



Feidhmeannacht na Seirbhíse Sláinte  
Health Service Executive

AML/DMCS

1<sup>st</sup> December 2009

Your reference: HD5/08/1870

**Mr Pat Whelan**  
**Director General**  
**Office of the Ombudsman**  
**18 Lower Leeson Street,**  
**Dublin 2**

**Re: Ombudsman Investigation – Nursing Home Subventions – Failure to Implement Appeal Decisions.**

**Dear Mr Whelan,**

I refer to your letter of 23<sup>rd</sup> October 2009 regarding the above and enclosing a copy of the draft report relating to the investigation. I have considered the draft report and set out below the HSE response.

The nature of the complaint as set out in chapter 1 is acknowledged. It is the HSE view however that "the complainants contend that the failure of the HSE to implement the decisions" is an inaccurate interpretation of the actual position. It is the HSE view that it has not failed to implement the decisions of the Appeals Officer but has, of necessity, delayed implementation in 6 cases, or partially implemented the decisions in 4 cases (at the time of finalising the report 7 cases have now been partially implemented) in line with the availability of resources and taking account of the fact that other applicants for support through "enhanced" or "alternative" subvention had been on the waiting list ahead of these particular cases.

On the general point the HSE is of the view that it must treat equitably decisions regarding enhanced subvention made on foot of an application which may not have gone through the appeals process, versus one which was the outcome of an appeal. Indeed a decision made by an Appeals Officer, without taking the resource issue into consideration, could effectively disadvantage those applicants already on the waiting list.

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The length of the time on a waiting list in each case is a factor of the availability of the resources for this scheme, as is the overall availability of alternative options for long term care including public bed capacity and the availability of community supports to assist some people to remain at home for as long as possible. The decision by the Appeals Officer are not in question but rather the point at which the HSE has the capacity to implement them taking account of, and treating in an equitable manner, all other applicants for funding from the same limited allocation.

### **The 10 Cases**

The HSE is satisfied that in each of the cases referred to in the report nursing home care was indeed required.

It is also satisfied that in each of the cases an assessment of the individual means of the applicant would indicate that basic or prescribed subvention together with the assessed patient contribution was insufficient to meet the cost of care in the nursing homes.

Unfortunately the situation for these ten applicants being placed on a waiting list for release of funding was representative of the position for many applicants for support under the Nursing Home Subvention Scheme across the country. The problems with the subvention scheme have been publicly acknowledged by the Department of Health & Children. The policy decision to replace the Nursing Home Subvention scheme with the introduction of the Nursing Home Support Scheme on 27<sup>th</sup> October 2009 was taken with the intention of addressing the weaknesses that had emerged with the earlier scheme.

### **Process Issues**

It is acknowledged that weaknesses in internal HSE processes have been identified in the Report by the Ombudsman in relation to

- the operation of the appeals process in an equitable manner across the system,
- the issue of critical financial information in relation to the subvention scheme being made to an Appeals Officer in advance of consideration of appeals.
- the standard approach to the status, and implementation of, decisions made by an Appeals Officer and
- the communication of the position as it emerged, to the appellants

The HSE takes cognisance of these identified issues and is immediately taking steps to ensure that the appeals process is operated in a consistent way in relation to future appeals under the new Nursing Home Support Scheme and any remaining appeals that may arise in relation to clients in receipt of subvention on the 27<sup>th</sup> October 2009.

It is not intended to enter into debate with regard to the process issues in this response but instead to acknowledge these matters and to assure the Ombudsman of the HSE intention to address these internal issues.

### **Further Review of 10 Carlow/Kilkenny Cases by HSE**

The HSE has reconsidered its position as set out in its earlier communications as pertains in the ten cases in the Carlow/Kilkenny area which are the subject of this complaint.

The process involving the appeals office in HSE South East is at variance with the approach in other offices as acknowledged in the Report. The Appeals Officer relied on the beneficial aspects of the 2007 Amendments in making his decisions but did not balance this approach by also taking account of the section of the Act relating to resources (7(C)(6)) and as required in 7(C)(1)(b). It may well be that the Appeals Officer was not given the specific details of the resource constraints however there is an onus on all senior officials of the HSE to take account of resource implications of any decisions he/she may make. These internal matters require to be, and will be, addressed internally by the HSE.

While an Appeals Officer, being independent, might not always be an employee of the HSE the fact is that, in this case, the Appeals Officer is a senior employee and as with all senior decision makers, was required to assess and take account of the resources available.

There are a number of additional aspects which have been taken into account in the HSE reconsideration of its earlier position in relation to these particular cases

- there was a lack of clarity in some locations with regard to the status of decisions made by Appeals Officers
- appellants were advised by the Appeals Officer that they would benefit from an increased rate of subvention from a particular date in each case;
- the decisions of the Appeals Office were not implemented immediately due to resource limits and the relevant applicants were not notified promptly of the approach being taken (i.e. that their names were being placed on a waiting list)

Taking these circumstances into account the HSE has decided to implement in full the Appeals Officers decisions in these 10 cases with immediate effect and is arranging to pay the appropriate levels of subvention as decided by the Appeals Officer from the dates he set out.

The upset, hardship and inconvenience that this matter may have caused to these applicants and their families is regretted.

### **The Nursing Home Subvention Scheme & Enhanced Subvention**

In the Report the issue of the inconsistencies in relation to the scheme are referred to at some length and while this matter is not included in the findings of the Report the HSE considers it important that the position regarding subvention and in particular enhanced or alternative subvention is set out.

The Nursing Home Subvention Scheme was introduced by the Health Act, 1990 and was operated by the Health Boards in accordance with Regulations introduced in

1993 and amended a number of times up to 2005. Acknowledged inconsistencies in the operation of the scheme were related to

- The 1993 Subvention Regulations were open in a number of sections to varying interpretations.
- The guidelines which accompanied the regulations were not detailed and comprehensive.
- There was a lack of communication between Health Boards which led to inconsistencies in interpretation of the legislation and guidelines.
- There was a significant degree of variation between Health Boards in resources available to services for the elderly e.g. long stay beds etc.
- There were varying per capita budgets allocated to Health Boards for the subvention scheme.
- Differing demographic and geographical profiles between Health Boards resulted in differing emphases within Health Boards.

The HSE took over the administration of the scheme in 2005 and commenced work in putting in place arrangements to address the inconsistencies in the application of the scheme within the funding available.

In 2006 a National Working Group was established by the HSE to examine best practice, and to draft National Guidelines for the assessment of applications for Nursing Home Subvention incorporating a procedures manual for staff. The Group completed this work in December 2006.

The completion of the Working Group report coincided with the Government decision to introduce a new Nursing Home Care Support Scheme - "A Fair Deal"- from 1<sup>st</sup> January 2008. However, the introduction of the scheme was delayed as the legislation was not finalised until July 2009 and the scheme did not commence until 27<sup>th</sup> October 2009.

The new scheme was developed to replace the

- Current system of charges for public beds *and*
- Private nursing home subvention scheme.

It will ensure the same level of support for public and private nursing home residents.

As a transition to the new Scheme the Minister announced specific arrangements to be put in place in 2007. The amendments were effective from 1<sup>st</sup> January 2007, and were reflected in the Guidelines, included:

- Introduction of one rate of subvention which increases the maximum basic subvention to €300 per week
- Principal Residence to be assessed for maximum 3 years from date of admission
- Extra support for enhanced subvention scheme

Having regard to the revision in the scheme as announced by the Minister and following consultation with the Department of Health and Children the HSE had to revise the Guidelines as completed by the Working Group in December 2006 to take account of the new arrangements to apply for 2007. This work was undertaken in

December and early January and the HSE finalised a national standardised set of guidelines to oversee the implementation of the scheme for 2007. Funding in the order of €85m was provided by the Department of Health and Children to implement the revised arrangements to apply in 2007.

The National Guidelines Document as issued in January 2007 gave clear guidelines on the assessment of income and assets, including the principal residence, for the purpose of determining a person's entitlement to Subvention. The document also includes guidelines on the allocation of enhanced subvention, which is discretionary. The amount of enhanced subvention paid depended on the local cost of Nursing Home Care, which varies significantly from area to area, the amount of basic subvention payable and the assessed means of the applicant.

The Guidelines achieve national consistency without taking away the obligation to consider exceptional cases on their individual merit.

Subsequently the scheme was further amended by the Health (Nursing Homes) (Amendment) Act 2007. However, due to an oversight, amended Guidelines were not issued to the system as the focus had become the new Nursing Home Support Scheme.

As the resources available for the Subvention Scheme were limited, an integral aspect to the approach adopted by the HSE to begin to bring equity into the subvention scheme prior to the introduction of the new support scheme, was the settlement on a maximum shortfall that any applicant might be expected to meet. A key feature of the improved scheme was the increase in the basic rate of subvention to a maximum of €300pw which meant that in some LHO areas the full cost of nursing home care would be met by a combination of basic subvention and the applicants assessed contribution. The settlement on a maximum shortfall as opposed to a maximum or standard enhancement as referenced in Chapter 6 Item 13 based on the average nursing home fee for the individual LHO area being used as the basis for calculation of the enhanced element of subvention. As average nursing home fees vary across the 32 LHO areas, to set the enhanced subvention rate at only one level for the entire country would have meant that applicants in different parts of the country with exactly the same income would have varying levels of shortfall to meet as set out in the examples below:

	<b>DNE - Former SW Area</b>	<b>Roscommon</b>	<b>Cork</b>
<b>1. Average weekly Nursing Home fee - Jan 2007</b>	863	561	650
<b>2. Average Fee less €100 (equalisation of shortfall )</b>	763	461	550
<b>3. Contribution from NCOAP ( Jan 2007 rate €200)</b>	-160	-160	-160
<b>4. Basic subvention - where assessed income not exceeding NCAOP rate</b>	-300	-300	-300
<b>5. Enhanced subvention payable (Item 2 less 3 &amp;</b>	€303	€1	€90

<b>4) based on HSE approach &amp; overall shortfall to be met by client</b>	Shortfall €100 pw	Shortfall €100 pw	Shortfall €100 pw
<b>6. Enhanced rate if maximum enhanced rate was applied nationally at €250 pw &amp; overall shortfall to be met by client</b>	€250	€1	€90
	Shortfall €153 pw	Shortfall €100	Shortfall €100

The approach adopted by HSE (Item 5) was considered to be, and is demonstrated to be, a more equitable one as it meant that in addition to their contribution based on assessed income no applicant for enhanced subvention would have to meet a shortfall greater than €100 per week. This approach was presented to the PAC by HSE Senior Management in January 2007 and was considered to be reasonable given the resource and legislative challenges relating to the scheme.

As the new scheme was due to be introduced in January 2008 it was understood that this significant improvement would bring a level of equity to the scheme across the country that would impact positively on the operation of the scheme until its replacement.

An extract from a memorandum to the Assistant National Directors on 29<sup>th</sup> January 2007 sets out the position as follows:

*The increase in basic subvention will result in a significant improvement for a large number of people. In some areas this will reduce very significantly the shortfall that existed between income/basic subvention and the average nursing home fee (having taken account of equalisation) and in some cases eliminating the need for an enhanced subvention payment. In other areas where nursing home fees are higher & consequently enhanced subventions have been a feature, the impact of the increase in basic subvention will have a less significant impact.*

*In order that the Health Service Executive begins to work towards equalisation of the level of support paid to people in different areas (taking the local prices and a person's means into account) the enhanced subvention scheme is being improved to ensure a more consistent approach across the Health Service Executive. Enhanced subvention will be considered in all cases, including applicants who have been refused basic subvention on means grounds, with reference to the average nursing home fee (less €100) for the area or the actual fee if less. This will have the effect of ensuring that no applicant for subvention will be required to contribute more than 80% of his/her assessed income (& imputed income) plus €100 when assessed against the average nursing home fee for the particular LHO area. The average nursing home fee figure for each LHO area within your area is set out in the attached table and reflects the figures submitted recently by the local subvention offices. Enhanced subvention should therefore be calculated with reference to this adjusted fee.*

This approach operated satisfactorily in 2007 and in the context of the planned introduction of the new scheme from 1<sup>st</sup> January 2008, when it was anticipated that

the inconsistencies with the subvention scheme would be fundamentally addressed. In January 2007 there were 3,948 people in receipt of enhanced subvention; by June 2008 this had risen to 5,087 as a result of the improvements introduced in 2007.

The introduction of the new scheme was delayed and the cost of nursing home care rose causing financial difficulties for many people. However, the capacity of the HSE to increase the levels of enhanced subvention were limited. Accordingly the gap between subvention payable and nursing home fees increased. The HSE was only in a position to respond in a limited way (2.15% increase provided for in 2008) and the shortfall to be met by the client began to exceed the 2007 equalisation level of €100 per week. In addition demand for basic subvention was continually increasing and the HSE prioritised the payment of basic subvention thereby ensuring that all qualified applicants received at least basic levels of support. (7588 people were in receipt of subvention in January 2007 which rose to 9073 in June 2008 and to 9225 in June 2009). In some areas this meant that the available resources were more and more focussed on paying basic subventions and waiting lists for enhanced subventions began to re-emerge.

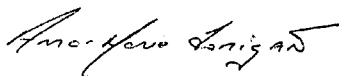
This position continued until the introduction of the Nursing Home Support Scheme on 27<sup>th</sup> October 2009.

It is expected that the introduction of the new Scheme will now fundamentally address the inconsistencies that arose in the Subvention Scheme. To this end detailed guidelines have been prepared and issued to the system to guide staff in implementing the new scheme in a standard way from the outset. Furthermore a central office has been established to oversee the roll out of the scheme and to issue additional supports and clarifications as queries arise in specific cases.

The HSE again confirms its intention to process, without any further delay, the 10 cases that are the subject of this report.

The HSE would welcome a copy of the Ombudsman's Report on this matter when it is finalised.

Yours sincerely,



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