



Investigation Report

regarding a complaint made by

Mr Thomas Kennedy, Co Galway

on behalf of his mother,

**Mrs Ann Kennedy (RIP), Highfield Nursing Home, Co. Galway
against**

the Health Service Executive, West

Office of the Ombudsman

September 2010

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Chapter 1

1. Background:

Note: The names of the complainant and his mother have been changed to protect their identities, The names of the nursing homes referred to in the Report are fictitious.

1.1 Nursing Home Care in Ireland - Public and Private

In Ireland, public long term residential care for the elderly is provided in either publicly owned and financed institutions or in contracted beds in private nursing homes. Private long term care is provided in private and voluntary nursing homes. During the period 1976-2004, most patients in public nursing homes were required to pay charges for their care at a rate calculated in accordance with and related to their income. They were allowed retain an amount of their income for their personal needs. (It subsequently emerged that there was no legal basis for those charges and many residents or their heirs became entitled to a refund of nursing home charges under the Health Repayment Scheme Act 2006.

At the time in respect of which this complaint relates, fees in private institutions were charged at commercial rates and were payable directly by residents. Financial support in the form of basic and/or enhanced nursing home subventions was sometimes available from the State for the provision of private care.

A nursing home subvention is a payment made by the HSE to people who:

- go into registered private nursing homes;
- are in need of full time care and attention; and
- pass a means test.

An enhanced subvention is an extra payment which may be granted at the discretion of the HSE, if an applicant's means and basic subvention are insufficient to meet the cost of nursing home care.

1.2 The initial complaint

In February 2004, Mr Thomas Kennedy wrote to me, on behalf of his mother, who was resident in Highfield Nursing Home, Co. Galway. He said that he wished to make a complaint against

the then Western Health Board (WHB) {now Health Service Executive (West)}, which had rejected his appeal for an enhanced nursing home subvention he had sought on behalf of his mother, to assist with the payment of her private nursing home fees.

In his letter of complaint, Mr Kennedy explained that his mother had been in private nursing home care for most of the previous 20 years. Two years earlier, in December 2002, the nursing home where his mother had been residing, St Margaret's Nursing Home, Galway closed down. When this occurred, she was referred by her GP to the Accident and Emergency Department in University College Hospital Galway. After a short stay in the hospital she was re-located to Highfield Nursing Home. Mr Kennedy said that he had been advised by the WHB at the time that his mother would have her nursing home fees at Highfield paid for in full by the Board, but that this did not happen. He said that there was a debt due to the private nursing home in excess of €15,000 and that the matter was causing him serious hardship. He said that she had now been put on the list for public long term care, but she was still waiting for a bed.

1.3 The response from the Western Health Board

Responding to the initial complaint, the WHB sent me its file dealing with the case. It said that while it had been agreed that the nursing home fees would be paid for by the WHB from 20 December 2002 to 31 December 2002, no undertaking had been given that the further nursing home costs would be met by the Board. With regard to the application for the enhanced subvention, it advised that this had been rejected, as Mrs Kennedy was the owner of a dwelling house. It said that such assets were taken into account in assessing the means of applicants and, as a result, she was precluded from receiving an enhanced subvention. The WHB advised that Mrs Kennedy had been admitted to public long stay care in Merlin Park Hospital on 14 April 2004.

1.4 The application for a public nursing home bed

Mr Kennedy told me that he was happy that his mother had been taken into long term care, but that he was still very concerned about the payment of the outstanding debt due to the private nursing home. In this connection, he also mentioned that an application for a public bed had actually been made for her, eight years earlier, in 1996.

When I examined the Board's file, I noticed a reference to an application for a public bed having been made on Mrs Kennedy's behalf, by her GP , in or around 1995. In a letter on the file to his local representative, date-stamped 23 February 1996, Mr Kennedy had written that his GP had applied for long term care for his mother and that following this application he himself had enquired about this possibility on several occasions and had been told that his mother was on a waiting list.

In October 2004 Mr Kennedy rang my Office to say that his mother had died. I advised him that I proposed to continue with my examination of his complaint.

From my analysis of the papers on the Board's file, it seemed to me that the Board's assessment for the enhanced subvention was generally in order, apart from one or two errors which appeared to have been made. The effect of these errors was to reduce the level of basic subvention payable in this case. I decided to write to the Board about these matters.

In my letter, I raised the issue of the public bed application and asked the Board to clarify its position about this. I said that I had noted from the file that the question of a public bed for Mrs Kennedy had been referred to in February 1996 through the local representative, but that over eight years had elapsed before Mrs Kennedy was finally admitted to public care. I asked the Board to explain why it had taken eight years to provide her with a public bed.

In its response, the Board acknowledged that a mistake had been made in the calculation of the standard subvention paid to Mrs Kennedy and that a refund would be made. It also acknowledged that an application for long stay care had been made by Ms Marie Regan, the Liaison Public Health Nurse on behalf of Mrs Kennedy on 23 June 1995 to the Director of Nursing, St Brendan's Hospital, Loughrea. However it added that, having checked with the Hospital, there were no other records relating to the application.

1.5 My Concern

My concern at this stage was that if the application for a long stay care bed had been processed at the time it was received in 1995, it could have resulted in Mrs Kennedy being allocated a public bed. As a consequence of the failure to deal with the application at the time, the Kennedy family had run up significant debts and suffered serious hardship paying the additional costs for their mother's private nursing home care (in St Margaret's Nursing Home from 1995 to 2002 and

Highfield Nursing Home from 2002 to 2004). Furthermore, if Mrs Kennedy had been in public nursing home care during these periods, she would, as a medical card holder, have been entitled to a refund of public long-stay charges levied on residents of public nursing homes in Ireland during the period 1976-2004. These residents were required to pay charges when there was no legal basis for those charges.

The HSE acknowledged that an approach had been made by the Liaison Public Health Nurse, on behalf of Mrs Kennedy, on 23 June 1995, to the Director of Nursing, in a public care facility about a public bed. In this context, I asked the HSE to advise me as to when the next application for long-stay care in that public care facility was made after that date, and how long that applicant was waiting before a bed was awarded.

The HSE said that there was record of an application form having been received in the public care facility on 26 June for a patient who was admitted on 17 July 1995. It added that while there were no formal records available, the practice at the time was that when a bed became available, the then Nurse in charge would have made contact with the applicant next on the list or their next of kin.

I suggested to the HSE that it seemed that, from the evidence available, the hardship experienced and the debts incurred by the family of Mrs Kennedy, arose out of the delay in the processing of the application for a public bed. The HSE acknowledged that a debt had been incurred by Mr Kennedy, but that it was not in a position to make a refund to him.

1.6 Redress

In 2000 my Office published guidelines for the provision of redress (see Appendix 1) when public bodies make mistakes in their dealings with members of the public. The guidelines stated that

"Members of the public are entitled to proper, fair, impartial and expeditious treatment by public bodies. Where there is a shortfall in these standards, and the fault lies with the public body, it should remedy the shortfall through the provision of redress. The general rule of thumb should be to put the person back into the position he/she would have been in if the public body had acted properly. "

The HSE, in its published Complaints Management Policy (see Appendix 2), underlined its stance in respect of the provision of redress as follows:

"The HSE is committed to considering fair and balanced redress for unfair or wrong decisions or actions taken, where it is established that a measurable loss, detriment or disadvantage was suffered or sustained by the claimant personally."

On the basis of the evidence available to me arising from the examination of the complaint, and the commitments it has given in respect of the provision of redress, I advised the HSE that in my view it should consider remedying the adverse affect which had occurred. I added that this should be done by way of a financial payment to Mr Kennedy to cover the hardship suffered and debts incurred by him in paying the fees to St Margaret's Nursing Home and Highfield Nursing Home from July 1995, when the application for a public bed was first made, until the date of his mother's death in October 2004.

In its response the HSE said that, having again examined the files, it concurred that Mr Kennedy was entitled to redress based on the expenditure incurred on the cost of private care (see Appendix 3*). The HSE indicated that it would proceed to arrange to have the total refund applicable calculated and keep me informed of developments.

* Appendix 3 indicates incorrectly that Mrs Kennedy was admitted to long stay on 14 April 2006. She was actually admitted on 14 April 2004.

Some months passed, but no information was provided to me about the payment. In April 2007, I was advised by the HSE that Mr J J O'Kane, Manager of Older People Services had met with Mr Kennedy in relation to the refund due to him. The HSE said that as the two nursing homes involved had since closed down, there had been delays in calculating the total refund due.

In June 2007, Mr Kennedy rang my Office. He said that he had recent contact with the officer processing the payment and that a figure of €25,000 had been assessed in respect of his mother's care in one of the nursing homes. In July 2007, Mr Kennedy again contacted my Office to say that he had been advised by Mr O'Kane that the arrears had been calculated, but that the HSE's legal advisors had instructed that payment should not be made, as it would set a precedent. In August 2007, the HSE West confirmed that it would not be proceeding with the proposed payment (see Appendix 4).

1.7 HSE Consumer Affairs Division

Following further contacts with the HSE West, I decided to refer the matter to the HSE National Director of Consumer Affairs, Ms Mary Culliton. In a letter dated 3 October 2007, my Office advised Ms Culliton that after a series of protracted communications with the HSE West, extending over a period of three and a half years, I was extremely disappointed with the HSE West's decision in this case, particularly given the manner in which it handled Mrs Kennedy's application for publicly-funded care. I again pointed out that this had resulted in Mrs Kennedy's son incurring significant debts in paying fees to St Margaret's Nursing Home and Highfield Nursing Home from July 1995. I said that before I would decide on whether to proceed with an investigation of the complaint, in accordance with Section 4(2) of the Ombudsman Act, 1980, I had chosen to refer the case to the Consumer Affairs Office, to enable the National Director to undertake a review of the actual handling of this complaint and the decision not to proceed to refund the costs incurred by Mr Kennedy. I asked Ms Culliton to let me have the results of the outcome of her review before the end of October 2007.

Following extended correspondence on the matter, my Office finally received a response in May 2008. The response indicated that the HSE West was prepared to offer an *ex-gratia* payment of €15,000 on a 'without prejudice' basis to Mr Kennedy (see Appendix 5).

My staff contacted Mr Kennedy about the HSE's offer. He was unhappy with the offer as he said that he had paid €13,000 alone in respect of the two years his mother spent in Highfield Nursing Home and that the previous amount mentioned by the HSE in their contacts with him, ie €25,000, was only in respect of the time she spent in St Margaret's Nursing Home. He mentioned that if his mother had been given a public bed, she would have also been entitled to a refund of nursing home charges under the Health Repayment Scheme. (Under this scheme people who had, or were eligible for, a medical card, but who paid public long-stay charges up until 9 December 2004, received refunds of the charges made. In responding to the draft investigation report the HSE West advised me that a payment of €3675.73 under the Health Repayment Scheme had been made to Mr Kennedy. This payment covered the period during which Mrs Kennedy was in public long stay care in Merlin Park Hospital during the period June 2004 to September 2004.

My staff responded to the HSE West, in July 2008, stating that, having further reviewed all of the evidence available in this case, including the reports submitted by the HSE, it was considered that Mrs Kennedy's 1995 application for a private bed was not processed in accordance with the procedures in place at the time and in a timely manner. This resulted in a situation where she had to avail of private nursing home care for over eight years before she was eventually awarded a public bed. In addition, the HSE, by virtue of its contact with Mr Kennedy to establish how much had been paid in respect of his mother's care, had created an expectation that the indicative level of redress in this instance would be in the region of €25,000. The HSE was asked for its further observations on the matter.

In its reply received in August 2008, the HSE West indicated that it proposed to withdraw the offer of €15,000 made to the complainant (see Apperdx 6). In light of the response received, I decided to commence an investigation of this complaint under Section 4 of the Ombudsman Act 1980.

Chapter 2

2. Statement of Complaint

On 9 January 2009, I sent the HSE a letter informing it of my intention to carry out an investigation of this complaint. Enclosed with this letter was a copy of the Statement of Complaint which stated as follows:

"Mrs Ann Kennedy had been a resident in St Margaret's nursing home from 1986 until it closed down in December 2002. She had been in receipt of a subvention from the then Western Health Board from mid 1994. In March 1995, the Board advised the complainant that St Margaret's nursing home had been refused registration under the Health (Nursing Homes) Act 1990 and that it was not allowed to pay subvention in a non-registered home.

In March 1995, the Board advised her son that his mother would have to transfer to a registered home and that the Board would assist him in finding alternative accommodation. His GP applied to the Health Board for a public long term care bed on his mother's behalf and was advised that she was on a waiting list. No decision is recorded as having been made with regard to her admission but, in May 1996, the Board wrote to Mr Kennedy granting a subvention in respect of his mother's continued residency in St Margaret's. Mrs Kennedy remained in St Margaret's until it closed down in December 2002 when she transferred to the A&E Department of University College Hospital, Galway. After that, she was transferred to another private nursing home, Highfield Nursing Home, by the WHB. She died in September 2004 in Merlin Park Hospital.

The complainant contends that he was adversely affected financially by the failure of the Board to process the application made on behalf of his mother for public nursing home care, as he had to make up the shortfall in the nursing home fees while his mother was resident in St Margaret's and Highfield private nursing home. "

Chapter 3

3. HSE's response

In an email dated 19 February 2009, I received the following response to the Statement of Complaint from the HSE:

"Report regarding Ombudsman Investigation

Name: Mr. Thomas Kennedy (and his late Mother, Mrs. Ann Kennedy).

***Background:** This case was originally concerned with a complaint concerning the decision of the Western Health Board to refuse an enhanced Nursing Home Subvention to Mrs. Ann Kennedy. This issue was reviewed and arrears due were refunded to Mr. Kennedy. The Western Health Board paid the statutory subvention in respect of Mrs. Kennedy's maintenance in both St. Theresa's and Highfield Nursing Homes.*

***Ombudsman's Investigation:** The Ombudsman's Office, in examining the records forwarded by the Western Health Board, noted from the file that the issue of a "public bed" for Mrs. Kennedy was raised in February 1996; however, over eight years elapsed before Mrs. Kennedy was finally admitted to public care. The Ombudsman's Office asked for an explanation as to why it took eight years before Mrs. Kennedy received a "public bed".*

***HSE Reply:** In written reply dated the 10th February 2005, the HSE advised that an application for long stay care was made on the 23rd June 1995 by the Liaison Public Health Nurse to the Director of Nursing in a public care facility. However, on checking with the public care facility, there are no records of the late Mrs. Kennedy's application. The HSE also advised that a referral was received on the 6th January 2003 from Mrs. Kennedy's G.P. for long stay care which was discussed by the Geriatric Admissions Committee on the 8th January 2003. Mrs. Kennedy was referred to the Consultant Geriatrician and was assessed in his clinic on the 7th February 2003. She was put on a waiting list for admission to Unit 5/6 in Merlin Park Hospital and was admitted to Unit 5 on the 14th April 2004.*

***Ombudsman's position:** The Ombudsman's Office formed the opinion that Mrs. Kennedy's application for long stay care took an inordinate amount of time to process, particularly as another applicant who was wait-listed for a bed in the public care facility prior to Mrs. Kennedy's application, and had applied on the 8th May 1995, was awarded a bed on the 17th July 1995. The Ombudsman's Office concluded that, from the evidence available, Mr. Kennedy's considerable debt was incurred because of the delay in the processing of the application for a public bed in respect of his mother by the HSE.*

Local Health Manager's (LHM's) response: In written reply dated the 12th January 2007, the LHM concurred that Mr. Kennedy is entitled to redress for costs incurred and that the cost can be reasonably based on expenditure incurred by Mr. Kennedy on the cost of private care, less subvention applicable at that time, from the 17th July 1995 until Mrs. Kennedy was admitted to long stay care on the 14th April 2006*. The LHM also said that arrangements would be made to have the total refund applicable calculated.

*This date is incorrect. It should read 14 April 2004

GM's letter: Mr. Brian Murphy, the General Manager, Primary, Community and Continuing Care (PCCC) Mayo wrote to the Office of the Ombudsman on the 11th April 2007 to advise that there were delays in calculating the total refund to Mr. Kennedy and that he would be in further contact to inform of the total refund due and the date Mr. Kennedy will be in receipt of same.

Older People's Services Manager's position: On the 13th August 2007 the Manager, Older People's Services, Galway PCCC, on the basis of legal advice received, wrote to the Office of the Ombudsman informing the Office that he did not recommend that the proposal put forward by the Ombudsman's Office should be adopted on the basis that there are many other cases throughout the country of patients who made their own arrangements to obtain care and maintenance in Private Nursing Homes because there were no public beds available in any of the long stay facilities or nursing units operated within the public health care system. He was also of the view that in time, the Courts may hand down a judgement to the effect that such patients, whom the Courts may deem to have been deprived of exercising their statutory entitlements to a bed in a public facility, should now be reimbursed for the full or part of the cost of their care in a Private Nursing Home. He added that he was not aware that any such judgement or ruling had at that time been handed down by the High Court and until such time as the HSE is required by the terms of such a judgement or by a change in the law to fund the cost of private nursing home care in situations where a public bed is not available, he does not recommend or advise that the proposal put forward by the Ombudsman's Office should be adopted.

Assessment of case: The LHM advised **that the system for the allocation of beds in public long stay facilities** in operation at the time (mid 90's) **and now**, was that applications were assessed on the basis of a points rating system. This took into account the medical, social and financial circumstances of the applicant. Vacancies were **not** allocated in chronological order based on date of application. Vacant public beds were very scarce and whoever got a bed would have had to be awarded top priority on the admissions list at the particular time.

There is an assumption running through the correspondence that Mrs. Kennedy should have got a bed shortly after making an application, as another applicant, who had applied on the 8th May 1995, was awarded a bed on the 17th July 1995.

There is also an assumption that beds were allocated in chronological order based on date of application. It is possible that the other applicant's circumstances and

dependency needs may have been much greater and thus attracted a higher prioritisation on the admissions ratings scale. It was also a fact that the priority list for the next available bed vacancy was constantly changing as more acute clients were assessed, resulting in earlier applicants moving down the priority list. Admission was on the basis of assessed need. This would support the reason why Mrs. Kennedy's application was still being considered in March 1996.

Legal advice was sought after the HSE had agreed that Mr. Kennedy was entitled to redress. The legal advice was provided in the knowledge that similar type cases are before the Courts and judgements have not yet been handed down. To pay for the private Nursing Home for costs in this case would set a precedent for other such cases. Even though the legal advice was sought after the HSE agreed that Mr. Kennedy was entitled to redress, it should still be taken into consideration. However, on the other hand, it did seem to be an inordinate amount of time for the late Mrs. Kennedy to be waiting for admission to a public nursing home bed.

Ombudsman's View: *The Ombudsman was of the view that as Mrs. Kennedy's application was not processed in a timely manner and in accordance with procedures at the time that Mr. Kennedy had an expectation of redress in the amount of €25,000.*

HSE's Decisions: *It is impossible to conclude exactly what occurred due to the lack of records available but taking a holistic view of all the circumstances, the HSE engaged with the Ombudsman's Office putting forward an offer of an ex-gratia payment of €15,000 to Mr. Kennedy as a token of goodwill for the possible failure to process the original application. This sum would also go towards providing redress for the debt incurred by Mr. Kennedy and was being offered **in full and final settlement and without prejudice.***

The original decision to make a payment was made in good faith. However, Mr. Kennedy refused this offer and in the context of the reasoning set out above in the LHM's letter of the 15th August 2008, the offer was withdrawn.

*Priya Prendergast
Local Health Manager
Galway PCCC"*

Included with the response was (i) a note concerning the amount owing in respect of St Margaret's and Highfield Nursing Homes (the HSE West later advised me that this document, which it had supplied to me, contained typographical errors and incorrect calculations) and (ii) a memo from the Legal Advisor HSE West, Mr Brendan Naughton, BL to Mr JJ O'Kane, Manager Older People Services, Galway PCCC, HSE West, as follows:

(i) Calculations – Ann Kennedy

Date	N/H	Pension	Sub	Total	Shortfall
09/05/94	160	77.50	63.80	141.30	18.70 x 13 wks = 243.10
09/08/94	165	77.50	63.80	141.30	23.70 x 43 wks = 1019.10
01/06/95	165	79.30	63.80	143.10	21.90 x 18 wks = 394.20
05/10/95	205	79.30	63.80	143.10	61.90 x 35 wks = 2165.50
01/06/96	231	81.85	81.65	163.50	67.50 x 52 wks = 3510
01/06/97	231	85.65	81.65	167.30	63.70 x 52 wks = 3312.40
01/06/98	231	92	81.65	173.65	57.35 x 13 wks = 745.55
01/09/98	258	92	81.65	173.65	84.35 x 39 wks = 3289.65
01/06/99	258	99.62	88.10	187.72	70.28 x 4 wks = 281.12
01/07/99	275	99.62	88.10	187.72	87.28 x 43 wks = 3753.04
01/05/00	275	108.50	88.10	196.60	78.40 x 4 wks = 1096.60
01/08/00	293	108.50	88.10	196.60	96.40 x 35 wks = 3374
06/04/01	293	121.20	133.30	254.50	56.50 x 21 wks = 1186.50
02/09/01	311	134	133.30	254.50	56.50 x 18 wks = 1017
04/01/02	311	134	135.86	269.86	41.14 x 22 wks = 905.08
01/06/02	350	134	135.86	269.86	80.14 x 29 wks = 2324.06

The above equates to €28,594.20. Less € 3,584.92 already received. Amount owing €25,032.98 for St. Teresa's. Plus €13,861.46 owing for Corandulla (Highfield Nursing Home). **Total = €38,894.44**

(ii)

Memo

To Mr. JJ O Kane, Manager Older People Services, Galway PCCC,
HSE West, Ballybane, Galway
From: Mr. Brendan Naughton, Legal Advisor, HSE West
RE: Ombudsman Complaint – Mr. P Kennedy, Galway.
Ref: BN/CC **Date:** 02nd July 2007

I wish to refer to our recent telephone conversation and to the contents of letter dated 3rd October 2006 you received from Mr. M Brophy, Senior Investigator, Office of the Ombudsman suggesting that the HSE should consider making redress, by way of a financial payment, to Mr. Kennedy “to cover the debts incurred by him in paying the fees to St. Theresa’s Nursing Home and Highfield Nursing Home from July 1995 until the date his mother’s death. I note the basis on which this recommendation is put forward. There are inevitably many other cases not alone in HSE West but throughout the country of patients who made their own arrangements to obtain care and maintenance in Private Nursing Homes on account of the fact that there was no public bed available for them in any of the long stay facilities or nursing units operated within the public healthcare system. It may well be in time that the Courts will hand down a judgment to the effect that such patients who were deprived of exercising their statutory entitlements to a bed in a public facility should now be reimbursed for the full cost of their care in the Private Nursing Home. I am not aware that any such judgment or ruling has been yet handed down by the High Court. Until such time as the HSE is required by the terms of such a judgment or by a change in the law to fund the cost of private nursing home care in situations where a public bed is not available, I do not recommend or advise that the proposal put forward by the Ombudsman’ Office should be adopted.

The statutory position in relation to patients entering Private Nursing Home accommodation is that subject to eligibility being established, they are entitled to the benefit of a subvention from the HSE under the terms of the Nursing Homes Act. I am not clear as to whether the late Ann Kennedy received such a subvention. In my view however the payment of a subvention represents the extent of the HSE’s liability to such patients under current law. I believe that it would set a very undesirable precedent for the HSE to pay for the Private Nursing Home costs in this case as it would inevitably open the flood gates and result in an avalanche of such claims. I believe that we should hold the line until the law is changed either through a Court judgment or new legislation or until clear instructions are received in the matter from the Department of Health and Children.

I trust that these observations will be of assistance to you.

Signed: _____
Brendan Naughton, B.L.,
Legal Advisor

Chapter 4

4. The Investigation

(Note: Because of the nature of the complaint received and the fact that the issues raised relate to events which occurred more than ten years ago, the focus of the investigation centred, to a great extent, on the documentary evidence available in the HSE's papers dealing with Mrs Kennedy's nursing home subvention application).

4.1 The application for a public bed

At the time Mr Kennedy initially approached my Office in February 2004, his mother had been in nursing home care for nearly 18 years. She had been first admitted to St Margaret's Nursing Home in July 1986. The nursing home fees in respect of the care provided by St Margaret's during the first eight years were funded by Mrs Kennedy's Contributory Widows Pension, her savings and contributions made by her son.

With the passage of time Mr Kennedy found it increasingly difficult to keep up payments of the nursing home fees. In May 1994, he applied to the Western Health Board for a subvention on behalf of his mother. In November 1994, Mr Kennedy was notified that a subvention of £50.25 (€63.37) per week had been awarded in respect of his mother. At the time, the nursing home charges were in the region of £127.00 (€ 159.00) per week.

In February 1995, St Margaret's Nursing Home was refused registration by the Western Health Board. (It had been refused registration because it did not comply with the then new Nursing Home Regulations. The proprietor of the nursing home had failed to carry out structural alterations to the premises to meet the new requirements and reduce the number of residents. Following a prosecution, in July 1995, for continuing to operate an unregistered nursing home, the proprietor complied with the requirements to reduce capacity and St Margaret's Nursing Home was again registered with effect from 5 October 1995). In March 1995, Mr Kennedy was advised by Mr Hugh Farrell, Community Care Administrator, Western Health Board that the Board was not allowed pay a subvention in a non-registered nursing home. He was further advised that in order to continue his mother's entitlement to the subvention, she would have to

move to a registered nursing home. The Western Health Board indicated to Mr Kennedy that the Board *'will assist you in relation to finding alternative accommodation'*. It was suggested to Mr Kennedy that he should contact Dr K Chambers, A/Coordinator of Services for the Elderly or Ms Marie Regan, Liaison Public Health Nurse for the Elderly in this regard.

The Board wrote to Mr Kennedy again in April 1995, noting that his mother had not yet transferred to a registered nursing home and advising that the Board would not be in a position to pay subvention to St Margaret's with effect from 30 April 1995. Mr Kennedy was told that in order to ensure future subvention payments, he should arrange a transfer for his mother from St Margaret's by 8 May 1995 at the latest. He was again advised to contact Dr Chambers or Nurse Regan.

The payment of the subvention in respect of Mrs Kennedy's care in St Margaret's ceased on 1 May 1995.

In May 1995, Dr Chambers noted that a call had been received from Mr Kennedy in which he indicated that he could not afford any other nursing home. Mr Kennedy was advised that he could request his mother's GP to apply for long stay care and send the application to the nursing home section in the Board.

On 10 May 1995, Mrs Kennedy's GP, applied to the Board seeking long term care in a public facility. Enquiries from her son over the following months indicated that she was on a waiting list for a public bed. In August 1995, Mr Hugh Farrell, Community Care Administrator, wrote to Mr Kennedy noting that he understood that an application for long stay care had been made to the public care facility. In February 2005, responding to a request from the Ombudsman's Office for additional information on the complaint, Mr Frank Murphy, Regional Manager, Mental Health and Older People's Services HSE West, acknowledged that an application for long stay care was made on 23 June 1995 by the Liaison Public Health Nurse to the Director of Nursing in the public care facility

In November 1995, Mr Hugh Farrell wrote to Mr Kennedy advising that the nursing home subvention had been restored to his mother with effect from 5 October 1995.

In February 1996, Mr Kennedy wrote to his local public representative, seeking her assistance. He explained that he was having great difficulty keeping up payments to St Margaret's. He added that the accountant in St Margaret's had been in contact with him and had expressed his alarm at the mounting debt on his mother's account. Mr Kennedy advised his public representative that a public bed had been applied for on his mother's behalf and that she was on a waiting list. On 21 February 1996, his local Councillor wrote to the CEO of the Western Health Board asking for help for the Kennedy family in paying the nursing home fees or to have Mrs Kennedy admitted to a state nursing home.

4.2 The Councillor's representations

The Councillor's letter of 21 February 1996, to the Board's CEO, Mr Eamon Hannan, was acknowledged on 28 March 1996 on behalf of the CEO. The acknowledgement letter advised that the case was being reviewed both medically and financially by the Nursing Home Assessment Team and that the public representative would be advised of the outcome in due course. The letter was copied to Mr Hugh Farrell for attention.

From the file dealing with the case received from the HSE West, there is a note dated 2 April 1996 to another person requesting that the position with regard to admission to the public care facility be checked out. A second note requested a second official to check with Marie Regan about the public care facility. The file also contained a 'post-it' note written by another official indicating that the case was to be discussed "at next assessment meeting once financial assessment is completed". The file contains no further reference to the public care request.

4.3 What would have happened if the application had been processed to a conclusion?

An application was made for nursing home care in the public facility, on Mrs Kennedy's behalf, on 23 June 1995. An application was made on behalf of another patient on 26 June 1995 and she was allocated a bed on 17 July 1995. My Office was advised that, at the time, when a vacancy for a public bed arose, the Nurse in Charge would routinely have made contact with the applicant next on the list or their next-of-kin. In this context it might be expected that, subject to all things

being equal, the application on behalf of Mrs Kennedy would have resulted in the allocation of a public bed on a date not later than that on which a bed was allocated to the patient on who's behalf the application of 26 June 1995 had been made.

Responding to the Statement of Complaint, the HSE west advised me that, contrary to what my Office had been told earlier, the system for the allocation of beds in public long stay facilities in operation in the mid 90's was that applications were assessed on the basis of a points rating system. This took into account the medical, social and financial circumstances of the applicant. The HSE West pointed out that vacancies were not allocated in chronological order based on date of application. Vacant public beds were very scarce and whoever got a bed would have had to be awarded top priority on the admissions list at the particular time.

The HSE has suggested that there is an assumption in correspondence from my Office that Mrs. Kennedy should have got a bed shortly after making an application, as another applicant for a public bed, was awarded a bed on 17 July 1995. It pointed out that it is possible that the other applicant's circumstances and dependency needs may have been much greater and thus attracted a higher prioritisation on the admission's ratings scale. The HSE said that it was also a fact that the priority list for the next available bed was constantly changing as more acute clients were assessed, resulting in earlier applicants moving down the priority list. Admission was on the basis of assessed need.

4.4 The legal advice received by the HSE

In the legal advice received by the HSE, (see Chapter 3), the key argument posited in favour of not making a financial payment to Mr Kennedy, is that there were many cases throughout the country of patients who made their own arrangements to obtain care and maintenance in private nursing homes, because there were no public beds available in any of the long stay facilities. In this regard, the HSE West's legal advisor contended that the courts might, in time, hand down a judgement that such patients were deprived of their statutory entitlements and should be reimbursed some or all of the cost of their care, but as of yet no such judgement had yet been handed down. Accordingly, it would not be appropriate for the HSE to make a compensatory payment in the present case.

Chapter 5

5. Analysis

5. 1. The application for a public bed

It is clear from the evidence available that, during the period 1994 - 1996, Mr Kennedy had serious concerns about the payment of his mother's nursing home fees. A weekly subvention of £ 50.25 (€63.37) had been approved with effect from 9 May 1994. However Mr Kennedy was told in March 1995, that, as St Margaret's had been de-registered by the Board, he would have to find an alternative nursing home for his mother if he wished continue to avail of the subvention.

In light of his difficulties, which he conveyed to the Board, in obtaining alternative private nursing home accommodation, the application for public care was the only real alternative. The application was made and the Board undertook to process the application, but there is no evidence that any further action was taken in the consideration of the public care application until the public representative wrote to the CEO on 21 February 1996, nine months after the original application had been made.

5. 2 The Councillor's representations

Given the financial circumstances in which Mr Kennedy found himself and the representations made on his mother's behalf by both her GP and local Councillor, the handling of Mrs Kennedy's application for public care is very difficult to understand. It would seem that although steps were taken to consider the application, they were never followed up and were eventually abandoned. Neither Mr Kennedy, his mother's GP nor the local Councillor were informed of the outcome of the assessment and in all likelihood the application was overlooked or lost.

5. 3. What would have happened if the application had been processed to a conclusion?

The HSE originally stated that, in 1995, public long term care beds were routinely allocated by the Nurse In Charge based on who was next on the list for a bed. This was later contradicted by the HSE when it stated that beds in public long stay facilities were allocated on the basis of a points rating system, based on patient needs. I am unable to clarify what arrangement for the

allocation of beds existed at that time, but, in any event, if we assume that a rating system did exist at the time, it would appear to me that Mrs Kennedy would have scored quite high.

I do not have any information with regard to the circumstances of the patient, who is recorded as having sought a public bed on 26 June 1995 and having received one on 17 July 1995, which might indicate her level of priority versus Mrs Kennedy. From information supplied to me by the HSE, I understand that at the relevant time the public facility contained a mix of agitated beds (ie beds for the care and treatment of patients suffering from dementia) and standard beds and that the patient in question was admitted to a standard bed. As I do not have the necessary or relevant information, I cannot say whether that patient's level of priority or dependency differed from that of Mrs Kennedy, which was deemed to be 'high' (1994) and 'maximum' (1996).

With regard to Mrs Kennedy's social circumstances, I consider it significant that, at the relevant time, she had been in receipt of nursing home care since 1986 (nine years). The indications were that she was likely to continue to have an on-going need for such care when her nursing home was de-registered by the HSE West. Despite no subvention being paid, Mrs Kennedy remained in this nursing home which the HSE had identified as structurally deficient, having too many residents and which had been the subject of a prosecution. When all of these factors are considered alongside the severe financial difficulties which her son had brought to the attention to the HSE West, it would suggest to me that there was an increased level of urgency and a high level of priority for the provision of a public long term care bed for Mrs Kennedy.

Notwithstanding the above, I acknowledge that there is no conclusive evidence that Mrs Kennedy would have been allocated a public long term care bed before the other patient. However, I am satisfied that, on the balance of probabilities, one would have been allocated to her in or around the same time or not long afterwards. This conclusion is supported by the HSE West itself. In her letter to my Office dated 13 April 2006, the Local Health Manager, Ms Priya Prendergast made the following comment:

"However, even in the absence of formal records there was contact made with Senior Nursing Staff at" (the public facility) "to ascertain what process would routinely have been

undertaken at that time. It was indicated that the then Nurse in Charge would have made contact with the applicant next on the list or their next of kin."

As we have established, no further contact was made with the complainant regarding Mrs Kennedy's assessment for a bed at that time.

Finally on this particular issue, the HSE appear to have acknowledged that Mrs Kennedy would have received a bed, had her application been processed properly at the time, in a letter to my Office dated 12 January 2007. Ms Prendergast (Local Health Manager), responded to a comment from my Senior Investigator that, in light of the HSE failure to provide Mrs Kennedy with long stay care in the public care facility, there were good grounds to suggest that the HSE should consider making a financial payment to Mr Kennedy to cover the debts incurred by him in paying the fees to St Margaret's Nursing Home and Highfield Nursing Home. In her response Ms Prendergast said:

" I have again examined Mrs Kennedy's file and concur that Mr Kennedy is entitled to redress for costs incurred. This cost can be reasonably based on a case relating to a bed on the 17th July 1995. The application for Ms Ann Kennedy was submitted on the 23rd June 1995 but for reasons outlined in previous correspondence was not processed. Therefore, the cost can be reasonably based on expenditure incurred by Mr Kennedy on the cost of private care, less subvention applicable at that time, from the 17th July 1995 until Mrs Kennedy was admitted to long stay care on the 14th April 2006."

As I have mentioned earlier, there is a lack of clarity as to what arrangement was in place for the allocation of public beds at the time in question. Conflicting views on the matter have been proffered by the HSE West. Assuming that a form of points rating system was in place at the time in question, it seems to me that there are doubts about its overall integrity and effectiveness. My sense is that, from the evidence of my investigation of this complaint, if such a system was in place it was more an *ad hoc* arrangement rather than a robust and formal process.

In this regard my view has always been that, where points rating systems are used for services which are based on a scheme of priorities, the qualities underlying their proper operation and probity should be openness and transparency, as set out in my Office's *Guide to Standards of Best Practice for Public Servants* (See Appendix 7).

5.4 The legal advice received by the HSE

In the advice given to the HSE, Mr Brendan Naughton, BL, noted that there were

"inevitably many other cases not alone in HSE West but throughout the country of patients who made their own arrangements to obtain care and maintenance in Private Nursing Homes on account of the fact that there was no public bed available for them in any of the long stay facilities or nursing units operated within the public healthcare system. It may well be in time that the Courts will hand down a judgment to the effect that such patients who were deprived of exercising their statutory entitlements to a bed in a public facility should now be reimbursed for the full cost of their care in the Private Nursing Home."

He added that he was not aware that any such judgment or ruling has been yet handed down by the High Court. He said that until such time as the HSE is required by the terms of such a judgment or by a change in the law to fund the cost of private nursing home care in situations where a public bed is not available, he could not recommend or advise that the proposal, put forward by my Office, i.e redress by way of a financial payment, should be adopted.

I am aware that hundreds of medical card holders, who opted for private nursing home care because insufficient public beds were available, are suing the State. They are doing so because of what they perceive to be the State's failure to provide adequate public nursing home care. A number of these cases have been settled out of court and many more are pending.

However, it is important to note that, in the present case, the complainant is not claiming that his mother was forced into private nursing home care against her will. Rather, in light of his mother's changing financial and social circumstances, after almost 10 years in a private nursing home, he made a specific request to the WHB for a public bed on behalf of his mother and there

is no evidence that the request was processed. This led to the family experiencing substantial financial adverse affect in making up the balance between the subvention and the private nursing home costs.

The HSE has acknowledged that there was an inordinate delay in processing the public care bed application and that redress was warranted. However it has chosen to be guided by the legal advice not to recommend any such payment.

It is my view that in all cases where public bodies must make decisions or determinations on the merits of issues for which they have responsibility, they should be guided by their own informed analysis of all the evidence available. Legal advice in this context is extremely important and in my view should be given considerable weighting in any evaluation of the arguments for and against a particular course of action. However, I consider that it is equally important to remember that any legal advice given, in a situation like this, should be an aid to the decision-making process and not specifically the sole determinant. I believe that any reasonable assessment of the legal advice given to the HSE, in this particular case, would conclude that it was not appropriate to the individual circumstances of this case.

Chapter 6

6. Findings

- I find that Mr Kennedy was adversely affected by the failure of the Western Health Board (HSE West) to process the application made on behalf of his mother for a public long term care bed.
- I find that the failure to process the application made on behalf of Mr Kennedy's mother for a public long term care bed was the result of carelessness on the part of the Western Health Board (HSE West).
- I find that the delays involved in corresponding with Mr Kennedy and his representatives and in changing its stance on a number of occasions in relation to whether it would make a refund to him, represents an undesirable administrative practice and was otherwise contrary to fair or sound administration on the part of the Western Health Board (HSE West).
- I find that, on the evidence available to me, there was, at the very least, confusion with regard to arrangements for dealing with the allocation of beds for long stay care at the time in question. Where a points rating system is used for the allocation of limited services, it should be open and transparent and consistent and effective in its application.

Chapter 7

7. Recommendations

I recommend that

(i) the HSE West, in recognition of the costs incurred by the Kennedy family for the payment of private nursing home charges, makes a payment of €30,000 to the Kennedy family;

(ii) the HSE West, in acknowledgement of the payment which would have been made to the family under the Health Repayment Scheme if a public bed had been allocated following the original application in 1995, makes an additional payment of €25,000 to the Kennedy family;

(iii) the HSE West makes an additional payment to the Kennedy family of €1,500, in recognition of the hardship endured by them in having to do without a sum of over €38,000 between 1996 and 2004 when this amount was used to pay for Mrs Kennedy's private nursing home costs in St Margaret's and Highfield nursing homes

(iv) when reviewing or designing schemes of priority in relation to the services it provides, the HSE West ensure that they are open, transparent and operated in a manner which is consistent with good administration.

Emily O'Reilly

Ombudsman

September 2010

Appendix 1

The Ombudsman's Guide to the provision of redress

The Ombudsman's Guide to the provision of redress when public bodies make mistakes in their dealings with members of the public

Redress - Getting it wrong and putting it right

Where a person has been wronged by a public body, that body should provide appropriate redress. This leaflet gives very broad proposals on the provision of redress to help public servants develop a consistent approach towards remedies.

Redress and public administration

Public bodies deliver a vast range of services and benefits to the public. Even where people are not entitled to a particular service or benefit, they are entitled to be told the reasons why they do not qualify and be informed of alternative services, where possible. Where they may be entitled to the service or benefit but a delay in the decision cannot be avoided, they should be told when the decision is likely to be made. In cases of need, other possibilities for short-term relief may have to be examined. Public service providers must always bear in mind that members of the public usually do not have the option of taking their business elsewhere. Members of the public are entitled to proper, fair, impartial and expeditious treatment by public bodies. Where there is a shortfall in these standards, and the fault lies with the public body, it should remedy the shortfall through the provision of redress. The general rule of thumb should be to put the person back into the position he/she would have been in if the public body had acted properly.

Apologies and explanations

When it turns out that the service or benefit has been wrongly denied or delayed, the public body should always give a detailed explanation and/or apology. Explanations and apologies should include the following:

- the reasons why the public body got it wrong;
- an apology for any hurt, inconvenience or hardship caused;
- an acceptance of responsibility for the fault which has occurred;
- an undertaking to make good any loss which may have resulted;
- an acceptance that, where time limits apply, any undue delay on the part of the public body will be discounted where possible.

When should compensation be paid?

In some cases an action (including an inaction) of a public body wrongly taken may affect a person in a manner which can easily be quantified and payment of compensation may be appropriate. Compensation may be considered for:

- **Financial Loss** - where there is a specific amount of money denied to a person as a result of the action, compensation should make good the specific loss which has occurred.
- **Loss of purchasing power** - where refunds or payments of benefits have been delayed or withheld over an unduly extended period of time as a result of an error, misinterpretation, oversight or other similar action on the part of a public body.
- **Loss of a non-monetary benefit or service** - where costs are incurred by a person in securing alternative services for non-monetary benefits or services normally provided by public bodies, e.g. school transport, housing repairs, refuse and water supply, hospital services, facilities for people with disabilities etc. and where these are initially denied or delayed and subsequently restored or granted.
- **Loss of opportunity** - where the action of a public body has the effect of preventing an eligible person from taking advantage of special arrangements or participating in a particular scheme or has resulted in the loss of an opportunity to exercise a right of appeal.
- **Costs incurred** - where a person complains or appeals he/she may need to seek professional advice, for example, from a solicitor, accountant, architect or engineer in order to vindicate his or her position. If, at the end of this process, the decision of the body is reversed or varied, the question of refunding costs incurred in obtaining professional advice should form part of the public body's redress proposals. The key consideration should be whether the costs arose as a result of an unreasonable attitude by the public body.

• **Time and trouble** - where writing letters, making telephone calls, carrying out interviews, research and getting legal or other professional advice are integral parts of the complaint/appeal process, these and other related activities involve time and trouble on the part of the complainant. Where it becomes clear that the complainant had to go to unusual lengths or suffered distress in making his/her case, compensation in the form of payments for time and trouble reasonably expended in pursuing the complaint, and associated vouched costs, should form part of the redress proposals.

Keeping it Right

An effective complaints system which offers a range of timely and appropriate remedies will save the public body time and money in the long run. It will enhance the quality of service to its clients, it will have a positive effect on staff morale and improve the body's relations with the public. It will also provide useful feedback to the body and enable it to review procedures and systems which may be giving rise to complaints.

Appendix 2

HSE Complaints Management Policy

Extract from Policy Document dealing with redress

"What can the HSE do if a complaint is upheld?"

The HSE is committed to considering fair and balanced redress for unfair or wrong decisions or actions taken, where it is established that a measurable loss, detriment or disadvantage was suffered or sustained by the claimant personally."

Appendix 3

Letter from HSE West to the Office of the Ombudsman agreeing entitlement to redress for costs incurred.

From the office of the General Manager
Primary, Community & Continuing
Care
Health Service Executive West
25 Newcastle Road
Galway
Seirbhisí Priomhúla, Pobail agus Cúram Leanúnach
Feidhmeannacht na Seirbhíse Sláinte an Iarthair
25 Bóthar an Chaisleáin Nua
Gaillimh
(091) 546312
(091) 546213

12th January 2007

Mr Michael Brophy,
Senior Investigator,
Office of the Ombudsman,
18 Lower Leeson Street,
Dublin 2.

Re: Mrs Ann Kennedy, Highfield Nursing Home, Co Galway

Dear Mr Brophy,

I refer to previous correspondence in relation to the above named and I wish at the outset to apologise for the delay in responding to your letter.

I have again examined Mrs Kennedy's file and concur that Mr Kennedy is entitled to redress for costs incurred. This cost can be reasonably based on a case relating to the other patient who applied for a public bed on the 26th June 1995 and was allocated a bed on the 17th July 1995. The application of Mrs Ann Kennedy was submitted on the 23rd June 1995 but for reasons outlined in previous correspondence was not processed. Therefore, the cost can be reasonably based on expenditure incurred by Mr Kennedy on the cost of private care, less subvention applicable at that time, from the 17th July 1995 until Mrs Kennedy was admitted to long stay care on the 14th April 2006.

I will arrange to have the total refund applicable calculated and may need to liaise directly with Mr Kennedy in this regard. I will ensure that you are copied with all correspondence regarding this claim.

Yours sincerely,

Priya Prendergast
Local Health Manager
Galway PCCC

Appendix 4

Letter from HSE West to the Office of the Ombudsman withdrawing offer to make a financial payment to the complainant.

**From the Office of the Manger,
Services for Older People,
Galway PCCC,
La Nua Day Hospital,
Ballybane,
Galway.
(091) 741765
(091) 74177719**

13th August, 2007

Mr. Paul Mallen,
Office of the Ombudsman,
18 Lower Leeson Street,
Dublin 2.

Re: Mrs Ann Kennedy of Highfield Nursing Home, Co. Galway

Dear Mr. Mallen,

I am writing with reference to my previous correspondence dated 12th June 2007 with regard to the complaint received from Mr. Thomas Kennedy, Galway, regarding his late mothers nursing home fees.

I wish to refer to the contents of letter dated 3rd October 2006 received from Mr. M Brophy, Senior Investigator, Office of the Ombudsman, suggesting that the HSE should consider making redress by way of a financial payment, to Mr. Kennedy "to cover the debts incurred by him in paying the fees to St. Margaret's Nursing Home and Highfield Nursing Home from July 1995 until the date of his mother's death. I note the basis on which this recommendation is put forward. There are inevitably many other cases, not alone in HSE West, but throughout the country, of patients who made their own arrangements to obtain care and maintenance in Private Nursing Homes on account of the fact that there may have been at the time no public bed available for them in any, of the long stay facilities or nursing units operated within the public healthcare system.

It may well be in time that the Courts will hand down a judgment to the effect that such patients whom they may deem to have been deprived of exercising their statutory entitlements to a bed in a public facility should now be reimbursed for the full or part of the cost of their care in the Private Nursing Home. However, I am not aware that any such judgment or ruling has been yet handed down by the High Court and until such time as the HSE is required by the terms of such a judgment or by a change in the law to fund the cost of private nursing home care in situations

where a public bed is not available, I do not recommend or advise that the proposal put forward by the Ombudsman's Office should be adopted.

The statutory position in relation to patients entering Private Nursing Home accommodation is that subject to eligibility being established, they are entitled to the benefit of a subvention from the HSE under the terms of the Nursing Homes Act. The payment of a subvention represents the extent of the HSE's liability to such patients under current law. I believe that it would set a most undesirable precedent for the HSE to pay for the Private Nursing Home costs in this case and until the law is changed either through a Court judgment or new legislation or until clear instructions are received in the matter from the Department of Health and Children, I do not recommend, as outlined earlier, that the proposal put forward by the Ombudsman's Office should be adopted.

I trust this clarifies the matter but please do not hesitate to contact me if I can be of further assistance to you.

Yours sincerely,

**J J O'Kane,
Manager,
Older Peoples Services,
Galway PCCC.**

Cc. Alex MacLean, A/General Manager.

Appendix 5

Letter from Consumer Affairs Department HSE West to the Office of the Ombudsman making a revised offer to make an ex gratia payment to the complainant.

Consumer Affairs Department
Roinn Gnóthaí Tomhaltóirí,
HSE West,
FSS Iarthair,
Merlin Park University Hospital,
Páirc Mheirlinne,
Galway.
Gaillimh.
(091) 775751
(091) 775858

8th May 2008

Mr. Matt Merrigan,
A/ Senior Investigator,
Office of the Ombudsman,
18 Lower Leeson Street,

RE: Mr. Thomas Kennedy, Galway

Dear Mr. Merrigan,

I wish to inform you that I was asked to review this case by Ms. Mary Culliton, Head of Consumer Affairs. I wish to apologise for the delay in responding to your correspondence.

I have examined the records available and I would like to clarify the position in relation to the allocation of beds in public long stay facilities. The system for the allocation of beds was that applications were assessed on the basis of a points rating system. This took into account the medical, social and financial circumstances of the applicant. When a bed became vacant, the allocation of that bed was not in chronological order based on the date of application. Vacant public beds were very scarce and whoever got a bed would have to be awarded top priority on the admission list at that particular time. This resulted in new applicants with circumstances and dependency needs being rated higher and given priority over those who may have been on the waiting list for a longer period but had a lower priority rating.

It was practice that the priority list for the next available bed vacancy was constantly changing as more acute clients were assessed, resulting in earlier applicants moving down the priority list. This practice would explain why Mrs. Kennedy's application was delayed. However, it is impossible to conclude exactly what occurred, due to the lack of records available

I also wish to inform you that the HSE has other cases of patients who made their own arrangements to obtain care and maintenance in Private Nursing Homes on account of the fact that there was no public bed available for them in the long stay facilities of the public health care system. Some of these cases are currently going through the Courts system and the HSE is not in a position to repay the full costs of Private Nursing Home fees as it may impact on those cases.

It is recognised that it is impossible to conclude exactly what occurred due to the lack of records available. It is accepted that Ms. Kennedy's application did take an inordinate amount of time to process. However, I refer to Mr. Michael Brophy's initial proposal asking the HSE to consider a financial payment to Mr. Thomas Kennedy to cover the debts incurred by him. The HSE is prepared to offer an ex-gratia payment of € 15,000 on a without prejudice basis as it will discharge the debt due to Highfield Nursing Home.

This offer is made on a full and final basis for all claims arising against the HSE with regard to the Nursing Home provisions for the late Ms. Kennedy and is made without any admission of liability on behalf of the HSE.

This offer is made to enable Mr. Kennedy to discharge debts arising from the care of his late mother, Mrs. Ann Kennedy to Highfield Nursing Home. Therefore, if the offer contained within this letter is acceptable to Mr. Kennedy, we will require, before payment of any funds, that Mr. Kennedy sign an affidavit confirming that he has made any payments sought by Highfield Nursing Home, or alternatively he will use the ex-gratia payment in discharge of these debts. The affidavit will also provide an indemnity from Mr. Kennedy to the HSE regarding any claims that might arise against the HSE in the estate of the late Ann Kennedy.

If this offer is acceptable to Mr. Kennedy please let me know and I will provide Mr. Kennedy with the form of affidavit required by the HSE.

I look forward to hearing from you,

Yours Sincerely,
Liam Quirke
Consumer Affairs Area Officer

Appendix 6

Letter from the Local Health Office, HSE West, to the Office of the Ombudsman withdrawing the revised offer to make an ex gratia payment to the complainant.

Office of the Local Health Manager
Galway PCCC
HSE West
Merlin Park
Galway
(091) 775 553
(091) 751 339

PP/jf

Mr. Matt Merrigan,
Office of the Ombudsman,
18 Lower Leeson Street,
Dublin 2

15th August 2008

Dear Mr. Merrigan,

I refer to previous correspondence in the Kennedy case and in particular to the issue of proposed redress in respect of waiting time to access a long stay bed in a public nursing home facility.

When I first examined this case, it appeared that there may be an entitlement to redress based on the length of time the patient spent on the waiting list and also because another application for a long stay bed had been processed. In this regard an offer was made of C15,000.

However, during subsequent review of the case I was advised that

(a) There were many cases of this nature throughout the country of patients who made their own arrangements to obtain care and maintenance in private nursing homes. Some of these cases are before the Courts and until such time as the HSE is required by a judgement of the High Court or a change in the law to fund the cost of private nursing home care in situations where a public bed is not available, we are not in a position to make payments of this nature.

(b) The case review also highlighted that the system for the allocation of beds in public long stay facilities, then as now, was to assess applications on the basis of a points rating system based on patient needs. This system takes into account the medical, social and financial circumstances of the applicant. Given the relative scarcity of public beds, the patients who are admitted have been awarded top priority on the admissions list at any particular time. The assumption that Mrs. Kennedy should have been allocated a bed shortly after another applicant is, therefore, not valid in that beds are and were not allocated in chronological order based on date of application.

c)It is possible in this respect, that the other applicant's circumstances and dependency needs may have been much greater and thus attracted a higher prioritization on the admissions rating scale. It was also a fact, at the time, that the priority list for the next available bed vacancy was constantly changing as more acutely dependent clients were assessed, resulting in earlier applicants moving down the priority list.

The original decision to make a payment was made in good faith. However, I understand that Mr. Kennedy has refused this offer and in the context of the reasoning set out above, I now withdraw the offer.

Yours sincerely,

Priya Prendergast
Local Health
Office,
Galway

Appendix 7

The Ombudsman's Guide to Standards of Best Practice for Public Servants

The Ombudsman's Guide to Standards of Best Practice for Public Servants

Public bodies should strive for the highest standards of administration in their dealings with people. Public servants should see it as their duty to deal with people **properly, fairly, openly and impartially**. The following checklist, although not exhaustive, is a guide to standards of best practice for public servants. As Ombudsman, I hope public servants will find it useful in their efforts to provide a better service to their clients.

Dealing "properly" with people means dealing with them –

- **promptly**, without undue delay; and in compliance with published time limits;
- **correctly**, in compliance with the law or other rules governing clients' entitlements and published quality standards;
- **sensitively** and by giving reasonable assistance, having regard to people's age, to their capacity to understand often complex rules, to any disability they may have and to their feelings, privacy and convenience;
- **helpfully**, by simplifying procedures, forms and information on entitlements and services, maintaining proper records, and providing clear and exact details on time limits or conditions which might result in disqualification;
- **carefully**, where more than one public body is concerned, by ensuring proper and effective communications between the bodies to prevent a person's needs being overlooked and to avoid a situation where a person is "caught in the middle";
- **courteously**, including communicating in Irish where it is clear a person wishes to do so. This can also mean communicating with a person in their national language, if from another jurisdiction.

- **responsibly**, by not adopting an adversarial approach as a matter of course where there may be a fear of litigation and by being prepared to explain why an adverse decision may have been given.

Dealing "fairly" with people means -

- **treating** people in similar circumstances in like manner;
- **accepting** that rules and regulations, while important in ensuring fairness, should not be applied so rigidly or inflexibly as to create inequity;
- **avoiding penalties** which are out of proportion to what is necessary to ensure compliance with the rules;
- **being prepared** to review rules and procedures and change them if necessary;
- **giving adequate notice** before changing rules in a way which adversely affects a person's entitlements;
- **having an internal review** system so that adverse decisions can be looked at again and reviewed by someone not involved in the first decision;
- **informing** people as to how they can appeal, co-operating fully in any such appeal and being open to proposals for redress, including apologies, explanations and payment of compensation;
- **making appropriate redress**, where possible, which puts the person back into the position he/she would have been in if the public body had acted properly in the first place.
- **adopting a policy** for dealing with the small number of people who act in a vexatious manner or in bad faith, which strikes a balance between the interests of the public body, its staff and the person concerned.

Dealing "openly" with people means -

- **putting people in contact** with the officials of the public body with responsibility for dealing with them or their representatives and, if appropriate, referring them to alternative sources of information.
- **making available** and keeping up to date, comprehensive information on the rules and practices which govern public schemes and programmes;

- **giving people** full information on the reasons for a decision which adversely affects them including details of any findings of fact made in the course of the decision;
- **ensuring** people know what information is available, where to get it and know of their right to access it in accordance with the Freedom of Information Act, 1997 and otherwise;
- **assisting people**, where necessary, to prepare their requests for access to information;
- **providing** accessible public offices and using information and communications technologies to ensure maximum access and choice in service delivery.

Finally, dealing "impartially" with people means -

- **making decisions** based on what is relevant in the rules and law and ignoring what is irrelevant;
- **avoiding bias** because of a person's gender, marital status, family status, sexual orientation, religious belief, age, disability, race, membership of the Travelling Community, language, attitude or reputation or because of who they are or who they know;
- **ensuring**, where a service is based on a scheme of priorities, that the scheme is open and transparent;
- **being careful** that one's prejudices are not factors in a decision;
- **declining any involvement** with a decision where one has a conflict of interests, a potential conflict of interests, or where there may be a perceived conflict of interests.