



**Office of the Ombudsman  
Oifig an Ombudsman**

# **Too Old to be Equal?**

**An Ombudsman investigation into the illegal refusal  
of Mobility Allowance to people over 66 years of age**

**An Investigation under section 4 of the Ombudsman Act 1980**

**April 2011**

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## Chapter 1

### 1. Background and Preliminary Examination

**The complainant's name and that of his late sister have been changed in this Report to protect their identities.**

#### 1.1 The Complaint

In September 2008 Mr. John Browne complained to the Ombudsman about the decision of the Health Service Executive (HSE) West to refuse a Mobility Allowance payment to his sister, Ms. Mary Browne. Ms. Browne had applied for the Allowance in June 2008. The reason for the refusal was that Ms. Browne was over 66 years of age (in fact, she was over 80 years) and therefore outside the scope of the scheme which limits payment to qualifying persons who are over 16 and under 66 years of age.

#### 1.2 Mobility Allowance

The Mobility Allowance is paid, subject to a means test, to people with a severe disability "who are unable to walk and who would benefit from occasional trips away from home". The purpose of the Allowance is to allow people with severe disabilities, who are not car owners, to make arrangements for their transport needs. The Allowance is intended to enable recipients to benefit from a change in surroundings - for example, by financing the occasional taxi journey. The Allowance, which is administered by the Health Service Executive (HSE) is currently worth €208.50 per month (or €104.25 per month for people also benefitting from the Motorised Transport Grant). In 2009 there were about 4,500 recipients of the Allowance at a cost in excess of €11 million.

First-time applicants for the Allowance must be under 66 years of age; though persons already receiving the Allowance on reaching 66 years will, subject to satisfying the other conditions, continue to be paid.

The Allowance was introduced in 1979 and operates within the terms of an administrative scheme set out by the then Department of Health in its Circular 15/79 (see Appendix 1). While the 1979 Circular does not say so, it appears that the Allowance operates within the context of section 61 of the Health Act 1970 under which a health board (now the HSE) "may make arrangements to assist in the maintenance at home" of a "sick or infirm person". It appears that the terms of the administrative scheme have remained largely unchanged since 1979. The one exception is that in 1981 the scheme was extended to include, subject to the other conditions being satisfied, persons in "any long-term institutions who are maintained by a health board".

#### 1.3 Appeal

On 6 August 2008 Ms. Browne appealed the decision to refuse her application. However, the decision of the HSE West's Appeals Officer, given on 10 September 2008, was to uphold the original decision that Ms. Browne was not entitled because of her age.

## 1.4 Preliminary Examination of Complaint

It was immediately clear that the decision of the HSE to refuse the Allowance to Ms. Browne was in accordance with the terms of the scheme as set out by the Department in 1979. However the Ombudsman was concerned, having carried out a preliminary examination of the complaint, that in two important respects the eligibility criteria for Mobility Allowance, as set out in the Department's Circular, were improperly discriminatory [in the sense in which this term is used in section 4(2) of the Ombudsman Act 1980].<sup>1</sup>

The first and most fundamental concern was that the Allowance is not available at all to a person who first applies after reaching the age of 66 years. The second concern was that there appeared to be improper discrimination within the over-66 age group in that a person, already receiving the Allowance before age 66, may continue to get the Allowance after 66 years whereas a person over 66, not previously benefitting, is excluded from the scheme.

Furthermore, it seemed to the Ombudsman that the age restriction was likely to be at odds with the provisions of the Equal Status Act 2000. This view is supported by the details of a particular case published in the **Equality Authority Casework Activity Report** for 2008. In that case<sup>2</sup>, a woman had complained to the Equality Authority against the HSE (West) which had refused a grant under a related scheme, the Motorised Transport Grant scheme, on the grounds that she was over 66 years of age. She claimed that she was discriminated against, on the grounds of age, contrary to the provisions of the Equal Status Act 2000.

That case was settled, without a hearing before the Equality Tribunal, following contacts between the Equality Authority, the HSE and the Department of Health and Children. The settlement was possible because the Department decided that it would remove the maximum age limit of 66 years in the case of the Motorised Transport Grant scheme. Arrears of the grant were paid to the woman in question and she was told that she would be eligible to apply for similar grants in the future.

## 1.5 Department of Health and Children – Responsible Body

While the decision to refuse Ms Browne the Allowance on the basis of her age was taken by the HSE, this decision was in line with the provisions of the Circular governing the operation of the Allowance. Responsibility for the governing Circular rests with the Department. Any adverse affect arising from the application of the provisions of the Circular is, therefore, also the responsibility of the Department. Accordingly, the Ombudsman's consideration of this complaint involved, primarily, the actions of the Department.

## 1.6 The Department's Response

Arising from the preliminary examination of the complaint, the Ombudsman sought the views of the Department as to whether it considered it appropriate to continue to retain a qualifying upper age limit for eligibility under the Mobility Allowance scheme. (See Appendix 3 for copies of the key items of correspondence with the Department.)

The Ombudsman wrote initially, on 3 February 2009, to the Director of the Department's Office for Disability and Mental Health and, in particular, sought a response to the analysis suggested by the preliminary examination. The Director's reply, almost three months later on

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<sup>1</sup> See Appendix 2 for text of section 4

<sup>2</sup> The *McNabola* case, dealt with in detail in Chapter 3

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30 April 2009, failed to state any position on the issue of whether the age restriction is, or is not, contrary to the provisions of the Equal Status Act 2000.

The Director's response noted that:

- Mobility Allowance is one of the allowances scheduled for transfer to the Department of Social and Family Affairs (now the Department of Social Protection);
- the Department intends to "review the policy and operation" of the Allowance prior to transfer;
- in the meantime the Health Service Executive will continue to operate the Allowance in accordance with the 1979 Circular;

The Director commented that "it is not feasible to amend the scheme to remove the upper age limit in the current economic circumstances".

No specific date had been set for the transfer of responsibility for the Allowance to the Department of Social and Family Affairs and, in fact, at the time of completing this report (April 2011) this transfer had not yet happened. The Ombudsman was concerned that a scheme which, on the face of it, is improperly discriminatory and contrary to the requirements of the Equal Status Act 2000, should continue to operate on such a basis. The fact that the Department had already, in 2008, dealt with an identical issue of improper age discrimination - in the case of the Motorised Transport Grant - suggested that the same resolution should apply in the case of the Mobility Allowance. Accordingly, on 14 July 2009 the Ombudsman wrote to the Secretary General of the Department of Health and Children suggesting that the terms of Circular 15/79 be reconsidered with a view to removing the upper age limit.

The response of the Secretary General, sent more than three months later on 2 November 2009, was brief. The Secretary General did not acknowledge the discriminatory nature of the scheme. He said that the views of the Ombudsman would be taken into account in a review of "Mobility Allowance [being undertaken by the Department] in the context of overall Government policy regarding supports for people with a disability". The Secretary General undertook to inform the Ombudsman of the outcome of this review "as soon as possible". The Ombudsman did not consider that postponing consideration of the matter, pending a review, could be deemed to be an adequate response. In the event, more than 18 months later, the Department has not yet been in touch with the Ombudsman regarding the outcome of this review.

In the light of the Department's responses, and in the absence of any sense of urgency on its part, the Ombudsman decided to investigate this complaint under Section 4 of the Ombudsman Act 1980.

### **1. 7 Death of Complainant's Sister**

Sadly in October 2010, before the completion of this investigation, the complainant's sister died. The complainant, Mr. Browne, wished that the Ombudsman investigation should proceed to a conclusion and the Ombudsman was happy to agree to this.

## Chapter 2

### 2. Notification of Investigation and Response of Department

#### 2.1 Notification of Investigation

On 13 January 2010 the Ombudsman notified the Secretary General of the Department of Health and Children of her decision to investigate this complaint. The notification letter explained as follows:

"The Ombudsman has completed a preliminary examination of the complaint and is satisfied that Ms. Browne has been adversely affected as a consequence of an action of your Department. The action in question relates to the creation of the Mobility Allowance scheme, under Section 61 of the Health Act 1970, which, on the basis of the evidence available, appears to be improperly discriminatory, contrary to the Equal Status Act 2000 and otherwise contrary to fair or sound administration. The Ombudsman has now decided to investigate this action as provided for at section 4 of the Ombudsman Act 1980. I attach, for your information, a copy of section 4 of the Ombudsman Act 1980. I enclose also a Statement of Complaint which sets out the precise issue to be dealt with in the investigation."

A copy of the Statement of Complaint accompanying this notification is available at Appendix 4.

#### 2.2 Response of Department

In his response to the notification of investigation, the Secretary General of the Department of Health and Children stated that its position in the matter was as had been outlined in previous correspondence. The Department chose not to make any comment on the substantive issue raised in the complaint, that is, whether or not the inclusion of an age condition in the Mobility Allowance scheme is contrary to the Equal Status Act 2000 and is improperly discriminatory.

## Chapter 3

### 3. Review of Law and Relevant Material

#### 3.1 Legal Instruments - General

The notion that there should be special recognition of the needs of older people, and in particular that they should not be discriminated against negatively, is well recognised in various legal instruments. The Directive Principles of Social Policy, set out at Article 45 of Bunreacht na hÉireann (1937), includes the following commitment:

"The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged."

While the Directive Principles are stated to be "for the general guidance of the Oireachtas", it is safe to assume that those same principles should inform public policy and the provision of State services generally.

The United Nations Principles for Older Persons (1991) promote the idea of equal treatment for older people regardless of age:

"Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution."

The EU Charter of Fundamental Rights (2000) includes an explicit prohibition on any discrimination based on age as well as a more general recognition of the rights of older people:

#### **"Non-discrimination**

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited." [Article 21]

[...]

#### **"The rights of the elderly**

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life." [Article 25]

The EU Charter is binding only at the level of the EU institutions or, in the case of member states, only where they are implementing EU law. Nevertheless, it is reasonable to expect that the values and principles enshrined in the Charter should be reflected in member states' laws and public services.

Relevant also, in a general way, is the UN Convention on the Rights of Persons with Disabilities (2007) which, amongst other things, deals specifically with the issue of the

mobility needs of people with disabilities (such as the late Ms. Browne); it provides, at Article 20 (Personal Mobility) that:

“States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by:

- a. Facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost;
- b. Facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost;
- c. Providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities;”

While Ireland has signed this Convention, it has not yet ratified it and it is not binding on the State in any sense. A State signing the Convention, in effect, says that it is its intention to take steps to be bound by it at a later date. Signing also creates an obligation, in the period between signing and ratification, to refrain from acts that would defeat the object and purpose of the Convention. Thus one might reasonably expect that the Department, in its arrangements for promoting mobility amongst those with a disability, would have regard to the overall values and objectives of the Convention.

### 3.2 Relevance of International Human Rights Standards

The Irish Human Rights Commission has drawn explicit attention, in a 2006 report<sup>3</sup>, to the relevance of international human rights standards in the formulation of public policy and the drafting of legislation in the social security area:

"The Commission ... **recommends** that the relevance of international human rights standards be closely examined in the formulation of public policy and legislative proposals in the field of social security. This would include examination of the impact of the measures in question on discrete groups of individuals (such as on grounds of a person's sex, sexual orientation, race, nationality, disability or age) in order to guard against discrimination. While this may occur at times at present, the examination should be routinely done and in a rigorous fashion."

### 3.3 The Equal Status Act

The Equal Status Act 2000 has immediate and direct application in Ireland; and insofar as it deals with age discrimination, its provisions reflect provisions of the 1997 Amsterdam Treaty of the European Union. The Equal Status Act 2000 (as amended) prohibits discrimination in the provision of services and this includes services provided by State bodies such as local authorities, the HSE and Government Departments. There is, however, an exemption from the requirements of the Equal Status Act where the conditions attaching to the provision of a service are provided for specifically in an Act of the Oireachtas or in EU law. The age restriction applying in the case of the Mobility Allowance is not a restriction which arises because of Irish or EU law and, accordingly, Mobility Allowance is a service which must comply with the Equal Status Act 2000.

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<sup>3</sup> Irish Human Rights Commission (2006) *The Self-Employed and the Old Age Contributory Pension: Report on an Enquiry into the Impact of Certain Provisions of Social Welfare Legislation on the Self-Employed*.

The Equal Status Act 2000 identifies nine distinct grounds on which discrimination is prohibited. These grounds are:

- Gender
- Marital status
- Family status
- Sexual orientation
- Religion
- Age
- Disability
- Race
- Membership of the Traveller community

The definition of "discrimination" for the purposes of the Equal Status Act 2000 is relatively complex but suffice to say, for present purposes, that it includes any instance *"where a person is treated less favourably than another person is, has been or would be treated"* in a comparable situation on any of the grounds specified.

### 3.4 Equality Tribunal Decisions

In early February 2009 the Equality Tribunal issued two decisions (DEC-S2009-011 and DEC-S2009-012) on claims made under the Equal Status Act in relation to the Mobility Allowance. Both cases involved people with disabilities (schizophrenia and Downs Syndrome, respectively) which, it was claimed, restricted their mobility. In both cases, the claim for Mobility Allowance was rejected on the grounds that the claimant did not meet the requirement that he or she be unable to walk. In both cases the Equality Officer, acting on behalf of the Equality Tribunal, upheld the claims and took the view that the terms of eligibility for the Mobility Allowance are defective in that they reflect a very narrow view of what constitutes mobility. The Equality Officer commented (DEC-S2009-012):

"... I note that there is an obvious failure to assess the intellectual and/or psychological capacity of the applicant in relation to their mobility. I find that the current clinical assessment does not, in its current format, allow for assessment that is compatible with the broad definition of disability as set out in the Equal Status Acts. The concept of mobility in the [Mobility Allowance] circular is construed in such a narrow manner that it fails to recognise that in severe cases a person's intellectual and/or psychological health may restrict their mobility as effectively as some physical disabilities do. I find that this is a clear omission and it is obvious that the mobility allowance has not been updated to comply with the requirements set out in the Equal Status Acts (enacted in October 2000). ...

**Based on the foregoing, I strongly recommend that the Health Service Executive (in partnership with the Department of Health and Children if necessary) examine the various allowance schemes governing people with disabilities to ensure that they and the associated assessment processes comply with the requirements of the Equal Status Acts."** (our emphasis)

Subsequently, the HSE appealed the decision of the Equality Officer in case DEC-S2009-012 to the Circuit Court. The only issue in the appeal was whether the HSE was the correct respondent in the hearing before the Equality Officer. The Circuit Court noted that, in effect,

the basis of the complaint adjudicated upon by the Equality Officer concerned the "lawfulness of the Department of Health Circular" and, in these circumstances, the respondent party should have been the Department rather than the Health Service Executive. The Circuit Court allowed the appeal but, in so doing, did not deal with the intrinsic merits of the Equality Officer's decision. Indeed, it appears from the Circuit Court judgment that the HSE did not seek to dispute the merits of the decision and focused only on the issue of whether it was the appropriate respondent.

The Equality Officer made an identical decision and recommendation in the second case (DEC-S2009-011). In the light of the Circuit Court judgment in the first case (DEC-S2009-012), it was agreed between the parties that the decision in case DEC-S2009-011 should not stand. As far as the Ombudsman can establish, the two cases adjudicated upon by an Equality Officer (in DEC-S2009-011 and DEC-S2009-012) were not re-submitted for adjudication, with the Department of Health and Children as respondent, presumably because the time limit for initiating such action had expired.

While the two 2009 decisions of the Equality Officer do not deal specifically with the issue of age discrimination, they support strongly the view that the Mobility Allowance scheme must operate in a manner which is compatible with the requirements of the Equal Status Act. The issue of age discrimination, however, arose explicitly in relation to a separate but related scheme in the *McNabola* case.

### 3.5 The McNabola Case

For the purposes of the present investigation, the Ombudsman examined the files of the HSE as well as those of the Department and of the Equality Authority in the *McNabola* case, referred to in **Para. 1.4** above. This involved the refusal of the Motorised Transport Grant on grounds of age. The key issue in the *McNabola* case - an upper age restriction in a scheme of assistance for disabled people - is the same as the issue arising in this present investigation. As set out below, the *McNabola* case was settled in June 2008 (before Mr. Browne complained to the Ombudsman) and the upper age restriction was removed in the case of the Motorised Transport Grant. It is difficult to understand why the same restriction, applying in a similar type scheme (Mobility Allowance), has not been removed.

Early in 2004, Mrs Maureen McNabola applied to the HSE West for a Motorised Transport Grant. This is a means tested grant for people with disabilities who need to buy a car or who need to have a car or other vehicle adapted. Like the Mobility Allowance, the Grant has no specific statutory basis and it operates under a Department of Health and Children circular first issued in 1968. One of the conditions attaching to the Grant at the time of the application was that the applicant had to be over 17 years and under 65 years of age. Mrs McNabola suffers from a visual impairment. She had been benefitting from this Grant for the previous nine years with her husband, who is her full-time carer, acting as her driver. Her 2004 application was refused as she was over the age limit. She appealed the decision to the HSE but her appeal was rejected. However, the HSE on its own initiative decided to make a once-off payment of €4,995 to Mrs McNabola on the grounds of hardship and exceptional need. It appears this was done on an extra-statutory, administrative basis.

Mrs McNabola made a new application for the Grant in March 2007. At this stage the guidelines for eligibility had changed with the upper age limit having been raised from 65 to 66 years. Mrs McNabola's application was refused on grounds of age. On 10 April 2007 Mrs

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McNabola appealed the refusal of the Grant. On 25 April 2007 the HSE Appeals Officer rejected the appeal explaining that Mrs McNabola did not fall within the terms of the Grant Scheme as she was over 66 years. The Appeals Officer sympathised with Mrs McNabola but said she was bound by the terms of the Scheme (including the age restriction) which had been re-stated in National Guidelines issued by the Department of Health and Children earlier that year.

In May 2007, Mrs McNabola contacted the Equality Authority to complain that she was being discriminated against on grounds of age, contrary to the Equal Status Act 2000. Acting on her behalf, in June 2007 the Equality Authority notified both the HSE and the Department of Mrs McNabola's complaint and of the fact that this could result in a legal action before the Equality Tribunal. The HSE replied to this notification saying that it had to operate the scheme in accordance with the National Guidelines and that "eligibility rules under the scheme are not questions for the Health Service Executive".

The Department, on the other hand, failed to make any substantive reply to the notification from the Equality Authority. Other than standard acknowledgments, the Department failed to reply to numerous letters<sup>4</sup> from the Equality Authority. As part of its action on behalf of Mrs McNabola, the Equality Authority had asked the Department the specific question:

"Why has an upper age limit of sixty-six years been specified as part of the eligibility criteria for the grant despite the fact that as a seventy-year-old woman with a disability Mrs McNabola is still in need of the grant?"

The Department never answered this question. In the absence of engagement by the Department, and because of the need to abide by the statutory time limits for lodging a case, the Equality Authority in late August 2007 referred the complaint to the Equality Tribunal for adjudication.

On 13 March 2008, the Equality Authority wrote to the Minister for Health and Children noting that, apart from acknowledging correspondence, the Department had failed to respond to the issues raised in Mrs McNabola's case. It said that Mrs McNabola was extremely upset at the failure to reply and referred to Section 26 of the Equal Status Act 2000 which permits inferences to be drawn from the failure to respond to correspondence

From the Department's file, it appears that it did not engage with the issue in any serious way until early April 2008. This is despite the fact that in replies to Parliamentary Questions (PQs) in February 2006 and November 2007 the relevant Minister had committed to reviewing the upper age limit for the Motorised Transport Grant. On 28 February 2006 Minister Tim O'Malley said [PQ 7773/06], in relation to the upper age limit, that

"[m]y Department is currently examining the issues that the Deputy is referring to in the context of my Department's strategic review of services for people with disabilities."

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<sup>4</sup> Letters of 11 June 2007, 24 July 2007, 22 August 2007 and 4 October 2007

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On 7 November 2007 Minister Jimmy Devins, dealing with a similar question, said [PQ 27807/07]

"[m]y Department is aware of the issue of age related criteria for health allowances and grants. Having regard to equality legislation, my Department is considering the question of removing the upper age limit for this scheme."

On 2 April 2008, in response to an internal memo, the Director of the Department's Office for Disability and Mental Health, wrote:

"The existing eligibility criteria are in contravention of the Equal Status Acts and it is recommended that they be changed in advance of this case."

The file then went to the Secretary General who commented: "*I accept that the upper age limit seems to contravene the Equal Status Acts*". The Secretary General agreed that the upper limit should be removed. Subsequently, in a note to the Minister dated 3 June 2008, the Secretary General commented: "*I don't think we have any option but to remove the upper age limit*." The Minister accepted this position and the Department then informed the HSE and the Equality Authority of its decision to remove the upper age limit. In its letter to the HSE, the Department acknowledged explicitly that the upper age limit for the Motorised Transport Grant was in contravention of the Equal Status Act "on the grounds of age". In the light of this change, the HSE was able to pay the Grant to Mrs McNabola and she, in turn, withdrew her case from the Equality Tribunal.

## Chapter 4

### 4. Analysis

#### 4.1 Legality of the Upper Age Limit

Given the position of the Department of Health and Children as one of the key public agencies involved in promoting the rights and welfare of people with disabilities, it is remarkable that, as an Equality Officer pointed out (in her decisions in DEC-S2009-011 and DEC-S2009-012), the Department has not yet, ten years after its enactment, updated the Mobility Allowance to bring its terms into line with the requirements of the Equal Status Act. Had there been a review, it seems inevitable that the Department would have recognised that the application of an upper age limit for the Mobility Allowance contravenes the Equal Status Act 2000.

In June 2008 the Department acknowledged that the application of an upper age limit, in the case of the Motorised Transport Grant, was contrary to the Equal Status Act 2000 and on this basis it removed the upper age limit as a condition of entitlement under that scheme. It is clear that this decision was forced on the Department because of the upcoming hearing before the Equality Tribunal in the McNabola case which the Department expected to lose.

The Mobility Allowance scheme is very similar to the Motorised Transport Grant scheme in terms of its broad objectives and in that it is an administrative rather than a statutory scheme. Prior to June 2008, both schemes had an upper age limit in place. With the removal of the upper age limit in the case of the Motorised Transport Grant in June 2008, one might reasonably have expected that the age limit attaching to the Mobility Allowance would also have been removed. This did not happen.

At the time when this complaint was first communicated to the Department, on 3 February 2009, it had already acknowledged (some eight months earlier) that the inclusion of an upper age restriction in the Motorised Transport Grant was illegal. On this basis, the inclusion of the upper age restriction in the case of the Mobility Allowance (a scheme very similar to the Motorised Transport Grant) must also be illegal. It is remarkable that in its written responses to the Ombudsman (dated 30 April 2009, 2 November 2009 and 29 January 2010) the Department failed to address the issue of compliance with the Equal Status Act 2000. Nor did it acknowledge the strong recommendations of the Equality Officer (see Para.3.3 above), made on 9 February 2009, that the Department and the HSE review those allowances aimed at people with disabilities so as to ensure their compliance with the Equal Status Act. While the two Equality Officer decisions in question were found to be invalid on a procedural technicality, it is clear that the analysis of the Equality Officer would have been the same had the technical issue not arisen. There was an onus on the Department to act in accordance with the Equality Officer's analysis notwithstanding the fact that there was a procedural mistake in the manner in which the two cases were taken before the Equality Officer.

There is no argument, nor has the Department tried to make the argument, that the upper age limit in the case of Mobility Allowance is consistent with the Equal Status Act 2000. Thus, it is clear that the upper age limit applying to Mobility Allowance is illegal and has been since the commencement of the Equal Status Act in October 2000.

### 4.2 Resource Constraints and the Law

From the Department's perspective the Mobility Allowance, being a cash payment, may well be seen as something peripheral to its primary business. In recent years the Department has shed responsibility for other cash payments such as Disabled Person's Maintenance Allowance and Domiciliary Care Allowance; and the Department says there has been a decision, in principle, that responsibility for the Mobility Allowance will transfer to the Department of Social Protection. However, for as long as the Department retains responsibility for the Allowance, it is reasonable to expect that it will ensure that it operates in accordance with the Equal Status Act.

The Department is the lead Department in terms of promoting the welfare and life chances of people with disabilities; it has a Minister of State with special responsibility for equality, disability issues and mental health and it has, within the overall structure, a dedicated Office for Disability and Mental Health with its own Director.

While not acknowledging explicitly that the upper age restriction is illegal, the Department has defended indirectly its failure to remove the restriction with its comment (letter of 30 August 2009) that "*it is not feasible to amend the scheme to remove the upper age limit in the current economic circumstances*". In terms of human rights principles, this position suggests that human rights (in this instance, freedom from unfair discrimination) takes second place to issues of resource constraints. In this case, however, it is not simply a matter of human rights principles. On the Department's own admission, albeit indirectly, the upper age restriction is in breach of statute law (Equal Status Act). Current economic circumstances do not constitute grounds on which it might be acceptable for a public body to continue with a practice which is illegal.

The argument that changes required by human rights principles may be rejected because of resource constraints is not one which has found favour with the European Court of Human Rights. In its 2002 judgment in the case *Willis v United Kingdom* (dealing with unequal treatment as between widowers and widows in the UK social security system) the European Court of Human Rights agreed that the fact that resources were finite did not justify concentrating all the resources which were available on the protection of bereaved women to the detriment of widowed men.<sup>5</sup>

In fact, there is a general acceptance that vulnerable groups are more than ever in need of the protection of human rights principles in circumstances of economic crisis, such as currently prevail in Ireland. The Council of Europe's Commissioner for Human Rights, Thomas Hammarberg, has observed:<sup>6</sup>

"The negative impact of the global economic crisis will hit vulnerable groups considerably harder [than others]. There is a major risk that it will be the weakest

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<sup>5</sup> *Willis v the UK* ECHR-IV, cited by the Irish Human Rights Commission in *The Self-Employed and the Old Age Contributory Pension: Report on an Enquiry into the Impact of Certain Provisions of Social Welfare Legislation on the Self-Employed*. (2006)

<sup>6</sup> "**Ensuring human rights protection for everybody in Europe**", Intervention of the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, 119<sup>th</sup> Session of the Committee of Ministers, Madrid, 12 May 2009 - cited by the Irish Human Rights Commission in *Human Rights Guide for the Civil & Public Service* (2010).

who will suffer the most ... We must not be complacent. The promotion of human rights is far too serious a question to be approached with half-measures."

There are parallels here with an issue raised in the Ombudsman's recent report to the Dáil and Seanad entitled *WHO CARES? An investigation into the Right to Nursing Home Care in Ireland*. That report concluded that the State, through the HSE and the Department of Health and Children, has failed consistently over decades to meet its legal obligation to provide long-stay nursing home care for older people. One of the arguments put forward by the Department in defence of its position was that the State cannot afford the costs of complying with its legal obligations. The Ombudsman in that case took the view that the negative consequences of disregard for the law by a public body are graver than any financial or administrative costs associated with observing the law. As the Ombudsman put it:

"... there is the fundamental point that continued disregard for the requirements of the law, even where that disregard may be well-intentioned, undermines the rule of law generally. On a more pragmatic note, the risks associated with neglecting to meet legal entitlements are high; in the longer term, the risk of litigation is real as the litigation currently under way shows."

In the case of the Mobility Allowance, amending the scheme to remove the upper age limit can be done on an administrative basis as the scheme is not a statutory scheme. If the cost implications of extending the scheme to people over 66 years cannot be borne in present financial circumstances then it may be necessary to make other changes to the scheme, consistent with the Equal Status Act and with other legal requirements, which allow it to operate within the resources available. Postponing action, or taking no action at all, is not acceptable behaviour on the part of a public body in a society which is ruled by law. This is particularly the case where those most affected by the failure to act constitute a vulnerable group which is unlikely to be able to organise and lobby with a view to vindicating its rights.

### 4.3 Reviews Promised

The Department has sought also to explain the failure to bring the Mobility Allowance into line with the Equal Status Act by saying that this was something which it proposed to review. In her letter to the Ombudsman, dated 30 April 2009, the Director of the Office for Disability and Mental Health said that

"it is intended to review the policy and operation of the mobility allowance prior to transfer [to the Department of Social and Family Affairs]. ... It is not envisaged that any changes will be made to the allowance prior to the review."

No timescale was given for the transfer of responsibility for the Allowance to the Department of Social and Family Affairs nor was a timescale given for the review.

In his letter to the Ombudsman, dated 2 November 2009, the Secretary General of the Department said that the

"Department is undertaking a review of the Mobility Allowance in the context of overall Government policy regarding supports for people with a disability"; and he promised that the "issue you have raised will be taken into account in the review".

## Ombudsman Investigation Report - Too Old to be Equal?

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The Secretary General undertook also to inform the Ombudsman of the outcome of the review "as soon as possible".

In his subsequent letter to the Ombudsman, dated 29 January 2010, the Secretary General said that the position was as outlined in the earlier letters. It appears that at that stage the review was still under way. At the time of writing (April 2011), there has been no further word from the Department regarding the outcome of the review.

In fact, the Department announced reviews of payments such as Mobility Allowance and the Motorised Transport Grant previously. For example, on 10 April 2001, a date after the enactment of the Equal Status Act 2000, the Minister for Health told the Dáil [PQ 10452/01] that

"my Department is currently undertaking an examination of the disability related allowances which come under its aegis and are administered by the health boards, including mobility allowance."

The Ombudsman is uncertain whether this review actually took place but, if it did, one would reasonably expect it to have taken account of the requirements of the Equal Status Act 2000.

In the light of the Department's decision of June 2009 to remove the upper age limit in the case of the Motorised Transport Grant; and of the strong recommendations of an Equality Officer in February 2009 that the Department (and the HSE) review "*the various allowance schemes governing people with disabilities to ensure that they ... comply with the requirements of the Equal Status Acts*"; along with correspondence from the Ombudsman since 3 February 2009: it is surprising that this promised review appears even yet not to have been completed.

On 3 December 2010, the Department published a document entitled **Summary of Key Proposals from The Review of Disability Policy**. The document summarises the key themes emerging from the work of an Expert Reference Group set up by the Department "to review current policy in relation to disability services". The work of the Expert Reference Group is intended to inform a wider "review of the efficiency and effectiveness of Disability Services funded from the Health Vote" being conducted "as part of the Government's Value for Money (VFM) and Policy Review Initiative". The Ombudsman appreciates that, following the completion of this review, there may well be a reconfiguration of disability services which might, or might not, involve changes to (or even the dropping of) the Mobility Allowance.

The fact remains that, despite all the talk of reviews over several years, there has not to date been a comprehensive review of the Mobility Allowance and of related schemes intended to benefit people with disabilities. More particularly, and despite the specific promises, there has not been a review to ensure that existing schemes (including Mobility Allowance) comply with the Equal Status Act. An intention to undertake a review at some future date is not a justification for continuing with a practice which is already known to be illegal.

### 4.4 Discrimination within the Over-66 Age Group

Under the Mobility Allowance scheme as currently constructed a person who, on reaching 66 years, is already a beneficiary will continue to benefit after the age of 66 years. This places such a person at an advantage over a person whose first application for the Allowance is made after reaching 66 years. In effect, this amounts to a form of discrimination within the over-66 age group. The Ombudsman is not aware of any specific ground on which such

## Ombudsman Investigation Report - Too Old to be Equal?

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discrimination might be justified and thus regarded as a proper and acceptable form of discrimination.

This discrimination within the over-66 age group may not involve any one of the nine grounds of discrimination prohibited by the Equal Status Act (see Para.3.2). However, actions reflecting this discrimination are very likely to be actions which are "improperly discriminatory" in the sense in which this term is used in section 4(2)(b)(v) of the Ombudsman Act 1980.

### 4.5 HSE Role

In appealing the refusal of Mobility Allowance to his sister, Mr. Browne pointed specifically to the inequity (as he saw it) of the upper age limit:

"I therefore request that this application be revisited and all of her medical history, and all factors pertaining to her situation be taken into account, and in particular, her solitary isolation, only then can she be part of a just and equitable society. The fact that the sole determining factor used in rejecting this claim was her age, I find this to be incomprehensible and completely unjust."

The HSE Appeals Officer, in notifying his appeal decision, simply commented:

"I regret that as you do not satisfy the age criteria, I cannot be of assistance in regard to this appeal."

It is true that the HSE's decision to refuse the Allowance to Ms. Browne was correct in the sense that the conditions of the scheme were applied and Ms. Browne failed to satisfy one of them (the upper age limit). The question arises of whether the HSE is absolved of any responsibility to ensure that the scheme operates in a manner which complies with the law and, in this context, with the Equal Status Act more particularly. In strict legal terms, as the Circuit Court found, the Department must answer for any alleged defects in the scheme for which it is responsible. Nevertheless, and while it may have had no alternative but to reject Ms. Browne's case (and other such cases), one might reasonably expect that the HSE would have been making representations to the Department seeking to have the scheme made compliant with the Equal Status Act. These efforts by the HSE, it seems reasonable to believe, should have been made irrespective of the February 2009 recommendations of the Equality Officer and irrespective of whether the Equality Officer's recommendations arose from a process which was found subsequently to have been flawed procedurally. Furthermore, given that the issue of an age limit had recently been the focus of detailed consideration within the HSE and the Department in the case of the Motorised Transport Grant (in the McNabola case), and given that the Department had removed the age limit as a result of that consideration, one can very reasonably expect that the HSE should have been questioning the Department on the continued application of an age limit in the case of the Mobility Allowance.

The Ombudsman has no reason to believe that the HSE, in fact, made any such representations. In the absence of efforts to have the scheme changed to respect the requirements of the Equal Status Act, the HSE was allowing itself to adjudicate on the

eligibility of Mobility Allowance applicants on grounds which it had reason to believe were unlawful.<sup>7</sup>

### 4.6 Department - Reluctance to Act?

In the case of the Motorised Transport Grant, it is evident that it was only through the determination of Mrs McNabola, acting with the assistance of the Equality Authority and having commenced proceedings through the Equality Tribunal, that the upper age limit was dropped. As described at Para. 3.5, the Department failed to engage with Mrs. McNabola or with the Equality Authority which was acting on her behalf. The Department allowed the complaint to go unanswered which, apart from the discourtesy involved, forced the Equality Authority to refer the case to the Equality Tribunal. Following the referral of the case to the Equality Tribunal, the Department allowed a full seven months to go by before it engaged in any meaningful way with the issue raised. In fact, between June 2007 and June 2008 the Department failed to reply, other than by way of standard acknowledgment, to any of the various communications from the Equality Authority and the Equality Tribunal.

The impression one gets from the conduct of this present investigation, and from the relevant files dealing with the related McNabola case, is of a Department which is struggling in its attempts to reconcile the requirements of the law with the constraints imposed by the limited availability of funding and by its own organisational arrangements. While the Department may well be acutely aware of the difficulties facing people with disabilities, its apparent inability to respond to specific situations (the Mobility Allowance issue, for example) leaves it open to the charge that it lacks a sense of urgency in tackling such issues. It leaves it open also, in this particular case, to the perception that it is unconcerned with the fact that it is operating a scheme which is at odds both with the law of the land and with human rights law more generally. The Ombudsman is not stating that this is her conclusion; nevertheless, she recognises that others may feel compelled to reach this conclusion.

Unfortunately, the Department's actions, both in the course of this investigation and in the course of the McNabola case, have contributed to the negative perceptions mentioned above. The Department's own reputation and integrity would have been much better served in these instances had it speedily and comprehensively explained the difficulties it faced and then taken action to deal with the issues raised.

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<sup>7</sup> The Ombudsman provided the HSE with a draft copy of this report and drew attention, in particular, to the comments in Para. 4.5. The HSE chose not to avail of the opportunity to make representations to the Ombudsman in relation to her comments on the HSE's involvement with Mobility Allowance.

## Chapter 5

### 5. Department's Response to Draft Report

#### 5.1 Response Summarised

The Department was given an opportunity to comment on a draft of this investigation report and to make whatever representations it wished in relation to it. The Secretary General of the Department responded to the draft report in a letter dated 11 February 2011. (See Appendix 5.)

The Secretary General made the following points:

- He accepted that the Department “should have reviewed and updated the mobility allowance scheme following the enactment of the Equal Status Act [2000].”
- He stated that following “a more recent review of the terms of the scheme, particularly the upper age limit and the definition of disability, the Department concluded that it could not continue to operate on the current basis.”
- He said that the Department, contrary to its action in the case of the motorised transport grant, had decided not to deal with the upper age limit issue separately from other issues.
- He said that “[c]ertain options in relation to the future of the mobility allowance scheme have been submitted to, and considered by, the Minister and the Government but final policy decisions in this regard have yet to be taken.”
- He said that in the particular case of Ms. Browne, “the Tánaiste has agreed that the mobility allowance should be paid, on an exceptional basis ... with effect from June 2008.”
- He said that he wished “to apologise through your Office to Mr. Browne and his sister for the delay and distress they experienced in having Ms Browne’s application dealt with.”
- In relation to the draft report, he asked that the Ombudsman review “the manner in which some of the material in Chapters 3 and 4 is presented and, in particular, the judgemental language used in some places.” He instanced in particular the final section of Para., 4.3 where some of the language used is, in the Department’s view, “untrue, highly emotive and prejudicial to the professional standing of the Department and its staff”.

#### 5.2 Ombudsman's Comments on Response

The Department has accepted unequivocally that it failed in its duty to ensure that the Mobility Allowance scheme complies with the requirements of the Equal Status Act 2000. It has also apologised to the complainant and arranged for Mobility Allowance to be paid retrospectively. All of this is very welcome. However the failure, over the past eleven years, to comply with the Equal Status Act must reflect very poorly on the Department.

The reference to a “a more recent review of the terms of the scheme” was initially unclear. From enquiries made with the Department, subsequent to the Secretary General’s letter of 11 February 2011, it appears that this is a reference to a process which would only be completed with a decision by the Minister, and perhaps the Government, on the future of the scheme. While certain options were developed by the Department, no decision on the matter was

made. It seems clear that whatever measures would be adopted to render the scheme compliant with the Equal Status Act, there was an acceptance within the Department that the existing age restriction is untenable. It seems clear that the Department had reached this conclusion some time ago and, certainly, had reached the conclusion during the period when this investigation was underway. Regrettably, in its exchanges with this Office in the course of the investigation, the Department failed to acknowledge in any explicit fashion that it had already accepted that the age restriction was untenable.

This lack of frankness on the part of the Department may have been prompted by a view that, until the Minister took a clear decision as to how the scheme should be reconfigured, it should refrain from expressing any view on the matter. If this was indeed the case, it is unfortunate. While the decision as to how the scheme might be re-drawn required a decision by the Minister (for which Government approval might have been necessary), there is no good reason why the Department should have been less than frank in acknowledging that it had already concluded that the scheme was at odds with the Equal Status Act. This conclusion was not one which could have been rejected by the Minister or by the Government.

It appears to be the case that officials of the Department had actually considered changes to the Mobility Allowance scheme, had outlined various options for the future, and were awaiting a response from the Minister. Details of the timeline involved have not been provided. The Secretary General's letter of 11 February 2011 appears to suggest that it is unreasonable to be critical of the "Department" in circumstances where a decision by the Minister was awaited. If this is the suggestion, it cannot be given any credence. The "Department" comprises both the Minister and the officials and there is no basis for distinguishing between their respective roles.<sup>8</sup> It is a matter of fact that a review leading to reform of the Mobility Allowance scheme (and rendering it compliant with the Equal Status Act 2000) has not been completed.

The Department has objected to some of the language used in the draft report and, in particular, in the latter section of Para. 4.3, which deals with the failure to review the scheme. The Department contended that some of the language in the draft was judgemental and highly emotive.

In the light of these comments by the Department, the Ombudsman has revised some of the language used in this report (at Para. 4.3 and Para. 4.6). In particular, the final text of these paragraphs draws a clear distinction between how the Department is likely to be perceived by some people with disabilities and the Ombudsman's own conclusions. While the Ombudsman strives to represent the views and the voices of complainants – which, in a case such as this, are likely to be hostile to the Department – she is conscious also of the need to be balanced and fair in how she expresses her own conclusions.

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<sup>8</sup> A Minister has a separate legislative role as a member of the Dáil or Seanad; but as a member of the Government is in charge of a Department of State and exercises the "executive power of the State" collectively with the Government as a whole.

## Chapter 6

### 6. Findings

#### 6.1

The Ombudsman finds that the decision of the HSE, to refuse the late Ms. Browne's application for Mobility Allowance, was taken in accordance with the terms of the Mobility Allowance Scheme as established by the Department of Health and Children.

#### 6.2

The Ombudsman finds that the Mobility Allowance Scheme, as currently constituted, is in breach of the Equal Status Act 2000 in as much as it includes an upper age limit which cannot be justified on any basis which would render that age limit in compliance with the Equal Status Act.

#### 6.3

The Ombudsman finds that the late Ms. Browne was affected adversely by the refusal of her application for Mobility Allowance and that this refusal arose from reliance on a condition of the Scheme (the upper age limit) which is improperly discriminatory, imposed without proper authority and is otherwise contrary to fair or sound administration (in the sense in which these terms are used in section 4(2)(b) of the Ombudsman Act 1980).

## Chapter 7

### 7. Recommendations

#### 7.1

Given the decision of February 2011, by the then Tánaiste and Minister for Health and Children, to award Mobility Allowance to the late Ms. Browne for the period back to June 2008, there is no necessity for the Ombudsman to make any recommendation in that regard.

#### 7.2

In order to deal with the underlying cause of the adverse affect on Ms. Browne, the Ombudsman recommends that the Department of Health completes its review of the Mobility Allowance scheme and, arising from that review, revises the scheme so as to render it compliant with the Equal Status Act 2000. The Ombudsman further recommends that this process of review and revision should be completed within six months of the date of this report.<sup>9</sup>

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**Emily O'Reilly**  
**Ombudsman**

**April 2011**

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<sup>9</sup> The Ombudsman expresses no view as to the terms of any revision of the Mobility Allowance scheme other than that the revised scheme should be compliant with the Equal Status Act 2000.

# Appendices

Department of Health  
Hawkins House, Dublin 2



An Roinn Skáinte  
Teach Haicín, Baile Átha Cliath 2

TEL (01) 784322 EXTN.  
TELEX 4894  
REF.  
Circular No. 15/79

8 Lunasa, 1979

HB/D4(N)/0002

Chief Executive Officer  
Each Health Board

Mobility Allowance Scheme

1. I am directed by the Minister for Health to state that a scheme for payment by health boards of mobility allowance at the rate of £150 per annum for severely handicapped persons will be introduced with effect from 1st September, 1979. The scheme applies to persons in the age group 16 to 66 years who are unable to walk and who would benefit from occasional trips away from home.
2. Although eligibility is confined to persons who are normally living at home, mobility allowance may continue to be paid in respect of occasional stays in hospital of up to 8 weeks, as in the case of Disabled Persons Maintenance Allowance.
3. As stated, an applicant must be under pensionable age. However, an allowance, once granted, will be continued after this age as long as the other criteria for eligibility are met.
4. A means test should be applied similar to that which is operated for the purposes of the Disabled Persons Maintenance Allowance. It seems likely that most of those who qualify for mobility allowance will already be in receipt of Disabled Persons Maintenance Allowance.
5. The essential medical criterion for the grant of the allowance is that the applicant is unable to walk, even with the use of artificial limbs or other suitable aids, or is in such a condition of health that the exertion required to walk would be dangerous. It is necessary that this criterion should be interpreted strictly. The inability to walk has to be likely to persist for at least one year and the applicant must not be forbidden for medical reasons from being moved. For the purposes of a meeting with Programme Managers and Directors of Community Care and Medical Officers of Health on 26th July, notes on relevant medical conditions were circulated. Further copies of these notes may, if required, be obtained from this Department.

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## Ombudsman Investigation Report - Too Old to be Equal?

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6. It will be a matter for the Director of Community Care and Medical Officer of Health to decide whether the medical criteria are satisfied in any case. It would be advisable for directors to brief general medical practitioners in their areas on the scope of the scheme, as medical certificates must be submitted with applications for the allowance.
7. Cases which have been accepted for payment of an allowance should be reviewed at appropriate intervals to establish that they continue to meet the criteria for eligibility.
8. An explanatory statement for the information of enquirers and a form of application for the allowance are enclosed as Appendix 1 to this circular. Copies of the statement and application form are being printed and supplies will be issued to health boards as soon as possible.
9. Statistics relating to the scheme should be kept in the form set out in Appendix 2 to this circular. Health Boards are requested to furnish returns in the first instance in respect of September to December, 1979 and thereafter for each calendar year.
10. Publicity about the commencement of the scheme on a national basis will be prepared by the Department and will be on the lines of the explanatory statement in Appendix 1. Health Boards should arrange for similar publicity locally.
11. The scheme will be subject to review from time to time.

Mise le meas



J. O'ROURKE

Appendix 1

Mobility Allowance for Handicapped Persons

A mobility allowance at the rate of £150 per annum for severely handicapped persons who are unable to walk will be introduced from 1st September, 1979. The scheme applies to persons in the age group 16 to 66 years who are living at home.

There will be a means test similar to that which operates for the purposes of the Disabled Persons Maintenance Allowance, i.e. that by reason of disability, the applicant is unable to provide for his maintenance and his spouse, if any, is unable to maintain him. The basic medical conditions to qualify for payment of allowance are:

- the applicant is unable to walk, even with the use of artificial limbs or other suitable aids, or is in such a condition of health that the exertion required to walk would be dangerous.
- inability to walk has to be likely to persist for at least one year.
- the applicant must not be forbidden for medical reasons from being moved.
- the applicant must be in a condition to benefit from a change in his surroundings.

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The scheme will be operated by the health boards. It will be a matter for the Director of Community Care and Medical Officer of Health to decide whether the medical criteria are satisfied in any case.

Allowances will be paid monthly.

Persons who consider that they satisfy the conditions of eligibility for the allowance should complete the attached application form and return it to the local office of the health board.

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Mobility Allowance for Handicapped Persons

Part 1: for completion by applicant

To Health Board

Name:

Address:

Date of Birth

I wish to apply for mobility allowance. I consider that I satisfy the required conditions. I am/am not\* in receipt of Disabled Persons Maintenance Allowance.

Medical Card No. (if any):

Signed \_\_\_\_\_

Date \_\_\_\_\_

\*delete as appropriate

Part 2: for completion by applicant's medical practitioner.

I have examined ..... of ..... He/She is suffering from ..... I certify that by reason of this condition he/she is unable to walk and I expect that this inability will last at least one year from the date of this certificate.

Signed \_\_\_\_\_

Date \_\_\_\_\_

**Ombudsman Act 1980, Section 4**

*Functions of the Ombudsman.*

4.—(1) The Ombudsman shall be independent in the performance of his functions.

(2) Subject to the provisions of this Act, the Ombudsman may investigate any action taken by or on behalf of a Department of State or other person specified in Part I of the First Schedule to this Act (being an action taken in the performance of administrative functions) where, upon having carried out a preliminary examination of the matter, it appears to the Ombudsman—

(a) that the action has or may have adversely affected a person (other than a Department of State or other person specified in the [First](#) or [Second Schedule](#) to this Act), and

(b) that the action was or may have been—

- (i) taken without proper authority,
- (ii) taken on irrelevant grounds,
- (iii) the result of negligence or carelessness,
- (iv) based on erroneous or incomplete information,
- (v) improperly discriminatory,
- (vi) based on an undesirable administrative practice, or
- (vii) otherwise contrary to fair or sound administration.

**Correspondence with Department of Health and Children**

Our Reference : HC8/08/2204

3 February 2009

Ms. Bairbre Nic Aonghusa  
Director  
Office for Disability and Mental Health  
Department of Health and Children  
Hawkins House  
Dublin 2.

Dear Ms. Nic Aonghusa,

The Ombudsman is examining a complaint received from Mr. John Browne, Athlone, Co. Roscommon on behalf of his sister Ms. Mary Browne, Athlone, Co. Roscommon concerning the refusal of the HSE West to award her a Mobility Allowance.

Ms Browne was advised by the HSE West that her application for the Allowance was rejected because she was not considered eligible under the Mobility Allowance scheme, on age grounds, as she is over 66 years of age. As you are aware, a Mobility Allowance is payable, under Section 61 of the Health Act 1970, and in accordance with the terms of an administrative scheme drawn up under Department of Health Circular 15/79, to persons with a severe disability who are resident at home or in a long stay facility. Payment of the Allowance is subject to a means test. The scheme specifies that applicants must be aged 16 years or older and under 66 years and recipients can continue to receive payment after they reach the age of 66 provided they were in receipt of the allowance prior to their 66th birthday. An issue of concern to the Ombudsman is whether the eligibility criteria for Mobility Allowance, as set out in the Minister's "directions" (Circular 15/79), might be deemed to be improperly discriminatory in two respects. The first and most fundamental concern is that the Allowance is not available at all to a person who applies after the age of 66 years. It is clear that the Allowance discriminates against applicants over the age of 66 years and, on the face of it, it would seem that this restriction is "improperly discriminatory" in the sense in which this term is used in section 4(2) of the Ombudsman Act 1980. A related concern is that the restriction may not comply with the provisions of the Equal Status Act 2000. You will be aware that in August 2008 the Equality Authority found that a woman had been discriminated against when it ruled in her favour in a case she had brought to the Authority, against the HSE, when she was refused a grant under a similar scheme (Motorised Transport Grant) on the grounds that she was over 66 years of age (see details attached). The second concern is

## Ombudsman Investigation Report - Too Old to be Equal?

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that the Allowance discriminates within the over 66 age group in that a person already benefiting from allowance before age 66 will continue to get the Allowance after 66 years whereas a person over 66, not already benefiting, is excluded from the scheme. Again, this restriction would seem, on the face of it, to be "improperly discriminatory" in the sense in which this term is used in section 4(2) of the Ombudsman Act 1980.

In light of the above, and to assist the Ombudsman in her consideration of the options as to how to progress her examination of this complaint, I would be grateful for the views of the Department on whether it is appropriate to continue to retain a qualifying upper age limit for eligibility under the Mobility Allowance scheme.

If you would like to speak to me about the matter, you are welcome to ring me at 01-6395650.

Yours sincerely

---

Fintan Butler  
Senior Investigator



Your reference - [REDACTED]

Fintan Butler  
Senior Investigator  
Office of the Ombudsman  
18 Lower Leeson St.  
Dublin 2

Dear Mr Butler

I refer to your correspondence regarding your examination of a complaint on behalf of [REDACTED] regarding a Mobility Allowance.

The Mobility Allowance was established in 1979 by way of Departmental circular. The purpose of the allowance is to provide financial support to severely disabled people who are unable to walk or use public transport in order to finance the occasional taxi journey. There are in excess of 4,500 recipients of mobility allowance at a total cost in excess of €11m.

The Government has decided that income support schemes operated by the HSE should transfer to the Department of Social and Family Affairs. Mobility allowance is one of the allowances scheduled for transfer to the Department of Social and Family Affairs. As part of this process it is intended to review the policy and operation of the mobility allowance prior to transfer. In the interim, the Health Services Executive will continue to operate the allowances in accordance with the circular. It is not envisaged that any changes will be made to the allowance prior to the review.

While the Department appreciates the issues raised in your correspondence it is not feasible to amend the scheme to remove the upper age limit in the current economic circumstances. However, the Department is committed to reviewing the scheme in the context of planning for its transfer to the Department of Social and Family Affairs and the matter will be considered further in that context.

Yours sincerely

  
Bairbre Nic Aongusa  
Director  
Office for Disability and Mental Health

Current take runs from 11/09/09 at 10:00am

Department of Health & Children  
Hawthorn House, Dublin 2  
Teach Mheán Balc Átha Cliath 2  
Tel: (01) 636 4000  
Fax: (01) 636 4001  
Email: info@health.gov.ie  
Web: www.dohc.ie

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Our Reference : HC8/08/2204

14 July 2009

Mr Michael Scanlan  
Secretary General  
Department of Health and Children  
Hawkins House  
Dublin 2

Dear Mr Scanlan,

The Ombudsman is currently examining a complaint received from Mr. John Browne, Athlone, Co. Roscommon. The complaint was made on behalf of his sister, Ms. Mary Browne, Athlone, Co. Roscommon concerning the refusal of the HSE West to award her a Mobility Allowance.

The background to the complaint is as follows: Ms Browne was advised by the HSE West that her application for the Mobility Allowance had been rejected because she was not considered eligible under the governing scheme, on age grounds, as she is over 66 years of age. A Mobility Allowance is payable, under Section 61 of the Health Act 1970, and in accordance with the terms of an administrative scheme drawn up under Department of Health Circular 15/79, to persons with a severe disability who are resident at home or in a long stay facility. Payment of the Allowance is subject to a means test. The scheme specifies that to be eligible, applicants must be aged 16 years or older and under 66 years. Recipients of the Allowance can continue to receive payment after they reach the age of 66, provided they were in receipt of it prior to their 66th birthday.

An issue of concern to the Ombudsman, arising from her examination of this complaint, is whether the eligibility criteria for Mobility Allowance, as set out in the Minister's "directions" (Circular 15/79), might be deemed to be improperly discriminatory in two respects. The first and most fundamental concern is that the Allowance is not available at all to a person who applies after the age of 66 years. It is clear that the Allowance discriminates against applicants over the age of 66 years and, on the face of it would seem that this restriction is "improperly discriminatory" in the sense in which this term is used in section 4(2) of the Ombudsman Act 1980. A related concern is that the restriction may not comply with the provisions of the Equal Status Act 2000. In this connection, in August 2008, the Equality Authority found that a woman had been discriminated against when it ruled in her favour in a case she had brought to the Authority, against the HSE, when she was refused a grant under a similar scheme (Motorised Transport Grant) on the grounds that she was over 66 years of age (see details attached).

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The second concern is that the Allowance discriminates within the over 66 age group in that a person already benefiting from allowance before age 66 will continue to get the Allowance after 66 years, whereas a person over 66, not already benefiting, is excluded from the scheme. Again, this restriction would seem, on the face of it, to be "improperly discriminatory" in the sense in which this term is used in section 4(2) of the Ombudsman Act 1980.

This Office recently wrote to the Office of the Minister for Disability and Mental Health (OMDMH) in your Department, outlining the Ombudsman's concerns and seeking its views on the question of whether, in light of the above, it was considered appropriate to continue to retain a qualifying upper age limit for eligibility under the Mobility Allowance scheme. In its response, the OMDMH noted that Mobility Allowance is one of the income support schemes, operated by the HSE, scheduled for transfer to the Department of Social and Family Affairs. As part of this process it said that it is intended to review the policy and operation relating to it prior to transfer. However, pending the outcome of this review, it advised that the HSE will continue to operate the Allowance in accordance with the Circular 15/79 and that it is not envisaged that any changes will be made to the Allowance prior to carrying out of the review. In conclusion the OMDMH said that, while it appreciated the issues and concerns raised by the Ombudsman, it was not feasible to amend the scheme to remove the upper age limit in the current economic climate.

Given the contents of the response received from the OMDMH, the Ombudsman had asked that I write to you to express her ongoing disquiet with regard to the potential for unfair discrimination arising from the way in which the Mobility Allowance scheme currently operates. She has asked me to advise that she fully appreciates that the removal of the upper age limit *per se* could, potentially, increase the numbers of those eligible for the Allowance and that any increase in the numbers qualifying for the Allowance could add to the costs of the administration of the scheme. She also acknowledges that your Department is entitled and obligated to regulate eligibility for the Allowance in a manner so as to ensure that the benefits of the scheme are targeted on those with the greatest need, while at the same time ensuring that costs of operating the scheme are maintained at a manageable level, in keeping with the budget allocated for this purpose. Notwithstanding this, the Ombudsman is of the view that the operation of any such regulatory process should be seen to be fair, impartial, reasonable and compliant with existing legislation. Her considered opinion is that the limitations placed on eligibility for the Allowance, through the application of an upper age limit, may be deemed not to meet these standards.

I would welcome your observations on this matter.

Yours sincerely

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Pat Whelan  
Director General



### **Statement of Complaint**

The complaint made by Mr Browne, is on behalf of his sister, Ms. Mary Browne, Athlone, Co. Roscommon. It relates to the decision of the HSE West to reject her application for a Mobility Allowance.

Ms Browne was advised by the HSE West that her application for the Mobility Allowance was rejected because she was not considered eligible under the governing scheme, on age grounds, as she is over 66 years of age. A Mobility Allowance is payable, under Section 61 of the Health Act 1970, and in accordance with the terms of an administrative scheme drawn up under Department of Health Circular 15/79, to persons with a severe disability who are resident at home or in a long stay facility. Payment of the Allowance is subject to a means test. The scheme specifies that to be eligible, applicants must be aged 16 years or older and under 66 years. Recipients of the Allowance can continue to receive payment after they reach the age of 66, provided they were in receipt of it prior to their 66th birthday.

The issue at the heart of this complaint is

- whether the eligibility criteria in the Mobility Allowance Scheme, as it currently exists, are improperly discriminatory in that they discriminate against applicants over the age of 66 years;
- whether the Scheme is improperly discriminatory in that it discriminates between persons within the over 66 age group in that a person already benefitting before age 66 will continue to get the Allowance after 66 years, whereas a person over 66, not already benefitting, is excluded from the Scheme;
- whether the age restriction, as set out in the Scheme, is in compliance with the provisions of the Equal Status Act 2000.



**Department of  
Health & Children**  
AN ROINN SLÁINTE AGUS LEANAÍ

**Office of the  
Secretary General**  
Oifig an Ard Rúnaí



11 February 2011

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

Dear Mr Whelan

I refer to your letter of 21 January 2011 about an investigation under section 4 of the Ombudsman Act 1980 of a complaint by Mr [REDACTED], Athlone, Co Roscommon on behalf of his sister Ms [REDACTED] in relation to her application for a mobility allowance.

As you know, the mobility allowance is payable on the basis of an administrative scheme outlined in a circular issued by the Department in 1979.

I accept that the Department should have reviewed and updated the mobility allowance scheme following the enactment of the Equal Status Act.

Following a more recent review of the terms of the scheme, particularly the upper age limit and the definition of disability, the Department concluded that it could not continue to operate on the current basis.

It was not considered appropriate to deal with the upper age limit separately from the issue which had also come to light in relation to the definition of disability. Accordingly, the option of simply abolishing the upper age limit for the mobility allowance, as was done in the case of the motorised transport grant, was not adopted.

There were a range of potential policy options that needed to be considered on foot of the review including expanding the scope of the scheme, putting the existing scheme on a statutory basis or making other changes to the scheme consistent with legal requirements which would allow it to operate within whatever resources are made available for the scheme now and in the future. These options had to be considered having regard to the scope and objectives of the scheme within the overall context of the Government's National Disability Strategy, the overall resources available to the Department to meet the needs of people with disabilities and the potential impact of each option on existing recipients and potential future claimants.

Certain options in relation to the future of the mobility allowance scheme have been submitted to, and considered by, the Minister and the Government but final policy decisions in this regard have yet to be taken. Given that a general election is currently underway, it is now clear that the issue will have to be dealt with by the new Minister/Government.

Cuirfeir fáilte roimh chomhfhreagras i nGaeilge

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I can assure you, however, that the issues involved will be brought to the attention of the new Minister as a matter of urgency and that the Department will advise you of the outcome as soon as possible thereafter.

As regards the case of Ms [REDACTED], I am pleased to say that the Tánaiste has agreed that the mobility allowance should be paid, on an exceptional basis, to Ms [REDACTED] with effect from June 2008. The Department will issue the required sanction to the HSE very shortly. I also want to apologise through your Office to Mr [REDACTED] and his sister for the delay and distress they experienced in having Ms [REDACTED] application dealt with.

I do not propose to comment in any detail on the draft report but I would ask you to review the manner in which some of the material in Chapters 3 and 4 is presented and, in particular, the judgemental language used in some places. To take one example, the implication in the final paragraph of section 4.3 that the Department was simply seeking to buy time and was not seriously committed to undertaking a review is entirely untrue, highly emotive and prejudicial to the reputation and professional standing of the Department and its staff. I can understand why your Office could have formed the view that the Department was very slow to engage and deal with the issues which emerged in relation to the mobility allowance scheme. However, I hope you will appreciate from the foregoing that the scheme has indeed been reviewed and potential policy decisions identified, and that this has been achieved during a period when the Department has also had to deal, within its own limited and reducing staff resources, with a large number of other difficult issues relating to pressing service and budgetary requirements.

Yours sincerely



Michael Scanlan  
Secretary General