# Nursing Home Subventions

**An Investigation by the Ombudsman of Complaints Regarding Payment of Nursing Home Subventions By Health Boards**

A Report to the Dáil and Seanad
in accordance with
Section 6(7) of the
Ombudsman Act, 1980

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# Contents

# Introduction

This report deals with the payment by health boards of subsidies or subventions to patients in private nursing homes as provided for in the Health (Nursing Homes) Act, 1990 (the 1990 Act). The majority of these patients are elderly people and, by definition, unable to care for themselves or be cared for at home by their families. The report is a case study in public administration which examines the operation of the subvention scheme by the health boards; it deals also with the role of the Department of Health and Children (the Department) in making regulations (as provided for in the 1990 Act) and in overseeing the introduction and operation of the scheme nationally. The report considers the nature of the relationship between the Department and the Oireachtas on the one hand, and that between the Department and the health boards, on the other. The manner in which the Department interacted with the Office of the Ombudsman is another area considered. In the concluding chapter of the report, the Ombudsman moves from a consideration of the particular case, represented by the nursing home subvention scheme, to wider and more fundamental considerations which have to do with the relationship between the executive and the parliament, on the one hand, and with the relationships within the executive, on the other.

This report arises from an investigation conducted by the Ombudsman in accordance with Section 4(2) of the Ombudsman Act, 1980. Where, following an investigation, the Ombudsman proposes to make comment or criticism which is adverse to a public body, he is obliged to allow that public body an opportunity "to make representations to him" in relation to the proposed findings or criticism.[1] In this case, and in line with standard Ombudsman practice, the Department was provided with a draft of the Ombudsman's report and allowed an opportunity to comment on it. In finalising the report, the Ombudsman has had regard to the representations made by the Department. In those instances where the Ombudsman has not found it possible to accept a point of significance raised by the Department, its view is nevertheless conveyed either in the body of this report or in a footnote.

Under the terms of Section 1(2) of the Ombudsman Act, 1980 references "to any Department of State include reference to the Minister of the Government having charge of that Department of State ...". Except where the context otherwise requires, all references in this report to the "Department" include reference to the Minister having charge of the Department for the time being.

## Why This Report?

The genesis of this report lies in the steady flow of subvention-related complaints (more than 150)[2] received by the Ombudsman since the commencement of the scheme in September 1993. Prior to 1993, the Ombudsman had already been receiving complaints arising from inadequacies in the provision of long-stay, nursing home type care for elderly patients. The new arrangements promised in the 1990 Act, and which eventually came into effect in September 1993, were meant to represent a radical improvement. Ironically, the new scheme has given rise to more complaints to the Ombudsman

than had been the case previously. In the main, these complaints have been about the refusal of subventions, or the payment of reduced rates of subvention, because of the operation of the means assessment. Details of some of these complaints are set out in the body of this present report as well as in some of the marginal inserts accompanying the report.

In the normal course, complaints received by the Ombudsman typically relate to the actions of individual officials (in the exercise of their official functions) or to positions adopted by individual public bodies. The nature and pattern of the nursing home subvention complaints received since 1993 reflect not just the actions of individual officials or public bodies; rather they reflect the corporate response of virtually an entire sector i.e. that of the Department along with most of the health boards.

The Ombudsman encountered several difficulties in his efforts to deal with the complaints received. These difficulties were reflected in delays, on the part both of the health boards and of the Department[3], in dealing with issues raised by the Ombudsman and in the consistent re-iteration of explanations and arguments which were, in his view, without merit. Only in January 1999 were the two most significant of the subvention problems eventually resolved. As the Ombudsman now knows from documentation seen in the course of preparing this present report, it took the Department more than five years to acknowledge and address defects **of which it was aware prior to September 1993**. These defects, and the Department's approach to dealing with them and with concerns raised by the Ombudsman, are described in detail later in this report.

While the complaints received are described in this report, its primary focus is on wider, more fundamental issues which have to do with good administration, and indeed with good government, generally. These issues are discussed in Chapter Eight. As his examination of the various complaints proceeded, it became evident to the Ombudsman that the failures in responsiveness and accountability which he identified were not due simply to maladministration (although there was maladministration) but arose because of more fundamental defects in the relationship

- between the Houses of the Oireachtas and the Executive (that is, Ministers acting either individually or collectively in conjunction with the civil service)
- within the Executive and
- between the Executive and operating agencies.

Some fundamental aspects of the subvention scheme, for example whether children should financially support their elderly parents, were put in place without any input by, or any real discussion in, the Houses of the Oireachtas.

The issue of whether adult sons and daughters should, in fact, contribute towards the nursing home costs of elderly parents is one which recurs

> "The fundamental functions of the Ombudsman ... may be summarised as:
>
> • protecting the rights of individuals in their dealings with those entrusted with the exercise of public power;
>
> • providing redress where it is found that these rights have been infringed;
>
> • promoting high standards of public administration generally;
>
> • acting independently in support of Parliamentary control of the Executive in the interests of fair and sound administration."
>
> **Annual Report of the Ombudsman, 1999**

"I received a complaint from an old age pensioner who said that he did not have enough money to meet his own needs after he had contributed to the maintenance charges for his wife in a nursing home. The family income consisted of Contributory Old Age Pension of £95.80 per week. In 1988, the pensioner's wife had a stroke which necessitated her moving into a nursing home. The cost of the nursing home was £130 per week. The Health Board ... agreed to pay £65 per week towards the costs.The balance was paid by the pensioner. This meant that he had £30.80 left out of his pension to look after himself and to provide for his wife's personal needs."

**Annual Report of the Ombudsman, 1990**

throughout this report. Accordingly, the Ombudsman wishes to make it clear from the outset that this is an issue on which he is entirely neutral. He sees this as a question of public policy which should have been dealt with at the appropriate political level, i.e. by the Oireachtas.

## What the Report Shows

What the report establishes in relation to the administration of the nursing home subvention scheme is a cause of real concern. Amongst the doubtful practices identified were:

- the making of regulations containing provisions which are likely to have been invalid (*ultra vires* the Act) including at least one instance in which the likely invalidity probably had been known in advance;
- the inclusion in a regulation of a provision which was almost immediately negatived by advice issued by the Department;
- the unreasonable prolongation of discussions with the Ombudsman's Office in relation to practices which, it appears, were known from the outset to be invalid or incorrect and
- the failure of some of the health boards to alter a practice even where the legal advice was that the practice was incorrect and where the Ombudsman had expressed the same opinion.

* * *

This is a report for the Houses of the Oireachtas which, in 1989/1990, devoted considerable time and effort to the enactment of the Health (Nursing Homes) Act. This Act involves far more than the payment of subventions to patients - it deals with the registration of nursing homes, the establishment of minimum levels of care and facilities as well as with an inspection system to ensure on-going compliance with registration standards - and the Ombudsman recognises that these provisions represent solid progress for which the Department must be commended. But in a very real way, it is the payment of subventions which impacts most directly on patients and their families. Standards mean little to the patient who cannot afford a place in the first instance. This report is intended to afford the Oireachtas an insight, in this specific instance, into how the law which it passed actually translated into action on the ground. The report draws heavily on the files of the Department, on health board case files, on Ombudsman complaint files as well as on media coverage of, and other commentaries on, the operation of the subvention scheme.

In observing the operation of the nursing home subvention scheme over the past seven years, the Ombudsman has always appreciated that the Department and the health boards have been operating in a very difficult environment. Securing adequate financial resources has always been a problem - for example, the maximum levels of subvention have not been increased since 1993, despite

significant inflation in nursing home fees over that seven year period. (General inflation over the period April 1993 - April 2000 runs at 18%[4]; inflation in nursing home fees over the same period is likely to be at least twice the general level.) The Ombudsman appreciates that, in the real world of health service funding, competition for resources is a permanent reality. In particular, the Ombudsman is conscious of the difficulties facing the Department in securing adequate funding for the subvention scheme[5]. Sometimes Departments have to be inventive in order to make progress. In this instance, unfortunately, invention went beyond the bounds of what, from the Ombudsman's perspective, is either reasonable or acceptable.

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**Notes**

(1) This is provided for in Section 6(6) of the Ombudsman Act, 1980:

> "The Ombudsman shall not make a finding or criticism adverse to a person in a statement, recommendation or report under subsection (1), (3) or (5) of this section without having afforded to the person an opportunity to consider the finding or criticism and to make representations in relation to it to him."

In accordance with this requirement, the Department was sent a draft of the entire report other than the concluding chapter.

(2) In commenting on a draft of this report, the Department made the following observations in relation to the figure of 150 complaints:

> "... firstly, this has to be seen in the context of almost 35,000 applications for subvention made under the scheme from its introduction to end 1999; secondly, the number of complaints which came to the attention of the Department was only a tiny fraction of 150, the vast majority of complaints related to individual cases and were dealt with at health board level."

(3) In commenting on a draft of this report, the Department said that these delays "were primarily due to the low staffing levels and heavy workload in the relevant Division of the Department."

(4) Source: Central Statistics Office (communication to Office of Ombudsman).

(5) The Department points out:

> "It has not been possible to increase the [subvention] rates over the period, as priority has had to be given to meeting the rising costs of the scheme; expenditure on the scheme has increased significantly from £4m in 1993 to over £38m in 2000. The main reasons for this are the increase in the number of subventions being paid, the movement of older people into higher dependency levels thus entitling them to higher rates of subvention and, in more recent times, the effect of the abolition of the regulation which allowed family circumstances to be taken into account in determining the amount of subvention payable in individual cases."

In January 2001 the Department informed the Ombudsman that the subvention rates are to be increased with effect from 1 April 2001. The new maximum weekly rates will be £90, £120 and £150 in place of the current maximum rates of £70, £95 and £120.

"Well perhaps Marian I could just explain briefly what the purpose of the new legislation is .. It does two things, to simplify it - it introduces a new, formalised system of registration of all nursing homes.. The second thing that the new legislation does is that it replaces some very unsatisfactory arrangements for paying nursing home subventions at the moment and we are introducing a uniform system throughout the country, so that if a person, usually a dependent elderly person, needs nursing home care they can apply to a health board, the health board will assess whether they really do need nursing home care, if perhaps they can be supported at home, it's up to the health board to make the arrangements to support them at home. But if they do need the nursing home care, and they can't afford to pay for it, the new system provides a method of subvention payments to be paid towards their care in nursing homes and the person can choose the nursing home that they want to go into."

**Transcript of Interview with Department of Health Official on RTÉ Radio One, *Liveline*, 6 September 1993**

# Background and Overview

"In this Part '**in-patient services**' means institutional services provided for people while maintained in a hospital, convalescent home or home for persons suffering from physical or mental disability or in accommodation ancillary thereto."

**Section 51 of Health Act, 1970**

The Health (Nursing Homes) Act, 1990 deals with private nursing homes and with subventions for people who opt to become patients in such private homes. With one exception, the Act does not in any way diminish the existing rights of the public to avail of services under the Health Acts generally. The exception is that the Act repeals a provision (Section 54) of the Health Act, 1970. Section 54 allowed for the payment of subventions to patients who, instead of availing of in-patient services in a public hospital or home, opted instead for treatment in an approved private institution. On the face of it, the effect of the Act in this context is to replace one system of nursing home subsidy with another. The reality is much more complicated and, to understand the significance of the Act, a brief outline of entitlement to hospital and nursing home services for public patients, under the Health Acts, is necessary.

## Entitlement under Health Acts

The legal position in relation to hospital in-patient services, both in 1990 and at present, was and is relatively straightforward. Everybody resident in the State is eligible to be provided with in-patient services, where necessary, by the relevant health board.[1] The service may be provided directly by the health board in one of its own hospitals, or in another publicly funded hospital (e.g. the so-called "voluntary" hospitals), or by way of a contracting out arrangement between the health board and a private institution. Such latter arrangements are provided for at Section 26 of the Health Act, 1970 and are required to be in accordance with such conditions as the Minister for Health and Children may specify.

Where the patient is covered by a medical card, the service is free of charge. Where the patient does not have a medical card there are, potentially, two categories of charges which may arise. The **first** is a fixed daily charge (currently £25) which applies to the first 10 days of the service and amounts to a maximum charge of £250 in any 12 month period. The **second** category applies only to patients who do not have a medical card and who do not have dependants; after 30 days hospitalisation such patients may become subject to charges which will continue for the remainder of their hospital stay. This second charge is not expressed as a fixed daily or weekly amount. Rather it is related to the income of the patient and expressed in terms of allowing the patient to retain a prescribed amount per week after the charge has been imposed. Unusually, no upper limit for such charges has been set. The prescribed retention figure is currently £2.50 per week, an amount which has not been increased since 1976. In practice, health boards tend to allow such patients retain a higher amount, frequently up to £12 or £15 per week. But when the patient has accumulated savings of a few thousand pounds (sometimes referred to as "burial money") the amount of income allowed to the patient is generally reduced to nearer the statutory amount of £2.50. What is significant here is that this second category of charge is determined by reference to the income of the patient only; there is no statutory provision to have regard to the income of other members of the family.

In the preceding paragraphs the term "in-patient services" has been used as this

is the wording used in the Health Acts. The definition of "in-patient services" as provided at Section 51 of the Health Act, 1970 is given on the previous page. As well as covering acute hospital stays, the term self-evidently includes wider categories of service such as the long-stay care of elderly or disabled people. To this extent, the term "in-patient services" includes the type of service generally made available to elderly people in nursing homes. Put another way, any elderly person who needs long-stay nursing home type care - which typically includes nursing care, supervision, assistance with daily activities such as feeding and dressing and which may also include services such as physiotherapy or occupational therapy - is eligible to have this service provided by the relevant health board as an aspect of in-patient services. The question of what constitutes in-patient services was clarified in a 1976 Supreme Court judgement (see opposite) in a case in which the Eastern Health Board had argued, unsuccessfully, that the services provided to an elderly, long-stay patient at St. Brigid's Home, Crooksling did not amount to in-patient services.

One important feature of entitlement to in-patient services was the option, under Section 54 of the Health Act, 1970, to forego one's entitlement to the service in a public hospital and to avail instead of the same service "in any (private) hospital or home approved of by the Minister for the purposes of this section". This provision - repealed by the Act of 1990 - allowed patients to choose between receiving in-patient services either under the public system or from an approved private hospital or home. In the latter case, the patient would receive a subvention towards (but not the full costs of) the fees of the private institution. It is worth mentioning that the Voluntary Health Insurance Board does not cover long-term nursing care.

## Actual Situation Regarding In-Patient Services

In the period prior to September 1993, when the Act of 1990 was commenced, the actual situation regarding the provision of in-patient services was quite different from the legal situation described above. More particularly, the position in much of the country regarding long-stay or nursing home type care fell considerably short of the legal entitlement. Most of the health boards, and the Eastern and Southern Health Boards in particular, did not have sufficient long-stay beds of their own. They would have needed to either "buy in" beds from the private nursing homes (under Section 26) or allow their long-stay patients to opt for care in approved private homes in return for a subvention (under Section 54). In the event, health boards made quite limited use of Section 26 and the option of Section 54 was very considerably curtailed, as explained below. The consequence was that in the period prior to September 1993 there was something of a crisis in the provision of in-patient services for long-stay patients in much of Ireland.

### Section 54

At a meeting with Ombudsman staff in December 1992 the Department gave a candid account of difficulties being created by Section 54. In 1979 entitlement

"The [applicant] in this case gets more than shelter and maintenance. She gets the nursing care requisite for a patient of her age and state of health in a geriatric institution. The evidence does not go in detail into the regimen of treatment provided for her, but it is clear that it involves nursing ...supervision, activation, and other paramedical services which are given in an institutional setting and which are above and beyond the range of mere 'shelter and maintenance'.

In other words, what she is getting is 'in-patient' services which she requires because she is a geriatric patient."

**Henchy J., In the Matter of Maud McInerney, a Ward of Court, Supreme Court, 20 December 1976**

"Let there be no doubt about it, this group of clients [elderly people in need of long term care] are amongst the most vulnerable to confront any Social Worker. ...Advising people about the Subvention Form and, more recently, writing begging letters looking for extra money to meet the ever widening gap in what Private Care costs and what people can afford, has become the daily grind of many Social Workers."

**Anne O'Loughlin, *Irish Social Worker*, Summer/Autumn 1992**

to in-patient services was extended to the entire population. Until then approximately 85% of the population had such entitlement. This meant, provided they chose an approved private hospital or home, everybody would now be able to avail of a Section 54 subvention. In particular, the group to which in-patient services was extended in 1979 (the "high income" group) included those most likely to use private services. The Department saw this as an unintended consequence of the extension of entitlement to the full population. Rather than deal with this by asking the Oireachtas to amend the Health Acts, the Department chose a different strategy. Section 54 approval for private hospitals was withdrawn which meant that patients were deprived of the option envisaged by Section 54. Existing approvals for private nursing homes, totalling 87 homes in 1980, were not withdrawn. (In this context, the reference to approved "private" homes includes "voluntary" homes typically operated by religious bodies.) But from 1980 onwards[2], no additional private nursing homes or hospitals were given approval under Section 54. As the private nursing home sector expanded, the proportion of "approved" homes declined. By 1988, for example, only one-third of all known nursing homes were approved under Section 54.

For reasons given later in this report, it appears to the Ombudsman that the Department was aware that this strategy in relation to Section 54 was likely to be legally unsound. The Minister for Health subsequently acknowledged (see Minister's Dáil statement of 9 November 1989 in page 13) that the scope of Section 54 had been "curbed ... due to constraints on the financial resources in the health services ...". By the early 1990s there was considerable pressure being brought to bear by the private nursing home sector and a number of High Court actions were threatened. The Department's legal advice at the time was that its position was extremely weak and that a well thought out court challenge would be likely to succeed. Nevertheless, this is the situation which persisted until Section 54 was eventually repealed in September 1993.[3]

**Consequences**

This effective "freezing" of the number of Section 54 approved nursing home beds had significant consequences. Perhaps the main consequence was that, in a context where demand for long-stay beds was growing (the numbers of elderly people, and more particularly of those over 85 years, was growing significantly) and where there was no significant increase in the number of publicly funded beds, many elderly patients in need of long-stay care were effectively left to fend for themselves. This conclusion is supported by the experience at that time of Ombudsman staff both in dealing with complaints and in contacts from families which did not result in formal complaints. This conclusion would have been widely shared by social workers, as well as by the staff of information and advice services, dealing with the elderly. What typically happened in such cases was that an elderly patient in immediate need of long-stay care would be placed on a waiting list for a public bed; if there was no Section 54 approved bed available, then the only option was to avail of a place in a private home without

a subvention of any kind. Indeed, even those with a subvention would still have to meet a substantial balance of fees. When Section 54 was repealed in 1993, the level of subvention under the Section amounted to £52 per week while private nursing home fees were typically in the range £150 - £200 per week.

Another consequence of the "freezing" of Section 54 approvals was that there was a geographical imbalance in the distribution of subvented beds. In the North Eastern Health Board area, for example, not even one private home had been approved by 1980; and this remained the position right up to 1993. Other health board areas fared almost as badly - the North-Western Health Board had only three approved homes and the Southern Health Board had only five approved homes.

Because of a particularly acute shortage of public long-stay beds in its area, the Eastern Health Board (EHB) introduced a limited system of non-statutory subventions for certain patients in private nursing homes. This involved a subvention which amounted to £40 per week in 1993. It was payable only in certain cases and was subject to a means test which took account not only of the income of the patient but also of the financial circumstances of the wider family. If this arrangement had applied only in those cases where the patient had specifically opted for private care, then it might have been in some way acceptable even though lacking in statutory authority. In reality, this arrangement applied largely to people who did not choose private care but had it forced upon them because of the non-availability of a public bed. In these circumstances, such an arrangement inevitably provoked deep dissatisfaction among elderly patients and their families.

To add to this already confusing situation, the EHB adopted its own unique approach to Section 54 approved nursing home places. For most of the period 1980 - 1993 the EHB limited the payment of Section 54 nursing home subventions to a maximum of six weeks per patient. Thereafter, a nursing home patient would only receive a subvention on the basis of the non-statutory, means-tested arrangement described above. There was no legal basis for this curtailment of the duration of the Section 54 subvention nor for its replacement with a lower value, means-tested, subvention. In the event, this EHB practice survived for more than a decade without legal challenge.

## Complaints to the Ombudsman

The Ombudsman had always received a trickle of complaints regarding long-stay care of the elderly; but from about 1990 onwards the volume of such complaints increased, particularly in relation to the EHB. In his 1992 Annual Report the Ombudsman reported on these complaints in considerable detail. The Ombudsman pointed out that the service being sought by these patients was "in-patient services", something which the health boards had a statutory obligation to provide. The Ombudsman noted that the health boards appeared to be directing such patients and their families towards private care without in any way acknowledging the boards' own responsibilities in the area.

> "Since the extension of eligibility for public hospital treatment to the entire population in 1979, all persons are entitled to a subsidy under Section 54, regardless of income. On the other hand, the refusal of the Minister to approve any new homes is unfair to elderly people who require a subsidy but who are unable to find a place in an approved home. There are, for example, no approved private nursing homes in the North Eastern Health Board."
>
> ***The Years Ahead... A Policy for the Elderly*** **(Report of the Working Party on Services for the Elderly), 1988**

"Technically, every person entering an approved nursing home is eligible for subvention since the extension of eligibility for care in public hospitals to the whole population in 1979. Under section 54 of the Health Act, 1970 a health board may pay a subvention to a person in a home approved by the Minister for Health. The scope of section 54 has been curbed as no new homes have been approved since 1980. Unfortunately, due to constraints on the financial resources in the health services it was not possible to approve new homes."

**Minister for Health in Dáil Debates 9 November 1989 - Second Stage of Health (Nursing Homes) Bill 1989.**

In the course of establishing the legal and practical positions in relation to these complaints, Ombudsman staff had a number of detailed contacts with the Department during the period 1991 - 1993. In the course of these contacts, the Department accepted that the position in relation to the public provision of long-stay care for the elderly - as required by the Health Acts - was deeply unsatisfactory. The Department acknowledged that funding of this sector had been inadequate for years and that the situation was now critical. The Department was hopeful that the 1990 Act, when commenced, would improve this situation significantly.

The Department explained that the 1990 Act would establish a new system of subventing patients in private nursing homes which would apply in a uniform manner across the entire country, based on standard criteria and paying standard levels of subvention. Above all, the new system would apply to all registered nursing homes and not just to the one third (or so) of homes which happened to have been approved under the old Section 54 arrangement. It was difficult, however, to share the Department's optimism in this regard given that the 1990 Act, in so far as it provides for subventions, deals with patients who opt for private nursing home care. The Act, which undoubtedly represents major progress as regards registration and standards of care in private nursing homes, has no apparent impact on the issue of meeting elderly patients' statutory entitlements to publicly funded nursing home care.

It appeared, in the light of these discussions with the Ombudsman's Office, that the Department had been under a misapprehension in its preparation of the Health (Nursing Homes) Bill. It appears that, in drafting the Bill, the Department had not understood that nursing home type care equated to "in-patient services" under the Health Acts. In effect, the Department appears not to have realised that any person in need of nursing home type care already had a statutory right to be provided with this service by the health board. It is hard to credit that the Department could have been unaware of such a fundamental feature of its own legislation. The definition of "in-patient services" is reasonably straightforward and, in any event, its precise meaning had been clearly interpreted in a Supreme Court judgement of 1976. (See also Dáil Debates extract opposite.)

The Department indicated that it would need to have Section 51 of the Health Act, 1970, which defines "in-patient services", amended so as to exclude nursing home care from the entitlement. Pending an amendment of the Act by the Oireachtas, the Department said it would look seriously at the possibility of amending Section 51 by way of regulation. Ombudsman staff pointed out that any such attempt to restrict an existing entitlement by way of a regulation would most likely be invalid (*ultra vires* the Act).

In the event, the Department did not seek to amend Section 51; rather, it introduced a new charging regime in those cases in which a health board opted to provide in-patient services by placing a patient in a private nursing home

registered under the 1990 Act. This was provided for in the Health (In-Patient Services) Regulations, 1993 (SI No. 224 of 1993) which, in effect, seem to place a public patient, entitled to in-patient services, in the same financial position as a person who has opted consciously for private nursing home care, i.e. the same subvention is payable to a person placed by a health board in a private home as is paid to a person who has chosen to forego Health Act entitlement and enter a private nursing home. (The question of the validity of this regulation is discussed in some detail in Chapter Seven.) Section 51 itself remains unamended to this day.

It is against this rather complex background, then, that the subvention arrangements provided for in the 1990 Act fall to be considered.

"The legislation governing nursing homes introduced a separate scheme of entitlement to nursing home care and subventions. There seems to be a conflict between the existing entitlement to in-patient services and the fact that nursing home services are subject to assessment and additional means testing."

***The Law and Older People*, National Council on Ageing and Older People (1998)**

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**Notes**

(1) In commenting on a draft of this report, the Department disputed the view that the Health Acts confer a legally enforceable entitlement to hospital in-patient services. The Department argues that the Health Act, 1970 distinguishes between the terms "eligibility" and "entitlement" and that the former, in the context of the Health Act, provides for eligible people to avail of services. However, as the Health Act does not define the manner in which, or the extent to which, in-patient services should be provided, the Department argues that the extent of any health board's legal obligation in this regard is unclear. The Ombudsman does not accept that there is any doubt as to the obligation on health boards to provide in-patient services for eligible people. This is clearly established by Section 52(1) of the Health Act, 1970. The Ombudsman is not aware that the issue of entitlement to in-patient services has been considered by the Courts. However, the issue of entitlement to services under Section 62 of the Health Act, 1970 - which provides for medical and midwifery care for mothers - has been considered by the Supreme Court in *Spruyt and Wates v Southern Health Board* (1988). The structure of Section 62 is virtually identical with Section 52. What was at issue in *Spruyt* was whether the Southern Health Board should provide domiciliary midwifery services through a general practitioner or through a midwife. That there was a statutory obligation under Section 62 to provide the service was not in dispute and this obligation was restated by the Court.

(2) In commenting on a draft of this report, the Department noted:

> "... the policy decision taken in 1980 must be seen in the context of the severe financial restrictions imposed on the health services in the 1980s. When account is taken of inflation, demographic factors and developments in medical technology, health spending was about 8.5% lower in 1986 than in 1981 and funding in 1986 was about £120m short of the level necessary to maintain services at 1981 levels. "

(3) In commenting on this aspect of the draft report, the Department repeated its view that the law is unclear as to whether people have a statutory right to be provided by a health board with nursing home type care. For the Ombudsman's views on this, see Note (1) above.

# Subvention Arrangements in Practice

"In September a new scheme of grants towards nursing home fees will be introduced ... A principle behind the scheme is that those people who are helping to pay an elderly person's nursing home fees at present should be 'encouraged' to continue doing so.

So these people are being caught twice. First, they are paying fees which should, in many cases, be paid by the health board but which aren't ... Then when the new scheme comes in, they will be 'encouraged' - probably through being given fewer rights to help than will be given to new applicants - to continue paying what many of them shouldn't have been paying to begin with."

**Pádraig O'Morain, *The Irish Times* 3 August 1993**

## The Subvention Regulations

The 1990 Act was commenced on 1 September 1993. The commencement was accompanied by the making of a series of regulations under the Act, one of which - the Nursing Homes (Subvention) Regulations, 1993 (SI No. 227 of 1993) - is the main focus of this report. These regulations are referred to throughout the rest of this report as "the Regulations".

In its general thrust, the new subvention regime had much to recommend it. Subventions, to be paid by the health boards, would be based on an assessment of the degree of dependency of the patient with three levels of dependency ("medium", "high" and "maximum") being defined. Different upper levels of subvention would apply to the three levels of dependency; a limit of £70 per week for medium dependency, £95 per week for high dependency and £120 per week for maximum dependency. In this way, the higher costs associated with higher levels of dependency would be recognised. Subventions would be payable in all registered nursing homes and not just, as previously, in the one third or so approved homes. Whereas the payment of a subvention would be subject to a means test (standardised for all health boards), the Regulations contained a provision which seemed to ensure that all subvention recipients would be able to retain some pocket money for their personal needs. (This was to be achieved by excluding from the means test an amount equivalent to one fifth of the prevailing rate of the Non-Contributory Old Age Pension viz. £11.84 per week in 1993.) Furthermore, the Regulations permitted the payment of higher than standard levels of subvention where the patient's assessed means amounted to less than the Non-Contributory Old Age Pension.

Because all nursing homes were now required to be registered, to be subject to inspection and to meet minimum standards, patients and their families could be assured that the level of care would be satisfactory. The Regulations provided for regular reviews of the assessment of dependency thus ensuring that a person whose degree of dependency increased would become entitled to the higher level of subvention associated with the increased dependency. Means assessments were also to be regularly reviewed and the Regulations provided for a right of appeal in relation to the means assessment.

At the same time, the Regulations contained a number of disquieting features. They contained provisions which, in effect, appeared to enable health boards take account of the income of adult sons and daughters of the patient in deciding what level of subvention should be paid. The Regulations appeared to penalise patients who entered a nursing home prior to claiming and being assessed for a subvention; such patients could be debarred from claiming a subvention for two years following admission to the nursing home. And when a claim from such a patient was eventually accepted, which might be two years following admission, any contribution to the nursing home costs already being made by the patient's family might be included in the means assessment. This would be in addition to the means assessed under the standard approach which

would already have taken account of the income of sons and daughters. This seemed to amount to a double penalty. Children might be supporting an elderly parent in a nursing home because no subvention was available; but when a subvention claim was eventually accepted by the health board, the existence of this support could be included, in effect, as an item of means resulting in no subvention or a very reduced subvention.

The Regulations seemed also to allow for a similar approach to be taken in relation to patients already in private nursing homes prior to 1 September 1993. If such a patient was already receiving financial help from family - because no subvention existed when the patient entered the home - then this level of family assistance might be assumed to be still available and might, in effect, be included in the means test.

Another surprising feature was a provision that a person, otherwise qualified for a subvention, could be offered instead a place in one of the health board's own homes. The inference is that, in the event of such an "offer" being refused, a subvention in the private home would not be payable. This amounted to a reversal of the thinking behind Section 54 of the Health Act, 1970. Under Section 54, a person entitled to in-patient services under the public system could choose instead to go for a private service and be subsidised. It is true that Section 54 was repealed by the Oireachtas in the context of the commencement of the 1990 Act. Part of that context was the provision of subventions to patients who opt for private nursing home care as opposed to public in-patient services. To this extent, Section 54 was replaced by a somewhat similar provision. However, under the Regulations, a person entitled to a subvention in a private nursing home could have the choice of private care removed - insofar as the person would need the subvention to take up the private place - and be given public care instead.

Yet another disquieting development was the making of separate regulations, the Health (In-Patient Services) Regulations, 1993 (SI No. 224 of 1993), which effectively amend Section 52 of the Health Act, 1970. (Section 52 requires health boards to make in-patient services available both to medical card holders and to people with "limited eligibility" - to the entire population, in effect.) The purpose of this regulation is to enable a health board to place a public patient in a private nursing home, which placement to be subject to the regime created by the 1990 Act and the regulations made under it. The charging arrangements applying under the 1990 Act and regulations are considerably more onerous than those arising under the Health Acts (described in Chapter Two). The effect of SI No. 224 of 1993 is to create a two tier charging regime for public patients with one tier being considerably more punitive than the other. Furthermore, the patient would not be choosing as between the two arrangements as it would be for the health board to allocate a place to the patient.

The question of the legal validity of some of these regulatory provisions is considered later in this report (see Chapter Seven).

> "... you do mention a central issue there and it's to do with family obligation and the obligation and duties of children towards their parents ... there is a very great difference between families coming to terms with their own beliefs about family responsibility and their obligations towards parents and being forced, in a quasi-legal way by these Regulations, to contribute and we see two results of this particular kind of means testing, one is that it will have unholy rows and really intensify conflict among families who have all sorts of differing ideas about duties and responsibilities. [The other is that] many old people do not wish, very strongly do not wish, to be forced into any level of dependency on their adult children."
>
> **Anne O'Loughlin, Irish Association of Social Workers, *Liveline*, RTÉRadio 1, 6 September 1993**

"And, not only can they now refuse a parent the grant if they decide that the children's means are too high, but they can also, by law, inform any son or daughter of the weekly amount which the State feels that person ought (to) be contributing to their parent's upkeep. There is more than a smack of Big Brother about this..."

**John Boland, *Sunday Press*, 19 September 1993**

## Complaints Predicted

It was both predictable and predicted that certain features of the new subvention arrangements would give rise to complaints. On a broad level, the Ombudsman had already drawn attention to the "general lack of clarity regarding the health boards' obligations in respect of .. long-stay patients" (Annual Report, 1992). In effect, people were not being told that they had a statutory right to long-stay care.[1] It was clear to the Ombudsman, from complaints received, that it was being implied that no such right existed. In a context where neither the Department nor the health boards were informing people of these existing entitlements, the subvention provisions were presented as amounting to a substantial improvement on existing arrangements. This was true only in the sense that many people were not having their existing statutory rights vindicated. In this context, people who required nursing home care and who hitherto had been unable to have this service provided by the health board, might now at least get some contribution towards private care. It is worth repeating that the 1990 Act made no substantive alteration to the existing entitlement to in-patient services. Accordingly, giving financial assistance towards the costs of private care can hardly be seen as an ideal response to the on-going failure to meet people's statutory entitlement to public care.

On a more specific level, a number of commentators drew attention to the provisions which related to the inclusion of family members in the subvention means test. Technically, what the Regulations provided for was the taking into account of the "capacity of a son and/or daughter, aged twenty one years and over residing in the jurisdiction ...to contribute towards the cost of nursing home care of his or her parent". For all practical purposes, this constituted part of the overall means test.

On 6 September 1993, speaking on the *Liveline* programme on RTÉ Radio One, a representative of the Irish Association of Social Workers (IASW) drew particular attention to the problems which would be created by the inclusion of the wider family in the subvention means test. Anne O'Loughlin of the IASW felt that this provision would prove controversial and, in effect, amounted to families "being forced in a quasi-judicial way ... to contribute" towards a parent's nursing home costs. The IASW felt that this approach was likely to promote conflict and divisiveness within families and that, in any event, "many old people do not wish, very strongly do not wish, to be forced into any level of dependency on their adult children."

Writing in the *Sunday Press* on 19 September 1993, columnist (and former Government Minister) the late John Boland expressed somewhat similar views. He saw the Regulations as having far-reaching consequences as they appeared to provide for a regime which required adult children to support their elderly parents. Mr. Boland read the Regulations to mean that such children would be required to support their elderly parents in nursing homes and that a health board would be able to tell adult children precisely how much they were required to contribute. Furthermore, he understood the Regulations to mean

that health boards were being given draconian powers to enquire into the financial circumstances of adult children. He felt that health boards were being given the "right to demand more information than is required by the Revenue Commissioners for income tax purposes"; and, if that information is not provided by the adult children, the "Regulations allow the Health Board to refuse to consider the application any further - even if this means the unfortunate parent, who otherwise qualifies on the basis of medical need and lack of income, cannot avail of the nursing home care." In fact, a close reading of the Regulations does not support the conclusion that an adult son or daughter is required to co-operate by giving income details; nor do the Regulations provide that a son or daughter's failure to co-operate results in the parent being penalised. But the Regulations were in fact interpreted in this way and the late Mr. Boland's predictions as to their application were quite accurate - see Chapter Four.

The Regulations also came under close academic scrutiny within a few months of being made. Writing in *The Gazette* (the journal of the Irish Law Society) of January/February 1994, Mel Cousins identified a number of features of the new subvention arrangements which were legally doubtful and liable to prove contentious. Included in this list of doubtful provisions was that in relation to the capacity of sons and/or daughters to contribute to a parent's nursing home costs.

> "The board can reduce the amount of the subvention based on the applicant's 'circumstances', i.e. its assessment of the children's capacity to contribute to the cost of nursing home care. This provision imposes a liability on the children which does not otherwise exist in law. It is not at all clear that this is authorised by the primary legislation. *Quaere* if this provision is not also *ultra vires*?"
>
> **Mel Cousins, *The Gazette*, January/February, 1994**

## Complaints to the Ombudsman

Between 1993 and 1999 the Ombudsman dealt with approximately 150 complaints in relation to nursing home subventions. The majority of these complaints related to just two issues:(1) disputes arising from health boards' insistence on assessing the capacity of sons/daughters to contribute and (2) the manner in which health boards were operating the means test provision which should have allowed subvention claimants to retain a small amount of personal income or “pocket money”. One complaint, where a health board had refused a subvention because the patient had entered a nursing home prior to claiming and being assessed by the board, involved a major investment of time and effort by the Ombudsman. The Ombudsman ultimately upheld this particular complaint. Other issues to arise in complaints included: failure of health boards to pay subventions in excess of the fixed levels; payment of a subvention from a date later than the date of claim; the decision of a health board to place a patient in one of its own homes where the patient wished to be paid a subvention to stay in a private nursing home.

At the time of writing (January 2001), only a small number of complaints regarding nursing homes is being received by the Ombudsman. The current complaint issues, in the main, relate to the investigation by health boards of complaints against individual nursing homes, the refusal of "top-up" subvention payments and the timing and conduct of dependency reviews. Mostly, these are what might almost be termed "normal" complaints, involving issues which are always likely to provoke some amount of dissatisfaction. Unlike the majority of

nursing home complaints received in the period 1993 - 1999, the current complaints generally do not particularly reflect problems of a sectoral nature. An exception to this general observation is the issue of "top-up" subvention payments which are provided for at Articles 10.6 and 22.4 of the Regulations. It appears some of the health boards are simply refusing to implement this provision notwithstanding advice from the Department that they should do so. The Ombudsman is currently pursuing this issue with the health boards concerned.

The Ombudsman's experience of dealing with complaints during the period 1993 - 1999 suggests that the underlying problems of complainants, which first surfaced in the period prior to September 1993, continued to manifest themselves under the new regime. These included:

- confusion and lack of hard information regarding legal entitlement to nursing home type care;
- failure of health boards and of the Department to inform patients and their families of a statutory entitlement to this type of care;
- promotion by the official bodies, whether directly or indirectly, of the view that health boards do not have any statutory obligation to provide nursing home type care;
- encouragement to patients and their families, by the official bodies, to take up places in private nursing homes.

A detailed account of the issues raised by these complaints, and of the practices which they revealed, is given in Chapters Four and Five.

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**Notes**

(1) The Department argues that individual people do not have "a legally enforceable right to obtain [in-patient] services." The Ombudsman does not accept this point - see Chapter Two, Note 1. The Department also notes that "there was (and is) the practical issue of the insufficiency of available extended care beds." It goes on to note:

> "During the 1980s there was a dramatic reduction in the number of acute and long stay beds as a result of financial constraints on the health services. The early 1980's saw the closure of Longford County Hospital, Roscrea District Hospital, Killarney Isolation Hospital, Mercers and Sir Patrick Dun's Hospitals in Dublin. Between 1987 and 1988 further rationalisation of the hospital system resulted in the closure of eight District Hospitals operated by health boards and voluntary hospitals such as Dr. Steevens and Baggot Street in Dublin, Barringtons, Limerick and the North Infirmary, Victoria and the Eye/Ear/Throat Hospitals in Cork. Between 1980 and 1990 the total number of hospital beds fell from almost 15,000 to 12,000. The closure of district hospitals and voluntary hospitals which had traditionally catered for older people had a serious impact on the availability of extended care places for older people."

# The Family Assessment Issue-Complaints

## Introduction

It was inevitable that the new nursing home subvention scheme would give rise to some level of complaint. Most new schemes have their teething problems and it is not unusual that certain provisions will prove to be ambiguous or, at least, open to interpretation. However, what became the single biggest source of complaint in the case of this scheme had little to do with teething problems or with ambiguities in the text of the Regulations. This was an issue which, as mentioned in Chapter Three, was predicted from the outset to cause trouble.

For more than five years the Ombudsman received complaints that the health boards were effectively including the income of the applicant's children in the calculation of subvention entitlement. In some cases the complainant, usually an adult son or daughter of the claimant, objected to this in principle; in other cases, the complaint related to the details of the assessment and/or to the manner of its conduct.

The practice of the EHB differed somewhat from that of the other boards. Whereas it did take account of the income of the applicant's children, and did refuse or reduce subventions on this basis, it generally dropped this aspect of the assessment if the family objected. [During the period 1993 - 1998 the assessment of children by the EHB had the effect of reducing the volume of subventions paid by approximately £810,000.[1]] This meant that complaints to the Ombudsman on this account, against the EHB, did not arise.

From the outset, the Ombudsman was unhappy with those provisions in the Regulations which dealt with family assessment. However not until January 1999, and only after a sustained series of contacts with the Department on the matter, were the impugned provisions deleted from the Regulations. From the Ombudsman's perspective, and even more so from the perspective of the families involved, it was disappointing that it should have taken more than five years to resolve this issue. Only towards the end of the period did the Ombudsman discover, following a detailed examination of its records, that the Department had been aware from the outset that the provisions in question were seriously flawed. Information gleaned from the Department's files is presented separately in Chapter Six.

## The Law

The statutory basis for the payment of subventions is contained at Section 7(1)(a) of the 1990 Act which provides:

> "Where, following an assessment by a health board of the dependency of a dependent person and of his means and circumstances, the health board is of opinion that the person is in need of maintenance in a nursing home and is unable to pay any or part of its costs, it may, if the person enters or is in a nursing home, and subject to compliance by the home with any


**Letter from Western Health Board to Department of Health, 5 August 1999**

"In its complexity and its confused detail it is a bad scheme. It is in the principle which it seems to impose into legislation, however, that it is positively dangerous. It is an intrusive, unwarranted and unjustifiable interference by the State into people's affairs."

**John Boland, *Sunday Press*, 19 September 1993**

> requirements made by the board for the purpose of its functions under this section, pay to the home such amount in respect of such maintenance as it considers appropriate having regard to the degree of the dependency and to the means and circumstances of the person."

Section 7(2) then delegates to the Minister for Health the power to prescribe by regulation:

> "the amounts that may be paid by health boards under this section and such amounts may be specified by reference to specified degrees of dependency, specified means or circumstances of dependent persons or other such matters as the Minister may consider appropriate.

It is clear that the key terms in relation to subvention entitlement are the means of the claimant, the degree of dependency of the claimant and the circumstances of the claimant. Of these three terms, only "dependency" is defined in the 1990 Act itself. The terms "means" and "circumstances" are defined in the Regulations, made by the Minister on the authority of Section 7 of the 1990 Act.

The definition of "means" in the Regulations is unexceptionable and fully in line with the general public understanding of the term. However, the Regulations define "circumstances" in a most unusual way, by reference to attributes of others rather by direct reference to the claimant himself or herself. The definition is as follows:

> " ..'circumstances' for the purposes of these Regulations is the capacity of a son and/or daughter, aged twenty one years and over and residing in the jurisdiction, of a person who has qualified for a subvention to contribute towards the nursing home care of his or her parent."

Given the nature of delegated legislation, where what is involved is the putting into effect of principles and policies[2] set out by the Oireachtas in the parent Act, it is difficult to see how this very unusual definition of "circumstances" can be regarded as being within the intention of the Oireachtas. As the 1990 Act does not define "circumstances" then, under the usual rules of statutory interpretation, the term should be given its ordinary meaning. Or at least it should not be given a meaning, as appears to be the case here, which is widely at variance with its ordinary meaning. The decision to define "circumstances" in this way is central to the difficulties and complaints which subsequently arose in relation to the assessment of family members. (This definition of "circumstances" was ultimately deleted - see later in this Chapter - but not before a great deal of time and effort was spent in analysing its consequences and discussing its validity.)

The Third Schedule to the Regulations sets down detailed rules as to the manner in which health boards are to assess the disposable income of a son or daughter whose parent has applied for a subvention. The rules include deductions for outgoings such as income tax and social insurance as well as personal

allowances or disregards in respect of the son or daughter and his or her dependent spouse and/or dependent children. Rule 7 of the Third Schedule provides:

> "Based on its assessment of the disposable income of a son and/or daughter the health board shall inform the son and/or daughter whether in its opinion, he or she has the capacity to contribute to the costs of his or her parent's care in a nursing home and the amount, if any, per week by which the board will abate the amount of subvention appropriate to the parent's level of dependency and means in respect of its assessment of the son's or daughter's capacity to contribute."

Other relevant provisions in the Regulations are the following: Article 4.5 which **requires** a health board to assess the "circumstances" of the claimant; Article 9.1 which provides that, "having decided that a person qualifies for a subvention, a health board **may** (our emphasis) take into account the circumstances of the person qualifying..."; Article 10.4 which appears to provide that, in calculating the rate of subvention to be paid, a health board **may** reduce the maximum rate payable by "no more than the amount by which the person's means and circumstances have been assessed by the board as exceeding the rate" of the NCOAP payable at the time.

**Comment**

Unfortunately, and whatever their validity, these Regulations are extremely confusing and require the closest attention to even begin to understand what is intended. On the one hand, health boards have no choice but to assess "circumstances" (Article 4.5). They are required to inform a relevant son or daughter of the board's opinion as to his or her capacity to contribute **and** of the amount by which the board will reduce the subvention otherwise payable (Rule 7 of the Third Schedule). On the other hand, once a claimant has been found to be qualified on the basis of means and dependency, Article 9.1 says that the health board **may** (but presumably has discretion) take "circumstances" into account. And Article 10.4 says that, in calculating the amount of subvention payable, the health board **may** (but presumably has discretion) reduce the maximum subvention by an amount not greater than the excess of means plus circumstances over the current NCOAP rate. Article 10.4 holds out the possibility that there will be no reduction at all by reference to means and/or circumstances; or the reduction could be by reference only to means; or it could be by reference to only part of the means and/or of the "circumstances".

Furthermore, the wording of Article 10.4 is flawed to the extent that it refers to "the amount of the subvention to be paid to a person who is not resident in a nursing home ..". To make sense of this, one must read into the text that it refers to a person currently not in a nursing home but proposing to enter a home. From an operational viewpoint, the Regulations are far from being internally consistent and require that choices be made between a number of possible interpretations. Unfortunately, the choices actually made appear to have been guided by the reality of funding shortages rather than by the dictates of statutory interpretation or of good administrative practice.

"The moral exploitation of families by the State does not work to the same extent as before ....Now people expect the State should have a role to play and these tremendous moral obligations should not be put on family members who have their own lives to live."

**Eric Byrne TD, Dáil Éireann 21 November 1989 - Second Stage Debate on Health (Nursing Homes) Bill**


## Family Assessment Complaints

By early 1994, within a few months of the commencement of the 1990 Act, complaints in relation to family assessments began to arrive in the Ombudsman's Office. This stream of complaints continued into 1999 even after the deletion of the family assessment provisions from the Regulations (which took effect from 1 January 1999). It is not the purpose of this Report to outline in any detail the outcome of individual complaints. But it is important to say that almost each individual case had to be examined separately in a time-consuming and frequently frustrating exercise. The Ombudsman's attempt to deal centrally with the underlying issue, by way of an approach to the Department, proved equally time-consuming and frustrating. The Ombudsman pressed the Department to acknowledge that the practices complained of were unacceptable and urged it to advise the health boards accordingly. Unfortunately, the Department did not accept the Ombudsman's approach. As a consequence, the same type of complaint continued to be made and each one had to be dealt with individually by the Ombudsman.

The Ombudsman's analysis of the family assessment provisions was clear almost from the time the first complaints were made. A full statement of this analysis is set out in Chapter Seven. For present purposes, this analysis may be stated in the following brief terms:

- The 1990 Act does not make adult children legally liable for parents' hospital or nursing home costs.
- There is nothing in the 1990 Act to suggest that any such liability was contemplated by the Oireachtas.
- The Regulations cannot impose a liability on adult children which is not explicitly provided for in the 1990 Act.
- The definition of "circumstances", as originally provided in the Regulations, is most likely to have been invalid as it cannot be said that it was authorised by the Oireachtas in the 1990 Act.
- The practice of determining, and assessing, a level of contribution which an adult son or daughter should be capable of making towards a parent's nursing home costs was invalid, even where such an adult son or daughter is willing to make some level of contribution.
- The entire approach of the Regulations in relation to family assessments was fundamentally misconceived.
- This analysis is entirely neutral as to whether it is desirable that adult son or daughter should have some liability for parents' hospital or nursing home costs. This is a question of public policy which should be dealt with at the appropriate political level, i.e. by the Oireachtas. It is an open question as to whether or not the Oireachtas would, or could, provide for such a legal liability.

**Complaint Details**

The complaints received in relation to the family assessment provisions reflect a wide range of concerns. Only a minority of complainants expressed the explicit view that they were opposed in principle to the notion of family assessment. The majority of complainants, who may or may not have accepted the principle of such an assessment, were unhappy with the manner and the outcome of the assessment. As a general observation, it appears that the vast majority of the complainants and their families were unaware, and had not been made aware by the boards, of an existing statutory entitlement to long-stay care under the Health Acts. A related observation is that, in the majority of cases, claimants had not so much opted for private nursing home care as accepted it in the absence of a choice between public and private care.

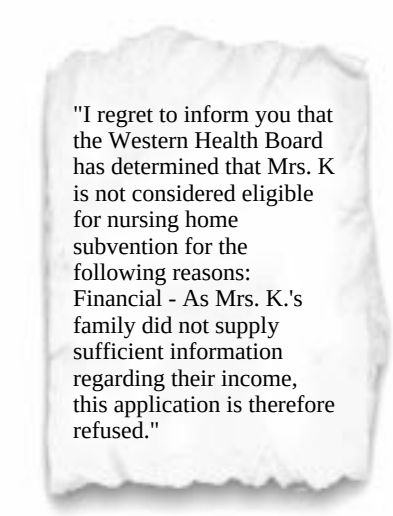
The approach of many of the health boards gave families the very clear impression that, under the Regulations, the family was liable to contribute to their parent's nursing home costs. A more subtle version of this approach was that, whereas family members could not be forced to contribute, the health board was entitled to decide on the application as if the family was contributing. The examples below - which are not intended as comprehensive case summaries - illustrate this approach in action.

– The **Southern Health Board** (SHB) refused a subvention to an elderly Alzheimer's patient because of the income of her married daughter who had been living away from her parents for 26 years. The claimant's husband did not wish his daughter to contribute. He felt this was wrong in principle; that, after more than 40 years of paying income tax and social insurance, he and his wife should not have to depend on their daughter. In any event, she was already incurring substantial costs in travelling to visit her mother and in contributing to other needs of her mother. The daughter wrote to the SHB to say that she was not actually contributing to the nursing home fees and that she felt "strongly that it is neither my duty nor function to pay such fees". Nevertheless, for almost five years the daughter's theoretical contribution remained the basis for the SHB's decision to refuse a subvention. The claimant's husband, who was in his eighties, pointed out to the SHB that he was paying the full nursing home costs and that this left him with less than £23 per week to live on. Regrettably, the husband died suddenly before this complaint was resolved. Ultimately, the SHB accepted that its decision was not sustainable and arrears of £14,027 were eventually paid.

– In some cases the claimant's sons and/or daughters refused to provide the health board with the income and personal details requested. Different boards responded to this in different ways. In some instances, where such details were not supplied by a son or daughter, the health board proceeded with a notional income assessment based on "local knowledge". This was the case in a complaint against the **South Eastern Health Board** (SEHB) where one of the claimant's sons refused to co-operate. The SEHB explained this to the

"The practice in this Board, where sons/daughters refuse or fail to provide details to enable an assessment of their capacity to contribute to be made, has been to make a notional assessment and to determine entitlement to subvention in that way."

**Letter of 24 October 1997 from Southern Health Board to Department of Health**




**Letter of 27 February 1998 from Western Health Board to son of subvention applicant.**

Ombudsman as follows:

> "Despite numerous reminders, Mrs T's son J. failed to provide the information needed to ascertain his disposable income, and we were obliged to base our assessment on best local information - (he) runs a .. business. J. was assessed as having a minimum disposable income of £32.41 per week. If of course J. does provide the necessary information, we would review the case again."

However, one of the Dáil representatives of this family wrote to the Ombudsman about the case and his perspective on matters was quite different:

> "They applied to the [SEHB] for a nursing home subvention and were refused on the grounds that the income from her family was marginally over the limit. Quite frankly this is ridiculous. The fact of her circumstances are that Mrs. T. lived with her son W.... [whose] sole iincome is unemployment assistance at the maximum rate. She is 89 years of age, her sole income is an old age pension. She is receiving no financial support from other members of the family who have not lived with her for many years."

– Another approach, adopted in particular by the **Western Health Board** (WHB) and the **Midland Health Board** (MHB), was to refuse a subvention where the claimant's children, or any one of them, refused to reveal income or personal details. For several years the WHB issued a standard letter to the children of a subvention claimant in which it sought family and income details of the particular son or daughter. This standard letter contained the following warning: "Failure to return this form will result in the application being refused". The WHB's implementation of this threat resulted in several complaints to the Ombudsman, including some right up to 1998. Some complainants objected to the arbitrariness, as they saw it, in the selection of which sons and daughters were chosen to contribute - for example, a son or daughter living just across the border with Northern Ireland would be excluded irrespective of income. Some other complainants simply felt that a parent's entitlement should not be dependent on the position of adult sons or daughters.

The MHB operated a similar approach, as illustrated in the extracts from a particular case reproduced below. The MHB wrote, as follows, to the daughter of a subvention applicant on 9 April 1998:

> "... the [Midland] Health Board are therefore now requesting you to submit details of income by way of P.60, Tax Assessment Form, Farming Accounts, Income from investments etc. The Health Board must be furnished with these details to enable us to determine your liability, if any. Failure to furnish this information will mean that the application for subvention cannot be proceeded with."

However, the response of the daughter in question was quite trenchant:

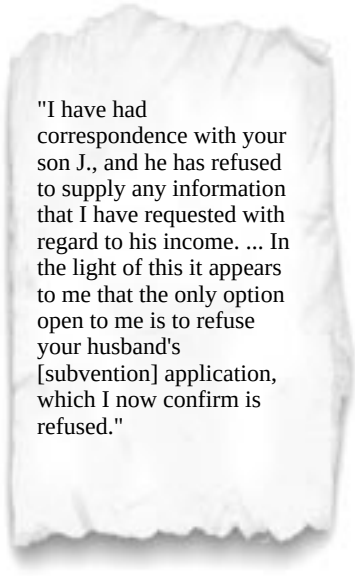
> "I wish to inform you that I absolutely refuse to furnish such details and demand that you assess my mother's entitlement to subvention on her own means. I feel she has been very badly treated by the Midland Health Board over the past three years in being refused what is her entitlement as a Non-Contributory OAP with NO OTHER MEANS of any sort."

In this particular case the MHB eventually agreed, following the intervention of the Ombudsman, not to have regard to the daughter's income. Arrears of subvention were paid.

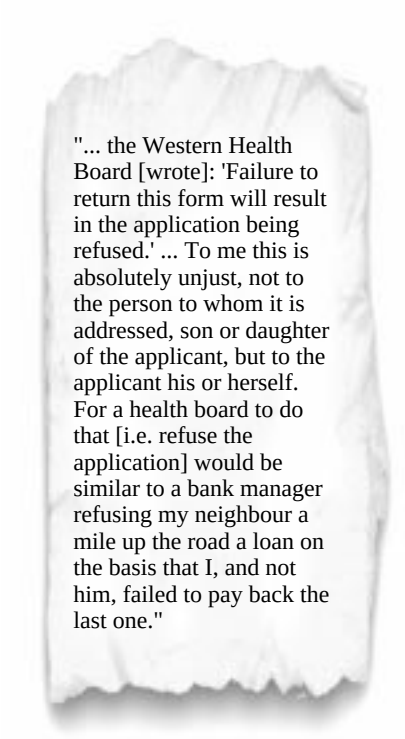
– The type of letter sent by a number of health boards to a claimant's children did, whether explicitly or implicitly, convey the impression that children were obliged to provide income and family details. The SEHB, for example, generally made it clear to adult sons and daughters that a decision could not be taken on a parent's claim in the absence of the children's details. Similarly, the SHB used the following formula in writing to a claimant's children: "Failure to respond to this query in full detail can result in the application being delayed or refused. I urge you to return the required information as soon as possible to avoid any such complications". In a number of complaints against the WHB it was claimed that income and family details of adult sons and daughters were obtained under false pretences i.e. on the basis that children were legally obliged to provide such details. In one such case the subvention claim was made in October 1997 and the claimant's children supplied personal details on the basis of the WHB letter which had made it clear that failure to co-operate would result in a refusal of the subvention. This resulted in the subvention being reduced by £46 per week. In November 1998 the claimant appealed the rate of subvention and argued that the children were not contributing £46 per week. She wrote:

> "I am again enclosing the letter, which you sent to my children, dated November 10th 1998. I would like to draw your attention to the sentence, which is underlined. (Saying failure to co-operate will result in a refusal of the claim.)
> My children co-operated because of this statement and unwillingly supplied details of their circumstances. They did not agree to, nor have they contributed to, my maintenance. Their details of circumstances were acquired by the Western Health Board under false pretences. Consequently the correct level of subvention should be backdated to 8th October 1997."

The WHB initially agreed to cease assessing the children's income from the date of appeal. But when the Ombudsman presented the WHB with a report on his preliminary examination of the complaint, it decided to withdraw the children's assessment with effect from the first date of claim in October 1997. Arrears of £2,502 were paid.




**Letter of 4 September 1997 from Mid-Western Health Board to the wife of a subvention applicant**




**Letter of 25 October 1997 to Ombudsman from the son of a subvention applicant**

– What emerged from some of the complaints was that certain family members could be left to pick up the bill where other family members refused to contribute or refused to co-operate with the health board's assessment of "circumstances". For example, a health board might decide that three children could contribute and that no subvention would be payable on that basis. But if two of the three children actually refused to contribute, or refused to co-operate with the health board's assessment procedures, this did not necessarily mean that the health board would adjust its decision accordingly. A particular complaint against the WHB highlighted this problem. The complaint was made by the daughter of a 95 year old woman who had been placed in a private nursing home. A subvention was refused by the WHB as some members of the claimant's family had given "insufficient information" on their income. For reasons of confidentiality, the WHB would not tell the daughter principally involved (the Ombudsman's complainant) which family members were uncooperative. This left the complainant in what she believed to be an impossible position. As she put it to the Ombudsman:

> "It appears that the Health Board will not release this information except to each individual. You will appreciate that it is well nigh impossible for me to contact each family member and ask them to write in to ascertain was their information sufficient and then assemble this information. Our family are all over 53 years of age, scattered in different parts of the country....I regard it as unconstitutional for the Western Health Board to ... seek details of family income and other matters in this case ..."

In this particular case, the WHB eventually agreed to pay almost the maximum level of subvention retrospective to the patient's admission to the nursing home.

In some instances health boards took account of the potential contribution of a son or daughter even where that son or daughter had lost all contact with the parent and where no such contribution was being made or was likely to be made. This is well illustrated in the following extract from a letter of May 1997 to the Ombudsman from the daughter of an elderly subvention applicant:

> "[My mother] was earlier this year deemed to be in the middle dependency bracket (she is unable to move about without the assistance of a walking frame) but then they decided (SEHB) that as one of my brothers has a [professional] practice he should pay for her, in spite of the fact that he has no communication [with her] whatsoever and has never had (a fact that can be verified by the owners of the nursing home)."

Ironically, perhaps, the Department had anticipated that problems could arise in cases where a son or daughter had lost contact with a parent. The Minister for Health, speaking in the Dáil on 4 May 1993, clarified what should happen in these situations:

> "In determining the scope and scale of the actual subvention, it is reasonable to take into account the income of sons and daughters...I might add that if there are sons and daughters who are not in contact with elderly parents, who are not in this country, or who have lost contact with them even within this country, there will be no question of that in any way affecting the level of subvention being made available".

In practice, as this and other cases established, the Minister's clear statement of what should happen was disregarded.

– Several complainants made the point that the subvention system is based on an entirely false premise. It appears to assume that a patient with income at the NCOAP level will be able to afford a private nursing home if paid the maximum subvention for that level of dependency. It appears to be on this basis that a patient, with assessed means in excess of the NCOAP rate, has the maximum potential level of subvention reduced by the amount by which means exceed the NCOAP level. This was acknowledged to be a problem by the Review Group on the Operation of the Health (Nursing Homes) Act, 1990 which reported in December 1995. It recognised that, frequently, the subvention rates were not sufficient to enable a person with no income, other than the NCOAP, to afford private nursing home costs. In very many cases, the shortfall between nursing home fees and the patient's own income plus subvention was (and is) being met by family members. But the fact that family members would have to subsidise the patient - even where the maximum subvention was being paid - was not taken into account in the manner in which most health boards operated the assessment of "circumstances". This point was made very forcibly to the SHB by a woman whose father had been refused a subvention because of her income. She was having to subsidise his costs very considerably. She wrote to the SHB in January 1998:

> "I wish to state that I reject the Southern Health Board's assumption that it has the right to assess my disposable income and my capacity to contribute towards the cost of my father's care in a nursing home. I recognise that even with the granting of the subvention there will still be a shortfall which I will need to make up. It will be impossible for me to maintain the current contribution of £162 per week on an indefinite basis".

Unfortunately, this woman's father died before the SHB accepted that it did not have the right to include her in the assessment. However, as a result of the Ombudsman's intervention, the SHB paid arrears of subvention, totalling almost £3,800.

– In many cases the elderly patient, the subvention claimant, would have been an in-patient in a public hospital for a period before been referred to a nursing home. Over the years the Ombudsman has regularly been made aware of difficulties where an acute hospital wishes to free up a bed occupied by an elderly patient but where there is no suitable public long-stay bed available. In

"I wish to point out ... [that] we as the family members were not legally obliged to furnish any information regarding our own financial situations. I would also like to point out that this information was obtained by the WHB under false pretences so therefore our rights were infringed. In this regard all personal financial information supplied by us to the WHB has to be totally ignored."

**Letter of 26 January 1998 to Ombudsman from son of subvention applicant**

a small number of cases a complaint was made that an elderly person, already in a public long-stay bed, was effectively discharged and forced into private nursing home care. In one such case, having had to leave public care, the patient was awarded a weekly subvention of £2.95 by the Southern Health Board. This is how the patient's son put the case to his local TD:

> "Recently my mother had to be hospitalised, she has Alzheimer's and needs 24 hour care. She spent six months in [a public] Hospital but they couldn't care for her anymore so we had to put her in a private nursing home... We applied for a subvention grant but were refused. We are a working class family and cannot keep up the payments. .. I think the reason we were turned down was because my brother would be on fairly good money for part of the year. I am hoping you will be able to do something for us because we won't be able to keep paying for much longer."

The SHB subsequently increased the subvention from £2.95 per week -which the son regarded as no subvention - to £40 per week. Subsequently, and following the intervention of the Ombudsman, the SHB increased the subvention to £95 per week which was the maximum rate payable for a patient of that level of dependency.

## Attitude of Department

The Department was aware at all stages of the approach being adopted by the health boards in relation to the assessment of family circumstances. It was aware that many of the health boards operated the assessment as an integral and mandatory feature of the subvention scheme. It was aware that the consequence of the approach of many of the boards, in practice, was to leave family members with no choice but to support their parents in nursing homes. However, the Department failed to intervene with the health boards, in relation to these practices, in any effective way.

The Department's failure was all the more surprising in view of a very clear statement on how the Regulations should operate which had been made by the Minister of State at the Department of Health in September 1993. On 26 September 1993 the then Minister of State, Willie O'Dea TD, wrote an article for the *Sunday Press* under the heading: "Nursing home rules change for the better". This article was in response to a piece by the late John Boland in the *Sunday Press* of 19 September 1993 (see Chapter Three) and was by way of setting the record straight on some points raised by Mr. Boland. The main point at issue was whether health boards, under the Regulations, could require children to contribute to a parent's nursing home costs or, alternatively, decide on a subvention application as if children were contributing (even where they might not be so contributing). Minister O'Dea dealt with these issues fairly unequivocally:

> "The Health Board is given no legal right to force a son or daughter to contribute if he/she does not wish to do so. All the Health Board can do under the new regulations is to enquire about the income or capital of the son or daughter of an applicant for subvention. If ... that son or daughter would be able to make a contribution to their parent's stay in the nursing home, then they can be **asked** to do so. The Health Board **cannot compel** them to do so. If the son or daughter refuses to contribute, the Health Board cannot escape its obligation to pay a subvention ... once the applicant himself qualifies for a subvention (on means grounds and medical grounds).
>
> Every son or daughter has a moral obligation to help and support a parent who is infirm ... if they can afford to do so. John Boland interprets the new .... Regulations as meaning that moral obligation is now being made legally enforceable. He is wrong. It is not and it will not be." (emphasis in original)

Notwithstanding the position outlined by Minister O'Dea in his *Sunday Press* article, it is fair to say that the Department took no active steps to dissuade the health boards from practices which conflicted clearly with the Minister's position. This is despite the fact that both the boards themselves and the Ombudsman's Office raised the validity of the practices on many occasions. Indeed, in relation to one aspect of practice, the Department clarified for one of the health boards as early as May 1994 that its practice was incorrect but it did not actively seek to change this practice. The MHB had sought clarification in relation to a case in which an applicant's children were being assessed with the capacity to contribute £60 per week but had refused to pay this amount. The Department clarified the position as follows for the MHB:

> "The nursing home legislation, while it enables health boards to enquire into the circumstances of sons and daughters of applicants, does not provide for compulsory payments by sons or daughters. Where sons or daughters decline to contribute, a health board should treat the applicant as if his or her circumstances have been assessed as zero. Mr. K. should receive the subvention to which he is entitled on the basis of his means and level of dependency.
>
> It is recommended that even if the circumstances of an applicant are such that the income of a son or daughter would cover the cost of nursing home fees, and the son or daughter is willing to contribute, a minimal payment should be made to the applicant."

In the event, and even though it had sought clarification from the Department, the MHB did not act on the basis of the advice given in the particular case. The applicant would have been entitled to a subvention of £87 per week were his children excluded from the calculations. Instead of this, the MHB appears to have paid a subvention of £20 per week, the "minimal payment" suggested by the Department where children are willing to contribute and where that contribution would otherwise result in a nil subvention.

"The Group was concerned about the equity of asking adult sons and daughters for details of their circumstances when a parent had applied for a nursing home subvention while those whose parents were in comparable care settings in health board accommodation were not asked for such details. .. However, the Group recognised that such enquiries did help to control expenditure on the Act."

**Report of the Review Group on the Operation of the Health (Nursing Homes) Act, 1990 (December 1995)**

The Department's clarification, as quoted above, was subsequently the subject of discussion at one of the regular meetings between health board CEOs and the Management Advisory Committee of the Department. This meeting took place on 23 June 1994. At the meeting, the CEOs expressed concern that the nursing home subvention scheme was taking on the aspect of a demand-led scheme and that the interpretation of the Regulations given to the MHB had enormous funding implications. The Department's representatives were concerned that current levels of expenditure on the Health (Nursing Homes) Act were undermining overall policy on the elderly. The discussion concluded on the basis that no extra funds would be available in 1994 and that the CEOs should "hold the line" on the issue for the moment to give the Department a chance to look at it.

It appears that at least one of the health boards (the NEHB) understood this to mean that its existing practices in relation to family assessment should continue for the time being; though it is open to the interpretation that health boards should comply with the Regulations until such time as the Department would have an opportunity to review them. It may be that the other health boards took a similar view to that of the NEHB. Whether or not there was a misunderstanding as to what was intended, the fact is that the Department's clarification of May 1994 had very little impact on actual practice. The health boards - including the MHB[3] to which the clarification was addressed - carried on more or less as before. In the absence of an increased financial allocation, it may well be that they felt they had no alternative.

Subsequent to the meeting of 23 June 1994, the CEOs submitted a document to the Department in which they expressed surprise at the advice which the Department had given in May 1994 to the Midland Health Board. Commenting on this document, a senior official of the Department observed (in an internal memo of 13 September 1994) that, as the health boards had "actively participated in the preparation of the Regulations", they should not be surprised at what the Regulations actually contain.

In November 1994 the Department established a review group, comprising some of its own senior officials along with three health board Programme Managers, to look at the operation of the 1990 Act. This group was established in response to continued concerns expressed by the health boards. The issue of family assessment was amongst the issues considered by this group. The 1995 Report of the Review Group on the Operation of the Health (Nursing Homes) Act, 1990 specifically noted that the family assessment practices (described in this chapter) were commonplace; but the Department would already have been aware of this in any case. The Department was also aware, as will be seen in Chapter Seven, that the practice of most of the boards in this area was legally indefensible. As noted later, this review group's deliberations resulted in an easing of the family assessment means test criteria; but it did nothing to clarify the issues in any fundamental way.

## Family Assessment Dropped

In July 1996 the Minister[4] amended the Regulations to provide for an easing of the assessment of family members. The amendment provided for an increase in the amounts of income disregarded in the assessment of the individual family member. The personal allowance was increased from £5,000 to £8,000; the allowance for a dependent spouse was increased from £3,000 to £5,000 and the allowance for a child dependant was increased from £1,000 to £2,000. This easing of the means test for family members was in line with views expressed in the 1995 Report of the Review Group on the Operation of the Health (Nursing Homes) Act, 1990. The Review Group did consider the possibility of dropping the family assessment entirely but concluded that the costs of such a move, estimated then at £913,000 per year, were prohibitive. The change in the Regulations undoubtedly resulted in an increased subvention for some and the award of subvention (on a current basis only) for others who had previously been refused. But the fundamental fact was that the continued assessment of the means of family members, albeit in terms less punitive than hitherto, remained incorrect.

The 1996 amendment did not halt the flow of subvention complaints to the Ombudsman. The volume of subvention complaints eventually began to decline some months into 1999 following the deletion from the Regulations, with effect from 1 January 1999, of the family assessment provisions. The decision to drop family assessment was taken in the context of increasing pressure in individual cases - including many complaints being pursued by the Ombudsman - and explicit legal advice which restated what the Department already knew to be the case i.e. that the Regulations dealing with family assessment were almost certainly invalid.

The health boards were provided with additional funding of £2.1m in 1999 to cover the cost of the removal of the assessment of circumstances on a current basis. This additional allocation was necessary in order to meet the increased levels of subvention and, to a lesser extent, the increase in the number of subventions being paid, consequent on the decision to cease assessing family circumstances. The fact that an additional allocation was necessary in 1999, and that an equivalent addition will be required annually into the future, establishes that the assessment of circumstances was an integral part of the subvention scheme. Notwithstanding any protestation from the Department that they were somehow optional, it is clear that the family assessment provisions were intended to be applied and the savings thus secured were built in to the overall subvention funding arrangements.

The Department did not, at that stage, make financial provision for the retrospective withdrawal of the family assessment arrangements i.e. the payment of arrears in those cases where a subvention was either reduced or refused because of the assessment of a liability on the part of a son or daughter. The Department's rough calculation is that such retrospective payments could cost up to £6m. Individual health boards have paid out full arrears in some

individual cases (often because of a complaint to the Ombudsman) but general retrospection has not been given. In his contacts with the Department, and in particular in providing it with a draft of this present report, the Ombudsman made clear his view that general retrospection should be paid. The detailed basis for this view will be clear from this report but, in essence, retrospection should be paid because:

- the family assessment provisions were almost certainly legally invalid;
- health boards generally misled families into believing that they had an obligation to contribute;
- health boards generally withheld the information that elderly patients are legally entitled to long-stay care from the health board and that entering a private nursing home should arise only where the patient genuinely wishes to choose private care over public care;
- the Department knew from the outset that the family assessment arrangements were legally invalid.

The Attorney General's Office advised the Department that there is no strict legal liability to pay arrears and that individual court actions would be unlikely to succeed. If, according to the Attorney General's Office, the Department should choose to fund the health boards to pay arrears, this would be on a policy basis rather than on the basis of a legal liability. The advice notes that the regulatory provisions in question are no longer in force and that a claim for misfeasance would be unlikely to succeed "as the Minister did not introduce the 1993 Regulations knowing they were contrary to the 1990 Act." On the basis of the information available to the Ombudsman and which is detailed in Chapter Seven, there is a contrary view to the position adopted by the Attorney General's Office; this casts doubt on the conclusion that there is no legal liability to pay subvention arrears.

In any event, at the point when this report was being finalised (January 2001), the Department informed the Ombudsman that it has now received the approval of the Department of Finance to the payment, by the health boards, of arrears in those cases where family assessment operated. The details of how this will be implemented are not yet available but the Ombudsman understands the Department has started discussions on the matter with the health boards.

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**Notes**

(1) Source: Letter of 17 January 2000 from CEO of Eastern Health Board to the Department of Health & Children.

(2) The leading case in relation to the "principles and policies" approach to secondary legislation is that of *Cityview Press v An Chomhairle Oiliúna* (1980). This approach was restated in the more recent

Supreme Court decision in *Sorin Laurentiu and the Minister for Justice, Equality and Law Reform* (1999).

(3) In recent correspondence with the Ombudsman (letter of 3 October 2000), the MHB contends that it did apply the advice contained in the Department's letter of May 1994. It said that the specific case highlighted in this present report - the case which occasioned the Department's intervention - represented "only one isolated case" in which it had "misapplied" the "Department's letter of interpretation". However, on the evidence of complaints against the MHB received subsequently by the Ombudsman, it would seem that the spirit of the Department's advice was not implemented. These subsequent complaints show that the MHB continued to insist on adult sons and daughters giving income and other family details. Once given, these details were then used as the basis for assessing a family contribution, even where the family resisted paying such a contribution. The MHB attitude is well expressed in the following internal minute of 22 March 1999:

> "... I accept that the Board has no statutory entitlement to enforce the payment of a contribution by a son or daughter, and could only enquire into the capacity of a son or daughter to contribute. However, having sought and obtained this information, the Board was obliged to take it into account in determining the rate of subvention payable and obviously, in the absence of the information being provided, such a decision could not be finalised."

(4) The Department points out that "the Minister who made the amending regulations was a different person to the one who made the original subvention regulations in July 1993 and was a member of a different political party ..."

# The Pocket Money Issue-Complaints

"The Minister has expressed his wish that we should try to ensure that all patients have at least £10 per week spending money"

**Internal Department of Health Minute of 23 September 1992**

"The points of concern to the Minister in relation to the [draft] Subvention Regulation relate mainly to the second schedule (the means assessment). ... there must be a provision for the applicants to retain some portion of their income - say, an amount equal to X% of the [non-contributory old age pension]."

**Internal Department of Health Minute of April 1993**

## Introduction

An issue raised in many complaints was whether the subvention system was intended to operate in a fashion which would enable nursing home patients to retain a minimum level of their own income as "pocket money". It emerged that six of the health boards adopted a practice which excluded this possibility. The complaints made to the Ombudsman in relation to this issue involved the Southern and South Eastern Health Boards in particular and the Midland, Western and Mid-Western Health Boards to a lesser extent. (The Eastern and North Eastern Health Boards appear to have implemented the "pocket money" provision correctly. The Ombudsman did not receive any complaints against the North Western Health Board on the issue but it appears it did not implement the provision correctly until 1998.) Dealing with these complaints absorbed a very considerable amount of the time of the Office of the Ombudsman particularly during 1995 - 1996.

## Assessing Means

The provisions of the 1990 Act relating to the payment of subventions have already been cited at Chapter Three. Section 7(2) of the 1990 Act authorises the Minister, by regulation, to prescribe the amounts to be paid by way of subvention and it enables the Minister to set these amounts "by reference to specified degrees of dependency, specified means or circumstances of dependent persons or other such matters as the Minister may consider appropriate." The key determinants of a subvention are dependency and the degree of dependency, means and circumstances. In this immediate context, we can assume that neither dependency nor circumstances are an issue; though the latter was very much an issue in Chapter Four. What is at issue, however, is the assessment of means and how this relates to the rate of subvention to be paid.

The means assessment is based on the income and assets of the claimant and detailed rules on this are set out in the Second Schedule to the Regulations. Under the Regulations, a person whose means are assessed as equivalent to, or less than, the current rate of Non-Contributory Old Age Pension (NCOAP) will be paid the maximum subvention for his or her level of dependency. (In 1993 the NCOAP rate was £59.20 per week; the current rate of NCOAP is £85.50 per week.) Thus, a person assessed with a medium level of dependency, and whose means are no greater than the current NCOAP rate, can expect a subvention of £70 per week; that same person, if assessed with maximum dependency, can expect a subvention of £120 per week.

Where the means are assessed as being greater than the current rate of NCOAP then the rate of subvention (if any) is calculated by reducing the maximum possible subvention by the amount by which the assessed means exceed the NCOAP rate. Thus, to take a simple example, where the NCOAP rate is £75 per week, where the claimant's assessed means are £100 per week, then the subvention payable is the maximum rate for that level of dependency less £25 (i.e. £100 minus £75).

From the outset, the Regulations clearly provided that in assessing means an amount of the claimant's income should be excluded or disregarded with a view to ensuring that, after the nursing home fees would be paid, the claimant would be left with at least a modest level of personal income or "pocket money". This was provided for at Article 8.2 of the Regulations:

> "A health board in assessing the means of an applicant ... shall disregard income equivalent to one fifth of the weekly rate of the Old Age Non-Contributory Pension payable at the time, such sum to be retained by the person for his or her own personal use."

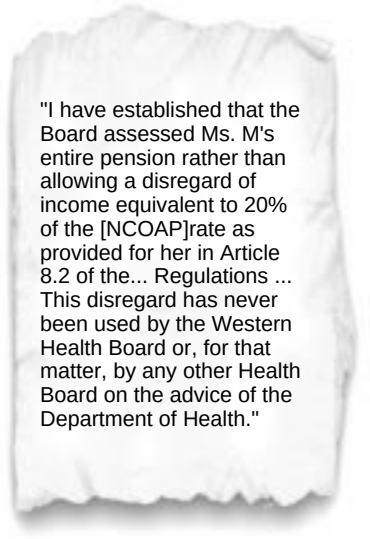
The effect of this provision was that a claimant could have actual income equivalent to the NCOAP rate **plus one fifth** before any reduction from the maximum level of subvention would apply. It is important here to distinguish between "means" and "income". An income equivalent to the NCOAP rate plus one fifth actually amounts to a means assessment equivalent to the NCOAP rate alone. In current cash terms, an income of £102.60 per week results in a means assessment of only £85.50 per week.

## Complaints and Official Response

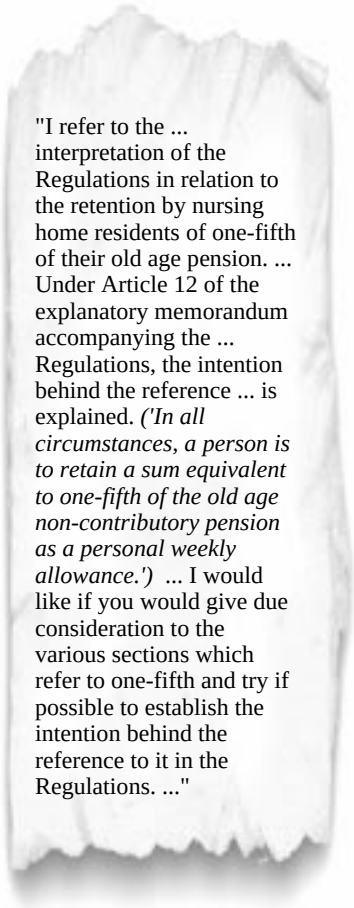
Despite the absolute clarity of the regulatory provision outlined above, and even though there is nothing elsewhere in the Regulations to modify or restrict its application, it emerged from complaints received that many of the health boards were not applying it to the benefit of claimants. The requirement, in assessing means, to exclude income equivalent to one fifth of the NCOAP rate, was not being met in these cases. This meant that many claimants were being paid a lower rate of subvention than was their entitlement. A typical statement of this type of complaint, against the South Eastern Health Board in this case, is set out below:

> "My mother's sole income is a Survivors Pension of £69.20 per week, she owns no property, and has no savings. However the subvention granted to her is £86.80 per week, this is as a result of the subvention being abated by £8.20 per week, which is the excess of her pension over the Old Age Non Contributory Pension.
>
> It appears to me that Article 8.2 ... has not been applied to my mother for the purpose of calculating her means. .... If the ... article, which is very clearly written, was applied to my mother's subvention application, the following is how it should have been calculated:
>
> Weekly Pension = £69.20
> Less 1/5 of NCOAP = £12.20
> Net = £57.00
>
> Under Article 8.2 my mother's weekly means are identified as £57.00 per week, therefore, no abatement should have been incurred."

**Letter of 10 April 1995 to Ombudsman from daughter of subvention applicant.**




**Letter from Western Health Board to Ombudsman, 28 July 1995**




**Letter of 10 May 1995 from Western Health Board to the Department of Health**

In the course of dealing with such complaints, it emerged that most of the boards were acting in accordance with advice received from the Department. Over the period 1993 - 1996 the Department regularly explained its position on the issue in response to queries from health boards and from the Ombudsman. The following passage, which is an extract from a standard letter sent by the Department to various health boards, on various dates throughout 1995, is typical of the advice it was giving:

> "The important point about Article 8.2 of the Regulations is that a health board is obliged, in **assessing** the means of an applicant, to disregard income equivalent to one fifth of the weekly rate of the Old Age Non-Contributory Pension in deciding whether or not a person qualifies for subvention. However, this does not affect the amount which a person may be paid who has qualified for a subvention. In other words, if an applicant's only source of income is the Old Age Non-Contributory Pension he or she will qualify for the maximum level of subvention in his or her dependency category. Any income of the person in excess of the OAP is abated from the maximum amount of subvention payable in respect of the person's level of dependency as specified in Article 10.4 of the Subvention Regulations. Under the scheme, the successful applicant retains income equivalent to the OAP and can decide how much of it to spend on nursing home fees.
>
> Article 10.4 allows abatement from the amount a person qualifying would otherwise receive by no more than the amount by which the person's means and circumstances exceed the rate of the Old Age Non-Contributory pension payable at the time. It does not contradict Article 8.2 which concerns the earlier stage of assessment of income."

The essence of this advice was that an amount equivalent to one fifth of the NCOAP rate could be disregarded for the purposes of qualifying people for a subvention; but, when it came to calculating the amount of subvention to be paid to a qualified person, the disregarded amount was to be taken back into the equation with the effect, generally, of reducing the level of subvention to be paid.

In some versions of the standard letter quoted above, the Department attempted to present its position as something positive rather than one which actually disadvantaged subvention applicants. The Department suggested that its interpretation had the effect of qualifying more people for a subvention than would otherwise be the case. In fact, this was not so and it could only have been true where the Department's interpretation effectively extended the "entry" requirements i.e. extended the level of means within which payment of a subvention was possible. Under the Department's approach, the means range for qualification purposes was precisely that provided for in the Regulations. Accordingly, there is no merit in the claim that more people were qualified under the Department's approach than would otherwise have been the case. On the other hand, as explained below, the Department's approach did have the

negative consequence of paying many applicants a smaller rate of subvention than they were entitled to and, in some cases, subventions were refused where a low rate should have been payable.

The Department's approach involved an unwarranted distinction between the assessment of means for the purposes of "qualification" and assessment of means for the purposes of determining the rate of subvention payable. For the somewhat nebulous purpose of "qualifying" people for a potential subvention (according to the Department), means should be assessed on the basis that an amount equivalent to one fifth of the NCOAP rate would be disregarded. But for the all-important purpose of calculating the rate of subvention, or whether there would be any subvention, the Department proposed that means be assessed without the exclusion of an amount equivalent to one fifth of the Non-Contributory Old Age Pension. Given that the key factor is the amount by which means exceed the rate of NCOAP, the use of the latter approach necessarily disadvantaged, rather than advantaged, applicants.

For example, in the case cited earlier above, the applicant's weekly means were assessed as £57 for the purposes of "qualification"; but for the purposes of the rate of subvention payable, means were assessed at £69.20. For the latter purpose, the disregard of income equivalent to one-fifth of the NCOAP (amounting to £12.20) was not allowed. As the applicant's means, on this latter assessment, exceeded the NCOAP rate by £8.20 per week, her subvention was reduced by £8.20 per week. In fact, her weekly means for all subvention purposes should have been assessed at £57 and she should have been paid the full rate of subvention.

In December 1995 the Ombudsman's Office contacted the Department in relation to its advice and suggested that it was not accurate. The Ombudsman was told that the Department would seek legal advice on the merits of its interpretation of the Regulations. In November 1996, in view of the failure of the Department to respond on the matter, Ombudsman staff met with senior Departmental officials on this and related matters. At this meeting, the Department said that recently received legal advice supported the interpretation put forward by the Ombudsman. The Department said it intended to amend the Regulations to clarify the matter but, pending such an amendment, it would contact the health boards suggesting they act on the basis of its recent legal advice.

The Department did write to the health boards in December 1996 outlining its new position in relation to the application of Article 8.2 of the Regulations. The Department advised that the income disregard, equivalent to one fifth of the current rate of NCOAP, applied not only in calculating means but also in calculating the actual rate of subvention payable. At the meeting with the Department in November 1996, the Ombudsman's staff raised the question of having the benefit of Article 8.2 applied not just for the future but also retrospectively, i.e. that appropriate arrears payments be made in all those cases where a subvention had either been refused or paid at a lower rate because of the failure to apply Article 8.2. The Department, at that stage, declined to advise

the health boards to apply the article retrospectively. It argued that Article 8.2 lacked clarity and that its previous interpretation, while now accepted to be incorrect, was at least arguable and had been held in good faith.[1]

## Eventual Resolution

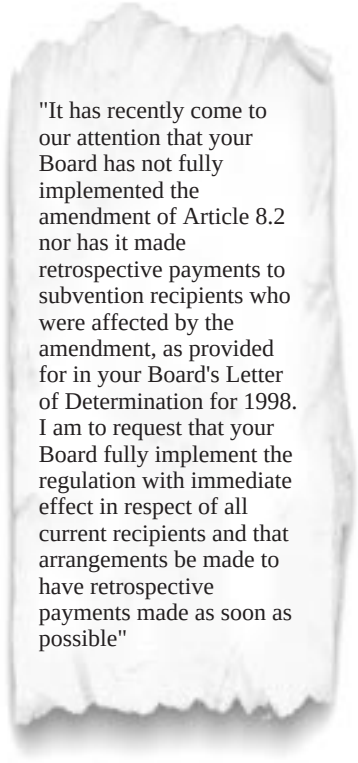
From January 1997 most health boards applied Article 8.2 correctly and excluded an amount, equivalent to one fifth of the NCOAP, from the means assessment. However, this change of practice applied on a current basis only and subvention arrears were not paid in the case of applicants who had been disadvantaged by the previous practice. Payment of arrears was not a realistic option for the boards without an additional financial allocation for that specific purpose. In December 1997 the Department allocated an additional £4m among six of the eight health boards (excluding the Eastern and the North-Eastern Health Boards) for the purpose, amongst others, of paying subvention arrears to claimants adversely affected by the failure to apply Article 8.2 correctly.

This additional allocation was actually paid out by the Department in January 1998. It appears some of the health boards failed to apply this additional funding immediately for the purpose intended. Or, at least, it appears that some of the Boards felt the money was more urgently needed in other areas and "borrowed" the allocation for other purposes. From information provided by the health boards themselves, it is clear that the payment of arrears has not been treated with any great urgency and inaction or half measures appear to have been the order of the day. The position, based on information from the Department's files and from direct contacts with the boards concerned, seems to be as follows:

- The Southern Health Board (SHB) says that, arising from advice from its own legal adviser, it had applied Article 8.2 "correctly" with effect from August 1995. However, the correct approach was applied from August 1995 only in the case of new applicants. In January 1998 the SHB received an additional allocation of £560,000 towards the operation of the subvention system. Of this, £197,000 was specifically earmarked for the payment of subvention arrears to people in respect of whom Article 8.2 had not been correctly applied. By September 2000 only £65,860 of this had actually been paid out - the bulk of these payments seems to have been made in the period June - September 2000.[2] By early January 2001, according to the SHB, it had paid out a further £107,611 which related to patients who were either deceased or had been discharged. The SHB says it hopes to have the balance of arrears payments, involving 89 cases, paid by the end of January 2001.
- The South Eastern Health Board (SEHB) received an additional allocation of £610,000 in January 1998 of which £200,000 was intended to cover payment of arrears to people who had not been given the benefit of the "pocket money" provisions in the subvention

means test. The SEHB says that in July/August 1998 it paid arrears in "appropriate cases" direct to the nursing homes involved, rather than to the applicant or to the family. Arrears have not been paid in cases where the claimant had died prior to the arrears being calculated. It is not clear how much of the £200,000 has actually been paid out by way of arrears.

- The Mid-Western Health (MWHB) received an additional allocation of £950,000 in January 1998. It is not clear how much of this was intended to cover payment of arrears to people who had not been given the benefit of the "pocket money" provisions in the subvention means test. The MWHB says it has paid arrears only in those cases in which (a) a subvention was still in payment on 1 September 1998 and (b) where it could get adequate details of income. Arrears were not paid in respect of applicants who had died prior to the arrears being calculated. The total amount paid out by way of arrears is not clear.
- The Western Health Board (WHB) received an additional allocation of £750,000 in January 1998. It is not clear how much of this was intended to cover payment of arrears to people who had not been given the benefit of the "pocket money" provisions in the subvention means test. As of 27 September 2000, the WHB had not paid any of the arrears under Article 8.2.[3]
- The Midland Health Board (MHB) received an additional allocation of £300,000 in January 1998 of which £150,000 was intended to cover payment of arrears to people who had not been given the benefit of the "pocket money" provisions in the subvention means test. The MHB originally said that it had applied Article 8.2 correctly, but when its attention was drawn to a particular case it accepted that this was not so. As of 30 September 2000 the MHB had paid a total of £86,256 arrears (including arrears in respect of people who had died in the meantime). The MHB did not begin to pay arrears until 26 May 2000, despite having received the allocation for that purpose in January 1998. It believes it has now discharged its full liability in respect of such arrears.
- The North Western Health Board (NWHB) received an additional allocation of £830,000 in January 1998. It is not clear how much of this was intended to cover payment of arrears to people who had not been given the benefit of the "pocket money" provisions in the subvention means test. There is some confusion as to how this allocation was used. On the one hand, the NWHB told the Department that it was reviewing all payments where Article 8.2 was an issue. On the other hand, it subsequently told the Ombudsman that it had always applied Article 8.2. More recently, the NWHB has told the Ombudsman that it operated Article 8.2 correctly "from a current date in 1998". The NWHB says: "[a] review of all previous applications has been carried out and all arrears are being paid". As of 10 November 2000, the NWHB had not paid any of theses arrears but had calculated the arrears figure for Co. Donegal as amounting to £80,000; it said it intended to pay




**Letter of 4 February 2000 from Department of Health and Children to Western Health Board**

> arrears "within the next week to those [Co. Donegal] clients who are still alive". Arrears payments to the next-of-kin of deceased clients would, according to the NWHB, take longer. As of 10 November 2000, the arrears calculations for Sligo/Leitrim were still being worked on. It appears much of the £830,000 allocation has been used to "restore" to other service areas money which had been diverted, over a period of years, to implement the Health (Nursing Homes) Act.

Untangling the detail of what precisely happened the additional allocation would involve a separate investigation. The Department has informed the Ombudsman that it is continuing to pursue the relevant health boards on the question of payment of arrears arising from the failure to apply the pocket money provisions (Article 8.2) correctly.[4]

### Comment

The Ombudsman does not accept that Article 8.2, in its original wording, was unclear either as to its meaning or its intended application. Article 8.2 was amended, with effect from 1 January 1999, ostensibly to clarify whatever was allegedly unclear in the original version. The amended version, provided by SI No. 498 of 1998, is as follows:

> "A health board in assessing the means of the person in respect of whom a subvention is being sought under these Regulations, and in calculating the amount of subvention to be paid in accordance with the Regulations, shall ensure that income equivalent to one-fifth of the weekly rate of the Old Age Non-Contributory Pension payable at the time, is disregarded for the purposes of such assessment, such sum to be retained by the person for his or her personal use"

It is the Ombudsman's view that this amendment was unnecessary and achieved no improvement within the Regulations. Furthermore, in the light of information subsequently acquired from the Department's own files, the Ombudsman has great difficulty in accepting that the Department's interpretation of Article 8.2 (up to December 1996) was soundly based. Equally, in view of the information which subsequently came to light, it is evident to the Ombudsman that the Department was less than open and helpful in its dealings with his Office in relation to the Article 8.2 issue. Among the facts to emerge subsequently, and which are dealt with in more detail at Chapter Seven, are the following:

1. There was quite a deal of scepticism among many of the health boards regarding the validity of the Department's advice on Article 8.2. This advice was originally given in late 1993 but by January 1995 the first of a number of health boards had formally written to the Department querying the advice. The Department subsequently gave the impression (letter of 15 December 1996 to all health boards) that it had only become aware of the disquiet in December 1995.[5]

2. In July /August 1995 two health boards (WHB and SHB) sought their own legal advice in relation to Article 8.2. These advices were unequivocal in concluding that the Department's interpretation was incorrect and that the position held by the Ombudsman was correct. Both health boards supplied the Department with copies of their advice within weeks. Yet when the Ombudsman's Office was in contact with the Department on the matter, in December 1995, no reference was made to these advices and the Department continued to hold its line.
3. The Department eventually requested legal advice on Article 8.2 from its own legal advisor on 13 December 1995. This advice was not received until 3 July 1996, more than six months later.[6] The Department's legal advisor also rejected the position being adopted by the Department and supported the Ombudsman's interpretation. The Department failed, over a four month period, to notify the Ombudsman of this advice despite a number of follow up contacts from the Ombudsman's Office.
4. Not until 15 December 1996, when it advised the health boards to change their practice in relation to Article 8.2, did the Department act on the legal advice received on 3 July 1996 . The Department's decision to issue new advice in December 1996 was the result of its meeting with the Ombudsman's Office in late November 1996.
5. The Department was at all stages aware that the EHB and the NEHB were operating Article 8.2 as envisaged by the Regulations. One of the functions served by the Department, in relation to health boards generally, is to assist in ensuring uniformity of practice in individual areas of activity. For more than three years the Department presided over a situation in which the practice of two boards, including the largest health board in the country, was at odds with the practice of the other six boards.

It is difficult to reach any conclusion other than (a) that the Department was aware from the outset that its interpretation of Article 8.2 was incorrect; (b) that it gave incorrect advice to the health boards; (c) that it was dilatory in withdrawing its incorrect advice and (d) that it was less than open and transparent in its dealings with the Ombudsman in relation to his examination of complaints on the matter.

> ".. this matter [Article 8.2] was discussed with the Board's Solicitor ... on 12 April 1995. ... [The Solicitor] has advised that the Board does not have any grounds to exclude Article 8.2 of the Regulations in assessing eligibility for a Nursing Home Subvention. As I stated in previous correspondence, excluding this Article was based on advice from the Department of Health. However, such advice cannot take precedence over legislation.
>
> The Board should therefore exclude the equivalent of 20% of the non-contributory old age pension rate from the means of each claimant for a Subvention. I would recommend that this be put into effect immediately ...."
>
> **Western Health Board Internal Minute of 21 April 1995**

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**Notes**

(1) In its response to a draft of this report, the Department commented:
"The Department accepts that the provisions of article 8.2 were unsatisfactory and that the advice it gave the health boards in good faith had the unintended effect of rendering ineffective the original intention behind the article. The Department denies that it knowingly gave incorrect advice or that it inserted a provision in the regulations which it intended would never be operated ..."

(2) The SHB explained that "the remaining arrears payments are all in respect of persons who are now deceased (or discharged) and the Board is working with its legal advisors to establish

on an individual basis who is legally entitled to receive the arrears due." **(Letter to Ombudsman, 4 October 2000)**

(3) The WHB has explained its failure to pay arrears in the following terms:

"... over the two year period up to the end of 1999 the number of persons qualifying for subvention in this Board's area grew from 800 to 1,000. The additional costs of these extra subvented places was in the order of £1 million ... At the end of last year we had incurred an overrun of almost £1 million on our budgetary allocation and this overrun had to be met by diverting revenue funds from other areas within the Board's scope of activities. ... it was not possible nor would it be fair or equitable to applicants or their families that [current] payments be deferred or withheld on the basis of assigning part of our allocation over the two years in question to the payment of arrears under Section (sic) 8.2." **(Letter to Ombudsman, 27 September 2000)**

(4) On 15 January 2001 the Department provided the Ombudsman with details of arrears payments by the health boards as at 8 January 2001. It has not been possible, for reasons of time, to reconcile these figures with the details set out in the body of this chapter. In summary, the position as of 8 January is reported to be as follows:

SHB - broadly as described in the chapter;
SEHB - paid out arrears totalling £153,000 but the amount due in respect of deceased and discharged patients not yet calculated or paid;
MWHB - paid out arrears totalling £142,000 but the amount due in respect of deceased and discharged patients not yet calculated or paid;
WHB - paid out arrears totalling £97,000 but the amount due in respect of deceased and discharged patients not yet calculated or paid; an amount of £366,000 has been earmarked for this purpose;
MHB - paid out arrears totalling £148,378;
NWHB - paid out arrears totalling £31,000 and the amount of unpaid arrears is estimated at £194,000.

(5) "The matter (the correct application of Article 8.2) was drawn, informally, to the Department's attention in December 1995 by a health board, following representations made to them by the Ombudsman's Office." **(Letter of 15 December 1996 from Department of Health to the eight health boards.)**

(6) The Department has explained this delay as follows:

"It should be noted that there was a change of Legal Adviser in March 1996. The previous Legal Advisor forwarded the request of December 1995 to the new Legal Advisor sometime after her appointment and the latter's advice came to hand in July 1996."

# The making of the Regulations

The purpose of this chapter is to examine the influences, considerations and consultations which led to the making of the subvention regulations in July 1993. The Regulations were commenced on 1 September 1993. The Health (Nursing Homes) Act was passed in July 1990, so the Department had three years in which to prepare the various regulations (including the subvention regulations) necessary for the effective commencement of the Act. Amongst the areas examined in this chapter are: the role of the Dáil and Seanad, the Department's consultations with interested parties and the Department's own internal consultative process, including the seeking of legal advice.

> "Without these [draft subvention] regulations before us I cannot see how we can seriously consider the Bill. When are we to get the regulations? How soon? They will be an integral part of the debate on the Bill and in their absence we are creating a debate minus 50 per cent of the information."
>
> **Dáil Debates on Health (Nursing Homes) Bill - Eric Byrne TD, 21 November 1989**

## Dáil and Seanad

When the Oireachtas delegates to a Minister, or to some other authority, the power to make regulations, the delegation given is very specific. What is being delegated is the authority to fill in the details where the main lines have already been spelt out. Such regulations should not contain anything that is not clearly envisaged in the parent Act. In this sense, regulation making (or secondary legislation as it sometimes known) is an exercise in realising the intentions of the Oireachtas. It is not an exercise in realising the intentions of the Minister or other authority to which the delegated powers have been given. Anything in a regulation which is not demonstrably in line with the intentions of the Oireachtas is likely to result in the regulation being deemed *ultra vires* and struck down in the event of a legal challenge in the High Court.

The 1990 Act was the subject of quite detailed debate in both the Dáil and Seanad during 1989/1990. However, the focus of this debate was primarily on issues to do with the definition of a nursing home, the licencing or registration of nursing homes, the setting of standards for, and the inspection of, nursing homes. There was only limited debate on issues to do with the payment of subventions. Perhaps this is not all that surprising as subventions are the subject of but one section in an Act of 17 sections.

In the context of subventions there was a recognition all around that the then existing arrangements for nursing home subventions, under Section 54 of the Health Act, 1970, were very unsatisfactory. There was no explicit articulation in the Oireachtas debates that a nursing home service, being the equivalent of "in-patient" services, was something to which the entire population had an entitlement under the Health Act, 1970.

Several Oireachtas contributors referred to the issue of regulation making in the course of debating the Act. Unease was expressed by these contributors at the possibility that important provisions would be introduced by way of regulation and that the Oireachtas would have no effective mechanism for the consideration of such provisions.

There were two overlapping concerns in the comments of Oireachtas members regarding regulations. There was a very specific concern, in relation to the

particular Bill, that the Oireachtas needed hard information in order to understand the consequences of what was in the Bill. On a more general but related level, concern was expressed about the absence of adequate mechanisms to enable the Oireachtas effectively to monitor secondary legislation made under its delegated authority.

On the specific level, the view was expressed that far too much was being left to be done by way of regulation and that, without a knowledge of what was proposed in certain areas, the Oireachtas was effectively operating in the dark. Questions were raised as to the level of finance to be provided, the details of establishing different levels of dependency and the rates of subvention. One Deputy observed that the Oireachtas would need to know what would be contained in the relevant regulations in order to judge the overall merit of the legislation.

On a more general level, several Deputies and Senators spoke of the need to ensure that important decisions were made by the Oireachtas rather than by the Department. A view was expressed that the current standard approach in relation to Oireachtas "vetting" of regulations is inadequate. The standard arrangement is that a regulation, when made, is laid before the two Houses of the Oireachtas and a period of 21 sitting days is provided within which it may be annulled by resolution of either of the Houses. This arrangement does not require positive approval of a regulation by the Oireachtas; rather, the regulation stands unless a negative resolution is carried. Over the years Oireachtas members have frequently pointed out, generally when in opposition, that as the Government parties effectively control Oireachtas business, there is little real opportunity to table resolutions on regulations.

Deputy Brendan Howlin expressed views on this at the Committee Stage of the Bill in June 1990. He put the issue as follows:

> "I am always concerned when sections in any Bill are broad enabling sections which devolve to a Minister power to take actions which are of a legislative nature. ... as a matter of principle, all regulations should be brought before the House to be copperfastened. My amendment ... will enable the House, if it sees fit, to express a view on a regulation.
>
> ... as a matter of fundamental principle, on all matters the final decision should be in the hands of the elected Members of the House. Motions should not be allowed through by stealth. It is impossible for Members to follow the huge number of statutory instruments that pour out of all Government Departments."
>
> **Dáil Debates, 6 June 1990**

However a number of amendments, which would have had the effect of requiring positive "vetting" of regulations under the Act, did not succeed. The Minister for Health argued that the current standard arrangements for regulations (as outlined above) contained sufficient safeguards:

"I support these amendments (to require the regulations to be subject to positive resolution of the Houses of the Oireachtas). The net issue is whether this legislation is accountable to the Dáil or to the Department of Health civil servants."

**Dáil Debates on Health (Nursing Homes) Bill - Ivan Yates TD, 6 June 1990**

"I am satisfied that the traditional method in this House is a sufficient safeguard to ensure that the legislation is in accordance with the wishes of the Members of this House and the people."

**Dáil Debates, 6 June 1990**

Clearly, any decision on the nature and extent of the subvention scheme necessarily involved competing social and financial considerations. Such a decision would certainly have benefited from a political input. With the benefit of hindsight, it would have been better had there been an effective mechanism in place whereby the 1993 subvention Regulations could have been actively considered by the Oireachtas.

On 4 May 1993 the Minister replied to a series of Dáil questions regarding the content of proposed subvention Regulations. The format of Dáil Question Time is not such as to provide a forum for debate on policy issues, although policy issues do arise. Question Time is essentially a mechanism for eliciting information from the particular Minister.[1] Accordingly, though the possibility of a family assessment arrangement was aired, it cannot be said that the issue was discussed in the sense that issues are discussed in the context of draft legislation. Nor was a resolution on the matter put before the Oireachtas to be voted on. (The Regulations, when made, did not require to be validated by a positive motion of either the Dáil or the Seanad. (See Chapter Eight for comment on the role of the Oireachtas in relation to secondary legislation.) In the light of what subsequently transpired in the implementation of the Regulations, this Dáil episode is of interest. The Minister clarified that there were proposals to take account of the income of sons and daughters. But such a family assessment would be relevant only in deciding how much subvention would be paid after eligibility had been established by reference to the claimant's own means. What was being considered then was a two stranded approach: the income of sons and daughters would not count in establishing eligibility (only the claimant's means would count); but once eligibility was established, the income of sons and daughters could be taken into account in deciding how much subvention to pay.

The Minister's Dáil statement on 4 May 1993 did not clarify whether the income of sons and daughters could have the effect of leaving an otherwise eligible claimant with a nil rate of subvention. However, the suggestion seems to have been that an otherwise eligible claimant would receive some minimal rate of subvention where sons and daughters' income was being taken into account. As has been shown in Chapter 4, the distinction drawn between determining eligibility, on the one hand, and the rate of subvention, on the other hand, proved unreal when the scheme was actually put into operation.

## Consulting Interest Groups

In replying to Dáil questions on 4 May 1993 the Minister mentioned that, in drafting the subvention regulations, his Department had consulted widely with "those organisations with an interest in the nursing home sector and in the

"A huge volume of legislation - greater than the total volume which goes throught this House- is enacted without reference to the elected representatives of the people...If there was a procedure whereby an affirming order had to be brought before this House it would at least require us to glance at it and know what sort of legislation was being passed...We should bring that power back to ourselves..."

**Dáil Debates on Health (Nursing Homes) Bill- Brendan Howlin TD, 6 June 1990**

" ... we will not get the opportunity to discuss regulations here in spite of what the Minister said about this negative resolution that is available to both Houses of the Oireachtas. I have never seen regulations discussed in either House. It certainly has not happened in recent times here."

**Seanad Debates on Health (Nursing Homes) Bill- Senator Patrick Kennedy, 10 July 1990**

welfare of the elderly". Among the organisations consulted were the Irish Private Nursing Homes Association (IPNHA), the Federation of Catholic Voluntary Nursing Homes (FCVNH), the National Council for the Elderly, the Alzheimer's Association and the Irish Association of Older People.

In the case of the IPNHA, it raised concerns in relation to issues which subsequently became contentious when the Regulations were put into operation. At a meeting with the Department in April 1993 to discuss a draft of the Regulations, the IPNHA raised the issue of the assessment of "circumstances" and the payment of family contributions. The IPNHA feared that its members, the nursing home proprietors, could become caught in the middle where a family claimed it could no longer contribute to a parent's nursing home fees. From the context, this scenario would most likely apply to patients already in a nursing home on the commencement of the new subvention scheme. The IPNHA asked whether a subvention would be paid in such cases. If a subvention were to be refused in such a case, the IPNHA feared that the nursing home operator would be left with a patient who might not be able to pay the fees and where the family and the health board declined to accept responsibility for the situation.

At a subsequent meeting, in May 1993, the IPNHA returned to the issue of family assessment. Specifically, the question was raised of what would happen in the event of information on the incomes of sons and daughters not being provided. The IPNHA asked whether a subvention would be paid where such information was not provided. The IPNHA also made the point that the maximum rates of subventions would not be sufficient to cover the costs of care of people whose sole means were the old age pension and who had no family members to subsidise their nursing home costs. The Department agreed to consider these points.

This last point, regarding the inadequacy of the subvention rates for a person with only old age pension level of income, did cause the Department to reflect seriously on the rates of subvention being proposed. This was the subject of an internal minute shortly after the meeting with the IPNHA in May 1993. The minute noted that the subvention system had been designed "on the basis that a dependent person with no more money than the OAP could just about pay for nursing home care". Since all old people should, by definition, have income equivalent to the NCOAP rate, this suggests the Department intended that virtually all old people would, with the help of a subvention if necessary, be able to afford private nursing home care. Arising from the comments of the IPNHA and of others, the Department now saw that one of the fundamental features of the scheme, its universal application, could not be realised with the subvention rates proposed.

On the other hand, the Department felt there were particular reasons not to increase the subvention rates. Apart from the inherent difficulty in securing Department of Finance agreement to increased rates, the Department felt the health boards themselves would not favour increasing the proposed subvention

rates. Health board spending on subventions would be demand led and would leave boards with little effective discretion. Keeping the subvention rates at a low level would appear to allow boards more control in the use of funds. In the event, the subvention rates proposed in the draft Regulations were not increased; nor have they been increased in the intervening seven years.[2]

The Department also met with the FCVNH in May 1993 to discuss the draft Regulations. The FCVNH was unhappy with the proposal that a person entering a nursing home, without having first applied for a subvention, would be debarred from so applying for a period of three years. The IPHNA had also expressed unhappiness with this proposal. Both organisations felt the three year exclusion was unreasonable. The Department pointed out that the three year exclusion was not absolute and that the proposed regulations allowed the health board CEO to accept an application before the expiry of three years. When it came to making the Regulations, the Department reduced the three year exclusion to a two year exclusion.

The FCVNH, like the IPNHA, also referred to the plight of families already subsidising parents in nursing homes because of the absence of any subvention or of a realistic subvention. Under the Department's proposals, such families would be expected to continue subsidising at the level prevailing when the new subvention scheme would be introduced. The new scheme would do nothing to ease the burden on such families. The minutes of the meeting record the FCVNH as expressing the view that many such family members were "at present very hard pressed and it therefore seemed unfair to take fully into account contributions currently being paid." The minutes record the official side responded by explaining that "the new subvention scheme could not substitute for all contributions being paid by family members at present." It is not recorded whether the arbitrary difference in treatment as between new patients (to be treated more favourably) and existing nursing home patients (to be treated less favourably) was discussed. When the Regulations were eventually made, the impugned provision was retained unaltered.

Subsequently, both the FCVNH and the IPNHA, along with the National Council for the Elderly, were invited to participate along with health board and Departmental representatives on the Implementation Group on the Health (Nursing Homes) Act which monitored the implementation of the scheme.

## Department's Internal Deliberations

Shortly after the passing of the Act, the Department established a Working Group on Subvention Regulations which had members from a number of sections of the Department itself as well as from some of the health boards. This Group served as a sounding board for subvention proposals being developed within the Department and looked critically at the draft Regulations as they evolved. Because they had funding implications, the Department also consulted with the Department of Finance in relation to the Regulations. The account given

> "In general [under the draft regulations], the incomes of sons and daughters will be taken into account when deciding whether to grant-aid nursing home places... Since the word "circumstances" is defined, as meaning "the income of any child of a person in respect of whom a subvention is being sought", it is clear that this provision, if applied strictly, would eliminate large numbers of people from grant-aid."
>
> **Pádraig O'Móráin, *Irish Times*, 7 April 1993**

> "The article [Irish Times, 7 April 1993] is misleading. The draft regulations do not permit health boards to take the income of adult sons or daughters into account in deciding whether an applicant is eligible for a nursing home subvention. It is proposed that health boards may only take the income of an adult son or daughter into account in deciding how much subvention to pay a person who is eligible."
>
> **Minister for Health, Question Time, Dáil Éireann, 4 May 1993**

below concentrates primarily on those issues which have been the main focus of this present report i.e. the "pocket money" issue and the assessment of family members.

**The "Pocket Money" Issue**

Much has already been said in Chapter Five regarding the Department's advice to the health boards on the "pocket money" issue. The Ombudsman takes the view that the Department's interpretation of Article 8.2 of the Regulations, which effectively negatived the "pocket money" provision, was never even arguable let alone well-founded. The internal Departmental discussions on this issue show that the Department fully understood from the outset what Article 8.2 was intended to achieve. Nevertheless, until December 1996 the Department clung to the position that Article 8.2 was unclear and that its interpretation was a reasonable one. The Department's actions in this regard appear to have been directly related to the financial implications of allowing subvention claimants retain approximately £11 per week for their own personal needs.

The Department's initial subvention proposals did not provide for the claimant to be allowed retain any amount of income for personal use. All of the claimant's income would be included in the subvention means test. The Department did look carefully at a proposal to allow the claimant to retain, for personal use, an amount equivalent to one fifth of the NCOAP, or about £11 per week in 1992/3. However, this was not a simple issue of an income disregard in the means test giving rise to increased subvention expenditure; it impacted also on the arrangements for long-stay patients in health board homes. The Department anticipated that an arrangement which allowed subvented patients in private nursing homes to retain £11 per week as "pocket money" would inevitably result in demands that similar arrangements apply in the case of elderly long-stay patients in health board homes.

The Department had data which showed that the practice in health board homes in relation to "pocket money" varied. Some boards allowed long-stay patients retain one fifth of their income but others did not. If all health board long-stay patients were to retain £11 per week for personal use, this would cost an additional £1m per year in 1992 terms. The Department estimated that the costs of allowing all private nursing home subvention recipients retain £11 per week would run to an additional £2.7m in 1992 terms. Accordingly, when the Department discussed the implementation of the subvention scheme with the Department of Finance, it was on the basis that a claimant's full income would be assessed.

The Minister for Health, however, was committed to an arrangement which allowed claimants retain one fifth of the NCOAP rate for personal use. Accordingly, the Department amended its proposals and provided for this by way of what became Article 8.2 of the Regulations. This sub-article read:

> "A health board in assessing the means of an applicant for a subvention under these Regulations shall disregard income equivalent to one-fifth of

the [NCOAP] payable at the time, such sum to be retained by the person for his or her own personal use."

In the light of the information above, there can be absolutely no doubt as to what Article 8.2 was intended to achieve. Nevertheless, from the commencement of the scheme in September 1993 the Department advised the health boards to apply Article 8.2 in a way which totally negatived its intended purpose. From the viewpoint of good administration, this raises very serious questions for the Department.

**The Family Assessment Issue**

The issue of including family members in the subvention means test was the subject of considerable internal discussion during 1992/3. Various proposals were considered and legal advice was sought in relation to them. The overall thrust of the legal advice was that any inclusion in the means test of family members, other than a spouse, was legally unsound. However, the Department was in the position that only limited funding would be available for the subvention scheme and it felt it necessary to make choices as to how that funding would be used. The Department explained to the Ombudsman that its objective was "to ensure that the limited expenditure available was targeted at those most in need, i.e. those who needed but could not afford to pay for nursing home care." In this context, the Department was particularly anxious to retain the contributions already being made by the family members of elderly people already in nursing homes.[3] The instrument chosen by the Department to facilitate this was the term "circumstances", referred to in Section 7 of the Act as one of the criteria by which the Minister might specify amounts of subvention payable (see Chapter Three). The Department decided to define the "circumstances" of the claimant as meaning the capacity of adult sons or daughters, living in this jurisdiction, to contribute to a parent's nursing home costs. This amounted to family assessment by the back door.

On 28 July 1992 the Department consulted its own legal advisor regarding its intention to define "circumstances" as including the income of a child of a person applying for a nursing home subvention. The Department's minute of that consultation records:

> "[The Legal Advisor] said that he did not consider that there was a sufficient basis for defining 'circumstances' in this way. I said that I had discussed this point with the Secretary and that he felt that we should define 'circumstances' in this way. The financial implications of not taking children's income into account for the new nursing home subvention system were serious. We would have to approach the problem in this way. The Legal Advisor accepted that we were in a difficult position but repeated his concern about defining 'circumstances' in this manner."

On the following day, 29 July 1992, the Legal Advisor rang one of the officials involved "on the question of taking children's income into account in

> "An implication of not taking family income into account would be that families currently paying for the care of their relatives in nursing homes would have an incentive to withdraw that care. The difficulty of obliging family members to contribute towards what might be a statutory entitlement was highlighted... It was agreed that, subject to legal advice, the means test would take into account the income of the children of the dependant elderly person."
>
> **Minutes of Meeting of Department/Health Board Working Group on Subvention Regulations, 18 December 1991**

"The Nursing Home Subvention Scheme is a national Scheme. It has very detailed criteria set out for the assessment of family circumstances and not general guidelines such as "whatever the family members themselves determine they may contribute." In the light of this, and in the interests of fairness and equality to all applicants, these criteria are applied equally in all cases."

**Letter of 3 September 1996 from Southern Health Board to Ombudsman**

determining the amount of subvention payable to a dependent person in a nursing home." The official recorded the Legal Advisor's position as follows:

> "His opinion was that the explicit reference to the income of any child of the person in the definition of 'circumstances' in the subvention regulation would invite a legal challenge which was likely to succeed. He suggested that the explicit reference to family members be dropped in favour of a more general wording allowing for all sources of contributions to be taken into account. In practice contributions could be sought from family members under this provision and if there were a legal challenge it would be to the actual practice rather than the explicit provisions of the subvention regulations."

On 4 August 1992 an Assistant Secretary in the Department read the draft memorandum to Government on the implementation of the 1990 Act. The Assistant Secretary noted just one concern:

> "I think the notion of formally taking account of a family's financial responsibility could lead to an early court challenge, perhaps on constitutional grounds. I presume this has been considered?"

Despite the fact that such a serious concern had been expressed at a senior level, the Department pressed ahead with its plans. On 14 September 1992 it sent the Legal Advisor a draft schedule to the Regulations dealing with the assessment of family members. This draft did not reflect the Legal Advisor's suggestion for "a more general wording allowing for all sources of contributions to be taken into account." On the following day, 15 September 1992, the Legal Advisor rang one of the officials involved to discuss the draft. The Legal Advisor reported that he had discussed the family assessment proposals with a senior official in the Attorney General's Office. The Departmental official's note of this telephone discussion records:

> "[The senior AG official] is of the opinion that there is no primary legislation which would oblige children or issue of a person to make financial contributions upon his/her behalf. [The senior AG official] advised that secondary legislation such as regulations under the Health (Nursing Homes) Act, 1990 would be insufficient to make such a provision legally valid."

Clearly, the Legal Advisor was concerned with the direction of the Department's proposals. The officials involved, however, appeared not to be unduly perturbed. An annotation on the record of the Legal Advisor's telephone call reads:

> "We are not obliging anybody to pay anything. We are simply allowing the [health boards] to take family circumstances into account in determining the amount of subvention to be paid."

What this meant was that while health boards could not require family members to contribute to a parent's nursing home costs, a health board could decide the

level of subvention to be paid (if any) as if the family were making that level of contribution. And, of course, this is precisely what did happen in practice. The Department's formula had the practical consequence of requiring family contributions if the elderly parent was to be provided with nursing home care.

When a new Minister came to examine the draft Regulations[4], which seems to have been in April 1993, he is reported to have been concerned about the family assessment provisions.[5] An official noted that the Minister "is not happy that children can be assessed by the Boards except perhaps in very tightly defined circumstances." Perhaps in response to this, though the timing is not quite clear, the Department developed the distinction that children's income would not figure in determining whether a claimant qualified for subvention; but children's income would be taken into account in deciding how much subvention would be paid to a qualified claimant. This distinction, as noted earlier, transpired not to have any practical value from a claimant's point of view.

In the event, and irrespective of the legal advice received, the Department proceeded to make regulations which had the practical consequence of including children in the means test. Clearly, financial pressures played a large part in the decision eventually made. Nevertheless, the conclusion is unavoidable that the Department made a regulation in the knowledge that it was almost certainly invalid (*ultra vires*) or, at least, highly unlikely to survive a legal challenge.[6] One must have sympathy for the Department's predicament, and one must assume that its actions were well-intentioned. However, this cannot excuse the decisions actually taken in July 1993 when the Regulations were made.

> "It is critical that we keep the assessment of children's income for persons who are in nursing homes when the Act is commenced and who qualify for a subvention. Otherwise there would be an incentive for the thousands of families who are supporting elderly people in nursing homes to withdraw their support and seek health board subvention. This would result in a large financial expenditure which would not be of benefit to the many elderly people in need of long-term nursing care at present and who cannot pay, or who have no children who can afford to pay, nursing home fees.
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> **Internal Department of Health Minute - April 1993**

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**Notes**

(1) "The purpose of each Question shall be to elicit information upon or to elucidate matters of fact or of policy and Questions shall be as brief as possible." **Dáil Standing Order No. 34(2)**

(2) In January 2001 the Department informed the Ombudsman that the subvention rates are to be increased with effect from 1 April 2001. The new maximum weekly rates will be £90, £120 and £150 in place of the current maximum rates of £70, £95 and £120.

(3) In commenting on a draft of this report, the Department explained its thinking in the following terms:
"The funding made available to implement the Act was limited, an additional £4m in the first year of implementation rising to £12m in 1997. ... It was agreed that the limited funding should be targeted at those most in need, in other words at those who needed but did not have the ability to pay for nursing home care. The costing exercise was based on the continuation of the common practice of sons and daughters contributing to the cost of nursing home care of their parents. If this assumption had not been built in to the Regulations, those sons and daughters who were contributing to the cost of the care of parents in private nursing home beds in September 1993 would have had every

incentive to withdraw the support they were giving and to seek a health board subvention. ... [Accordingly] health boards were entitled in the Regulations in the case of those resident in nursing homes on the day the Act was implemented to abate the subvention by reference to the actual amount payable by or on behalf of the person prior to that date. If health boards could not take into account the ability of a son or daughter to contribute to the cost of nursing home care for a parent who was not resident in a nursing home on the date the Act was commenced, much of the limited funding available would have gone to subsidise families that were in a position to contribute towards the cost of that care."

What is missing from this analysis is a recognition (a) that elderly people already had an entitlement to nursing home type care under the Health Acts; (b) that people who needed such care, but could not afford private care, should not have had to contemplate seeking private care; and (c) that a policy, the effect of which was to place a liability on adult sons and daughters to contribute to parents' nursing home costs, could only be legislated for by the Oireachtas itself.

(4) In its response to a draft of this report, the Department emphasised "that the Minister was involved in the decision making process leading up to the making of the 1993 regulations and subsequent amendments". The Ombudsman accepts that this was the case notwithstanding the paucity of direct evidence of Ministerial involvement.

(5) The Department explained these reservations as follows:

> "... the Minister's reservations were not in relation to the principle of taking family circumstances into account; rather his concern was that the assessment of such circumstances should not be too onerous on the family. ... a number of changes were made in the draft regulations to take account of the Minister's concerns in this matter."

(6) In commenting on a draft of this report, the Department rejected the Ombudsman's draft conclusion that it made a regulation in the knowledge that it was invalid. It contends that the final text of the family assessment provisions in the Regulations "differed significantly" from the draft provisions on which the Legal Advisor had expressed doubt, as quoted in this chapter. In particular, the definition of "circumstances" was re-cast so as to refer to the "capacity" of a son or daughter to contribute to a parent's nursing home costs; the reference in the original draft definition to "income" of a son or daughter, to which the Legal Advisor had objected, was now removed.

On the face of it, this should have rendered the Regulations less vulnerable to legal challenge - though the Ombudsman has not seen any evidence that the final Regulations were "cleared" with the Department's Legal Advisor. In the event, Article 9.1 of the Regulations provides that "circumstances" are to be taken into account in accordance with the provisions of the Third Schedule which, in turn, provides that an assessment of the income of a son or daughter is a key feature of the "circumstances" assessment. In this respect the change achieved, as between the original draft and the Regulations as made, was entirely cosmetic. It remained the case that income of a son or daughter was central to the assessment of "circumstances", something which the Legal Advisor had specifically advised against.

# A Failure in Responsiveness and Accountability

Between 1993 and 1999 the subvention scheme operated more or less on the basis of family assessment; and for much of that same period it operated with the "pocket money" provision effectively in abeyance. Although the subvention scheme appears not to have commanded much direct Oireachtas attention after September 1993, the scheme was otherwise the subject of some debate and, from 1995 onwards, became the subject of a veritable deluge of legal advice. At the same time, the financial constraints on the Department in funding the scheme remained significant and this must have restricted its capacity to respond to the growing evidence that the scheme, as operated, was not satisfactory.

## Funding Constraints

In all its contacts with the Ombudsman's Office, from 1992 onwards, the Department always made it clear that the health boards' capacity to meet their obligations to people in need of nursing home type care was severely curtailed by the inadequate finances available. Whereas the Department hoped that the new subvention scheme would improve matters, it acknowledged that securing adequate finances remained a problem. Some measure of the extent of the funding difficulty it faced can be gauged from exchanges it had with the Department of Finance as recently as 1997.

In July 1996 the Minister made a regulation (SI No. 225 of 1996) which increased the allowances available to family members whose incomes were being assessed as part of the subvention application process. Full details of these changes are given in Chapter Four. That regulation also purported to authorise health boards to make contractual arrangements ("contract beds") with private nursing homes to look after health board patients where such arrangements would be in accordance with the subvention Regulations generally. In December 1996 the Department changed its advice in relation to the "pocket money" issue. These developments had cost implications and in May 1997 the Department of Finance posed a series of searching questions in relation to them.

In relation to the "contract beds" the Department of Health was effectively asked to justify its actions. The reality was that the use of "contract beds", within the context of the 1990 Act, amounted to a dilution of patients' existing entitlements under the Health Act, 1970. This is because the charging regime under the 1990 Act is much more onerous than that under the Health Act, 1970. In fact, the contracting provision under SI No. 225 of 1996 is quite likely to be invalid (*ultra vires*) as it creates an arbitrary distinction between two groups of patients in a manner not envisaged in the parent legislation (the Health Acts). The Department of Health would have been aware of this in making the regulation (see legal advice quoted opposite). Nevertheless, even where the Department had made an arrangement which actually saved money, it was still required to defend its actions on purely financial grounds.

Questions were also raised about the wisdom of having eased the means test on family members. This was put as follows: **"In a time of rampant demand, why**

> "The Legal Adviser is of the opinion that under the Health Act 1970 medical card holders should be treated in the same way whether they are placed in health board homes or in nursing homes. If a medical card holder in need of long-stay care is placed in a [private] nursing home, he or she should not be charged more than if they were placed in a health board home."
>
> **Department of Health Internal Minute, 11 February 1993**

"[A son/daughter] has no legal obligation to support the parent but the parent will suffer if he/she does not do so. If the son or daughter has an income above [the amounts disregarded in the assessment of circumstances] then the health board may reduce the subvention which would otherwise be payable. The son or daughter cannot be forced to pay this amount. There is no legal obligation on children to support their parents. There are no provisions in the legislation for dealing with the situation where a son or daughter does not pay."

**Ms. Ita Mangan - address to 1997 Conference of the National Council on Ageing and Older People.**

**was the threshold made less onerous at a cost of £1.5m per year?"** In its reply the Department of Health effectively acknowledged that the State was failing in its obligations to elderly people in need of long-stay care; it recognised that the subvention scheme was a cheaper option than that of meeting people's statutory entitlement to long-stay care. Notions of entitlement and legal propriety were not in evidence on either side in this dialogue. The Department of Health's reply, in part, was:

> "The State is currently unable to meet the demand for long-stay places. If the nursing home legislation became unworkable, the State would have to pick up the pieces by means of huge capital investment for the provision of new long-stay accommodation for elderly people. The capital cost alone ... would be well over £200m. Since the Act commenced to the 31st December 1996, 10,106 people have been approved for a subvention. Of this number, 5,639 people are actually being paid subvention at a cost of £17,124,000 to the State. There is no way in which the State could support that number of people in health board long-stay units (assuming those units existed) for £17m a year."

Implicit in the Department of Finance questions was an assumption that family members could, and should, be required to contribute. One question was put as follows: **"The Regulations are readily policeable in terms of requiring people to produce a P60 ... Why is this not included as a requirement for the operation of the Scheme?"** Another question was: **"What arrangements are in force to enforce and police the regulations?"** To this latter question, the Department of Health rather enigmatically replied: "It is not clear what is meant by this question as the Act and Regulations are self-explanatory - applicants either qualify or do not qualify."

It will be clear from the tone of the above exchanges that, for the Department of Health, acquiring funding from the Department of Finance for its subvention scheme was an on-going struggle. The latter Department, for its part, was ever conscious of that aspect of its role which requires it to act as the custodian of the public finances.

## Commentators

The Ombudsman was among a number of commentators who drew attention to some of the inherent defects in the operation of the subvention scheme. The Ombudsman's Annual Report for 1996 highlighted the failure to operate the "pocket money" provision:

> "... complainants pointed out that some health boards were not applying this provision [Article 8.2] in determining the rate of subvention and consequently an amount equivalent to one fifth of the NCOAP rate was not being disregarded. This resulted in a reduction in the level of subvention otherwise payable by the health board. The consequence of this was that the patient - or frequently the patient's family - was required to meet the shortfall created by the failure to pay a higher subvention. "

The Ombudsman returned to this issue in his 1997 Annual Report. However, it was the operation of the family assessment provisions which was the subject of the Ombudsman's most detailed public commentary on the scheme.

In November 1997, in an address to the Institute of Public Administration's National Conference on the theme of Governance and Accountability, the Ombudsman expressed serious concerns that secondary legislation was being misused by the inclusion within regulations of provisions (including penalties) which were not authorised by the parent Act. The Ombudsman detected "an attitude which sees delegated legislation as a means of fine tuning in areas which might prove controversial if included in the primary legislation." One of the two detailed examples the Ombudsman gave was the inclusion of the family assessment provisions in the nursing home subvention regulations. The Ombudsman's description of the scheme in operation is given opposite. However, the kernel of the Ombudsman's concern in principle was expressed as follows:

> "It may, or may not, be desirable that children should support their elderly parents. I believe that in Germany, for example, there is some such obligation. Whether or not we should have such a provision is a matter for the Oireachtas. What concerns me here is, that the Minister, and his Department, appear to have created a *de facto* obligation to support as between children and their elderly parents without any discussion on this issue in the Houses of the Oireachtas thereby avoiding effective accountability."

A number of other commentators also drew attention to the likely invalidity of certain features of the Regulations. One of the first in this regard was Mel Cousins BL. Writing in the *Irish Social Worker* (Summer/Autumn 1992) before the subvention scheme got off the ground, Mr. Cousins speculated that Section 7 of the 1990 Act appeared "to be intended to provide a legislative basis for the current practice ... [of] making nursing home grants". He pointed out that the 1990 Act did not supersede the existing general statutory entitlement to nursing home care. Accordingly, Mr. Cousins concluded that a subvention under the 1990 Act was not a satisfactory alternative to the existing right to long-stay care under the Health Act, 1970. In a later article following the commencement of the subvention scheme, and published in the Law Society's journal *The Gazette* (January/February 1994), Mr. Cousins developed his theme. He highlighted some very specific defects:

- A person who enters a nursing home without having first claimed a subvention is generally debarred for two years from making such a subvention claim. This provision is arguably invalid (*ultra vires*).
- As regards the family assessment provisions, these also seem invalid.
- Separate regulations - the Health (In-Patient Services) Regulations, 1993 [SI No. 224 of 1993] - made under the 1990 Act purport to amend Section 52 of the Health Act, 1970. The effect is that where a health board provides nursing home services for a public patient in a private nursing home "it shall

" ... subvention decisions take account of the capacity of a son or daughter to contribute to a parent's nursing home costs. The subvention otherwise payable is reduced by the amount by which a son or daughter is considered by the health board to be in a position to contribute. And this line is generally taken irrespective of whether the son or daughter wishes to contribute, is actually contributing, or is contributing at a rate less than the health board's figure. In effect, the regulation is being generally operated as if the adult children had an obligation to contribute to the parent's nursing home costs."

**Ombudsman Address to Institute of Public Administration's National Conference, 7 November 1997**

> do so in accordance with the provisions" of the 1990 Act rather than under the Health Act, 1970. The charging arrangements under the 1990 Act are more onerous than those under the Health Act, 1970. Mr. Cousins suggests that SI No. 224 of 1993 is "almost certainly unconstitutional" representing "an attempt by the Minister to amend primary legislation contrary to article 15.2.1 of the Constitution".[1]

In relation to SI No. 224 of 1993, the Ombudsman's Office had discussed the substance of the regulation informally with the Department as far back as November 1991. The Department outlined its plans to deal with the difficulty created by the fact that everybody in need of long-stay care was already entitled to it under the Health Act, 1970. It explained that it intended, by way of a regulation to be made under Section 72 of the Health Act 1970, to distinguish between patients provided with care in health board homes and patients placed by health boards in private homes. The stricter charging regime of the 1990 Act would apply in the latter cases while those fortunate to have got a place in a health board home would enjoy an easier charging regime. The Ombudsman's Office suggested that any such arbitrary distinction in charging could hardly be said to have been intended by the Oireachtas and that any regulation to that effect would be likely to be invalid.

Ms. Ita Mangan of the National Social Service Board (now known as Comhairle) has commented on several occasions both on the legality of the family assessment arrangements generally as well as on the detail of how the assessment operated. Speaking at the 1998 AGM of the Irish Association of Older People, Ms. Mangan commented:

> "There is a need for a clear-cut and unequivocal statement of rights for older people. ... Changes need to be made, for example, in the way the nursing home subvention is calculated - in particular, in the way in which the income of children is assessed as if the parent had a right to that income. If society wishes to place a legal obligation on children to support their parents then this should be done in a proper legal manner and should not be done surreptitiously and without any legal recourse for the parent."

## Negative Legal Advice

Both the "pocket money" issue and the family assessment issue were the subject of detailed and repeated legal advice in the period 1995 - 1998. Some of these advices were requested by individual health boards and some by the Department. Whereas the health boards were always quick to inform the Department (and generally the other boards) of such advice, the Department appears not to have circulated the advice it was receiving. Given that the Department had itself made the Regulations, and had sought legal advice in the process, it is difficult to see why it should have needed legal advice, after the event, to clarify what its own Regulations meant.[2]

### The "Pocket Money" Issue

In 1995 two of the health boards (WHB and SHB) separately received legal advice that the approach to the "pocket money" issue advocated by the Department was incorrect. (See Chapter Five for details.) Not all the health boards changed their practice consequent on this advice; and the WHB in particular, continued its practice for a considerable period despite the explicit advice it had received.

In November 1997 the Attorney General's Office, in response to queries from the Department, commissioned legal advice from an independent Senior Counsel in relation to the operation of the "pocket money" provision (Article 8.2). The Department had already conceded that its original advice to the boards was incorrect. This legal advice was sought in the context of demands for the retrospective restoration of Article 8.2 and the payment of appropriate arrears. The Senior Counsel agreed with the advice received by the two health boards which, in turn, was consistent with the position already adopted by the Ombudsman's Office. He pointed out that the position argued by the Department could only be correct if one took the view that Article 8.2 had no relevance at all, a scenario which the rules of statutory interpretation clearly exclude.

The Senior Counsel dealt specifically with the question of liability for the payment of arrears. He advised that any person who, as a result of a misinterpretation of the Regulations, had in the past received a lower level of subvention than would otherwise be the case, would be entitled to be compensated accordingly unless the health board in question could show that, in the exercise of its discretion (assuming it was a case where such discretion existed), it could not have paid the applicant any more than was actually paid. The Senior Counsel's view was that this might be difficult to show in many cases and perhaps even in all cases.

Following receipt of this advice, the Department accepted the need to pay arrears in the "pocket money" cases and provided the health boards with a specific allocation for that purpose (see Chapter Five).

### The Family Assessment Issue

In July 1997 the SEHB sought legal advice on its application of the family assessment provisions. This was in the context of points made by the Ombudsman in relation to a complaint made against the Board. The SEHB would already have been aware of major question marks over the validity of the provisions arising from a detailed subvention appeal submitted in May 1994 by a solicitor acting for a particular claimant.

While offering the SEHB as much support for its position as possible, its legal adviser's overall assessment in July 1997 was that the Regulations would be open to challenge on a number of points. He advised that several of the items

> "It is my opinion that the reference to 'the means and circumstances of the person' ... refers to the means and circumstances of that person only and does not refer to the circumstances of that person's family. Thus, I do not think 'circumstances' can be defined in the manner they are defined in the regulations."
>
> **Legal Adviser to Department of Health, 18 November 1997**

".. the Minister cannot exclude an otherwise eligible applicant by reference to the fact that his children have the capacity to pay, since this pre-supposes the existence of a non-existent legal duty on the part of the children concerned.

.. Article 3 [the definition of 'circumstances'] is in itself haphazard.... It means for example that a parent whose millionaire children happen to reside in Enniskillen is still eligible, while in other cases the mere fortuity that the children reside within this State and are deemed to have the capacity to pay renders the parents ineligible, regardless of the children's willingness to support the parent."

**Senior Counsel advice to the South Eastern Health Board, 18 May 1998, as circulated to the health boards and the Department of Health**

raised by the Ombudsman had undoubted merit and, in his view, were likely to be considered favourably by a Court. The legal adviser observed that this should rightly be a matter of concern on the part of the Board and of the Minister. He felt in no doubt but that a properly mounted challenge, both on the basis of the legislation and on the basis of constitutionality generally, could be made with considerable chances of success.

This advice was passed on to the Department on 10 July 1997. On 13 November 1997 the Department asked its own legal adviser for a view. The Department's adviser agreed with the position articulated by the SEHB legal adviser. This should not have been surprising given that a previous Departmental legal adviser had cautioned against including family assessment provisions in the Regulations before they were made. Because of the possibility of retrospective payments being sought, the legal adviser suggested the Department consult with the Office of the Attorney General (AG).

The Department had a consultation with the AG's Office on 3 December 1997 at which the AG 's Office agreed with the position already articulated by the advisers of both the SEHB and of the Department. On 2 February 1998, the AG 's Office gave the Department written advice. This pointed to the requirement that secondary legislation must comply with the policy and principles of the parent Act. The AG's official concluded that, in this instance, the Minister had acted *ultra vires* the 1990 Act in defining the term 'circumstances'. The AG's official felt that, if the matter were to be determined by a Court, it was likely the Court would come to a similar conclusion.

It appears the fairly definitive advice provided by the AG's Office was not shared with the health boards as, in May 1998, the SEHB commissioned further advice on the family assessment provisions from a Senior Counsel[3]. This very detailed advice was provided on 18 May 1998 and a copy was promptly provided to the other boards and to the Department. The key points made in this advice were as follows:

- There is no obligation in common law on children to support their parents and the 1990 Act does not impose such an obligation.
- The Minister cannot by regulation impose such an obligation in the absence of a clear authority in the 1990 Act.
- The Regulations do not impose an obligation on children of claimants to provide details of their own means.
- "In my view, key features of the Regulations are plainly and unarguably *ultra vires*." Primarily, this refers to the definition of "circumstances" (the capacity of a son or daughter to contribute).
- The fact that the "circumstances" definition captures only adult sons and daughters "residing in the jurisdiction" is haphazard and is not a principle or policy to be found in the parent Act.
- In relation to the liability to make restitution, i.e. pay arrears, in the event of the Regulations being found by the Courts to be *ultra vires*, such a

liability would, in principle, arise. What might happen in practice on this front would depend on a number of considerations.

**Conclusion**

A key objective in any programme of public service modernisation is the improvement of the responsiveness of the public service to client needs. There is an obvious failure in responsiveness when a particular scheme gives rise to a significant number of complaints from clients or from groups, including politicians, which articulate their constituents' concerns. Such failure is compounded when, by a failure in accountability, obvious defects or illegalities are met with inaction.

It is clear in relation to both the "pocket money" issue and the assessment of family circumstances that the positions adopted by the Department, and generally accepted by the health boards, never had the support of any of the legal advisers. The decision to define "circumstances" as it was defined appears to have been contrary to clear legal advice received. It is an inescapable conclusion that the Department presided over a set of practices for a period of more than five years in the knowledge that those practices were legally indefensible.[4]

There is no doubt that by reference to Section 4 of the Ombudsman Act, 1980 maladministration had occurred on a significant scale. The actions or inactions of the Department and the health boards were "taken without proper authority", were "improperly discriminatory" and were generally "contrary to fair or sound administration". Inevitably the question must be raised of to whom, or to what, is this maladministration to be attributed and consideration must be given to whether or not there were mitigating circumstances. It is the Ombudsman's view that any attempt simply to apportion blame, without regard to the complexities of the framework within which government in Ireland operates, runs the risk of the central message in this report being overlooked. Accordingly, these issues are addressed in some detail in Chapter Eight. With regard to mitigating circumstances, it has to be accepted that, as a result of the cut-backs of the 1980s and the rationalisation of the hospital system, the Departmen could no longer deliver on the entitlements provided for in earlier legislation. In addition, as mentioned earlier, serious funding constraints continued to apply. The question remains as to whether or not these difficulties could have been faced up to in ways which would not have involved maladministration.

**Notes**

(1) In its comments on a draft of this report the Department rejected this conclusion. It argued that the effect of SI No. 224 of 1993 amounted to no more than a determination of "the nature and the quality" of the service in question and, as such, was within the scope of what was allowed to be done

by the Minister under Section 72 of the Health Act, 1970. The Department cited the judgement of the Supreme Court in the case of *Cooke v Walsh* [1984] in support of its position. While only the Courts can decide this question, it is the Ombudsman's view that the regulation, in effect, creates a two-tier charging regime as between public patients provided for in public hospitals or homes and public patients provided for in private homes and that this is a distinction which is not authorised by the parent Act.

(2) The Department has commented:

> "The interpretation of legislation is an on-going process and is influenced by changes in society and in other relevant legislation. The extent to which the Department was prepared to seek legal advice, including advice from the Office of the Attorney General, on the interpretation of the legislation is evidence of its commitment to good administrative practice."

(3) The Department says that, when this advice came to hand, it decided to revoke the family assessment provisions in the Regulations. However, to do this would involve additional expenditure and no additional funds were available for that purpose at that time. "There was therefore, no advantage in informing the boards of the advice unless funding was available to enable them to act accordingly. Our priority was to secure the necessary funding so that the health boards would be able to operate the scheme without family assessments. The matter was raised in the context of the Estimates for 1999. Additional funding of £2.1m was secured and distributed among the health boards. The regulations in relation to the assessment of family circumstances were revoked with effect from 1 January 1999."

(4) The Department's overall comment is as follows:

> " ... the Department considers that this conclusion is unfair and unjustified. The Department accepts there were shortcomings in the implementation and operation of the Nursing Home Subvention Regulations, particularly in respect of the 'pocket-money' issue. The Department also accepts that some of the Regulations proved to be defective. However the Department considers that it acted in good faith at all times and that it addressed defects as quickly as these came to light and funding constraints permitted. The contention that the position adopted by the Department on the assessment of family circumstances 'never had the support of any of the legal advisers' and that the Department acted "contrary to clear legal advice received" does not accord with the facts as outlined in [the Department's response to a draft of this report]. As is accepted in the Draft Report, the regulations did not create an obligation on children to support elderly parents. It is important to distinguish between the intent of the regulations and the manner in which they were implemented by health boards. The Department rejects the suggestion that it knowingly engaged in illegalities. The Department's objective was to put in place a fair and equitable subvention scheme. In a context of limited resources, difficult decisions had to be made; these were at all times in good faith and based on the Department's understanding of the legal parameters. Similarly, advice given by the Department regarding the "pocket money" issue was given in the honest belief that it was to the advantage of the older people concerned. The fact that the Regulations were subsequently amended on legal advice does not take away from this. The Department must emphasise again that due process was followed in the making of the Regulations and that all parliamentary procedures were properly followed in relation to the presentation of the regulations to the Oireachtas."

# Some Reflections

This report is critical of the Department of Health and Children and of the health boards. Is this criticism fair or does it amount to no more than an academic analysis which reflects a failure to appreciate the realities of how Ireland is actually governed? Does the analysis take account of the problems "on the ground" of maintaining schemes or programmes where the resources available are inadequate? Is it not the case that the actions of the Department actually improved the real level of support being provided to elderly long-stay patients and their families? Were the Department's actions - in taking short-cuts, in disregarding legal advice, in assuming powers which technically it did not have, in resisting a growing weight of evidence and complaints that its subvention scheme was seriously flawed - were these actions understandable in that the alternative (amending the legislation) was likely to be politically unacceptable? Is it fair to expect that the health boards should have acted independently of the Department (their paymaster) and have satisfied themselves that the Regulations were valid?

In the long run, the exercise of non-existent authority, the "surreptitious" (to quote one of the commentators) introduction of family assessment, the disregard for clear principles of law, the sustained proffering of incorrect advice, the reluctance to acknowledge mistakes, the tardiness in the Department's dealings with the Ombudsman's Office - all of these can only undermine public confidence in government and in our democratic institutions and call into question whether the present arrangements facilitate efficient, open and accountable government. From the point of view of the Oireachtas, to which this report is addressed, the issue is whether its intentions, as expressed in legislation, were honoured as befits its constitutional status.

The Ombudsman operates in the real world and recognises that resources are limited. Sometimes people's needs can only be met on the basis of a system of priorities. So long as these priorities are set by reference to clear and transparent criteria (for example, as with housing lists or orthodontic treatment waiting lists) the necessary element of fairness is maintained; although, in the Ombudsman's view, these criteria should properly be provided for on a statutory basis. Furthermore, if economic and financial difficulties of a serious nature arise, any diminution of entitlements should be effected by reference to these criteria.

But in relation to the payment of subventions to patients in private nursing homes, the Ombudsman is convinced that the actions of the Department and of the health boards were fundamentally wrong. What was done represented, in the eyes of the Department, a pragmatic response to a difficult situation; one in which, in effect, the Department (along with the health boards) was expected to achieve a particular objective without being given the means so to do. The Department always had the option to declare that what was expected, viz. the creation of a nursing home subvention scheme, was simply not achievable. But it appears that within the culture of Irish public administration, in which the head of a Department of State is almost invariably an elected member of the Oireachtas, this type of approach is rarely seen as a real option.

"The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."

**Bunreacht na hÉireann, Article 15.2.1**

The Government shall be responsible to Dáil Éireann.

The Government shall meet and act as a collective authority, and shall be collectively responsible for the Departments of State administered by the members of the Government.

**Bunreacht na hÉireann, Article 28.4.**

In this concluding chapter, the Ombudsman wishes to move from the particular case represented by the nursing home subvention scheme to more general and, indeed, more fundamental considerations.

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This report is concerned with a particular social policy initiative, how it was conceived, provided for in legislation, funded and implemented. The Ombudsman became involved because members of the public complained about the manner of its implementation. The Ombudsman's investigation of these complaints reveals serious deficiencies and these are detailed in the earlier chapters of this report. Stepping back from all the detail of the earlier chapters, there is one overarching issue which may be put in the form of the following questions: why did this project go so badly wrong? why did it continue to operate so unsatisfactorily for so long? which systems, which should have picked up on these problems, failed to function? In a democratic society, where governmental arrangements are predicated on a system of checks and balances, one is entitled to expect that oversight and accountability mechanisms would have identified and dealt with these problems. The fact that this did not happen has to be a cause for concern.

The Ombudsman's Office - though not provided for constitutionally - forms part of our system of checks and balances and this report to the Houses of the Oireachtas is intended to draw attention to one particular failure within the overall accountability framework. However, the Ombudsman's jurisdiction relates to administrative actions only and does not encompass all of the elements which make up the wider governmental process. The present report has identified serious issues in regard to the relationship, on the one hand, between the Oireachtas and the Executive and, on the other, the relationships within the Executive between the political and administrative levels as well as between those controlling resources and those in receipt of resources. The Ombudsman is drawing attention to these issues in the hope of encouraging serious debate on them. In this regard, the present report reinforces the concerns expressed by the Ombudsman in his report *Lost Pension Arrears* which was presented to the Oireachtas in June 1999.

A detailed analysis of the constitutional and legal framework of government is beyond the scope of this report but a brief survey of the issues, and of possible responses, is presented here. Because these issues relate to accountability, to authority and to oversight mechanisms generally, they are of central importance in a democratic society.

## Oireachtas and Executive

The model for government in Ireland is set out in the Constitution (particularly Articles 6, 15 and 28) and in statute (particularly the Ministers and Secretaries Act, 1924 as amended). Ireland is a parliamentary democracy with a written

Constitution providing for the traditional division of powers between the legislature, executive and judiciary. The executive power of the State is exercisable by or on the authority of the Government, which acts collectively and which is "responsible to Dáil Éireann". The Government is collectively responsible for the "Departments of State administered by the members of the Government", i.e. by Ministers. Each Department of State is a "corporation sole" and all the acts of a Department are the acts of its Minister for which she or he is responsible to the Dáil.

This model of government is posited on notions of checks and balances and accountability. Practice in recent decades suggests that, increasingly, this model is more of a theoretical construct than a reality. This may be particularly the case in terms of the actual balance of power as between the executive and the legislature and in terms of the capacity of the legislature to supervise the executive.

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

*In Administrative Law in Ireland* (3rd edition, 1998), Hogan and Morgan describe the Irish governmental system as a "fused executive-legislature" rather than one in which the executive and the legislature are separate. They write:

> "... all the Dáil's powers over the Government are conditioned by the basic fact of political life which is that a Government can almost always command the support of a majority of deputies, because deputies are elected principally on the basis of the party which they have pledged themselves to support in the Dáil. Such is the strength of the whip-system that the legislature cannot be regarded as speaking with a voice independent of the executive and, so, it is realistic to characterise the central element in the Irish governmental system as a fused executive-legislature."

Writing almost 30 years earlier than Hogan and Morgan, the same issue was addressed by Basil Chubb in somewhat starker terms:

> " A division of functions and powers along the lines suggested by the literal meaning of the words of the Constitution does not obtain in Ireland. It would be absurd to think of the Government as having only 'executive' functions. ... Again, it would be misleading to envisage the Oireachtas as 'making laws' in the literal sense or to the extent that American congressmen, for example, are 'legislators'. The Oireachtas has the authority

"In any democracy the role of Parliament is central in:

1.deciding on legislation

2.establishing departments and other agencies of the State to implement fully and fairly legislation,

3.ensuring that Ministers, Departments and State Agencies are fully accountable to it, and

4.holding the Government to account."

**Committee of Public Accounts, *Parliamentary Inquiry Into DIRT - First Report,* December 1999**

"Although the constitution implies that the government merely carries out the policies decided by the Oireachtas, the reality is very different ... The government's monopoly on legislative initiative, and virtual immunity from informed review or criticism, has fostered a distinctive style of rule in Ireland. Executive government is strong, though not necessarily very effective."

**Eunan O'Halpin, "Policy Making", in *Politics in the Republic of Ireland* (eds. John Coakley & Michael Gallagher), 1992**

> to declare law and thus to legitimize it. Although it makes some contribution to its content by way of criticism and amendment, the initiative in preparing and proposing bills rests almost wholly with the government, and the origins and formulation of legislation owe little to the Oireachtas as such."
>
> *Constitution and Constitutional Change* (3rd edition, 1970)

If Chubb's analysis is accurate - and several more recent commentators appear to take the same broad view[1] - then it would make sense either (a) to legitimise the actual practice by way of an appropriate amendment to the Constitution (while taking care to provide for some new system of checks and balances) or (b) change the practice in a manner which allows the legislature to exercise its constitutional functions of law making and of supervising the executive. It is disappointing that the 1996 *Report of the Constitution Review Group* makes no proposals in this area. However, it does seem to the Ombudsman to be fundamentally unsatisfactory that the practice of government should diverge so significantly from the theoretical model.

Whereas Dáil Éireann remains supreme in that it retains the ultimate power of making or breaking a Government, power actually resides with the Government rather than with the Oireachtas. Some Oireachtas members, for their part, give the impression that legislation is the property of the sponsoring Minister and his or her Department rather than of the Oireachtas itself. This is particularly the case with lengthy and highly technical Acts such as the annual Finance and Social Welfare Acts. In terms of secondary legislation, as this present report suggests, the Dáil and Seanad appear to have no effective mechanism for vetting regulations. This means that the Dáil and Seanad find it very difficult to exercise any legislative or supervisory role other than what is permitted by the Government of the day.

The main casualty in all of this is the integrity of the governmental process. As currently operated, the system of checks and balances envisaged in the Constitution appears not to be functioning. If it were functioning, it is unlikely that the difficulties with the nursing home subvention scheme (as described in this report) would ever have arisen.

If the system had functioned properly in this case, the issue of requiring adult sons and daughters to contribute to their parents' nursing home costs would have been raised, debated and decided upon within the Oireachtas. Similarly, if the Oireachtas had been made aware at the outset that the State did not have the financial capacity to meet its obligations to elderly patients in need of nursing home care, then it could (had the system functioned properly) have debated priorities and options and, perhaps, decided to target scarce resources more effectively. For example, the Health Acts might have been amended to confine hospital entitlement to a smaller proportion of the population. The Ombudsman is not aware that any such analysis or proposal was ever put to the Dáil and Seanad. The action actually taken was at the executive level and was by way of secondary legislation which the Dáil and Seanad had no real opportunity to debate or amend. It is true that, within a restricted timeframe, a

motion opposing the coming into effect of a regulation may be put down in either of the two Houses of the Oireachtas; but the volume of secondary legislation is now so great that such motions seldom, if ever, occur.

**Concerns Expressed**

Within the Oireachtas itself, and among commentators on politics and government, concerns are increasingly being expressed about the manner in which the respective branches of government relate to one another and, more specifically, as to whether the Houses of the Oireachtas are in a position to exercise fully their functions. The Ombudsman feels it is important to advert to these expressions of concern and, without in any way wishing to be drawn into party political debate, some recent examples are summarised below.

– At a meeting of the Committee of Public Accounts (PAC) on 13 July 2000 the Committee Chairman, Deputy Jim Mitchell, made a series of comments on the need for parliamentary reform as well as wider governmental reform. Deputy Mitchell observed:

> "Following the DIRT inquiry it was the conclusion of this committee that all the recent scams, going back to the beef scandal, were contributed to, in part at least, by the lack of performance by the Oireachtas itself in obtaining accountability from the Government and state agencies."

Deputy Mitchell went on to comment that insufficient attention was being paid by the House itself to "the need for accountability, proper processes, and checks and balances in the system".

– In its report of December 1999, entitled *Parliamentary Inquiry Into DIRT - First Report,* the PAC discussed the issue of Oireachtas reform. The PAC identified a number of weaknesses in procedures and practices and made a series of recommendations as to how matters might be improved. Overall, it was the view of the PAC that "accountability to the Oireachtas is weakened ... by a lack of clear boundaries between Parliament and Government."[2]

– The Fine Gael party published a policy document in September 2000 entitled *A Democratic Revolution - A Plan for Institutional and Public Service Reform.* This document drew attention to a number of concerns of relevance in the present context. These included:

- a concern that the "laws enacted by Parliament elected by the people are often set aside or ignored by the very public servants hired for the directly opposite purpose";
- a concern that legislation is increasingly framed "in a way that allows political or administrative discretion to decide which individuals should benefit from it, rather than the application of clearly drafted rules";
- a concern that the Houses of the Oireachtas are ineffective "in scrutinising the activities of Ministers so as to ensure that Ministers are acting in the public interest in the discharge of their duties..." and a related concern with what is termed the "subjugation, possibly unconstitutional, of the Houses

> "It is understandable that Governments in power are not anxious to burden themselves with keen and effective critics, but what of the members generally and the Oireachtas as a body? Members have, it seems, accepted the comparatively passive role, so far as legislation and the scrutiny of the conduct of business are concerned, which has become such a feature of British parliamentary life in this age of disciplined parties and large-scale governmental operations."
>
> **Basill Chubb (ed.), *A Source Book of Irish Government*, 1964**

"The nub of the matter is that the Houses of the Oireachtas have failed to assert their proper role in the governance of our society. The difference between the Legislative Branch and the Executive Branch has been fudged and obscured resulting in essentially political questions being frequently referred to the Judicial Branch in either Courts or Tribunals for resolution."

**A Democratic Revolution – A Plan for Institutional and Public Service Reform (Fina Gael, September 2000)**

of the Oireachtas to the Government which they are supposed to hold to account".

– Speaking in a personal capacity, the present Attorney General, Mr. Michael McDowell SC recently alluded[3] to a "democratic deficit" arising from the non-involvement of the Oireachtas in relation to European Union law making. Mr. McDowell made the point that, "unlike some other European member state parliaments, the Oireachtas does not, to any significant extent, claim for itself a right of input into forthcoming directives or regulations". He went on:

> "Indeed, the scheme of incorporation of directives into Irish law envisaged by the European Communities Act, 1972 which allows for incorporation by regulation subject to parliamentary veto has little effect in reality. The theoretical supervisory role exercisable under the 1972 Act remains just that - theoretical."

Mr. McDowell suggested that it is possible for a Minister at a departmental level to negotiate the terms of a draft directive or regulation without reference to his or her Government colleagues and to make a regulation under the 1972 Act transposing it into Irish law "without substantial governmental involvement and without any notice at all to the Oireachtas."

– The Government has recently published a discussion document, *A Dáil for the New Millennium*, which "recommends the most radical reappraisal of the workings of the Dáil parliamentary system since the foundation of the State." These proposals are designed to "increase the relevance and effectiveness of the Oireachtas by way of reform of some of its undoubtedly outmoded procedures and practices." These proposals appear to represent a response to some of the concerns identified earlier in this chapter.

## Relationships within Executive

What is of interest here is the nature of the relationship between a Minister and his or her senior civil servants. The legal status of the Minister as a corporation sole generally precludes the possibility of independent action by senior civil servants. All acts of the Department and of its officials are the acts of the Minister. This remains the case even after the enactment of the Public Service Management Act, 1997. Of course, in practice, common sense has to apply in relation to the extent to which a Minister should be held accountable for the actions of each and every official. As a general rule of thumb, accountability should apply to those actions of which the Minister was aware, or of which the Minister as head of the Department could reasonably be expected to have been aware, or to have made himself or herself aware.

Clearly, the strict legal position could give rise to considerable practical difficulty in a situation where the range of activity of a typical Department is far beyond the compass of the individual Minister. The particular *modus operandi* which

evolved to cope with this difficulty was succinctly described in the 1969 *Report of Public Services Organisation Review Group (Devlin Report)* - see opposite.

Within this model there was a clear division of functions as between the political (Ministerial) side and the official side. Good government, as Professor Séamus Ó Cinnéide put it, "depended on a certain distance and balance between the two sides"[4]. The question is whether this traditional *modus operandi*, as described in the Devlin Report, continues to operate some 30 years later. The Ombudsman has already commented on the cumulative effect of a series of recent enactments - the Public Service Management Act, the Privilege and Compellability Act and the Freedom of Information Act - on this traditional model.[5] The effect of these enactments, as the Ombudsman sees it, is to move away from the traditional model without having put anything specific in its place.

Other commentators are perhaps more forceful in contending that the traditional, extra-statutory arrangement no longer exists. For example, Professor Séamus Ó Cinnéide argues that there has been a radical change amounting to an unspoken revolution in our system of governance (see following page).

In the case of the nursing home subvention project, the subject of this present report, it is not the Ombudsman's conclusion that the officials failed to consult with the Minister, or that they failed to act in accordance with his wishes. Ultimately, the Minister (and more than one was involved over the period) signed the various regulations and is, as a matter of constitutional law, responsible for them. Even if the Minister had not been properly briefed, which is not contended by the Ombudsman to have been the case, he would still be responsible. What is perhaps cause for concern is the paucity of written evidence of the Minister's involvement and of the Minister's own views on the subject. This apparent reluctance to record the Minister's involvement represents a departure from the traditional model in which senior civil servants could expect to have a detailed record of the Minister's thinking. The traditional model certainly existed up to the 1980s.

The Ombudsman has already[7] raised the issue of what appears to be a growing practice within Departments whereby Ministers tend not to put their views or instructions explicitly in writing. For example, the views of the Minister may be conveyed verbally, or conveyed via his or her private secretary, or conveyed through such phrases as "as directed" or "as discussed". While acknowledging the pressure of work facing all Ministers, there are a number of difficulties with this type of practice. In the immediate term, it may lead to a lack of clarity as to a Minister's actual views and intentions. In the immediate and medium terms, failure properly to record a Minster's views and intentions may well undermine that sense of absolute trust between a Minister and his or her senior officials which is vital to an effective working relationship. Such a practice also has implications for accountability; the absence of a clear, written record can lead to uncertainty when the actions, or inactions, of a Minister (and his or her Department) are being scrutinised by the Oireachtas. In the longer term, and from an archival point of view, it means that public administration records are going to be incomplete.

> "The *modus operandi* which has been adopted is to issue letters, minutes and instructions, in the name of the Minister.... The official does not sanction, he conveys the sanction of the Minister. He does not describe himself as authorising, he speaks of the Minister authorising. The personal and final responsibility of the Minister is in every instance stressed. The whole system is extra-statutory but it functions. That it does so is because of the special relationship of trust between the Minister and his officials. The trust is and must be mutual. The official knows that the Minister will stand over his action vis-à-vis public and parliament if this action is in conformity with his general views. The Minister knows that the official in taking any action will always be conscious that the Minister may, in relation to the official's action, be challenged: that it is his business to have a convincing answer to such challenge. He knows furthermore that the Minister must be personally consulted and a direction sought from him where the subject matter may have serious public and political implications."
>
> ***Report of Public Services Organisation Review Group (Devlin Report) 1969***

"... both sides still have power, but otherwise the position has completely changed in regard to both ministers and civil servants. These changes represent an unspoken revolution in our system of governance, all involving greater power with the executive and less accountability. ... The problem is that we do not know what exactly has replaced the old system. This very uncertainty is yet another challenge to democratic values."

**Séamus Ó Cinnéide**
***Democracy and the Constitution*, Administration, Vol. 46, No. 4.**

There are two other elements which call for comment. First, it is disappointing that there appears not to have been any detailed discussion within the Department of Health on alternative courses of action, including the option to amend the legislation, when it became clear that the subvention scheme as originally envisaged could not be realised within existing resources. (The issue of health service funding, which is of relevance in this context, is discussed later in this chapter.) One would expect that, in putting proposals before a Minister, a range of alternatives should be proposed. While senior civil servants, in putting alternatives, may be expected to be attuned to political realities, it is surely their role sometimes to put unpalatable options to their Ministers so long as the "pros" and "cons" of the various options are clearly outlined. The Ombudsman has not seen any records which suggest that serious discussion on such alternatives took place.

Second, the dialogue between the Department of Health and the Department of Finance, on the one hand, and between the Department of Health and the health boards, on the other, clearly falls in to the category of the "controllers" talking to the "controlled". As often happens, this dialogue was concerned largely with *post hoc* "damage limitation" so far as financial costs were concerned. It is self-evident that the Department of Finance has a crucially important role to play in controlling public expenditure, especially in a demand led sector such as health. It is equally self-evident that the Department of Health must ensure that maximum effectiveness is achieved by the health boards in using the resources given to them. But dissatisfaction on the part of the general public also gives rise to considerable costs which are not taken into account when schemes and programmes are being costed. What seems to have been lacking from the dialogue is an acceptance that, increasingly, human rights, including economic and social rights, have to be addressed. In a number of areas recently this has given rise to criticism of the executive by the judiciary.[8] This aspect is further discussed later in this chapter.

## Relationship between Department and Health Boards

The question has been posed in this report as to why the health boards did not rely on their status as independent, statutory bodies and refuse to operate a scheme about whose validity they had real doubts. To a large extent, health boards appear to act in relation to the Department as if they are satellites rather than independent bodies; though this is not the case in every circumstance for every board. For example, several of the health boards received clear legal advice that aspects of the Regulations were invalid and that aspects of their practice were not defensible. With some exceptions, the health boards did not act on the advice though they did bring it to the attention of the Department. The majority of the health boards were prepared to continue with a scheme, about which they increasingly had doubts, for as long as the Department told them they should.

It is not possible in this report to deal in any detail with the complex relationship between the Department and health boards. However, it does appear to the Ombudsman that the most significant factor determining this relationship is the fact that the health boards have no financial independence; for all practical purposes, they are entirely dependent on the Department for their finances. The Department, for its part, is dependent on the Department of Finance for its allocation. Accordingly, it seems to the Ombudsman that health service funding - both the manner and the amount - is a critical consideration.

The issue of health service funding was a live issue in the 1980s and a Commission on Health Funding, which was set up in 1987, reported in September 1989. The Commission's terms of reference are given opposite.

A majority of the Commission favoured a public funding system with funds coming from general taxation. A minority favoured a compulsory health insurance, or ear-marked tax, system which would link clearly the services provided with their cost and provide a secure source of funding for healthcare. However, the kernel of the Commission's conclusions was that the solution to the problems facing the Irish health service did not lie primarily in the system of funding; rather, it lay in the way in which services are planned, organised and delivered.

Since the Commission's report there have been significant changes in the attitude to compulsory insurance, as epitomised by the PRSI system, as well as to ear-marked taxation. The PRSI system, in particular, is seen as an essential element in protecting citizens against loss of income on retirement or because of unemployment or illness. Local authority financing is now moving in the direction of greater reliance on ear-marked taxation and funds in support of the view that local government should enjoy greater autonomy from central government.

It is clear that the population of Ireland is an ageing one. Already, special provision is being made from budget surpluses to meet future pension costs. Similarly, it is clear that demand for health services will grow and it may be that the question of health funding should be revisited. Any revisiting of the issue might pay particular attention to the desirability of ensuring health boards are not hindered, in exercising their statutory role, by the nature of the funding mechanism itself. This is not to suggest that the Department does not have a significant role to play in relation to the health boards; rather, it is to say that the Department's relationship with the health boards will be more transparent and effective where the lines of demarcation are more clearly drawn.

> "To examine the financing of the health services and to make recommendations on the extent and sources of the future funding required to provide an equitable, comprehensive and cost-effective public health service and on any changes in administration which seem desirable for that purpose."
>
> **Report of the Commission on Health Funding, 1989**

## What Next?

It may be that if the Committee system, which exists at present in the Houses of the Oireachtas, had been in operation when the Health (Nursing Homes) Bill was being considered that some of the problems identified in this report might

have been avoided. In particular, the gulf which occurred between policy and implementation might have been avoided, or at least narrowed. The present system now seems flexible enough to enable the Committee dealing with a particular piece of legislation to explore its "mechanics" with the officials of the sponsoring Department. It may be also that, if the Freedom of Information Act, 1997 had been in operation in the early 1990s, the pressure on the Department to get to grips with the defects and illegalities of the nursing home subvention scheme might have been much greater.

Nevertheless, there is no certainty that the failures in accountability highlighted in this report could not occur in the case of other schemes and programmes. This is because of certain basic features of the system:

- the difficulties that the Houses of the Oireachtas face in attempting to monitor the growing mountain of regulations and other secondary legislation by which policy is implemented;
- the weakness in the links between two separate legislative processes, the process whereby the Houses of the Oireachtas create new entitlements or benefits for the public and the process by which Dáil Éireann allocates resources annually to facilitate the actual provision of these entitlements or benefits;
- the difficulties faced by members of the Houses of the Oireachtas in feeding into the Administration, in a formal and transparent way, their concerns and those which are brought to their attention by their constituents, or indeed by the Ombudsman's Annual Report, in a way which ensures an effective response.

**Secondary Legislation**

In the shorter term, establishing a mechanism for monitoring secondary legislation is an obvious step worth taking. Such monitoring might have to be done, initially at least, on a selective basis. This could be done by ensuring that, in the case of certain Bills, the section dealing with the making of regulations by the relevant Minister would provide that an affirmative resolution from each of the Houses of the Oireachtas would be needed before any such regulations would come into effect. This would be particularly the case where the regulations in question confer entitlements, require payments by, or otherwise impose penalties on members of the public. There is something to be said for having the Committee, which dealt with the passage of the legislation, also deal with monitoring the making of the regulations. In this context, what was done in the case of the Ombudsman Act, 1980 may be of interest. When the Ombudsman Act was passed it contained, at Section 4(10), the "standard" provision in relation to the making of regulations whereby public bodies could be added to, or deleted from, the list of public bodies subject to investigation by the Ombudsman. When the Act was implemented in 1984 with the appointment of the first Ombudsman, the then Minister introduced the Ombudsman (Amendment) Bill. This, when enacted, provided that any regulation under Section 4(10) required an affirmative resolution by each of the Houses of the Oireachtas. It was considered that any proposed amendments to the Ombudsman's jurisdiction were worthy of consideration by the two Houses.

**Funding of Entitlements**

Dáil Éireann might also wish to give consideration to the way in which, at present, it deals with the Annual Estimates. It might be useful if expenditures which are effectively non-discretionary (i.e. which arise from entitlements which must be met, for example, public service pensions) were identified. The Departments responsible for these expenditures would be asked to confirm that these were the best estimates of what was required to meet these entitlements; if this proved not to be the case, they would face questioning by the Public Accounts Committee in due course. If, because of a general need to reduce public expenditure, it became necessary to reduce the estimate for a non-discretionary service below the realistic amount, then the Department concerned would have to indicate the actions required to "square the circle". It would then be a matter for Dáil Éireann to decide how this might be achieved.

**Oireachtas-Executive Interaction**

There may also be a case for particular Oireachtas Committees, from time to time, pursuing with specific Departments areas which have been identified as giving rise to a significant number of justifiable complaints.

**Human Rights Issues**

The Ombudsman has already observed that, in relation to the particular scheme the subject of this report, there is little evidence that notions of the rights of applicants were paramount. Whereas it may be easier to recognise and meet basic rights in times of economic success, it is more important that those same rights are provided for when times are hard.

With the passing of the Human Rights Commission Act, 2000 and the intention that the European Convention on Human Rights will become part of Irish law, it is clear that international human rights instruments will increasingly represent a significant influence in the State's approach to service provision. This is likely to be particularly so in the case of entitlements for groups such as children, the disabled, the homeless, travellers and other minority groups, the elderly, immigrants and persons in custody and detention. A human rights approach may not, in fact, be all that different to what our Constitution already provides; but it may well be the catalyst to unlocking what is already contained in the Constitution.

This approach will pose fresh challenges for our institutions of government. It will underline the importance of an open and accountable parliament, an executive which is accountable to that parliament, an independent and impartial judiciary and a free and responsible media. These institutions will have to develop an awareness of the relevance of human rights protection not only to existing international instruments but also to domestic law and, indeed, to administrative schemes and programmes which are not part of domestic law. Citizens too will need assistance, on the one hand to develop their awareness of these rights and how they impact on their daily lives and, on the other, to develop new responsibilities which tolerate and encourage support for individual difference.

> " In this Act ... 'human rights' means -
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> (a) the rights, liberties and freedom conferred on, or guaranteed to, persons by the Constitution, and
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> (b) the rights, liberties or freedom conferred on, or guaranteed to, persons by any agreement, treaty or convention to which the state is a party."
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> **Human Rights Commission Act, 2000**

Viewed in the broadest sense, a government's task is to serve the interests of its citizens and it derives its legitimacy from the way in which it does so. The function of serving its citizens is most clearly seen in areas in which the government protects or cares for individuals and their interests, or provides public services. Although it may seem paradoxical, the public also needs to be assured of protection against the government when it fails to fulfil its responsibilities in relation to the public. For example, doing justice to social, economic and cultural human rights and the right to development may pose serious problems if a country's finances do not permit the government to honour justifiable claims. In that situation it is important that the model of government in place permits the allocation of scarce resources to be administered under a system of priorities in an equitable and transparent manner. In cases where a government has not adequately protected these and other human rights, it is important that the citizen is enabled to pursue the matter further either to the courts or to the appropriate "national human rights institution" in the form of a National Ombudsman or a Human Rights Commission.

The growing importance of the human rights dimension is evident from the increasing extent to which the case law of the European Court of Human Rights (ECHR) is penetrating national legislation. The European Convention on Human Rights celebrated its 50th anniversary last year. Of all the judgements handed down by the ECHR over that period, some 80% have been given in the past ten years.

It should be clear from the above that the subject matter of this report - the elderly and the manner in which they were treated in relation to nursing home subventions - can be analysed at two distinct levels. The first level is quite specific and involves a consideration of the actions of the Department and the health boards by reference to Section 4 of the Ombudsman Act. As already indicated, there is no doubt that on this basis significant maladministration has occurred. The second level is more general but equally important in that it involves a consideration of the extent to which the human rights of elderly patients in nursing homes have been infringed. Admittedly, awareness of the human rights dimension of these issues was not well developed in the early nineties. However, one of the central messages of this report is that the human rights dimension of issues of this type need to be carefully considered by the Oireachtas and the Executive from now on.

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The Ombudsman is not convinced that the various measures mentioned above can, by themselves, deal adequately with what is fundamentally a constitutional matter. In the longer term, the relationship between the Oireachtas and the Executive, as well as the relationships within the Executive, may need to be thought through afresh in the context of a wider programme of constitutional reform. There is already a momentum in support of such reform and the Ombudsman hopes that this report will make a contribution to the debate.

## Notes

(1) See, for example, Alan J. Ward *The Constitution Review Group and the 'Executive State* in Ireland, Administration, Vol. 44, No. 4. Professor Ward characterises government in Ireland as that of an "executive state", one in which the Executive takes practical precedence over the Legislature, where the government is "permitted to govern, free of unnecessary distractions from the Oireachtas". In this context, Professor Ward cites the following statement made in the Dáil in 1983 by the late Brian Lenihan TD:

> "Whatever we do ... as parliamentarians must be regarded essentially as a kind of subsidiary or advisory function ... Fundamentally, what we are all concerned about in a representative democracy is electing people who will come here and elect a government ..."

See also Séamus Ó Cinnéide, *Democracy and the Constitution*, Administration, Vol. 46, No. 4. Professor Ó Cinnéide argues that democracy in Ireland is under threat because the checks and balances of a parliamentary democracy no longer function properly:

> "There are three main things wrong with the system. Firstly, the executive, that is the government and the civil service, has gradually become more and more powerful, while the Dáil and the Seanad have become less important. Secondly, political consensualism is made worse by the creeping corporatism of the last twenty years ... Thirdly, the bureaucracies have become more powerful and, notwithstanding information booklets and better telephone etiquette, have become less accountable and at the same time less independent of the politicians."

(2) To illustrate this point, the PAC pointed out that in conducting its DIRT Inquiry it had "to repeatedly seek sanction from the Department of Finance for staffing and resources and for other, even minor, expenditure". The fact that such requests were always met in this instance does not, according to the PAC, take from the fact that it was dependent for resources on the good will of the Executive (in the form of the Department of Finance).

(3) Speech by the Attorney General, Michael McDowell SC to the Association of European Journalists, 22 November 2000.

(4) Ó Cinnéide, ibid.

(5) Paper delivered by the Ombudsman/Information Commissioner, Kevin Murphy, at the *Management of Government in the New Millennium*, Conference organised by the Departments of Government and of Law, University College Cork , 1 October 1999. (Text of paper available on Ombudsman website - http://www.irlgov.ie/ombudsman/)

> "What comes over very strongly to me is that the attempt by means of these various Acts to move away from the traditional model of accountability to a new model seems to lack completion and that as a result there is scope for a great deal of confusion. The traditional model - which I would call the Collaborative Model - is at its best exemplified by the Seán Lemass/John Leydon relationship in the Department of Industry and Commerce . ... The model to which we seem to

be moving is what I would call the Contractual Model exemplified by the new relationships in the New Zealand public service. Here the Minister with the advice of special advisors determines what he/she wishes to achieve during a term of office and enters into a short-term contract with the Secretary General. The Secretary General undertakes to deliver a range of outputs to realise the Minister's desired outcomes and is assessed on the success or otherwise of that delivery. ....The Collaborative Model is by definition less open and much less defined than the Contractual Model and respective responsibilities are much less clear cut. To operate successfully it requires a high degree of co-operation and common ground as well as mutual trust - some would say loyalty. It may also require a high degree of official secrecy, particularly in relation to the Minister/Secretary General relationship. The Contractual Model needs very precise definition especially in relation to responsibilities and accountabilities. It is a more professional relationship but by its nature may develop an adversarial aspect. It may be that holding someone accountable necessarily requires an adversarial aspect. It is clear that, while we have moved somewhat in the direction of the second model, we have stopped well short of it."

(6) Ó Cinnéide, ibid

(7) *Management of Government in the New Millennium*, Conference organised by the Departments of Government and of Law, University College Cork, 1 October 1999.

(8) See, for example, the High Court judgement of Mr. Justice Barr in *Jamie Sinnott and Minister for Education, Ireland and the Attorney General* (4 October 2000). This case involved the failure of the State to make adequate provision for Jamie Sinnott's constitutional right to primary education in a situation where Mr. Sinnott had special educational needs because of autism. Mr. Justice Barr commented on

> "the administrators in the Department of Finance, who play a major role in advising on the dispositioning of the financial resources of the State, [and] who appear to be insufficiently informed regarding the constitutional obligations of the State to the weak and deprived in society to enable them to assess realistically the degree of priority which should be attached to each such claim ... the ultimate financial decision-makers and officials who devise annual revenue/exchequer budgets and administer state funds must have a real awareness and appreciation of the constitutional obligations of the State to all sectors of the community and in particular to the rights of the grievously deprived in society ..."

It would seem that the broad thrust of Mr. Justice Barr's comments may also be relevant in relation to the State's funding of statute-based services for the elderly.