which his decision was to be based when questions arose about it, whether these issues arose on assessment at the Appeals Office or in oral hearings with appellants. The correspondence, in 2009, between Ms Ciara McGoldrick, HRS Appeals Officer, and the HSE, shows that such questions had arisen in similar cases. It was the understanding of the family that following the oral hearing the Appeals Officer would request further information on Mrs. Coffey's case from the Health Services Executive. The legislation obliged the HSE and the Scheme Administrator to provide such information to the Appeals Officer when it was requested however it appears that the Appeals Officer did not go behind the information provided to him by the HSE in this case, information which the HSE has now accepted was incorrect.

## 11. Findings

11.1 Based on the evidence of this investigation, the Ombudsman finds that the NAHB entered into a contractual arrangement with the Roscommon nursing home for the provision of beds to it at a preferential rate.

11.2 The Ombudsman finds that the contract of care witnessed by Mrs. Byrne expressly excluded her from any liability in the payment of fees to the Roscommon nursing home in respect of her mother Mrs. Jean Coffey.

11.3 The Ombudsman finds that Mrs. Coffey was charged by the NAHB for in-patient services, that those charges were paid by her, and that her daughter Mrs. Byrne holds receipts to show that payment was received by the Health Board.

11.4 The Ombudsman finds that the arrangement for payment as set out in the contract of care in this case, taken together with the arrangement between the nursing home provider and the NAHB for the provision of beds, meant that the Nursing Home Subvention Scheme did not apply to Mrs. Coffey.

11.5 The Ombudsman finds that to all intents and purposes Mrs. Coffey was a public patient who was placed at the Roscommon nursing home under a contract for the provision of beds.

11.6 The Ombudsman finds that the decision of the HSE, through its agent the Scheme Administrator, to refuse repayment of the in-patient charges was a decision based "*on erroneous or incomplete information*" as well as being a decision taken "*contrary to fair or sound administration*".

11.7 The Ombudsman finds that the administrative (including payment) arrangements of the NAHB's Nursing Home Section and Patient Accounts Section, as they related to the placement of Mrs. Coffey in the Roscommon nursing home, were confused and lacking in transparency and thus reflect an undesirable administrative practice as well as being contrary to fair or sound administration.

11.8 The Ombudsman finds that the failure of the Appeals Officer to follow up on queries raised about contractual, invoicing, and payment arrangements in this case was contrary to fair or sound administration.

11.9 The Ombudsman finds that the decision of the Appeals Officer was based on erroneous or incomplete information. It is now accepted by the HSE that incorrect information was provided to the Appeals Officer.

11.10 The Ombudsman finds that the failure of the Appeals Officer to keep records of the oral hearing in the case reflected undesirable administrative practice and was contrary to fair or sound administration.

## 12. Conclusion

The HSE has accepted all of the findings in this case and has agreed that Mrs. Byrne will be repaid the In-Patient Charges which were incorrectly levied on her mother from March 2003 to December 2004. It has also undertaken to review the position of other residents of the Roscommon nursing home who were placed there by the NAHB in similar circumstances to those of Mrs. Coffey.

The HSE has accepted that this report has brought clarity to the key question of whether Mrs. Coffey was effectively a public patient or whether she was in receipt of subvention. It has accepted also that its administrative processes were not consistent with good practice and do pose very serious questions for the area of the HSE which includes the former Northern Area Health Board.

The introduction of the Nursing Home Support Scheme in 2009 means that the provision of long term residential care is radically different to the situation which pertained in 2003 when Mrs. Coffey first entered nursing home care. As such, the issues in this case are historic or legacy issues related to contract and subvented beds.

In response to the view of this Office that the NAHB took on the role of promoting the services of one private company by introducing its own patients to the company and encouraging them to avail of its services, in circumstances where that company's business was being managed by a senior member of NAHB staff on leave of absence, the HSE has stated "*We note that the Ombudsman accepts that personnel involved in this case were motivated by a desire to make suitable arrangements for people in Mrs. Coffey's position, at a time of significant resource constraints. However, we also accept that the arrangements made could not be considered consistent with good practice and do pose very serious questions for HSE DNE, which includes the former NAHB.*

In light of the HSE's response to the draft report, it is not necessary to make recommendations in this case.

Emily O'Reilly
Ombudsman

December 2011

## Appendix 1

**STATEMENT OF COMPLAINT**

Mrs. Collette Byrne

Dublin

This complaint is made by Mrs. Collette Byrne on behalf of her mother, Mrs Jean Coffey, who is a patient in [Name] Nursing Home, Co. Roscommon. The complaint arises from the refusal of the claim under the Health Repayment Scheme, made by Mrs. Byrne on behalf of Mrs. Coffey, for a refund of charges incurred during the period 2003 - 2004. This refusal was upheld by the Appeals Officer, Mr. Ed Kent, in his letter of 25 April 2008 to Mrs. Byrne.

Mrs. Byrne contends that her mother's placement in the Roscommon Nursing Home was at the behest of the then Northern Area Health Board (now subsumed into the HSE), that care charges were raised by the Health Board and paid to the Health Board and that these charges are "recoverable health charges" within the meaning of the Health (Repayment Scheme) Act 2006. Mrs. Byrne contends that the decision of the Scheme Administrator, and subsequently that of the Appeals Officer, is incorrect; she characterises the position as follows:

> "We understand the position to be quite straightforward. The HSE contracted several beds in private nursing homes due to lack of beds in their own facilities and placed patients in them. The HSE placed Jean Coffey in one of their contracted beds and subsequently charged her (we consider illegally)."

## Appendix 2

Our Reference : HRS/08/1008
Health Repayment Scheme Claim No. 30855022
HRS Appeal No. 2007/1965

26 November 2009

Professor Brendan Drumm
Chief Executive Officer
Health Service Executive
Dr Steeven's Hospital
Dublin 8

Dear Professor Drumm,

**Investigation under section 4 of Ombudsman Act 1980**
**Complainant: Mrs. Collette Byrne of, Dublin on behalf of her mother, Mrs. Jean Coffey**

The Ombudsman is currently dealing with a complaint from Mrs. Collette Byrne, on behalf of her mother Mrs. Jean Coffey, arising from the refusal of her application under the Health Repayment Scheme (HRS). This Office first notified the complaint to the HSE on 3 June 2008 and, in the meantime, has had a number of contacts with the HSE as well as receiving some documentation from it. As the HRS claim was appealed to the HRS Appeals Office, which upheld the refusal of the application, this Office took the view that our investigation should be directed primarily at the actions of the Appeals Office. Accordingly, we commenced an investigation under section 4 of the Ombudsman Act 1980 into the actions of the Appeals Office. Based on the information acquired in the course of this investigation, it has now become clear that it will be necessary to extend the investigation to include the actions of the HSE as well as those of its agent, the HRS Administrators. This letter is to notify you that the Ombudsman has now extended her investigation to include the actions of the HSE and of its agent.

I enclose for your information copies of relevant communications with the Appeals Office, namely, our preliminary views letter of 25 March 2009 and the notification of investigation letter of 28 July 2009. I enclose also a copy of the Statement of Complaint; this was issued initially to the Appeals Office but it applies equally to the actions of the HSE and those of its agent, the HRS Administrators. As you will see, the key question arising in this investigation is whether the charges paid on behalf of Mrs. Coffey, during the period 2003 - 2004, are "recoverable health charges" within the meaning of the Health (Repayment Scheme) Act 2006. Mrs. Byrne, on behalf of her mother, contends that the charges in question are "recoverable health charges" and that she and her mother have been adversely affected by the actions of the HSE, the HRS Administrators and the Appeals Office in their handling of the HRS application.

In extending the investigation to the HSE and its agent, the Ombudsman will be looking in particular at:

- the involvement of the HSE (then the Northern Area Health Board) in the placement of Mrs. Coffey in a private nursing home in Co. Roscommon as well as the nature of the relationship more generally between the NAHB and the private nursing home;
- whether Mrs. Coffey was placed in the Roscommon nursing home under the care of the NAHB as opposed to being placed there as a private patient who would benefit from the nursing home subvention;
- the information provided by the HSE to the HRS Administrators for the purposes of its initial decision on the HRS application as well as the working arrangements generally between the HSE and the HRS Administrators;
- the information provided by the HSE and/or the HRS Administrators to the Appeals Office as well as the working arrangements generally between the HSE/HRS Administrators and the Appeals Office.

I would suggest that the HSE would now nominate a senior member of staff to liaise with this Office for the purposes of the investigation. This person should also be in a position to deal with matters relating specifically to the HRS Administrators. I would envisage the HSE's nominated person engaging with the Ombudsman's staff in relation to any specific requirements we may have as the investigation progresses. It is probable that we will need to interview some HSE and/or HRS Administrators staff in the course of the investigation. Arrangements for these interviews will be made with the HSE's nominated person.

The Ombudsman invites the HSE and its agent to make any written submission it wishes in relation to the investigation. We have already received a number of specific communications from the HSE in the course of the preliminary examination and it might be helpful for the HSE to review these communications to see if they require any elaboration or revision. In any event, any written submission from the HSE and/or its agent should be received in this Office by **11 December 2009** at the latest.

For the purposes of the investigation, we require documentation in three separate areas:

1. documentation relating to arrangements for the placing of Mrs. Coffey in the private nursing home in Co. Roscommon and including the arrangements generally as agreed between the NAHB and the nursing home;
2. the documentation provided by the HSE to the HRS Administrators for the purposes of the initial decision on the HRS application;
3. the documentation provided by the HSE and/or the HRS Administrators to the Appeals Office for the purposes of the appeal decision.

In relation to items 2. and 3. above, we have already acquired copies of some relevant documentation from the HSE and from the Appeals Office. However, it is not clear that we have acquired all the relevant documentation. It appears that the HSE has provided the HRS Administrators with a database of information relating to individual institutions and to individual patients or clients and that this information is relied upon by the HRS Administrators in their decision making. The Ombudsman requires a clear statement from the HSE outlining the arrangements generally for the collection and transmission of all information provided for purposes of assessing claims to the HRS Administrators. We understand that the HSE has provided the HRS Administrators with a list of institutions (both public and private) throughout the country which catered for public long-stay patients during the period to which the HRS applies. The Ombudsman requires a copy of this list of

institutions - which may be provided electronically if this is more convenient. In relation to Mrs. Coffey's particular case, the Ombudsman requires a copy of all information relevant to her claim provided by the HSE to the HRS Administrators and/or to the Appeals Office. We appreciate that this may involve some duplication of what has already been provided but it is essential that the Ombudsman will have a full understanding of the information base relied upon by the decision makers in dealing with Mrs. Coffey's application. Again, if it is more convenient, the information relating to Mrs. Coffey may be provided to us electronically.

In the case of documentation covered by item 1. above, we have been told by the HSE that it does not hold any records of contacts between the NAHB and the private nursing home operators (First Citizen Residential) concerning arrangements entered into by the NAHB which resulted in the placement in 2002/2003 of approximately 20 patients from the Dublin area (including Mrs. Coffey) in the Roscommon nursing home. While the precise nature of these arrangements is a matter of dispute between Mrs. Byrne and the HSE, it is quite clear that arrangements were agreed. It is, therefore, very surprising that there should not now be any record available concerning the nature of NAHB discussions with First Citizen Residential and of their outcome. Accordingly, the Ombudsman requires that further searches and enquiries be made by the HSE so that she can be satisfied that no such records exist. The results of these searches and enquiries, as well as confirmation of the position in the case of documentation covered by items 2. and 3, should be provided to the Ombudsman by **11 December 2009** at the latest.

If there is any point on which the HSE requires clarification, or any additional information it requires, Ms. Aoife Nic Réamoinn, Investigator, will be happy to be of help. Ms. Nic Réamoinn may be contacted by email at aoife_nicreamoinn@ombudsman.gov.ie or by telephone at 01-6395661.

Yours sincerely

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Pat Whelan
Director General

## Appendix 3


Advocacy Unit
Quality & Patient Safety
Directorate
HSE
Lime Tree Avenue
Millennium Park
Naas

**21st September 2011**

**Mr. Fintan Butler**
**Senior Investigator**
**Office of the Ombudsman**
**18 Lower Leeson Street**
**Dublin 2.**

**Your Ref: HRS/08/1008**

**Re: Ombudsman Investigation – Health Repayment Scheme**

Dear Mr. Butler,

I refer to your letter to Mr. Cathal Magee, CEO, dated 24th August 2011 in relation to a complaint received from Mrs. Collette Byrne regarding refusal of her mother's application under the Health Repayment Scheme. I am responding on behalf of Mr. Magee.
The HSE are not contesting the findings of the draft report and accept that Mrs. Coffey is entitled to repayment of the 'recoverable health charges' through the Repayment Scheme.

We note that the Ombudsman accepts that personnel involved in this case were motivated by a desire to make suitable arrangements for people in Mrs. Coffey's position, at a time of significant resource constraints. However, we also accept that the arrangements made could not be considered consistent with good practice and do pose very serious questions for HSE DNE, which includes the former NAHB. We also wish to point out that the Scheme Administrator and the Appeals Officer acted on information provided by the former NAHB to the HSE Central Unit in relation to this application and based on the information they received, their decisions were correct. However, it is now acknowledged that this information was incorrect.

The creation of the Health Service Executive brought into sharp focus variances in service delivery practices and processes across the former health boards. Considerable effort has been, and continues to be invested in achieving greater consistency, uniformity and a

general higher degree of professionalism in service delivery and associated administrative processes. While there is still some way to go, significant progress has been made.

In regard to long term residential care provision, the introduction of the Nursing Homes Support Scheme legislation has transformed prior practice. The new legislation and associated Department of Health policy has resulted in a single national system of providing financial support for long term care. There is also a national standard approach to determining the need for long term residential care. While there are still legacy issues in relation to subvention and contract beds, Department of Health Policy precludes any other approach to long term care provision.

These changes, along with the more streamlined and accountable management structures within the organisation, greatly reduce the possibility of the poor administrative practice identified in the report.

The report is extremely valuable in bring clarity to the key question of whether Mrs. Coffey was effectively a public patient or whether she was in receipt of subvention.

I wish to acknowledge that the administrative processes were not what they should have been and on behalf of the HSE, I apologise to the family of Mrs. Coffey for any confusion and distress that they may have been caused.

Yours sincerely,

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Greg Price
Director of Advocacy

## Appendix 4

**Emailed Response to Draft Investigation Report by Mr. Edmund Kent**

**Date: 13 September 2011**

Dear Mr. Butler,

I am in receipt of your draft report herein.
I have considered the contents of the draft report.
I have also considered the file in this appeal and my evidence to the inquiry conducted by your Mr. Merrigan and Ms. Nic Reamoinn.

The jurisdiction of the Ombudsman:
I note that Page 4 of the draft report states that the Appeals Officer is subject to the jurisdiction of the Ombudsman pursuant to S.23, Health (Repayment Scheme) Act 2006. I reject that contention, insofar as it suggests that the Ombudsman has jurisdiction to conduct an alternative appeal or review the appeal decision. The Ombudsman has no such jurisdiction - her jurisdiction is confined to the administration of the appeals. It does not extend to the adjudication of them. I was the person charged with adjudicating on Mrs. Coffey's appeal. I have made my decision. I am satisfied that my decision accords with the evidence made available to me and that it is correct in law. I have no further jurisdiction in the matter.

The conduct of the appeal:
Having re-considered the appeal file, I am satisfied that, in adjudicating on this appeal, I complied with my obligations pursuant to S.16 (5), Health (Repayment Scheme) Act 2006 in every respect.
It is not within the jurisdiction of the Ombudsman to make findings regarding the manner in which I adjudicated on the appeal.

Yours faithfully,

**Edmund Kent,**
Appeals Officer,
Health Repayment Scheme Appeals Office,
Floor 4, Block 6/7,
Irish Life Mall,
Dublin 1.
Tel.: 01-8792980
Fax: 01-8792989