



A Report Investigation by the Ombudsman

in relation to a complaint made by Mr. John Kelly, Co. Kildare, on behalf of his father, Mr. David Kelly, about the imposition and collection of in-patient charges by the Sacred Heart Hospital, Carlow, in respect of his late wife, Mrs. Lisa Kelly, against the Health Service Executive.

**An investigation by the Ombudsman
under section 4(2) of the Ombudsman Act 1980**

April 2010

Contents

Chapter 1 Statement of Complaint

Chapter 2 Background information about in-patient charges and Qualified Adult Allowance

Chapter 3 Background to the complaint

Chapter 4 HSE's response to the complaint

Chapter 5 Analysis

Chapter 6 Analysis of HSE's comments on draft report

Chapter 7 Findings

Chapter 8 Recommendations

**Appendix 1 HSE Letter – 24th July 2009.
Available only as a separate pdf document.**

**Appendix 2 HSE comments on draft report.
Available only as a separate pdf document.**

Chapter 1

Statement of Complaint

(The complainant's name and that of his father and late mother have been changed to protect their identities).

This complaint arises from the imposition of charges for in-patient services by the HSE, and from the manner in which such charges were collected by the HSE, in the case of the late Mrs Lisa Kelly during the period July 2005 – November 2007. The complaint has been made by Mr John Kelly, acting on behalf of his father, Mr David Kelly, the husband of the late Mrs Lisa Kelly.

The late Mrs Lisa Kelly was a medical card holder with no income in her own right. In April 2001 Mrs Kelly, who suffered from Alzheimer's disease, was admitted to public long-stay nursing home care in the Sacred Heart Hospital (SHH) in Carlow. Following his wife's admission, Mr Kelly Sr. says he was advised by the SHH to arrange to have a separate pension book provided for his wife, containing the Qualified Adult Allowance portion of his Old Age Contributory Pension, in order to facilitate collection by the SHH of in-patient charges. Subsequently, the Department of Social and Family Affairs issued a separate pension book in the name of the late Mrs Kelly containing the Qualified Adult Allowance.

The complainant contends that the HSE acted illegally in the manner in which it took charge of the Qualified Adult Allowance pension book and cashed it to its own advantage in order to collect in-patient charges. The complainant contends that the money collected by the HSE, based on a practice which he contends was illegal, should be repaid to his father, Mr David Kelly.

In the interest of clarity, it should be noted that charges collected up to December 2004 have been refunded under the Health Repayment Scheme. This complaint relates only to charges collected from July 2005 up to the death of Mrs Kelly in November 2007.

Chapter 2

Background information about in-patient charges and Qualified Adult Allowance

Charges for public nursing homes are governed by Article 3 of the Health (Charges for In-Patient Services) Regulations 2005 (S.I. No 276 of 2005). These Regulations allow the HSE to levy a charge at a weekly rate for the provision of in-patient services. This charge is levied against the person receiving the service and is payable only if that person has an income.

The legislation which was in place prior to 2005 [Health (Charges for In-Patient Services) Regulations 1976] also precluded the then health boards from applying in-patient charges if a person had no income of his or her own. Charges then were generally applied on the basis of a contribution of four fifths from the person's pension, with the remaining one fifth being used to fund comforts such as cigarettes, sweets or toiletries for the patient.

Qualified Adult Allowance

A person qualifies for an Old Age Contributory Pension (otherwise known as the State Pension Contributory) based on his or her pay-related social insurance record (PRSI). Whether a person qualifies for a payment depends on having a certain number of PRSI contributions. If a person has a spouse, she or he may, subject to certain conditions, receive an increase in pension for the spouse. This is known as a Qualified Adult Allowance (QAA) or an Increase for A Qualified Adult. The QAA is paid in respect of a qualified adult who is being wholly or mainly maintained by the pensioner. In this case, the complainant was receiving a QAA in respect of his wife as part of his Old Age Contributory Pension. Mrs Kelly had never worked outside the family home and did not have any income of her own when she entered nursing home care in April 2001.

Chapter 3

Background to complaint

When the late Mrs Kelly entered nursing home care in April 2001, patients who were liable to pay in-patient charges for long-stay care were normally given two options. The first option was that the patient could give his or her pension book to the hospital where the relevant HSE authorised officer would apply to the Department of Social and Family Affairs (DSFA) to become an agent to handle the pension. The authorised officer would then be empowered to cash the pension in the local post office and arrange to pay the in-patient charges. The balance would either be returned to the patient in cash or lodged to the patient's own private property account (PPPA) operated by the nursing home.

The second option was that the pension book could be held by the patient, or by a relative, and the charges could be paid by that person to the nursing home. The patient, or the relative, would then be responsible for meeting all of the patient's comforts.

Following Mrs Kelly's admission to the SHH, her husband says he was never told that his wife was not liable to pay charges given that she had no income of her own. He says that he was advised by the staff in the SHH to apply for a separate pension payment for his wife. (Mr Kelly received a weekly pension of €249.68, which included the QAA of €101.07). He was told that the QAA could be paid directly to his wife in the hospital and that the in-patient charge could be deducted from this payment. The remainder of the allowance could be paid into Mrs Kelly's private property account. Mr Kelly says he was not given the option of making the payment himself directly to the nursing home, or by direct debit, as this system was not in place in the SHH at that time.

On foot of the advice from the SHH, Mr Kelly wrote to the DSFA saying that his wife had been admitted to long-stay care, having been stricken with Alzheimer's disease. He sought information regarding his wife having her own pension book, which he said he knew "must go to the Hospital". The DSFA responded by issuing a separate payments book for Mrs Kelly covering the QAA portion of Mr Kelly's pension. It was sent to the local Post Office in Carlow with instructions that Mrs Kelly should sign it in the presence of a witness, in acknowledgement of having read and understood the instructions and warnings on the inside of the book.

In the normal course of events, the SHH should then have applied to the DSFA to become a lawful agent to collect Mrs Kelly's pension payments. It did not, however, apply to the DSFA but appears to have cashed the pension book using the hospital stamp by way of verification of authorisation to collect the pension. This procedure was followed throughout Mrs Kelly's hospital stay.

Mr Kelly contends that there are two issues to be resolved – the first is the imposition of nursing home charges on his late wife who had no income of her own, and the second is the SHH practice of cashing the pension payments without proper authority.

The SHH claims to have advised Mr Kelly in July 2005 that new charges (based on the 2005 Regulations) would apply to his wife and that he was given the option of changing the method of payment. It appears that he was not told that, if he opted to rescind the separate payment arrangement, his wife would be classified as having no income and thus would not be liable for charges. Nor, it appears, was he told that by leaving the separate payments in place he was creating an income for his wife, thus making her liable for in-patient charges. Mr Kelly denies having received correspondence from the SHH in July 2005 about the new charges. It was not until March 2007, following the repayment of charges to Mr Kelly under the Health Repayment Scheme, that he wrote to the SHH saying that he wished to leave the existing arrangements in place whereby the separate payments would continue with the SHH providing comforts for his wife.

It is important to note that, while comforts were provided to Mrs Kelly by the SHH from her private property account, her husband says he also provided clothes, shoes and treats for his wife from his own pension.

In 2006, this Office drew the HSE's attention to the incorrect practice of charging patients in long-stay facilities by reference to the income of their spouses. The HSE reviewed this practice and a number of such cases around the country were identified and repayments were made. The only difference in those cases was that the pensioner had not agreed to separate the QAA portion of the pension and have it paid to the spouse in the nursing home. When the Health Repayment Scheme was established in 2006, following the declaration by the Supreme Court that charges paid under the Health (Charges for In-Patient Services) Regulations 1976 were illegal, Mr Kelly submitted an application to have his wife's charges repaid to him.

The Health Repayment Scheme was established to repay nursing home charges taken without statutory authority prior to the enactment of new legislation in July 2005. The Scheme Administrator under the Health Repayment Scheme accepted that Mrs Kelly had no income of her own (despite a separate payment arrangement having been put in place) and that Mr Kelly had paid the charges from his income. In May 2007 he received a refund of charges covering the period from April 2001 until December 2004. Public nursing home charges ceased from December 2004 until the implementation of new legislation in July 2005 when charges recommenced for patients.

Chapter 4

HSE's response to the complaint

When the complaint was received initially in this Office, efforts were made to resolve it through the Ombudsman's preliminary examination process. An Appeals Officer from the HSE was asked to review the complaint. The appeal was not upheld. The Appeals Officer determined that since Mrs Kelly had been receiving the QAA from 2001 it was reasonable to consider it her income. He did not comment on the issue of the nursing home cashing the pension payment without legal authority.

This Office then arranged to meet with HSE officials to discuss the complaint further. The HSE officials acknowledged that an administrative error had been made by the SHH in failing to apply to the DSFA for authority to collect Mrs Kelly's QAA payment. However, they did not consider this to be a serious issue. The HSE said that it was not only legally entitled but obliged to regard the QAA as Mrs Kelly's income for the purpose of raising a charge.

The HSE cited legal advice it had obtained in 2007, following the receipt of this complaint, which acknowledged that the QAA was the income of the person entitled to the primary benefit. However, it said that once the QAA was paid to the dependant she had control over those monies and it therefore, became her income.

When, following preliminary examination, this Office began an investigation of the complaint, the HSE reviewed its position. It acknowledged that the SHH had not complied with "agreed protocols" when it cashed Mrs Kelly's QAA payment in the local post office without having been appointed an agent to do so. It accepted that it had acted "*ultra vires*" (outside of its powers) and agreed to repay the charges in the sum of €10,159.25 to Mr Kelly. This refund covered in-patient charges for the period July 2005 to November 2007 which had not been covered by the Health Repayment Scheme's refund. However, it stated that its decision to refund this sum had been made because, due to non-compliance with agreed protocols at the hospital, the usual arrangements for the transferring of agency and cashing of the pension were not, in this case applied. It said that its decision to repay this sum was not to be regarded as an admission that the HSE had acted incorrectly in raising charges against the late Mrs Kelly.

The HSE apologised to Mr Kelly saying that it regretted any inconvenience this matter may have caused. [The HSE's full response (letter dated 24 July 2009) is reproduced at Appendix 1].

[Ombudsman's Note: It would have been more accurate for the HSE to have said that it had failed to comply with the legal requirements (rather than "agreed protocols") governing agency arrangements in the case of social welfare pensions.]

Chapter 5

Analysis

Agency issue: In order to legally cash Mrs Kelly's QAA payment, the HSE should have applied to the DSFA to be appointed as an agent. Having failed to do so, the HSE did not have legal authority to cash Mrs Kelly's QAA payment book. The HSE told this Office that this was a once-off isolated incident which arose as a result of human error. On examination of all other pension books at the SHH, the HSE said that the correct agency documentation was in place. The HSE stated that it had carried out a survey in relation to practices taking place in most other parts of the country. The outcome was that in all of the HSE areas surveyed, an application had always been made to the DSFA where a patient or the personal representative wished the HSE to be appointed as an agent.

In relation to the practice of stamping rather than signing the pension book by the agent prior to cashing the payable order, the HSE stated that its staff, generally speaking, either signed or stamped each order before presenting it to the relevant Post Office. It said that at no stage had an issue arisen with regard to the stamping of payment orders. It stated that in some of the larger HSE institutions it may not be practical for the agent to sign each order. The DSFA has informed this Office that it is not acceptable for agents in nursing homes to apply a stamp for the purposes of cashing pension payment orders. It said that the nursing home stamp would not allow any traceability in the cases of a query. The DSFA has said that encashment should only have arisen when the book was presented by the named holder of the book, in this case Mrs Kelly, or by a nominated third party. However, the risks associated with this issue appears to have been resolved with the recent introduction of a new system whereby the DSFA transfers pension payments electronically to a central HSE account from which long-stay charges are deducted. This transfer of funds can only happen in a situation where a nursing home has been appointed an agent to collect the pension on behalf of a patient.

On its own admission, the HSE acted without legal authority in the manner in which it cashed the QAA payment book of Mrs Kelly. While the HSE appears to represent this as simply a technical breach, this is to understate the unacceptability of its actions. Furthermore, the HSE showed great reluctance in accepting the consequences of having acted without legal authority; its decision to refund the charges collected illegally came only in July 2009, almost two years after Mr Kelly had first complained.

The onus on public bodies to act within the law is self-evident. But that onus is even greater in circumstances in which a public body imposes a charge or a penalty on a member of the public. It is not open to a public body, such as the HSE, to take short-cuts, or by-pass a legal requirement, even in circumstances in which it believes that its actions overall are sensible and reasonable.

Issue of charges when patient has no income

Mrs Kelly entered nursing home care without any income in her own right. Her husband, following instructions from the SHH, wrote to the DSFA seeking advice that resulted in separate payment arrangements being put in place. It appears that the DSFA, rather than replying to his specific enquiry, simply split the pension payment without having ascertained that this was acceptable to Mr Kelly. As Mrs Kelly had no income, she had no liability to pay in-patient charges and the issue of charging her should not have arisen.

Had Mr Kelly retained the QAA within his own pension book, there would not have been any question of treating the QAA as the income of his wife. The splitting of the pension into two separate payments happened because Mr Kelly, it would seem, was not properly advised by the SHH in 2001. It is unclear whether the SHH offered him alternative ways of paying the charges other than by separate payments.

(The Assistant Hospital Manager, in her report, said that she could not recall whether Mr Kelly was advised in 2001 that an invoice could issue each month for which he could pay the charge directly himself on a monthly basis. She stated that the option of paying maintenance charges by direct debit was not available at that time).

In 2005, when a new charging regime was introduced, the SHH claims to have offered Mr Kelly the option of providing comforts for his wife and of paying the charges himself. (Mr Kelly denies having received any correspondence from the SHH at that time). It failed, however, to inform him that if he withdrew the separate payments arrangement, his wife would not be liable for charges. The existing payment arrangement was left in place with charges being taken from Mrs Kelly's PPP Account.

When Mr Kelly sought a full refund of charges from the SHH following the death of his wife in November 2007, he was refused. At that point, the HSE sought legal advice which said that, provided the QAA part of the pension was paid on an ongoing basis to a spouse, he or she has control over those monies, and they are his/her income. The essential point in this complaint is that it appears that Mr Kelly was never told by the SHH that he would be creating an income for his wife if separate payments were put in place. Furthermore, as Mrs Kelly had Alzheimer's Disease, she did not have control over the separate payment which was made to her.

The HSE Appeals Officer determined in his response that in order for Mr Kelly to qualify for the QAA at all, it would be necessary for him to be wholly or mainly maintaining his wife while she was in nursing home care. His view was that the payment of in-patient charges would probably justify the continued payment of the QAA to him in respect of his wife. This Office raised this issue with the Department of Social and Family Affairs. The DSFA advised that the provision of essential items such as clothing, footwear and hairdressing for a patient would qualify the pension holder to the continued receipt of the Qualified Adult Allowance. In any event, Mr Kelly had made the DSFA aware of his wife's admission to nursing home care on a long-stay basis and the DSFA deemed him entitled to its continued payment. This issue should not, therefore, have concerned the Appeals Officer.

Chapter 6

Analysis of HSE's Comments on Draft Report

The HSE's response to the draft Report is attached at Appendix 2. This response reiterates the original position taken by the HSE in relation to the complaint. In response to draft Findings that it had failed to give Mr Kelly correct advice regarding his wife's liability for charges, the HSE says that, based on legal advice obtained from Senior Counsel, it is satisfied that it was correct in determining that the late Mrs Kelly's QAA payments were her own income for the purposes of raising a charge in respect of in-patient services. In support of this position, the HSE quotes part of the legal advice which it received in October 2007. The HSE requests that, in the event that the Ombudsman upholds the draft Finding that "the HSE failed to advise Mr Kelly that his wife was not liable for in-patient charges", that she should explain why she has made a determination which is contrary to the HSE's legal advice.

HSE Legal Advice

This legal advice is dated October 2007. While this Office has seen a copy of the legal advice, we have not seen a copy of the request for advice, although this was sought from the HSE. Clearly, the HSE received this advice long after it took the actions complained of by Mr Kelly. Equally clearly, the HSE's actions (dating back to 2001) were not influenced or guided by the particular legal advice.

The HSE says that the issues on which advice was sought are itemised in the Senior Counsel's written advice. While the general issues addressed by the Senior Counsel arise in the Kelly case, they are not linked in any way to the specific circumstances of the Kelly case. It seems to this Office that the relevance of the legal advice will necessarily be linked to the adviser being given sufficient information about the circumstances of the case in point. In this instance, there are several relevant facts which appear not to have been put before the adviser. These include: the fact that the late Mrs Kelly was not being paid a QAA in her own name prior to admission to the SHH and the fact that, by the time of her admission, Mrs Kelly was unable to look after her affairs or to make any agreement to accept a source of income.

While the legal advice is quite lengthy, it is also quite circumscribed and conditional as to its applicability. It appears the legal adviser was not aware of the precise circumstances of the Kelly case. It is the view of this Office, therefore, that it is not safe to conclude that the advice, as to the circumstances in which a QAA becomes the income of the dependent spouse, applies to the Kelly case. The adviser identifies a particular scenario in which the QAA may be regarded as the income of the dependant. That scenario is one in which (a) the pension is split, (b) there is a separate payment of the QAA to the dependent spouse and (c) that spouse is admitted to hospital. The advice applies only where the three steps follow in the order set out in the advice and it seems that the adviser consciously set out the steps in that order. This scenario does not apply in the Kelly case as the QAA was split from the pension only after Mrs Kelly was admitted to the Hospital. The HSE does

not advert to this aspect of the legal advice despite its relevance in deciding on whether the advice addresses the issues raised in the Kelly case. In the view of the Ombudsman, the legal advice must be considered in its entirety before any view can be taken as to its relevance to the particular case. It is unreasonable of the HSE to seek to justify its actions in the Kelly case by reference to a portion only of the legal advice where it is not at all clear that the adviser was addressing circumstances of the kind which arise in the Kelly case.

This Office, therefore, does not accept that the QAA constituted income in the hands of Mrs Kelly. In any event, the HSE failed to give Mr Kelly comprehensive information when his wife entered nursing home care in 2001. Had it done so, Mr Kelly would not have sought information from the DSFA, the DSFA would not have put split payments into operation and there would not be any question of Mrs Kelly having her own income. It is worth emphasising again that Mr Kelly did not seek a split payment arrangement but simply contacted the DSFA seeking information. The DSFA, without a clear request from Mr Kelly, split the pension payment and allocated the QAA to Mrs Kelly.

In relation to a draft Finding that the HSE had failed to comply with the legal requirements governing agency arrangements for a social welfare pension, the HSE represents this as a once-off error which should not be seen as having any wider implications. In its defence, it points out that the practice went on for six years (2001 – 2007) with neither An Post nor the DSFA raising any objection. Neither did Mr Kelly object. On this basis, the HSE argues that this error should not give rise to a finding by the Ombudsman that the HSE's actions were negligent or careless. This Office rejects these claims of mitigation. As a statutory body dealing with vulnerable people, and in the context of the imposition of charges, the onus on the HSE to act correctly is very high. It is not an acceptable excuse to say that nobody else noticed the mistake.

The HSE states that at the time of introducing charges in 2005, Mr Kelly was advised in writing of his option to retract the arrangement in place since his wife's admission in 2001. It claims that Mr Kelly was given the option either (a) to leave the QAA pension book with the hospital, or (b) to take this pension book from the hospital and make payments by cash or by direct debit. The complainant has denied that his father received these letters in 2005. When this Office sought a copy of the letters which issued to Mr Kelly, we received copies of standard letters (templates), which remained to be "personalised", rather than copies of the actual individualised letters which the hospital said had issued in July and August 2005 to all clients and relatives. These standard letters had been included in the late Mrs Kelly's file. The complainant contends that it was not until March 2007, after his father received repayment of charges under the Health Repayment Scheme, that he was contacted by the SHH and advised of these options. He said that he wished to leave the pension book in the hospital's care for the continuing payments of his wife's maintenance. The HSE says it is satisfied that Mr Kelly clearly intended the DSFA payment to be used to pay his wife's maintenance as set out in his letter. The complainant has made the point, however, that his father was never advised by the SHH that his wife was not liable for in-patient charges.

The HSE has again raised the question as to why the QAA continued to be paid by the DSFA where the qualifying adult is being wholly or mainly maintained in a HSE nursing home. As previously stated, this is a matter for the DSFA to determine. (In many instances, the pension holder will have to meet the cost of purchasing personal items of clothing, hairdressing and toiletries for the qualifying adult spouse, not to mention other costs associated with visiting and taking the patient out for short breaks.)

Chapter 7

Findings

I find that the actions of the HSE adversely affected Mrs Kelly and her husband as follows:

The HSE failed to advise Mr Kelly that his wife, on admission to hospital, was not liable for in-patient charges given that she had no income of her own. This failure reflects negligence or carelessness on the part of the Health Service Executive.

The HSE advised Mr Kelly to make arrangements which resulted in the imposition of charges on his wife, with a corresponding financial loss for him, in circumstances in which the correct advice would have meant that charges would not have been collected. This action was improperly discriminatory in that other couples, in similar circumstances but with the correct advice, did not have charges levied against them.

The HSE failed to comply with legal requirements governing social welfare agency arrangements; this resulted in the cashing of Mrs Kelly's QAA payment book. This was an action taken without proper authority, reflecting negligence or carelessness as well as being an action which was contrary to fair or sound administration.

In the course of pursuing his complaint, I understand that the complainant (Mr John Kelly) incurred legal costs which amounted to €500. He also incurred administrative costs (telephone calls, letter writing and postage) in his contact with other bodies (the Department of Social and Family Affairs, An Post and An Garda Síochána). Furthermore, the refund of nursing home costs which his father received from the HSE for the period 2005 -2007 did not include any provision for loss of purchasing power. Therefore, provision has been made in the recommendations to contribute towards these costs.

Chapter 8

Recommendations

I note that, in the course of this investigation, the HSE decided to refund to Mr. Kelly the hospital charges imposed for the period July 2005 - November 2007. Accordingly, it is not necessary for me to make a recommendation on this matter.

I recommend that the Health Service Executive - Dublin Mid-Leinster makes a "Compensation" payment of €1,000 to Mr John Kelly in recognition of the costs he incurred in the pursuit of his father's complaint.

Emily O'Reilly
Ombudsman
April 2010