OPINION OF COUNSEL

Re: The provision of nursing home services

For: The Minister for Health and Children

Date: 18 March 2005

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I INTRODUCTION

1. We have been asked to advise on a number of issues concerning the provision of nursing home care by health boards prior to their dissolution in 2004. Specifically, we have been asked to advise on the following issues:

   (i) whether health boards had a duty to provide access to public nursing homes to persons within their functional areas and whether such persons enjoyed a corresponding right to be placed in such homes;

   (ii) the provision of subventions to persons who were placed in private nursing homes; and

   (iii) the potential liability of the State in actions for breach of statutory duty and restitution by persons who were refused access to public nursing homes by health boards.

2. For the purposes of these advices, we make the following assumptions in the light of the instructions which were provided to us in the context of the reference to the Supreme Court of the Health (Amendment) (No. 2) Bill 2004:

   (i) Until their recent dissolution, health boards operated two different systems for the provision of nursing home care in the State. The first system entailed the provision of care to persons in public hospitals / public nursing homes; the second entailed the provision of care to person in private nursing homes.

   (ii) When a bed in a public hospital / public nursing home was available, the question of whether a person was to be charged for obtaining in-patient services therein (and, if so, the amount of such charges) was determined or purportedly determined under the framework of the Health Acts, 1947 – 1970, as amended, and regulations made thereunder. In broad terms, that entailed a consideration of a person's means.[1]

   (iii) If a bed in a public hospital / nursing home was not available, the person was only able to apply for a subvention towards the cost of his or her care in a private nursing home and the question of his or her entitlement to a subvention (and, if so, the amount thereof) was determined under a different statutory framework,

[1] However, the practical impact of the means testing regime was reduced by the extension of medical cards to all persons over 70 since by the Health (Miscellaneous Provisions) Act, 2001.

namely the Health (Nursing Homes) Act, 1990 and the regulations made thereunder. In broad terms, that question entailed a consideration of a person's means and assets.

3. Section II of this Opinion summarizes the conclusions we have reached on the issues set out above. In sections III, IV and V we address each of the said issues in turn. Section VI contains an executive summary of the advices contained herein. The Appendix to this Opinion outlines the relevant statutory and regulatory framework within which the said issues must be considered.

II SUMMARY

4. Our conclusions can be summarized as follows:

5. We are clearly of the opinion that the Health Act, 1970 (the "*1970 Act*") imposed a duty on health boards to make nursing home services available free of charge to persons with full eligibility and that such persons enjoyed a corresponding right to the receipt of such services. Subject to the foregoing, however, we believe that the 1970 Act conferred a discretion on health boards as to whether such services were provided in a public or private setting and, accordingly, that there is no basis for contending that the 1970 Act imposed a duty on health boards to provide access to public nursing homes or a corresponding right of access to such homes. Similarly, as regards persons with limited eligibility, we are of the view that the 1970 Act imposed a duty on health boards to make nursing home services available to persons with limited eligibility and that such persons enjoyed a corresponding right to the receipt of such services subject to the entitlement of health boards to levy charges in respect thereof. We believe that an attempt to argue that the 1970 Act does not confer specific entitlements to health services, but rather simply provides a framework governing eligibility for such services,[2] would be very unlikely to prevail.

6. We believe that it is very unlikely that the courts will recognise an unenumerated constitutional right to nursing home services free of charge.

7. Article 4 of the Health (In-patient services) Regulations, 1993[3] (the "*1993 Regulations*") is very vulnerable to challenge on the basis that it constitutes an unauthorised exercise of legislative power by the Minister contrary to Article 15.2.1 of the Constitution. Article 4 purports to add a new subsection to s.52 of the 1970 Act which excludes, from the benefit of that section and the statutory entitlement thereby afforded, a category of persons whose exclusion is in no way authorised or contemplated by the 1970 Act.

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[2] This appears to have been the position adopted by the Department of Health and Children in disputing the view of the Ombudsman in 2001 that the Health Acts confer legally enforceable entitlements to hospital in-patient services. See *Nursing Home Subventions – an investigation by the Ombudsman of complaints regarding the payment of nursing home subventions by health boards* (January 2001) Chapter 2, fn. 1.

[3] SI No. 224 of 1993.

Included in this category are persons who by the Act are given full eligibility and full statutory entitlement to avail of the services provided by s.52 without charge. In this light, article 4 can be seen as, *"in reality, an attempt to amend [section 52] by ministerial regulation instead of by appropriate legislation"*.[4] In this context, it is relevant to note that, extraordinarily, the explanatory note to the 1993 Regulations states explicitly that "*these Regulations amend s.52 of the Health Act, 1970*".[5] As the Oireachtas could not, in the light of Article 15.2.1 of the Constitution, have intended to give power to amend s.52 to the Minister when it enacted s.72 of the 1970 Act, article 4 would, if challenged, almost certainly be declared *ultra vires* the Minister and void.

8. The Nursing Homes (Subvention) Regulations, 1993[6] (the "*Subvention Regulations*") are also very vulnerable to challenge on the basis that they constitute an unauthorised exercise of legislative power by the Minister contrary to Article 15.2.1 of the Constitution. The Subvention Regulations were purportedly made pursuant to the powers conferred by section 7(2) of the 1990 Act, as originally enacted. A Minister is only entitled to make statutory instruments to the extent that such measures are within the principles and policies of the parent statute.[7] In our view, s.7(2) of the 1990 Act, (as originally enacted), did not contain sufficient principles and policies for the purpose of circumscribing the Minister's legislative power and, if they had been challenged prior to the passing of the Health (Miscellaneous Provisions) Act, 2001, (which substituted for section 7(2) of the 1990 Act a sub-section containing principles and policies), the Subvention Regulations would have been invalidated by the courts. In our view, the Subvention Regulations are still vulnerable on the basis of an absence of sufficient principles and policies in the parent statute since they were made pursuant to s.7 as originally enacted and not the substituted provision. Quite apart from the foregoing, we believe that most of the core provisions of the Subvention Regulations would be declared *ultra vires* the Minister and consequently void on the basis that they were not made within the principles and policies which are contained in the 1990 Act.

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[4] [1984] IR 710 at 729 (per O'Higgins C.J.).

[5] Emphasis added.

[6] SI No. 227 of 1993.

[7] See Cityview Press Ltd. v. Anco [1980] IR 381. See also Meagher v. Minister for Agriculture [1994] 1 IR 329; Laurentiu v. Minister for Justice, Equality and Law Reform [1999] 4 IR 26; Maher v. Minister for Agriculture [2001] 2 IR 139; [2001] 2 ILRM 481; Leontjava v. D.P.P. [2004] 1 IR; and In re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill, 2004, unreported, 16 February 2005.

9. In many respects, the validity of the parallel systems of health services created by the 1970 Act and the Health (Nursing Homes) Act, 1990 (the *"1990 Act"*) is one of the most difficult issues confronting the State in relation to the provision of nursing home services. Almost every person who was dealt with under s.7 of the 1990 Act would either have full eligibility or limited eligibility for health services under the 1970 Act. The probable invalidity of the 1993 Regulations only compounds this problem since it is the only (if unsatisfactory) attempt to effect some intersection between the two systems. The existence of two different regimes with different criteria for eligibility and cost to patients has undoubtedly given rise to serious anomalies. At a general level, it is very likely that two persons of the same age, income and disability were / are treated very differently: one in a public hospital at no cost (or a minimal cost in respect of maintenance) and the other in a private nursing home with only a modest subvention and bearing a very heavy weekly bill. Indeed, the potential for anomaly is greater: the person in the public hospital at no cost, (or minimal cost), may have greater means than the subvention patient in the private nursing home. When one considers the fact that some patients may not have access to either a public hospital or a subvented private nursing home and that persons with limited eligibility may be required to pay some charges, the possibilities for anomalies are multiplied. This is particularly serious since the cost involved is significant and likely to be an extremely heavy burden on older people and their families.

10. In our view, the entire system is so lacking in coherence and consistency that individual determinations are inherently vulnerable to successful challenge. The starting point is that if a health board failed to provide nursing home services to persons with full or limited eligibility, (either in its own hospitals or pursuant to an arrangement made under s.26 of the 1970 Act), in accordance with the financial entitlements of such persons, *prima facie* the board was in breach of its duty under s.52 of the Act. If, as a result, arbitrary and *ad hoc* distinctions were made between essentially similar members of the public, then *prima facie* that would also be, at a minimum, a breach of the guarantee of equality contained in Article 40.1 of the Constitution.[8] *Prima facie*, therefore, there is a potential liability on the part of the State on the grounds that: (i) health boards acted in breach of statutory duty; (ii) health boards and/or the State were unjustly enriched at the expense of persons whose rights under the 1970 Act were infringed; and (iii) the State failed to hold such persons equal before the law.

[8] See, e.g., de Burca v. Attorney General [1976] IR 38; Dillane v. Attorney General [1980] ILRM 167; O'B. v. S. [1984] IR 316. *Cf.* O'Brien v. South West Area Health Board, Unreported, Supreme Court, 5 November 2003.

11. Apart from challenges to the validity of article 4 of the 1993 Regulations and the Subvention Regulations (which we believe would be successful), there are, in principle, a number of grounds upon which proceedings against health boards / the State arising from the matters addressed herein could be successfully defended. This view is necessarily of a general nature, however, since the question of whether an individual case can be successfully defended is also a factor of the particular circumstances of that case and, perhaps, in particular the state of knowledge of the claimant and the express or implied representations which were made to the claimant when payment was demanded.

III DUTIES AND RIGHTS IN RESPECT OF THE PROVISION OF NURSING HOME SERVICES

12. This section addresses the questions of whether health boards had a duty to provide access to public nursing homes to persons within their functional areas and whether such persons enjoyed a corresponding right to be placed in public nursing homes.

13. In order to address the foregoing questions it is necessary to consider the ambit of: (i) certain provisions of the Health Act, 1970, as amended; and (ii) Article 40.3.1 of the Constitution.

(i) The Health Act, 1970, as amended

14. The provisions of the 1970 Act are central to an analysis of the questions set out above. Sections 6(1), 26, 45, 46, 48, 49(1), 52(1), 53(1) and 54 of the 1970 Act merit particular note in this regard. For ease of reference, the most relevant provisions are set out hereunder:

(i) Section 6(1) of the 1970 Act[9] provided that, subject to s.17,[10] a health board *"shall perform the functions conferred on it under [the 1970 Act]…."*.[11]

(ii) Section 26(1) of the 1970 Act[12] provided that *"[a] health board may, in accordance with such conditions (which may include provision for superannuation) as may be specified by the Minister, make and carry out an arrangement with a person or body to provide services under the Health Acts, 1947 – 1970, for persons eligible for such services."*[13] Section 26(2) provides that *"[t]wo health boards may make and carry out an arrangement for the provision by one of them on behalf of and at the cost of the other of services under the Health Acts, 1947 to 1970."*[14]

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[9] Repealed by the Health Act, 2004.

[10] Section 17 was repealed by the Health (Amendment) (No. 3) Act, 1996, s.23.

[11] Emphasis added.

[12] Repealed by the Health Act, 2004.

[13] Emphasis added.

[14] Emphasis added.

(iii) Section 45 of the 1970 Act (as amended) provides that certain persons *"shall have full eligibility for the services under Part IV of the [1970] Act".*

(iv) Section 46 of the 1970 Act (as amended) provides that *"[a]ny person ordinarily resident in the State who is without full eligibility shall, subject to s.52(3),*[15] *have limited eligibility for the services under [Part IV of the 1970 Act]".*[16]

(v) Section 48 provides that *"[f]or the purpose of determining whether a person is or is not a person with full eligibility or a person with limited eligibility, or a person entitled to a particular service provided under the Health Acts, 1947 to 1970, a health board may require that person to make a declaration in such form as it considers appropriate in relation to his means and may take such steps as it thinks fit to verify the declaration."*[17]

(vi) Section 49(1) provides that *"[w]here a person is recorded by a health board as entitled, because of specified circumstances, to a service provided by the board under the Health Acts, 1947 to 1970, he shall notify the board of any change in those circumstances which disentitles him to the service."*[18]

(vii) Section 52(1) provides that *"[a] health board shall make available in-patient services for persons with full eligibility and persons with limited eligibility."*

(viii) Section 53(1) of the 1970 Act provides that *"[s]ave as provided for under subsection (2) charges shall not be made for in-patient services made available under section 52."*[19]

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[15] Section 52(3)[15] provides that, subject to s.54, (which was repealed by the Health (Nursing Homes) Act, 1990) where, in respect of in-patient services, a person with full eligibility or limited eligibility for such services does not avail of some part of those services but instead avails of like services not provided under s.52(1), then the person shall while being maintained for the said in-patient services, be deemed not to have full eligibility or limited eligibility for those services. (Emphasis added).

[16] Health (Amendment) Act, 1991, s.3.

[17] Emphasis added.

[18] Emphasis added.

[19] Emphasis added.

(ix) Section 54 of the 1970 Act provided that *"[a] person entitled to avail himself of in-patient services under section 52 or the parent of a child entitled to allow the child to avail himself of such services may, if the person or parent so desires, instead of accepting services made available by the health board, arrange for the like services being provided for the person or the child in any hospital or home approved of by the Minister for the purposes of this section, and where a person or parent so arranges, the health board shall, in accordance with regulations made by the Minister with the consent of the Minister for Finance, make in respect of the services so provided the prescribed payment."*[20]

(x) Section 55 provides that *"[a] health board may make available in-patient services for persons who do not establish entitlement to such services under section 52 and (in private or semi-private accommodation) for persons who establish such entitlement but do not avail themselves of the services under that section and the board shall charge for any services so provided charges approved of or directed by the Minister."*[21]

15. It is also appropriate to refer to a number of other provisions of the 1970 Act which are relevant to an assessment of whether the Legislature intended to impose duties on health boards to provide particular services and to create corresponding rights to the receipt of those services.

(i) Section 56(2) of the 1970 Act[22] provides that, subject to any regulations relating to out-patient services under section 56(5), a health board *"shall ... make out-patient services available for persons with full eligibility and persons with limited eligibility".*[23]

(ii) Section 58(1) of the 1970 Act provides that *"[a] health board shall make available without charge a general practitioner medical and surgical service for persons with full eligibility".*[24]

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[20] Emphasis added.

[21] Emphasis added.

[22] As inserted by the Health (Amendment) Act, 1987, s.1.

[23] Emphasis added.

[24] Emphasis added.

(iii) Section 59 of the 1970 Act provides that *"[a] health board shall make arrangements for the supply without charge of drugs, medicine and medical and surgical appliances to persons with full eligibility".*[25]

(iv) Section 60 of the 1970 Act provides that *"[a] health board shall, in relation to persons with full eligibility and such other categories of persons and for such purposes as may be specified by the Minister, provide without charge a nursing service to give to those persons advice and assistance on matters relating to their health and to assist them if they are sick".*[26]

(v) Section 61(1) of the 1970 Act provides that *"[a] health board may make arrangements to assist in the maintenance at home of:*

(a) a sick or infirm person or a dependant of such a person;

(b) a woman availing herself of a service under section 62, or receiving similar care, or a dependant of such a woman;

(c) a person who, but for the provision of a service for him under this section, would require to be maintained otherwise than at home;

either (as the chief executive officer of the board may determine in each case) without charge or at such charge as he considers appropriate."

Section 61(2) provides that *"[i]n making a determination under subsection (1), the chief executive officer of a health board shall comply with any directions given by the Minister."*[27]

(vi) Section 62(1) of the 1970 Act provides that *"[a] health board shall make available without charge medical, surgical and midwifery services for attendance to the health, in respect of motherhood, of women who are persons with full eligibility or persons with limited eligibility."*[28] Section 62(2) of the 1970 Act provides that *"[a] woman entitled to receive medical services under this section may choose to receive them from any registered medical practitioner who has entered into an*

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[25] Emphasis added.

[26] Emphasis added.

[27] Emphasis added.

[28] Emphasis added.

agreement with the health board for the provision of those services and who is willing to accept her as a patient."[29]

(vii) Section 65(1) of the 1970 Act provides that *"[a] health board may make arrangements for the supply of milk to expectant mothers with full eligibility, nursing mothers with full eligibility, and children under five years of age whose parents are unable from their own resources to provide the children with an adequate supply of milk."*[30]

(viii) Section 66(1) of the 1970 Act provides that *"[a] health board shall make available without charge at clinics, health centres or other prescribed places a health examination and treatment service for children under the age of six years."*[31]

(ix) Section 66(2) of the 1970 Act provides that *"[a] health board shall make available without charge a health examination and treatment service for pupils attending a national school ...."*.[32]

(x) Section 67(1) of the 1970 Act provides that *"[a] health board shall make dental, ophthalmic and aural treatment and dental, optical and aural appliances available for persons with full eligibility and persons with limited eligibility."*[33]

(xi) Section 68(1) of the 1970 Act provides that *"[a] health board shall make available a service for the training of disabled persons for employment suitable to their condition of health, and for the making of arrangements with employers for placing disabled persons in suitable employment."*[34] Section 68(2) provides that for the purposes of subsection (1), *"a health board may provide and maintain premises, workshops, farms, gardens, materials, equipment and similar facilities."*[35] Section 68(3) provides that *"[a] health board may provide equipment,*

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[29] Emphasis added.

[30] Emphasis added.

[31] Emphasis added.

[32] Emphasis added.

[33] Emphasis added.

[34] Emphasis added.

[35] Emphasis added.

materials or similar articles for a disabled adult person where neither the person nor the person's spouse (if any) is able to provide for his maintenance."[36]

(xii) Section 69(1) of the 1970 Act provides that *"[a] health board shall provide for the payment of maintenance allowances to disabled persons over sixteen years of age where neither the person nor the person's spouse (if any) is able to provide for his maintenance".*[37]

(xiii) Section 70 of the 1970 Act provides that *"[a] health board shall make arrangements for carrying out tests on persons without charge, for the purpose of ascertaining the presence of a particular disease, defect or condition that may be prescribed".*[38]

16. A number of the provisions of the 1970 Act set out above have been the subject of judicial consideration. In this regard, it is appropriate to refer to the cases of *In re* McInerney,[39] Cooke v. Walsh,[40] Spruyt v. Southern Health Board,[41] O'Sullivan v. Minister for Health,[42] C.K. v. Northern Area Health Board,[43] Walsh v. Mid-Western Health Board[44] and In re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill, 2004.[45]

17. In *In re* McInerney,[46] the Supreme Court had to consider whether a ward of court, who was resident in a particular nursing home, was receiving *"in-patient services"* pursuant to s.51 of the 1970 Act or *"institutional assistance"* pursuant to s.54 of the 1953 Act.[47]

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[36] Emphasis added.

[37] Emphasis added.

[38] Emphasis added.

[39] [1976-7] ILRM 229.

[40] [1984] IR 710.

[41] Unreported, Supreme Court, 14 October 1988.

[42] Unreported, Supreme Court, 31 March 1995.

[43] [2002] 2 IR 545 (High Court); [2003] 2 IR 544 (Supreme Court).

[44] Unreported, Supreme Court, 2 May 2003.

[45] Unreported, Supreme Court, 16 February 2005.

[46] [1976-7] ILRM 229.

[47] The significance of this question was adverted to by Finlay P. in the High Court (at pp. 231 – 232.):

"if the maintenance of the ward in St. Brigid's Home is to be considered as being institutional assistance afforded pursuant to s.54 of the [1953 Act] then she is chargeable therefor .... If, on the other hand, what the

Finlay P. held that the ward was receiving in-patient services under s.51 of the 1970 Act and the Supreme Court upheld this decision. Henchy J. stated that s.54 is aimed at duly eligible, healthy persons, who are not patients, and who are provided with no more than shelter and maintenance. In the case of Ms. McInerney, Henchy J. observed that she obtained more than shelter and maintenance:

> *"She gets the nursing care requisite for a patient of her age and state of health in a geriatric institution. The evidence does not go into detail into the regimen of treatment provided for her, but it is clear that it involves nursing ... supervision, activation and other para-medical services, which are given in an institutional setting and which are above and beyond the range of mere 'shelter and maintenance'. In other words, what she is getting is 'in-patient services' which she requires because she is a geriatric patient."*[48]

18. In Cooke v. Walsh,[49] the Supreme Court had to consider the constitutionality of section 72 of the 1970 Act and certain regulations made thereunder. Before addressing this issue, O'Higgins C.J. provided the following overview of *"the manner in which health services in this country are provided"*:

> *"These services are at present administered under the general authority of the Health Act, 1970. This Act supersedes many provisions of earlier Health Acts. It provides for the administration of specified services through health boards which operate on a regional basis. The services which are to be provided are dealt with in Part IV, Chapter 2 of the Act and are classified as 'hospital inpatient and outpatient services', 'general medical services', 'services for mothers and children', 'other services.' In Part IV, chapter 1, eligibility for these services is dealt with under two headings. These two headings relate to 'full eligibility' and 'limited eligibility.' [Having quoted section 45(1) of the 1970 Act, O'Higgins C.J. continued as follows:]*

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ward is receiving in St. Brigid's Home must be construed as in-patient services within the meaning of s.51 of the [1970 Act] then she is entitled to receive them free and cannot be charged for them at all."

[48] [1976-7] ILRM 229 at 235 – 236.

[49] [1984] IR 710.

Subsequent subsections provide for the manner in which the means of a person to qualify for services should be considered, for the deeming of certain classes to be qualified and for dealing with particular hardship in individual cases. While the section refers to 'categories' it is clear that the only dividing line between those covered by the section is that between adult persons and their dependants, and, that the common bond amongst such adults is their inability or deemed inability to arrange the necessary services for themselves and their dependants. The phrase 'full eligibility' is not defined. It is, however, clear from the scheme of the Act that it indicates an entitlement to all the services which it is the obligation of the appropriate health board to provide and, further, that these services must be provided for such persons free of all charge. (See s.52 (in-patient services), s.56 (out-patient services), s.58 (general medical services), s.59 (drugs, medicines, appliances), s.60 (home for infants), s.67 (dental, opthalmic and oral services)). Section 46 deals with the second heading which is 'limited eligibility.' [Having quoted section 46 of the 1970 Act, O'Higgins C.J. continued as follows:]

By subsequent subsections it is provided that there may be a substitution by the Minister of other provisions defining categories of persons with limited eligibility. These alterations were in fact made but it is unnecessary to consider what was involved. What is relevant is that this section deals with those with 'limited eligibility.' Again, this phrase is not defined but, having regard to the scheme of the Act, it seems to indicate groups of persons, classified under different headings, who are entitled to avail of health services under the Act but who may be charged for the services which are provided for them. The charges which may be imposed vary according to circumstances, and, according to the specified class amongst those with such eligibility to which the person concerned belongs. (See ss.53, and 67). In addition, persons with such limited eligibility are not entitled to all the health services which are available. (See section 58)."[50]

19. In Spruyt v. Southern Health Board,[51] the Supreme Court had to consider the ambit of section 62(1) of the 1970 Act and, in particular, whether the midwifery services referred to therein could be provided by a registered medical practitioner or had to be provided by a midwife registered under the Nurses' Act. In addressing the entitlement of the

[50] Emphasis added.

[51] Unreported, Supreme Court, 14 October 1988.

applicants to midwifery services pursuant to section 62, Finlay C.J. stated that the applicants were husband and wife and they were both *"entitled to medical services, pursuant to the [the Health Act, 1970] to be provided by the Southern Health Board."*[52]

20. In O'Sullivan v. Minister for Health,[53] the Supreme Court had to consider an application for an order of certiorari directing the respondent to deliver up the approval of a particular nursing home made under section 54 of the 1970 Act for the purpose of having that part of it quashed which imposed a limitation on the number of beds for which approval was granted by the respondent. The following passage from the judgment of Hamilton C.J.[54] merits note:

> *"Under the scheme set up pursuant to the provisions of the Act, the Health Boards were obliged to make available in-patient services for persons with eligibility (either full or limited) but it was provided at Section 54 of the Act that a person entitled to avail himself of such in-patient services might, instead of accepting services made available by the Health Board, arrange for the like services being provided in any hospital or home approved of by the Minister for the purposes of this Section and when such services were availed of, the Health Board was obliged to make the prescribed payment in accordance with regulations made by the Minister for Health with the consent of the Minister for Finance."*[55]

21. In C.K. v. Northern Area Health Board,[56] the High Court and Supreme Court had to consider a claim that the care and facilities afforded by the respondent health board to the applicant's brother (a ward of court) were inadequate to discharge its duties under sections 56 and 60 of the 1970 Act. In granting declaratory relief to the applicant, the High Court (Finnegan P.) reasoned as follows:

> *"It seems to me therefore that out-patient services and in-patient services are identical in nature and scope save that the former are provided within the institution and the others being services of the like nature but provided at home. Section*

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[52] Page 1 of the unreported judgment.

[53] Unreported, Supreme Court, 31 March 1995.

[54] With whose judgment the other members of the Court (O'Flaherty and Denham JJ.) agreed.

[55] At p.7 of the unreported judgment.

[56] [2002] 2 IR 545 (High Court); [2003] 2 IR 544 (Supreme Court).

56(2) provides that a health board shall make available out-patient services without charge for persons with full eligibility: P.K. is a person with full eligibility. The decision as to the services which ought to be provided in any particular case is an administrative one. However, the decision as to the services to be provided must not be capricious or arbitrary. Further, the decision as to the appropriate out-patient services must not be such that it could not reasonably have been arrived at within the sense of the term 'reasonable' as defined in The State (Keegan) v Stardust Victims Compensation Tribunal.[57] *This court acting on a judicial review application however, is not to substitute its decision for that of the decision maker merely because it considers that it would have made a different decision. The striking circumstance in this case is that no institutional provision is available as required by s. 52 of the Act of 1970 or, at least, is not available in any real sense because there are no places available and there is a long waiting list for places. If P.K. is to be provided for at all it must be by way of out-patient services. Notwithstanding the exceptionally high standard required by The State (Keegan) v Stardust Victims Compensational Tribunal, I am satisfied that the out-patient services provided by the respondent at the date of the institution of these proceedings were inadequate and neither appropriate nor reasonable and the respondent was in breach of its statutory duty to P.K.*

Section 60 likewise creates an obligation on the respondent the extent of the obligation being the like of that under s. 57 to do so to a reasonable extent. The nursing service provided was likewise not adequate, appropriate or reasonable. The respondent was in breach of its statutory duty to P.K.

Section 61 is regulated by the word 'may' rather than the word 'shall'. In these circumstances, it is a matter of policy for the respondent and, having regard to the terms of the section, for the Minister for Health and Children, if any such services should be provided and, if provided, to what extent. There is no statutory right to such services. In these circumstances, it is inappropriate that the court should intervene insofar as a claim under this section is made."[58]

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[57] [1986] IR 642.

[58] [2002] 2 IR 545 at 557.

22. In addressing the form of the order which he which he granted, Finnegan P. stated as follows:

> *"As to the form of the order which should be made upon the applicant succeeding, I have regard to the dicta in the several judgments of the Supreme Court in Sinnott v Minister for Education.*[59] *The appropriate order will be in the form of a declaration as to the failure of the respondent to provide appropriate services to P.K. in accordance with ss. 56 and 60 of the Health Act, 1970. Having regard to the absence of a claim for damages in the statement to ground the application for leave and the provisions of O. 84, r. 24 of the Rules of the Superior Courts, 1986, it would not be open to make an award of damages."*[60]

23. The health board appealed against the judgment and order of the High Court on the grounds that, *inter alia*:

> *"1. the provisions of s. 56 of the Health Act 1970, as amended, do not give rise to individually enforceable statutory rights in the applicant;*
>
> *2. the provisions of s. 60 of the Health Act 1970, as amended, do not give rise to individually enforceable statutory rights in the applicant;*
>
> *3. the provisions of s. 56 of the Health Act 1970, as amended, impose only a general obligation on the health board to provide the services specified in that section for the benefit of those members of the public as a whole who are eligible, either in whole or in part, for those services;*
>
> *4. the provisions of s. 60 of the Health Act 1970, as amended, impose only a general obligation on a health board to provide the services specified in that section for the benefit of those members of the public as a whole, who are eligible, either in whole or in part for those services;*

[59] [2001] 2 IR 545.

[60] [2002] 2 IR 545 at 558.

5. the statutory duty imposed on a health board pursuant to the provisions of s. 56 of the Health Act 1970, as amended, are qualified by the provisions of s. 2 of the Health (Amendment) (No. 3) Act 1996;

6. the statutory duty imposed on a health board pursuant to the provisions of s. 50 of the Health Act 1970, as amended, are qualified by the provisions of s. 2 of the Health (Amendment) (No. 3) Act 1996 ...."

24. The Supreme Court allowed an appeal against the judgment of Finnegan P. Before addressing the reasons for the decision of the Court, it is appropriate to note the submissions of Counsel for the appellant and Counsel for the applicant. They were summarized as follows in the judgment of McGuinness J., with whose judgment the other members of the Court[61] agreed:

"Counsel for the respondent (the health board), informed the court that the health board, in arguing the appeal, did so on the basis that the board accepted that the ward was deemed to have full eligibility under the Health Acts; he was the holder of a medical card.

In his submissions counsel for the health board chiefly laid emphasis on the interpretation of the relevant sections of the Health Act 1970, as amended. He argued that the High Court Judge erred in holding that in the terms of the said sections out-patient services were identical in nature and scope to in-patient services save that out-patient services were provided at home. He submitted that the decision of the High Court in respect of the ward's claim to the services in question was incorrect as it was based on the misinterpretation of ss. 56 and 60 of the Act of 1970. On the evidence, the services sought on behalf of the ward were not out-patient services at all but rather were home help services and a carer's allowance.

In regard to the High Court Judge's finding that the out-patient services provided by the respondent at the date of the institution of the proceedings were not reasonable in the sense of the term reasonable as defined in The State (Keegan)

[61] Keane C.J. and Denham, Murray and McCracken JJ.

v. Stardust Compensation Tribunal[62] *counsel submitted that the applicant had not made a claim in her pleadings that the conduct of the health board was unreasonable. The applicant's claim was simple and clear – that the health board had not fulfilled its statutory duty under ss. 56, 60 and 61 of the Health Act 1970. Even if it were to be accepted that the question of unreasonableness arose, the conduct of the health board in regard to the ward was far from being unreasonable as defined in the well-known and much quoted judgments in The State (Keegan) v. Stardust Compensation Tribunal and O'Keeffe v. An Bord Pleanala.*[63]

Counsel for the health board also stressed the importance of s. 2 of the Health (Amendment) (No. 3) Act 1996. The health board's resources were limited and it had to work within the limits of those resources as set out in that section. In the instant case, as set out in s. 2 of the Act of 1996, the health board had assessed the needs of the ward, had rationally and lawfully had regard to the then current levels of availability of scarce resources and had correctly and lawfully made a determination of the level of service provision to be afforded to the ward. He submitted that the health board had the professional competence, expertise and experience necessary to carry out these functions and that this was a lawful and intra vires performance of the functions imposed on it by the Health Acts. The intention of the Oireachtas as expressed in the Health Acts would be frustrated if individual applicants could successfully move the court to interfere in the respondent's prioritisation and rationing of resources.

Counsel for the notice parties [Ireland and the Attorney General] adopted the submissions of counsel for the health board, stressing in particular the issues relevant to the interpretation of ss. 56 and 60 of the Act of 1970.

Counsel for the applicant relied on the decisions of this court in Brady v. Cavan County Council[64] *and Spruyt and Wates v. Southern Health Board.*[65] *He submitted that ss. 56 and 60 were couched in mandatory terms and that it was the clear statutory duty of the health board to provide the necessary services for the ward.*

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[62] [1986] IR 642.

[63] [1993] 1 IR 39.

[64] [1999] 4 IR 99.

[65] Unreported, Supreme Court, 14th October, 1998.

The High Court Judge had correctly interpreted the sections in holding that there was equivalence between out-patient services and in-patient services."

25. McGuinness J. observed that *"[c]rucial to the ultimate decision of the trial judge as to the services to be provided by the health board under s. 56 was his finding ... that 'out-patient services and in-patient services are identical in nature and scope save that the former are provided within the institution and the others being services of the like nature but provided at home.'"* McGuinness J. added that the High Court had inferred that the nursing services to be provided in the ward's home were to be in principle equivalent to those that would be provided for him in institutional care. McGuinness J. noted that the respondent and the notice parties argued that this interpretation of ss. 56 and 60 was basically an error – that out-patient services and home nursing services were not, and never were, envisaged as being a home based equivalent of services to be provided in a hospital or other institution. Against this background, McGuinness J. stated that it was *"clear, therefore, that the question of the interpretation of these relevant sections [was] the first matter to be considered...."* and that *"[t]he matter of the reasonableness or otherwise of the services provided or proposed by the health board [could] be considered only in the light of the correct interpretation of the statutory provisions".* McGuinness J. continued as follows:

> *"In her judgment in Howard v. Commissioners of Public Works*[66] *Denham J. stated:*
>
> > *'Statutes should be construed according to the intention expressed in the legislation. The words used in the statute best declare the intent of the Act. Where the language of the statute is clear we must give effect to it, applying the basic meaning of the words.'*
>
> *This approach has been well established in the decisions of this court. Most recently perhaps, I considered this principle of construction at pp. 31 to 40 of my judgment in D.B. v Minister for Health.*[67]
>
> *It is also well settled law that the individual sections of a statute should be interpreted in the context of the statute as a whole or, where that is so provided by*

[66] [1994] 1 IR 101 at p. 162.

[67] Unreported, Supreme Court, 26th March, 2003.

the Oireachtas, in the context of a number of statutes which are to be construed together."[68]

26. Against this background, McGuinness J. addressed the ambit of section 56 of the 1970 Act as follows:

> *"It seems clear that the legislature intended that the words 'institutional services' in ss. 51 and 56 of the Act of 1970 are to bear the same meaning as the same words in the Act of 1947.*[69]
>
> *Sections 51 and 56 of the Act of 1970 form part of Chapter II of Part IV of the Act. This Chapter is headed 'Hospital In-Patient and Out-Patient Services'. As set out above s. 51 defines 'in-patient services' as meaning 'institutional services provided for persons while maintained in a hospital, convalescent home or home for persons suffering from physical or mental disability or in accommodation ancillary thereto'. Section 52 goes on to provide at subs. (1) that these in-patient services are to be made available for persons with full eligibility and persons with limited eligibility. Thus, the in-patient 'institutional services' are to be provided not alone in a hospital as such but also in a convalescent home or a home for the mentally or physically disabled. The 'home' referred to here is, of course, an institutional home in which patients or inmates reside on a temporary or permanent basis. It is not the ordinary home of an individual.*
>
> *Section 56(1) provides, inter alia, that for the purposes of the section 'out-patient services' means 'institutional services other than in-patient services provided at . . . a hospital or a home . . .'*
>
> *It appears that in interpreting the subsection, the trial judge had regard to this part of the wording in isolation from the remainder of the section and from the surrounding sections. It seems clear that his understanding of the word 'home' in s. 56(1) was that it referred to the ordinary home of an individual and that thus the*

[68] [2003] 2 IR 544 at 559.

[69] Section 2 of the 1947 Act provides that "... *the expression 'institutional services' includes - (a) maintenance in an institution, (b) diagnosis, advice and treatment at an institution, (c) appliances and medicines and other preparations, and (d) the use of special apparatus at an institution.*"

out-patient services to be provided to the ward were to be provided for him not alone at a hospital or institution but at his own home. In this, in my view, the President erred.

In construing s. 56(1) as a whole, and in particular construing it in the context of s. 51, it is clear that the 'home' at which out-patient services are to be provided is an institutional home, such as a convalescent home or disabled persons' home as referred to in s. 51. If this interpretation is accepted, the meaning of s. 56 falls into place and the section describes what are normally considered as outpatient services – the situation where a person who is otherwise resident at his or her own home attends at a hospital, health centre, clinic or other institution to obtain such medical services as x-rays, dressing of minor wounds, clinical tests and the like. The words of the section then assume their 'ordinary and natural sense'.[70]

This understanding of the word 'home' in the subsection is also consistent with the meaning of 'institutional services' as set out in s. 2 of the Health Act 1947, which makes it clear that such services (other than the provision of appliances, medicines and other preparations) are to be provided 'at an institution'. (The provision of medicines, etc., to eligible persons, including the ward in the instant case, is, of course, covered by the medical card scheme).

In considering the submission on behalf of the applicant that services provided 'by persons attached to' a hospital or home must envisage the provision of these services at a person's own residence the definition of 'institutional services' in s. 2 of the Act of 1947 is also relevant. Under s. 56(1) of the Act of 1970 the services that are to be provided 'by persons attached to' a hospital or home are 'institutional services'. As I have already noted, under s. 2 of the Act of 1947, these are services to be provided 'at an institution'. It seems clear, therefore, that the phrase 'by persons attached to' does not imply the provision of services at an individual's own home. However, this need not mean that the phrase is surplusage. It could well be envisaged, for example, that a particular consultant would provide out-patient services at more than one hospital without necessarily being a member of the staff of all, or indeed any, at the institutions concerned. Alternatively laboratory or pathology services could be provided for, say, a nursing or convalescent home by

[70] Citing *Craies on Statute Law* (1971, 7th ed.) at p. 65.

the staff of a nearby hospital. These are mere examples but it appears to me that there is no great difficulty in attributing meaning to the phrase used in the section without implying that institutional services are to be provided in a person's own home.

In my view s. 56 of the Act of 1970, when taken in its context, cannot be taken to mean that the health board must provide for the ward in his own home the equivalent care and maintenance service both medical and practical that he would receive as an in-patient in a hospital. The section provides for the establishment of an out-patient service, in the normal and ordinary sense of the words, at or attached to hospitals and other institutions.

In this context the wording of s. 56(1) may be contrasted with that of s. 61 of the Act of 1970 (quoted above). This section enables the health board to make arrangements to 'assist in the maintenance at home' of sick and infirm persons and in particular under s. 61(1)(c) of 'a person who, but for the provision of a service for him under this section, would require to be maintained otherwise than at home.' It is clear that the words 'at home' in this section refer to the person's own residence as opposed to an institutional home. Section 61(1)(c) applies precisely to the circumstances of the ward in the instant case. The assistance which the health board may give under s. 61 may be given either without charge or at such charge as the chief executive officer of the health board considers appropriate. In deciding what charge, if any, should be made for this assistance the chief executive officer must comply with any directions given by the Minister for Health and Children.

As was correctly pointed out by the President in his judgment the provision of services under s. 61 is not mandatory and it was therefore 'a matter of policy for the respondent and, having regard to the terms of the section, for the Minister for Health and Children, if any such services should be provided and, if provided, to what extent' (p. 557 of judgment). In the context of the instant case, however, s. 61 empowers the health board to provide the services which they now propose for the assistance of the ward in his own home."[71]

27. In addressing section 60 of the 1970 Act, McGuinness J. stated as follows:

[71] [2003] 2 IR 544 at 560 – 562. (Emphasis added).

"The learned trial judge deals somewhat briefly with [section 60] in his judgment. No reference is made to the provision that the nursing service that is to be provided without charge must be provided 'for such purposes as may be specified by the Minister'. Presumably the purposes and ambit of this nursing service must have been set out and established at some time, whether by statutory instrument or otherwise, by the Minister. No material whatever in this regard was put before this court by any of the parties to the appeal. The statutory and other parameters of the service remain unknown to the court.

In the wording of the section itself, the purpose of the nursing service is to give to eligible persons 'advice and assistance on matters relating to their health and to assist them if they are sick'. In the ordinary and natural sense of these words I do not consider that what is intended is the provision of a long term virtually full-time (or even extensive part-time) nursing service for disabled persons in their own homes. I would accept the contention of the respondent and the notice parties that what is in question is an advice and assistance service as is at present provided by the public health nurse scheme."[72]

28. Against this background, McGuinness J. concluded that *"neither s. 56 nor s. 60 of the Act of 1970 provides a ground for the orders sought by the applicant in her judicial review proceedings"*. Having regard to her interpretation of those sections, McGuinness J. stated that *"the question of the reasonableness of the health board's actions [did] not arise"*. In her concluding paragraph, McGuinness J. stated as follows:

> *"I would add, however, that it is clear that the applicant has a grave need for assistance in caring for the ward. The applicant and her family have given devoted and untiring care to the ward, at times in very difficult circumstances. As a result both the ward's health and his quality of life have greatly improved. The ward's estate, through no fault of his own or of his committee, the General Solicitor, is nearing exhaustion. Under s. 61 of the Act of 1970 the health board may make arrangements to assist in the maintenance at home of a sick or infirm person. It is abundantly clear that it is in the interests of the ward that he should be maintained in his own home and, indeed, common sense would suggest that for the health*

[72] [2003] 2 IR 544 at 562. (Emphasis added).

board the course of assisting him at home is probably a more economical course than that of maintaining him in an institution. In their most recent proposals, the health board have made a substantial effort to put this discretionary power under s. 61 into effect. It is to be hoped and indeed anticipated that the board will continue in its efforts to give material assistance both to the ward and to the applicant."[73]

29. The Supreme Court declined to consider the reasonableness of the health board's actions in the C.K. case. It is important to note, however, that the issue of whether a health board acted reasonably arises in the context of an assessment of the manner in which the board distributed its resources (an issue which we address below) and not in the context of determining whether it is under a statutory duty to perform particular acts.

30. In O'Brien v. South West Area Health Board,[74] the applicants sought, *inter alia,* a declaration that the failure of the respondent health boards to provide domiciliary midwife services (whether by way of direct provision of the service or by defraying all or part of the costs which the applicants were obliged to incur in purchasing such services from an independent domiciliary midwife) constituted a breach of their obligations under s.62 of the 1970 Act. In refusing the application, the High Court (O'Caoimh J.) reasoned as follows:

"[T]he central issue arising in these proceedings is whether s.62 of the Act of 1970 confers on the applicants a right to have a midwife provided for them to enable them to give birth in their homes. It is clear that sub-s (1) of the section indicates the nature of services which must be made available by a health board and these include midwifery services. Subsection (2) is confined to medical services which must be distinguished from the other services provided for in the section and in this regard it is clear that the subsection enables a woman to chose to receive medical services from the medical practitioner of her choice, provided the provider has entered into an agreement with the health board responsible for the provision of those services and it is clear that the medical practitioner must be willing to accept the woman as a patient.

[73] [2003] 2 IR 544 at 562 – 563. (Emphasis added).

[74] Unreported, High Court, (O'Caoimh J.), 2 September 2002; Unreported, Supreme Court, 5 November 2003.

Subsection (3) upon which reliance is placed by the applicants in these proceedings is predicated upon the fact that a woman avails herself of services under the section for a confinement taking place otherwise that in a hospital or maternity home. The subsection cannot be read as requiring the provision of these services in any particular place that is not a hospital or maternity home and, in particular, it is clear that the section has not been drafted in a manner that requires it to be construed as requiring the provision of midwifery services to any woman who chooses to have a home birth. I am satisfied that the subsection must be read as requiring the provision of obstetrical requisites as provided for by regulations made by the Minister where the woman is availing of services out of a hospital or maternity home. It again cannot be construed as requiring the provision of these services at a place of choice of the woman concerned but it does indicate that if a health board chooses to make available midwifery services at a woman's home that in addition to the provision of the midwifery services free of charge, the health board is required to provide without charge obstetrical requisites to the extent as specified by regulations made by the Minister.

...

In conclusion, I am satisfied that where as in the case of each of the applicants the respondent health board has indicated that it is disposed to make available without charge the services specified in the section, assuming each of the applicants are persons eligible for same, albeit the provision in the circumstances will be made available within a maternity hospital, that the respondent has indicated that it is disposed to fulfil its statutory requirement and in light of this fact I am satisfied that each of the applicants have failed in their claim for the relief of mandamus sought herein and that in the circumstances they are not entitled to any other relief. I am satisfied that a rational basis has been advanced by each of the respondents as to why the provision of the services in question will take place in a maternity home. In so ruling I do not wish to express any view on the policy as contained in the Health Acts as that is a matter solely within the prerogative of the Oireachtas and the Minister to decide in enacting the legislation and the regulations under the section at issue."[75]

[75] Emphasis added.

31. The Supreme Court dismissed an appeal against the judgment of O'Caoimh J. Geoghegan J., with whose judgment the other members of the Court[76] agreed, summarized the arguments of Counsel for the appellant in the following terms:

> *"Counsel for the respective applicants and appellants, Dr. Michael Forde, concedes, as he must do, that there is no express provision in section 62 compelling a health board to provide for home births, but he says that such an obligation must be read into the section by implication and furthermore he says that if there is a breach of that obligation proceedings lie at the suit of an individual damnified. In other words, he argues that the section does not just create a duty to the public but creates a duty owed to individuals who might want to avail of the services referred to. Dr. Forde places heavy reliance on the historical context in which section 62 came into existence. He rightly points out that the section replaces section 16 of the Health Act, 1953 which as to its relevant part, is couched in more or less identical terms. Dr. Forde reminded the court that the 1953 Act was introduced in the wake of the famous mother and child controversy and he invited the members of the court to speculate on what the TDs and senators would have had in mind as of that time. He says that as of 1953 it would have been unthinkable that a provision for free maternity services would not have involved the private home as much as the hospital. Where there is ambiguity in the interpretation of a statutory provision, context may in many instances be relevant but I hardly think that the kind of speculation which counsel suggests that this court should enter into would be legitimate. The question does not arise because new provisions albeit similar were enacted by the Oireachtas in the Health Act, 1970 and it is section 62 of that Act and not any other section which the court must construe though the court must, of course, construe it in the light of other provisions in the Act and may have regard if appropriate to statutory antecedents.*
>
> *In my view, the furthest that can be said in favour of Dr. Forde's interpretation of the section is that having regard to the terms of subsection (3) of the section it would seem that the Oireachtas clearly had in mind the possibility at least that the midwifery services provided by a health board might include home midwifery services. But this is a far remove from a national statutory obligation on the health*

[76] Denham, Murray, McGuinness and Hardiman JJ.

boards to provide such services. I can find nothing in section 62 to justify interpreting it as creating such an obligation. If subsection (3) did not exist I cannot see how one could conceivably interpret subsection (1) as compelling home as well as hospital midwifery services. The subsection simply does not say so and there is no justification in the court adding words which are not there. The expression 'midwifery services' could only be given some special interpretation as distinct from the ordinary natural interpretation if there was some other provision in the section or indeed in the Act which clearly indicated that it was to have such a special meaning. But subsection (3) of section 62 is not such a provision. That subsection simply deals with what is to happen if there are in fact home midwifery services provided and an eligible woman avails of those services. The subsection requires that the health board should provide without charge obstetrical requisites listed in regulations made by the Minister. It has no relevance whatsoever to the question of whether there is an obligation to provide home midwifery services. In my opinion subsection (1) cannot be interpreted as requiring such services.

It would be reasonable to interpret subsection (1) as requiring a health board to make available appropriate medical, surgical and midwifery services. But that obligation would be fully complied with by the provision of medical, surgical and midwifery services within the confines of a hospital."[77]

32. Geoghegan J. also rejected the appellant's contention that it was *"discriminatory for one health board not to provide home midwifery services of a kind which other health boards do provide"*. In this regard, he stated as follows:

> *"I can find no justification for this argument. Section 62 of the Health Act, 1970 does not lay down a national prescription as to how these services are to be provided. It leaves it to the individual health board. That must mean that each health board is entitled to consider the matter itself and there may obviously be different policies in different boards. Unless a health board was to adopt a wholly unreasonable policy, its decisions in this regard cannot be impugned. Apart from what is contained in the papers before the court it is common knowledge that there is widespread difference of opinion within medical circles as to the desirability or otherwise of home births. The policy of the East Coast Area Health Board has*

[77] Emphasis added.

been set out in the affidavit of Dr. Brian Redahan who is general manager of that area health board. He has stated that within the functional area of that board there are comprehensive medical, surgical and midwifery services available for expectant mothers and their unborn children. He explains that the view of his board is that consultant staff maternity units are deemed to be the safest environment for deliveries especially in the event of the many complications that can arise. Dr. Redahan goes on to assert that even if Ms. Brannick's construction of section 2 was accepted the domiciliary services claimed could only be provided on behalf of the board by registered medical practitioners who had contracts with the respondent for the provision of such service and he goes on to say that there are no medical practitioners in the functional area who have entered into such contracts. There appears to be nothing unreasonable in the policy of the East Coast Area Health Board. It is irrelevant that some other Health Boards may provide limited home midwifery services. There is no unfair or unlawful or still less unconstitutional discrimination."[78]

33. In Walsh v. Mid-Western Health Board,[79] the Supreme Court dismissed an appeal from an order of the High Court refusing to grant leave to apply for relief by way of, *inter alia*, a declaration that the respondent was in breach of section 62 of the Health Act 1970 in not providing any home birth service to qualifying expecting mothers in its functional area. The Court held that the High Court had properly exercised its discretion in finding that a declaratory order would serve no useful purpose given the very advanced stage of the pregnancy.

34. In In re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill, 2004[80] the Supreme Court addressed *"certain key provisions of the Health Act, 1970 ...."* which are relevant in the present context. In addressing *"the nature of [in-patient services], the obligations of the Health Boards to provide them, the persons to whom they are to be provided and the provisions regarding charging for their provision"*, the Court stated, *inter alia*, as follows:

[78] Emphasis added.

[79] Unreported, Supreme Court, 2 May 2003.

[80] Unreported, Supreme Court, 16 February 2005.

"Section 51 of the Act of 1970 defines "in-patient services" as meaning "institutional services provided for persons while maintained in a hospital, convalescent home or home for persons suffering from physical or mental disability or in accommodation ancillary thereto". "Institutional services" refers to that term as defined in s. 2 of the Health Act, 1947, as including: (a) maintenance in an institution, (b) diagnosis, advice and treatment at an institution, (c) appliances and medicines and other preparations, (d) the use of special apparatus at an institution.'

The Act of 1970 draws a distinction, for the purpose of enjoying such services, between persons having respectively 'full eligibility' and 'limited eligibility'. Persons in the former category are commonly described under the non-statutory name of medical-card holders. According to s. 45(1) of the Act of 1970 they are 'adult persons unable without undue hardship to arrange general practitioner medical and surgical services for themselves and their dependants' and the dependants of such persons. Section 46 defines persons with limited eligibility by reference to means and is not relevant to the issues referred to the Court. The Court has been informed that no regulations have been made pursuant to s. 45(3) of the Act of 1970 and that the determination of who is entitled to 'full eligibility' – a medical card – is administered by a system of departmental circulars, with the relevant chief executive officer of each health board making the decisions.

These are the persons in respect of whom Part IV of the Act of 1970 imposed upon Health Boards obligations to provide services. Health Boards are obliged, pursuant to s. 52 of the Act of 1970 to 'make available in-patient services for persons with full eligibility and persons with limited eligibility'.

However, s. 53(1) of the Act states that, subject to subsection (2), which permits such charges in respect of persons with limited eligibility, 'charges shall not be made for in-patient services made available under s. 52'. Regulations have been made from time to time pursuant to s. 53(2). Clearly, they were not made and could not have been made in respect of persons having full eligibility.

...

The sum total of these provisions is that, by the legislation of 1970, at least following its interpretation in M'Inerney, the Oireachtas required and has continued to require Health Boards, at all times prior to the passing of the Bill, to make in-

patient services available without charge to all persons "suffering from physical or mental disability". While the individual circumstances of patients will vary enormously in terms of age and physical and mental capacity, it is obvious that, by enacting the Act of 1970, the Oireachtas was concerned to ensure the provision of humane care for a category of persons who are in all or almost all cases those members of our society who, by reason of age, or of physical or mental infirmity, are unable to live independently. They are people who need care. Even without the benefit of statistical or other evidence, the Court can say that the great majority of these persons are likely to be advanced in years. Many will be sufferers from mental disability. While some will have the support of family and friends, many will be alone and without social or family support. Most materially, in a great number of cases, the patients will have been entitled to and in receipt of the non-contributory social welfare pension."[81]

35. As regards the issues in respect of which we have been asked to advise, the import of the legislative provisions and jurisprudence surveyed above can be summarized as follows:

(i) Prior to their dissolution, health boards were under a statutory duty to make *"in-patient services"*[82] available to persons with *"full eligibility"*[83] and persons with *"limited eligibility"*.[84]

(ii) *"In-patient services"* include *"nursing ... supervision, activation and other para-medical services, which are given in an institutional setting and which are above and beyond the range of mere 'shelter and maintenance'"*[85] (referred to herein as ("*nursing home services*").

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[81] Pages 32 – 35 of the unreported judgment. (Emphasis added).

[82] Within the meaning of the 1970 Act.

[83] *Ibid.*

[84] *Ibid.*

[85] *Per* Henchy J. (Griffin and Kenny JJ. concurring) delivering the judgment of the Supreme Court in *In re* McInerney [1976-7] ILRM 229 at 235 – 236.

(iii) Persons with *"full eligibility"* have *"an entitlement to all the services which it [was] the obligation of the appropriate health board to provide and, further, ... these services must be provided for such persons free of all charge".*[86]

(iv) Persons with *"limited eligibility" "are entitled to avail of health services under the [1970] Act but ... may be charged for the services which are provided for them."*[87]

(v) Health boards were entitled *"to make and carry out an arrangement with a person or body to provide services under the Health Acts, 1947 – 1970, for persons eligible for such services."*[88]

(vi) Prior to the repeal of section 54 of the 1970 Act (by section 15 of the 1990 Act), a person *"entitled to avail himself of in-patient services under section 52 ... [could] if the person ... so desire[d], instead of accepting services made available by the health board, arrange for the like services being provided for the person ... in any hospital or home approved of by the Minister for the purposes of [section 54], and where a person or parent so arrange[d], the health board [was required], in accordance with regulations made by the Minister with the consent of the Minister for Finance, [to] make in respect of the services so provided the prescribed payment."*

36. Against this background, we are clearly of the view that the 1970 Act imposed a duty on health boards to make nursing home services available free of charge to persons with full eligibility and that such persons enjoyed a corresponding right to the receipt of such services. Subject to the foregoing, however, we believe that the 1970 Act conferred a discretion on health boards as to whether such services were provided in a public or private setting and, accordingly, that there is no basis for contending that the 1970 Act imposed a duty on health boards to provide access to public nursing homes or a corresponding right of access to such homes. Similarly, as regards persons with limited

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[86] *Per* O'Higgins C.J. (Henchy, Griffin, Hederman and McCarthy JJ. concurring) delivering the judgment of the Supreme Court in Cooke v. Walsh [1984] IR 710 at 726. The Chief Justice stated that this interpretation of "full eligibility" was "clear from the scheme of the Act" and, in this context, he cited sections 52, 56, 58, 59, 60 and 67 of the 1970 Act.

[87] *Per* O'Higgins C.J. (Henchy, Griffin, Hederman and McCarthy JJ. concurring) delivering the judgment of the Supreme Court in Cooke v. Walsh [1984] IR 710 at 726.

[88] Health Act, 1970, s.26(1).

eligibility, we are of the view that the 1970 Act imposed a duty on health boards to make nursing home services available to persons with limited eligibility and that such persons enjoyed a corresponding right to the receipt of such services subject to the entitlement of health boards to levy charges in respect thereof. Against this background and having regard, in particular, to the jurisprudence surveyed above, we believe that an attempt to argue that the 1970 Act does not confer specific entitlements to health services, but rather simply provides a framework governing eligibility for such services,[89] would be very unlikely to prevail. However, the ambit of the said entitlements and duties and the extent to which they can form the bases for causes of actions against the State are separate issues which we will address below in section V of this Opinion.

(ii) Article 40.3.1 of the Constitution

37. Prior to the judgment of the Supreme Court in In re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill, 2004,[90] the question of whether the Constitution (in Article 40.3.1 thereof) impliedly guarantees a right to nursing home services free of charge would have merited very little attention because the prospect that the Courts would recognize such a right seemed extremely remote. The Supreme Court did not

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[89] This appears to have been the position adopted by the Department of Health and Children in disputing the view of the Ombudsman in 2001 that the Health Acts confer legally enforceable entitlements to hospital in-patient services. See *Nursing Home Subventions – an investigation by the Ombudsman of complaints regarding the payment of nursing home subventions by health boards* (January 2001) Chapter 2, fn. 1:

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

[90] Unreported, Supreme Court, 16 February 2005.

declare the existence of such a right in the Article 26 Reference but, equally, the court did not hold that the Constitution does not guarantee such a right. Indeed, its analysis of the contentions of Counsel assigned by the Court in this context assumed that such a right does exist but was not breached by the provisions of the Bill. The following passages from the judgment of the Court merit note in this regard:

> *"In a discrete case in particular circumstances an issue may well arise as to the extent to which the normal discretion of the Oireachtas in the distribution or spending of public monies could be constrained by a constitutional obligation to provide shelter and maintenance for those with exceptional needs. The Court does not consider it necessary to examine such an issue in the circumstances which arise from an examination of the Bill referred to it. Even assuming there is such a constitutional right to maintenance as advanced by counsel the question actually raised is whether the charges for which the Bill provides could be considered an impermissible restriction of any such right.*
>
> ...
>
> *Persons who avail of in-patient services pursuant to s. 52 of the Act of 1970 and who have the means to pay for maintenance charges related to those services are not denied access to them. The Court does not consider that it could be an inherent characteristic of any right to such services that they be provided free regardless of the means of those receiving them.*
>
> ...
>
> *It is not in contention that the maximum proposed charge would be but a fraction of the total cost of maintenance of a person concerned. However, the real question is whether the charges as envisaged could be said to infringe or unduly restrict the constitutional rights asserted.*
>
> ...
>
> *It seems to the Court that it cannot be gainsaid, having regard to its well established jurisprudence, that it is for the Oireachtas in the first instance to determine the means and policies by which rights should be respected or vindicated. Counsel assigned by the Court are correct in submitting that the doctrine of the separation of powers, involving as it does respect for the powers of the various organs of State and specifically the power of the Oireachtas to make decisions on the allocation of resources, cannot in itself be a justification for the*

failure of the State to protect or vindicate a constitutional right. This of course begs the question as to whether the provisions in question involve such a failure.

In this instance the Oireachtas has been careful to insert into the Bill a cap on the maximum charge which the Minister can impose, as referred to above. In doing so it is clear that it sought to avoid causing undue hardship generally to persons who avail of the in-patient services. No doubt it could be said that the State could or should have been more generous, or less so with regard to persons of significant means, but that is the kind of debate which lies classically within the policy arena and is not a question of law. All the Court is concerned with is whether the charges are such that they would so restrict access to the services in question by persons of limited means as to constitute an infringement or denial of the rights asserted by counsel. In reaching its conclusion on this question the Court must also take into account the fact that such persons who avail of in-patient services involving maintenance as referred to in the Bill would otherwise have had to maintain themselves out of their own means when living outside the care of the Health Board. Furthermore, there is nothing before the Court from which it could conclude that the judgment of the Oireachtas that a charge capped at the level of 80% of the maximum of the weekly old age (non-contributory) pension would generally cause undue hardship or be an undue denial of access to the services in question. Certainly there may be individual cases where, due to personal circumstances, the charge concerned would involve undue hardship. But, as previously outlined, the Oireachtas has put in place a provision in the Bill (subsection 4 as inserted in s. 53) expressly providing for an administrative mechanism for the remission in whole or in part of such a charge by a Chief Executive Officer in order to avoid undue hardship.

...

Accordingly the Court concludes that a requirement to pay charges of the nature provided for in the Bill could not be considered as an infringement of the rights asserted by counsel."[91]

38. In assessing the significance of the foregoing passages, it is appropriate first to highlight that the pledge in Article 45.4.1 *"to safeguard with special care the economic interests of the weaker sections of the community, and, where necessary to contribute to the support*

[91] At pages 21 – 24 of the judgment.

of the infirm, the widow, the orphan and the aged" is expressly declared to be non-justiciable and for *"the care of the Oireachtas exclusively"*.[92] As the Constitution must be *"read as a whole and its several provisions must not be looked at isolation, but be treated as interlocking parts of the general constitutional scheme"*,[93] there is, in our view, a strong basis for contending that the Courts cannot under the guise of implying a personal right under Article 40.3.1 effectively treat the principles in Article 45 as if they were fully justiciable and available for the invalidation of legislation duly enacted by the Oireachtas. We also believe that there is a strong basis for contending that the recognition of the unenumerated right which was asserted in the Article 26 Reference would be fundamentally at variance with settled jurisprudence on the Separation of Powers and, in truth, would entail an amendment of the Constitution otherwise than in accordance with Articles 46 and 47 of thereof. The following passages from the judgment of Murphy J. in T.D. v. Minister for Education[94] are particularly instructive in this context:

> *"With the exception of Article 42 of the Constitution, under the heading 'Education', there are no express provisions therein cognisable by the courts which impose an express obligation on the State to provide accommodation, medical treatment, welfare or any other form of socio-economic benefit for any of its citizens, however needy or deserving. It is true that the exploration of unenumerated constitutional rights in Ryan v The Attorney General[95] has established the existence of a constitutional right of 'bodily integrity'. The examination of that right in The State (C.) v Frawley[96] and The State (Richardson) v Governor of Mountjoy Prison[97] certainly establishes that the State has an obligation in respect of the health of persons detained in prisons. However, these authorities do not suggest the existence of any general right in the citizen to receive, or an obligation on the State to provide medical and social services as a constitutional obligation. ...*

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[92] Emphasis added.

[93] [1985] IR 532 (*per* Henchy J).

[94] [2001] 4 IR 259.

[95] [1965] IR 294.

[96] [1976] IR 365.

[97] [1980] ILRM 82.

With the exception of the provisions dealing with education, the personal rights identified in the Constitution all lie in the civil and political rather than the economic sphere. ....

The absence of any express reference to accommodation, medical treatment or social welfare of any description as a constitutional right in the Constitution as enacted, is a matter of significance. The failure to correct that omission in any of the 24 referenda which have taken place since then would suggest a conscious decision to withhold from rights, which are now widely conferred by appropriate legislation, the status of constitutionality in the sense of being rights conferred or recognised by the Constitution.

The reluctance to elevate social welfare legislation to a higher plane may reflect a moral or political opposition to such change or it may be a recognition of the difficulty of regulating rights of such complexity by fundamental legislation which cannot be altered readily to meet changing social needs. Alternatively, it may have been anticipated that the existence of a constitutional right enforceable by the courts would involve - as the present case so clearly demonstrates - a radical departure from the principle requiring the separation of the powers of the courts from those of the legislature and the executive. The inclusion in the Constitution of Article 45 setting out directive principles of social policy for the general guidance of the Oireachtas - and then subject to the express provision that they should not be cognisable by any court - might be regarded as an ingenious method of ensuring that social justice should be achieved while excluding the judiciary from any role in the attainment of that objective. Indeed a similar approach was adopted in the Constitution of India, 1949, which having provided in Part IV thereof for certain 'Directive Principles of State Policy', went on to provide in Article 37 that:-

> *'The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.'*

It may be that the Constitution of India has not excluded the courts from consideration of matters of social policy as effectively as Article 45 of our

Constitution, but there is a distinct similarity in the approach made in both Constitutions to this difficult problem.

It is, of course, entirely understandable, and desirable politically and morally, that a society should, through its laws, devise appropriate schemes and by means of taxation raise the necessary finance to fund such schemes as will enable the sick, the poor and the underprivileged in our society to make the best use of the limited resources nature may have bestowed on them. It is my belief that this entirely desirable goal must be achieved and can only be achieved by legislation and not by any unrealistic extension of the provisions originally incorporated in Bunreacht na hEireann. I believe that Costello J (as he then was) was entirely correct when, in O'Reilly v Limerick Corporation,[98] *he concluded that the courts were singularly unsuited to the task of assessing the validity of competing claims on national resources and that this was essentially the role of the Oireachtas. It is only fair to add, as I have already pointed out, that those who framed the Constitution seem to have anticipated this problem and provided a solution for it."*[99]

39. It is also notable that, *"[f]or the reasons there set out and in the light of the considerations so forcefully urged by Murphy J. in his judgment [in T.D.]"*, Keane C.J. stated that he "*would have the gravest doubts as to whether the courts at any stage should assume the function of declaring what are today frequently described as 'socio-economic rights' to be unenumerated rights guaranteed by Article 40".*[100]

40. Ultimately, we believe that it is very unlikely that the courts will recognise an unenumerated constitutional right to nursing home services free of charge. The possibility of the courts expanding the ambit of certain constitutional rights (including, in particular, the right to bodily integrity and the right to life) or declaring a right pursuant to Article 40.3.1 cannot be ruled out however. It is also appropriate to observe in passing that Article 35 of the European Union Charter of Fundamental Rights ("*EUFCR*") guarantees the right to health care in circumstances where there is no EUFCR equivalent of Article 45 of the Constitution. It is true, of course, that the EUFCR is presently non-justiciable but this will change if the European Constitution comes into

[98] [1989] ILRM 181.

[99] [2001] 4 IR 259 at 316 – 322. (Emphasis added).

[100] *Ibid.* at 282. (Emphasis added).

force. It is also true that Article 51 EUFCR provides that it only applies when Member States are "*implementing*" Union law, but we have also seen that purely accidental factors such as nationality and travel are sufficient for the present Court of Justice to hold that Community law is engaged,[101] so that on this scenario the failure to provide adequate nursing home care to, say, an elderly German tourist who suffered a debilitating stroke here would (or, at the very least, might) trigger the application of Article 35 EUFCR. If this occurred, the Supreme Court might well be tempted to break loose of the constraints of Article 45 and interpret our own constitutional law in order to ensure an equivalent level of constitutional protection for Irish citizens.

[101] See, e.g., Carpenter [2002] ECR (non-EU national who stayed at home to look after children could invoke rights of free movement of her husband to resist deportation from the UK because this had enabled her husband to travel to other EU countries to sell advertising) and Chen [2004] ECR I (non-EU national entitled to invoke free movements rights of her Irish citizen daughter in order to resist U.K. deportation order, even though the child had been born in the UK and lived there with her mother).

IV THE PROVISION OF SUBVENTIONS TO PERSONS WHO AVAILED OF PRIVATE NURSING HOME SERVICES

41. This section addresses the provision of subventions to persons who availed of private nursing home services.

(i) The Health (In-patient services) Regulations, 1993 (SI No. 224 of 1993)

42. The Health (In-patient services) Regulations, 1993[102] were made by the Minister pursuant to s.72(1) of the 1970 Act. Article 4 of the Regulations provides that *"[i]f, under s.52 of the [1970 Act], a health board makes available in-patient services in a home for persons suffering from a physical or mental disability which is a home registered under the Health (Nursing Homes) Act, 1990 it shall do so in accordance with the provisions of that Act and any Regulations made under that Act."* In our view, this provision merely compounds the problems which were created by the terms of the 1990 Act. That Act sought to achieve its object by simply ignoring the provisions of the 1970 Act and, in particular, the fact that persons falling within the scope of section 7 were entitled to either full eligibility or limited eligibility for health services under Part IV of the 1970 Act. The Act made no attempt to reconcile the two statutory schemes. Indeed, it is notable that section 7 of the 1990 Act does not even refer to the entitlement of the persons under the 1970 Act. Instead, it provides for payment by health boards to nursing homes. However, SI No. 224 of 1993 proceeds on the legally dubious presumption that on making an arrangement under section 7 of the 1990, the health board is *"mak[ing] available in-patient services under s.52 of [the 1970 Act]"* and, therefore, performing its duty under that Act. Thus, article 4 purports to channel patients, whom a health board has opted to provide with in-patient services in a private nursing home, through the subvention/charging framework established under the 1990 Act (and regulations made thereunder) notwithstanding the entitlements of such patients under the financial framework established by the 1970 Act.

43. On the assumption that the constitutional validity of article 4 and s.72(1) were to be challenged in appropriate legal proceedings, a court would first consider whether it was

[102] SI No. 224 of 1993.

ultra vires the Minister to make the regulation.[103] If the court were to declare article 4 as beyond the powers of the Minister, it would be void and of no effect. If, however, it found that article 4 was within the apparent authority conferred on the Minister by s.72(1), the court would assess whether s.72(1) is valid having regard to the provisions of the Constitution.

44. Pursuant to Article 15.2.1 of the Constitution, the sole and exclusive power of making laws for the State is vested in the Oireachtas.[104] It follows that the Minister for Health and Children has no power to make, amend, vary or repeal a statute or primary legislation[105]: in the light of Article 15.2.1 of the Constitution, this is the exclusive preserve of the Oireachtas. A Minister is, however, entitled to make secondary legislation or statutory instruments, but only insofar as such measures are within the principles and policies of the parent statute. The law in this area is governed by the judgment of the Supreme Court in Cityview Press Ltd. v. Anco[106] which has been reaffirmed on numerous occasions since:[107]

> *"... the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits - if the law is laid down in the statute and details only are filled in or*

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[103] See, *e.g.*, East Donegal Co-op v. Attorney General [1970] IR 317; Cooke v. Walshe [1984] IR 710. This is the analysis traditionally employed by the Court. It is, however, probably duplicative. If a particular statutory instrument is outside the terms of the parent statute, then it must, *ipso facto*, be an unconstitutional usurpation of the sole and exclusive power of lawmaking vested in the Oireachtas. In truth, therefore, the test as to the constitutional validity of a statutory instrument has but a single step.

[104] This proposition is subject to a qualification (concerning the powers of the law-making institutions of the European Union) which is not relevant to the matters under consideration.

[105] This proposition is, of course, subject to section 3(2) of the European Communities Act, 1972 which confers power on a Minister to make regulations including regulations which amend, vary or repeal other laws (exclusive of that Act). The constitutionality of that legislation was upheld in Meagher v. Minister for Agriculture [1994] 1 IR 329.

[106] [1980] IR 381.

[107] See, *e.g.*, Meagher v. Minister for Agriculture [1994] 1 IR 329; Laurentiu v. Minister for Justice, Equality and Law Reform [1999] 4 IR 26; Maher v. Minister for Agriculture [2001] 2 IR 139; [2001] 2 ILRM 481; Leontjava v. D.P.P. [2004] 1 IR; and In re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill, 2004, unreported, 16 February 2005.

completed by the designated Minister or subordinate body - there is no unauthorised delegation of legislative power."[108]

45. In broad terms, therefore, where a statutory instrument made by a Minister is impugned, the courts have a duty to determine whether that instrument was made under powers conferred, and for purposes authorised, by the Oireachtas. As O'Higgins C.J. stated in Cassidy v. Minister for Industry and Commerce:[109]

> *"If the powers conferred by the Oireachtas on the Minister do not cover what was purported to be done then, clearly, the instrument is ultra vires and of no effect. Equally, if the rule-making power given to the Minister has been exercised in such a manner as to bring about a result not contemplated by the Oireachtas, the Courts have the duty to interfere. Not to do so in such circumstances would be to tolerate the unconstitutional assumption of powers by great departments of State to the possible prejudice of ordinary citizens. If what the Minister seeks to do was not contemplated by the Oireachtas then, clearly, it could not have been authorised."*[110]

46. In advising on whether article 4 of the 1993 Regulations was *ultra vires* the powers of the Minister, it is appropriate to highlight a number of authorities which would undoubtedly have a significant bearing on a court's assessment of this issue. The first such authority is Cooke v. Walsh[111] which has a particular relevance to the present matter since it involved a challenge to the validity of article 6(3) of the Health Services Regulations, 1971 which had been made by the Minister pursuant to s.72 of the 1970 Act. Article 6(3) purported to exclude persons who had full eligibility to medical services under s.45 of the 1970 Act and who had suffered personal injuries from a road accident from their entitlement to free medical services unless it was established that the person concerned was not entitled to recover damages or compensation in respect of his injuries. The Supreme Court held that article 6(3), in purporting to exclude a category of persons from the benefits of the 1970 Act, which exclusion was not authorised by the Act, constituted an attempt to amend the Act by ministerial regulation rather than primary legislation. As the Oireachtas had not intended to confer such a power on the Minister, article 6(3) was

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[108] [1980] IR 381 at 399.

[109] [1978] IR 297.

[110] *Ibid.* at 305 – 306. See, also, Purcell v. Attorney General [1996] 2 ILRM 153 at 160.

[111] [1984] IR 710.

ultra vires the Minister's powers and void. O'Higgins C.J., who delivered the leading judgment of the Supreme Court,[112] stated that the interpretation of s.72 of the 1970 Act was a prerequisite to a determination of whether what purported to be done by article 6(3) was, in fact, within the Minister's powers under the section. In addressing what is permitted by s.72, he stated as follows:

> *"The first subsection applies only to health boards and clearly relates to the manner in which these boards are to administer the health services provided for under the section. While it refers to the making of regulations 'regarding the manner in which and the extent to which the board or boards shall make available services', this must not be taken as meaning that such regulations may remove, reduce or otherwise alter obligations imposed on health boards by the Act. To attach such a meaning, unless compelled to do so by the words used, would be to attribute to the Oireachtas, unnecessarily, an intention to delegate in the field of lawmaking in a manner 'which is neither contemplated nor permitted by the Constitution.' [See this Court's judgment in* Cityview Press v. An Chomhairle Oiliuna*]. Accordingly, these words must be taken as applying only to standards, periods, places, personnel or such other factors which may indicate the nature and quality of the services which are to be made available."*[113]

47. In relation to s.72(2), the Chief Justice reiterated the need to seek a meaning for these words which absolved the National Parliament from any intention to delegate its exclusive power of making or changing the laws.[114] *Prima facie,* therefore, these words were to be interpreted in such a manner as to authorise only exclusions which the Act itself contemplated. The Chief Justice continued:

> *"Such exclusions may be possible in relation to particular services for persons with limited eligibility. Those with such eligibility are classified under s. 46 and the Minister, by subs. 3, is given power to change or alter this classification. The obligation imposed on health boards is to provide, not all the services, but, such services as are specified, for persons with limited eligibility. While I do not find it necessary to come to a final decision in this regard it seems to me possible that*

[112] Henchy, Griffin, Hederman and McCarthy JJ. agreed with the judgment of the Chief Justice.

[113] [1984] IR 710 at 728.

[114] *Ibid.*, at 729.

regulations under the subsection could excuse a particular health board or health boards from the obligation to provide a particular service for a particular class of those with limited eligibility, while the obligation to provide that service for others with limited eligibility remained. I am, however, satisfied that the subsection is not to be interpreted as permitting by regulation the cancelling, repeal or alteration of anything laid down in the Act itself unless such is contemplated by the Act."[115]

48. In relation to article 6(3), the Chief Justice concluded that, in effect, it purported to add new subsections to ss.52 and 56 of the 1970 Act which excluded, from the benefit of those sections and the statutory entitlement thereby afforded, a category of persons whose exclusion was in no way authorised or contemplated by the Act. Included in this category were *"persons who by the Act are given full eligibility and full statutory entitlement to avail of the services provided for by the two sections without charge."*[116] Thus, article 6(3) was, *"in reality, an attempt to amend the two sections by ministerial regulation instead of by appropriate legislation".*[117] The Chief Justice stated that *"the National Parliament could not and did not intend to give such a power to the Minister for Health when it enacted s.72 of the Health Act, 1970."*[118] Accordingly, he held that article 6(3) was *ultra vires* the Minister and void.

49. It is also appropriate to refer to State (McLoughlin) v. Eastern Health Board[119] which involved a challenge to the validity of social welfare regulations on the grounds that they were *ultra vires* the parent legislation. Sections 199, 200 and 209 of the Social Welfare (Consolidation) Act, 1981 conferred a statutory entitlement on persons whose means were insufficient to meet their needs to a supplementary welfare allowance.[120] Section 209(2) empowered the Minister for Social Welfare to prescribe "(a) the circumstances under which a payment may be made to any person pursuant to [s.209(1)]; and (b) the amounts of payments to be made either generally or in relation to a particular class of persons." Pursuant to s.209(2), the Minister for Social Welfare made the Social Welfare (Supplementary Welfare Allowances) Regulations, 1977. Article 6(7)(a) of the those

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[115] *Ibid.*

[116] *Ibid.*

[117] *Ibid.*

[118] *Ibid.*

[119] [1986] IR 416.

[120] Consisting of either an increase in the existing supplementary allowance or, in the case of a person who was not in receipt of any supplementary allowance, an allowance in addition to their means otherwise arising.

Regulations, as amended, purported to exclude persons from eligibility for fuel allowances by reference to the type of social welfare payment they received. Specifically, they provided that an increase in supplementary welfare allowance, to be known as a fuel allowance, was payable to persons whose means were insufficient for their needs and who were in receipt of one of 15 listed social welfare payments. The prosecutor, who was in receipt of unemployment assistance, had been refused a fuel allowance on the sole ground that he did not fall within one of the 15 categories listed in article 6(7)(a). His means were insufficient to meet his needs and the amount of his unemployment was less than some of the 15 listed payments. The Supreme Court held that the power conferred on the Minister for Social Welfare by s.209(2) of the 1981 Act to prescribe the circumstances in which payments might be made did not entitle him to exclude persons from consideration for fuel allowance merely on the basis that such person was in receipt of unemployment assistance.

50. Finlay C.J., who delivered the leading judgment of the Supreme Court,[121] observed that the power contained in s.209 of the 1981 Act was a power to prescribe for the implementation of the rights vested in individuals by s.200; by article 6(7)(a), *"far from implementing those rights, the Minister ha[d] purported to use that power to alter, amend and cut down those rights."*[122] The Chief Justice also held that s.209(2) could not be more broadly construed by virtue of the general power to make regulations conferred by s.3(2) of the 1981 Act:

> *"Section 3(2) of the Act of 1981, which undoubtedly gives to the Minister in the making of regulations certain wide powers as to the form of such regulations, is subject to the pre-condition contained in the words 'except in so far as this Act otherwise provides.' I take the view that the meaning of s.200, combined with the meaning of s.209, and in the light of the provisions of ss.207 and 208, is quite clear and that this provision does not permit the Minister to exclude persons from eligibility for supplementary welfare allowance on the basis of the particular payment or allowance they are in receipt of and not on the basis of their means and needs."*[123]

[121] With which Henchy, Griffin, Hederman and McCarthy JJ. agreed.

[122] [1986] IR 416.

[123] *Ibid.*

51. Accordingly, the Court concluded that article 6(7)(a) of the 1977 Regulations was *ultra vires* and void.

52. Harvey v. Minister for Social Welfare[124] involved a challenge to the constitutional validity of s.75 of the Social Welfare Act, 1952 which conferred a power on the Minister for Social Welfare to make regulations adjusting certain statutory benefits including pensions. The section was challenged on the basis that it purported to vest power to legislate in the Minister contrary to Article 15.2.1 of the Constitution. Having regard to its presumed constitutionality, the Supreme Court held that it was not possible to imply into s.75 a necessary or inevitable requirement that the Minister when exercising his regulatory powers thereunder must invade the exclusive legislative domain of the Oireachtas. Finlay C.J., who delivered the judgment of the Court, stated that *"[t]he wide scope and unfettered discretion contained in s.75 can clearly be exercised by the Minister making regulations so as to ensure that what is done is truly regulatory or administrative only and does not constitute the making, repealing or amending of law in a manner which would be invalid having regard to the provisions of the Constitution."*[125] Accordingly, the Court refused to declare the section constitutionally invalid.

53. However, the Court held that regulations which had been made pursuant to s.75 and which purported to withdraw certain welfare payments to which the applicant would otherwise have been entitled under the Social Welfare Act, 1979 were *ultra vires* and void. Article 4 of the Social Welfare (Overlapping Benefits) (Amendment) Regulations, 1979 provided that where a woman who had attained pensionable age, would, but for article 4, be entitled to certain pensions or allowances, only one such pension or allowance would be payable. The Supreme Court held that article 4 was in direct conflict with the express provisions of s.7 of the Social Welfare Act, 1979 and, therefore, an impermissible intervention by the Minister into the legislative domain. Accordingly, the Court held that article 4 was *ultra vires* the powers conferred on the Minister by s.75 of the Social Welfare Act, 1952.

54. In O'Connell v. Ireland[126] the plaintiffs challenged the validity of article 6 of the Disabled Persons (Maintenance Allowances) Regulations, 1991 which had been made by the

[124] [1990] 2 IR 232.

[125] *Ibid.* at 241.

[126] [1996] 2 IR 522.

Minister for Health under s.72 of the Health Act, 1970. Article 6 purported to reduce the amount of the maintenance allowance to which the plaintiffs were otherwise entitled under s.69 of the 1970 Act. The High Court (Barron J.) referred to Cooke v. Walsh and observed that it established that *"there is no power under s.72(1) [of the 1970 Act] to remove, reduce or otherwise alter obligations imposed on the health boards by the Act; nor any power under s.72(2) to permit the cancellation, repeal or alteration of anything laid down in the Act itself unless such is contemplated by the Act."*[127] He concluded that the regulations had done that which was not permissible: *"they ha[d] denied to the plaintiff and to his wife the right granted by s.69 [of the 1970 Act] to receive the full maintenance allowance."*[128] Accordingly, he held that article 6 was *ultra vires* the Minister.

55. It is clear from the above authorities, that insofar as article 4 can be regarded as diminishing an entitlement or right enjoyed by a person under the 1970 Act, it will be declared *ultra vires* the Minister, void and of no effect.

56. In our view, it is equally clear (as indicated in section III above) that the 1970 Act imposed a duty on health boards to make nursing home services available free of charge to persons with full eligibility and that such persons enjoyed a corresponding right to the receipt of such services.

57. Article 4 of the 1993 Regulations was made pursuant to s.72(1) of the 1970 Act. In Cooke v. Walsh, O'Higgins C.J. stated that the power to make regulations conferred by s.72(1) could not be interpreted as meaning "*that such regulations may remove, reduce or otherwise alter obligations imposed on health boards by the Act*". That article 4 purports to achieve precisely this result can be illustrated by considering the case of a person with full eligibility for in-patient services under the 1970 Act who seeks admission to a public hospital in the functional area of a health board. We understand the question of admission to such a hospital is invariably decided solely on the grounds of bed availability on the date of application. Assuming that a bed is not available and the person is, as a result, forced to avail of private nursing home care, the effect of article 4 is to obviate his entitlement to in-patient services free of charge under the 1970 Act (and the corresponding obligation of the health board to provides such services) since,

[127] *Ibid.* at 530.

[128] *Ibid.*

pursuant to the 1990 Act and the Subvention Regulations made thereunder, the person will merely be *eligible to apply for, at most, a subvention* towards the costs of his nursing home care and will not be entitled to all of the costs of such care.

58. The reasoning which resulted in the invalidation of the regulation that was challenged in Cooke applies, in our view, with equal force to Article 4. In effect, Article 4 purports to add a new subsection to s.52 of the 1970 Act which excludes, from the benefit of that section and the statutory entitlement thereby afforded, a category of persons whose exclusion is in no way authorised or contemplated by the Act. Included in this category are persons who by the Act are given full eligibility and full statutory entitlement to avail of the services provided for by s.52 without charge. In this light, article 4 can be seen as *"in reality, an attempt to amend [section 52] by ministerial regulation instead of by appropriate legislation"*.[129] In this context, it is relevant to note that, extraordinarily, the explanatory note to the 1993 Regulations states explicitly that "*these Regulations amend s.52 of the Health Act, 1970*".[130] As the Oireachtas could not, in the light of Article 15.2.1 of the Constitution, have intended to give power to amend s.52 to the Minister when it enacted s.72 of the 1970 Act, Article 4 would, if challenged, almost certainly be declared *ultra vires* the Minister and void.

(ii) The Nursing Homes (Subvention) Regulations, 1993 (SI No. 227 of 1993)

59. In order to assess the validity of the Nursing Homes (Subvention) Regulations, 1993, as amended, (referred to herein as the "*Subvention Regulations*"), it is necessary to view them in the context of the overall framework for the provision of nursing home care under the 1990 Act *and* under the 1970 Act which, in turn, must be viewed in the light of relevant constitutional principles.

60. Under the 1970 Act and the regulations made thereunder,[131] a person with full eligibility is entitled to free in-patient care.[132] A person with limited eligibility can be subjected to potentially two charges. The first is a fixed daily charge (presently €31.74 per day) which

[129] [1984] IR 710 at 729 (per O'Higgins C.J.).

[130] Emphasis added.

[131] The Health (Charges for In-Patient Services) Regulations, 1976 (SI No. 180 of 1976), as amended, and the Health (In-Patient Charges) Regulations, 1987 (SI No. 116 of 1987), as amended.

[132] See section III of this Opinion in this regard.

applies during the first 10 days of the service and amounts to a maximum of €317.43 in any 12 month period. The second charge arises after 30 days of hospitalisation and may continue for the remainder of a patient's stay in hospital. Unlike the first charge, the second is not expressed as a fixed amount but, rather, and somewhat peculiarly, is determined by reference to the income of the patient.

61. A completely different framework is provided under the 1990 Act and the Subvention Regulations made thereunder. Section 7(1) of the 1990 Act provides that where, following an assessment by a health board of the dependency of a dependent person and of his means and circumstances, the health board is of the opinion that the person is in need of maintenance in a nursing home and is unable to pay any or part of its costs, it may, if the person enters or is in a nursing home,[133] pay to the home such amount in respect of maintenance as it considers appropriate having regard to the degree of the dependency and to the means and circumstances of the person. Section 7(2)[134] empowers the Minister to make regulations specifying the amounts that may be paid by health boards under s.7 and states that such amounts can be specified by reference to specified degrees of dependency, specified means or circumstances of dependent persons or such other matters as the Minister considers appropriate. Pursuant to s.7, the Minister made the Subvention Regulations which purport to establish a comprehensive framework for the payment of subventions in respect of nursing home care. The financial entitlements arising under those Regulations are substantially lower than those arising under the 1970 Act and applicants for a subvention are required to satisfy relatively onerous criteria to obtain a subvention, including a comprehensive assessment of one's means. Moreover, the term "*means*" is very broadly defined as *"the income and imputed value of assets of a person in respect of whom a subvention is being sought and the income and imputed income of his or her spouse"* and Schedule II to the Subvention Regulations purports to establish detailed rules for the assessment of such means.

62. In our opinion, the Subvention Regulations are vulnerable to challenge on the basis that they constitute an unauthorised exercise of legislative power by the Minister contrary to Article 15.2.1 of the Constitution. Those Regulations were made pursuant to s.7 of the

[133] And subject to compliance by the home with any requirements made by the board for the purposes of its functions under s.7 of the 1990 Act.

[134] As substituted by s.3 of the Health (Miscellaneous Provisions) Act, 2001 (No. 14 of 2001).

1990 Act, specifically s.7(2), *prior* to the substitution for that subsection of s.7(2)(a) and (b)[135] by s.3(b) of the Health (Miscellaneous Provisions) Act, 2001. Accordingly, the Subvention Regulations were made pursuant to a statutory provision which simply provided that the Minister could by regulations prescribe the amounts that may be paid by health boards under s.7 and that such amounts can be specified by reference to specified degrees of dependency, specified means or circumstances of dependent persons or such other matters as the Minister considers appropriate. As noted above, a Minister is only entitled to make statutory instruments insofar as such measures are within the principles and policies of the parent statute.[136] We are of the opinion that s.7(2), as originally enacted, did not contain sufficient principles and policies for the purpose of circumscribing the Minister's legislative power[137] and, that, prior to the passing of the 2001 Act, the Subvention Regulations would, if challenged, have been invalidated by the courts. It is also arguable, however, that the Regulations are still open to challenge since they were not made pursuant to the provisions of s.7 of the 1990 Act, as substituted by the 2001 Act, but rather pursuant to s.7 as originally enacted. In this regard, a court may well take the view that the 2001 Act, in effect, provides the principles and policies which were missing from the 1990 Act and thus cures any legislative deficiency which arose.[138] However, a court may consider that there is a certain cart-before-the-horse logic about enacting a statutory provision which is based upon particular regulations and which is simultaneously designed to constrain the Minister's powers to make those regulations. It is possible that, if challenged on the grounds outlined above, a court would seize upon this logic and hold that the "restoration" of principles and policies to s.7(2) was inadequate to save the Subvention Regulations from condemnation. The fact that the draft Subvention Regulations were not laid before and approved by the Houses of the Oireachtas in accordance with s.14 of the 1990 Act, as

[135] Section 7(2)(a) effectively mirrors the provisions of the original s.7(2) while s.7(2)(b) stipulates various matters which may be provided for by the regulations.

[136] See Cityview Press Ltd. v. Anco [1980] IR 381. See also Meagher v. Minister for Agriculture [1994] 1 IR 329; Laurentiu v. Minister for Justice, Equality and Law Reform [1999] 4 IR 26; Maher v. Minister for Agriculture [2001] 2 IR 139; [2001] 2 ILRM 481; Leontjava v. D.P.P. [2004] 1 IR; and In re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill, 2004, unreported, 16 February 2005.

[137] This possibly explains the reason for the amendment to s.7(2) of the 1990 Act and for the strong parallels between s.7(2)(b) and the Subvention Regulations.

[138] See, *e.g.*, McDaid v. Sheehy [1991] 1 IR 1.

amended, may fortify the views of a court in this regard.[139] Even if the Subvention Regulations were to survive such a challenge, however, it is an entirely separate question as to whether the Regulations are within the principles and policies laid down in the 1990 Act, as amended. It is to this issue that we now turn.

63. The detailed provisions of the Subvention Regulations are referred to in the Appendix to this Opinion. Viewed in the light of s.7(2) of the 1990 Act, as amended, and the jurisprudence of the High Court and Supreme Court in this area, the following provisions of the Subvention Regulations are particularly vulnerable to a successful challenge:

(a) Article 3 – insofar as it defines *"means"* for the purpose of the Subvention Regulations as including the imputed value of assets of a person in respect of whom a subvention is sought and, also, the income and imputed income of that person's spouse;

(b) Article 4.1 – insofar as it limits the entitlement to apply for a subvention to person who applied prior to the admission of the patient to a nursing home;

(c) Article 4.3 – which prohibits a person who commenced residence in a nursing home after 1 September 1993 and who had not made an application for a subvention prior to his admission thereto from applying for a subvention sooner than two years from the date of his admission, unless the chief executive officer of the health board determines otherwise;

(d) Article 7 – insofar as it permits an examination of the patient;

(e) Article 8.1 insofar as it requires a health board to assess the means of a person in respect of whom a subvention is sought on the basis of the rules for the assessment of means in the Second Schedule to the Subvention Regulations

[139] On one view, s.14 is inapplicable to the Subvention Regulations since it applies only *"[w]henever a regulation is proposed to be made under [the 1990 Act]"* and the Subvention Regulations were already made when that section was inserted. On another view, however, s.14 must be read in conjunction with the additional safeguards inserted into s.7 and that, as a matter of inexorable logic, the Subvention Regulations should be condemned so that new subvention regulations could be passed in accordance with s.7(2)(a) and (b), which regulations would also have to be approved by both Houses of the Oireachtas."

(encompassing certain income assessment rules and all of the asset assessment rules);

(f) Article 8.3 – insofar as it permits a designated officer of a health board to request information and conduct interviews with a person, other than the prospective patient, who is not acting on behalf of that patient; and

(g) The Second Schedule to the Subvention Regulations – in particular, rules 4 – 22 (encompassing certain income-related provisions and all of the asset related provisions).

64. In our opinion, all of the above provisions of the Subvention Regulations would, if challenged in an appropriate case, be invalidated on the grounds that they were not made within the principles and policies of the 1990 Act. In relation to many of the above provisions, there are simply no principles and policies in the 1990 Act which guide and/or restrict the exercise of the Minister's legislative power and, accordingly, such provisions would almost certainly be condemned as *ultra vires* the Minister. The reference to assets in the definition of "*means*" and the asset assessment provisions in the Second Schedule fall into this category. Indeed, it is arguable that the asset assessment provisions are in fact contrary to the spirit of the legislative framework governing the provision of health services and, therefore, unreasonable in the sense that that word is used in Cassidy v. Minister for Industry & Commerce.[140] In respect of the other provisions, we are of the view that the regulations exceed such principles and powers as may be gleaned from the 1990 Act and would likewise be declared *ultra vires* the Minister. For instance, the crucial term "*means*" is defined in article 3 of the Subvention

[140] [1978] IR 297. In Cassidy, Henchy J. stated that it is a general rule of law that where Parliament has by statute delegated a power of subordinate legislation, the power must be exercised within the limitations of that power as they are expressed or necessarily implied in the statutory delegation; otherwise it will be held to have been invalidly exercised for being *ultra vires*. He added that "*it is a necessary implication in such a statutory delegation that the power to issue subordinate legislation should be exercised reasonably.*" In this context, Henchy J. cited with approval the following passage from the judgment of Diplock L.J. in Mixnam's Properties Ltd. v. Chertsey Urban District Council [1964] 1 QB 214:

> *"Thus, the kind of unreasonableness which invalidates a by-law (or, I would add, any other form of subordinate legislation) is not the antonym of 'unreasonableness' in the sense in which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say: 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.'"*

See, also, McGabhann v. Law Society [1989] ILRM 854; and Crilly v. T. & J. Farrington Ltd. [2001] 3 IR 251.

Regulations as "*the income and imputed value of assets of a person in respect of whom a subvention is being sought and the income and imputed income of his or her spouse*". The term is not defined in the 1990 Act but it would appear from s.7 of the Act that the Oireachtas contemplated that a health board would only be entitled to assess the means of the person in respect of whom a subvention is sought and *no other person*. Section 7(1) provides, *inter alia*, that a subvention may be paid "*following an assessment by a health board of the dependency of a dependent person and of his means and circumstances [where] the health board is of opinion that the person is in need of maintenance in a nursing home and is unable to pay any or part of its costs.*"[141] Similarly, s.7(2)(b) empowers the Minister to make regulations in relation to, *inter alia*, "*(iii) the furnishing by applicants for payments ... of information specified or requested by health boards in relation to the means and dependency of the persons in respect of whom the payments are being sought*", and "*(iv) the assessment by health boards of the degree of dependency and the means and circumstances of persons in respect of whom payments are being sought*".[142] In this light, we are of the opinion that the Oireachtas did not envisage that the income and imputed income of an applicant's spouse should be taken into account for the purpose of assessing his means and, to the extent that the Regulations permit such, they exceed the principles and polices set down in the 1990 Act. Arguably, the assessment of the income and imputed income of an applicant's spouse is relevant to the assessment of an applicant's means. However, the absence of a clear statutory basis for the former assessment is likely to be fatal to the validity of those provisions of the Regulations which purport to permit such an assessment. In this context, it is appropriate to compare s.7(2) with s.45(2) of the 1970 Act which provides that in deciding whether or not a person comes within the category mentioned in s.45(1)(a),[143] "*regard shall be had to the means of the spouse (if any) of that person in addition to the person's own means.*" Nor would the generality of the powers conferred by s.7(2) to make regulations in respect of "*such other matters as the Minister considers appropriate*" be likely to fill this particular breach.

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[141] Emphasis added.

[142] Emphasis added.

[143] Namely, adult persons unable without undue hardship to arrange general practitioner medical and surgical services for themselves and their dependants, (which category has full eligibility for the services under Part IV of the 1970 Act).

65. In view of the factors referred to above, we believe that, if they were to be challenged in an appropriate case, most of the core provisions of the Nursing Homes (Subvention) Regulations, 1993, would be declared *ultra vires* the Minister and consequently void.

V POTENTIAL LIABILITY OF THE STATE

66. This section considers the potential liability of the State in the light of actions by persons claiming damages and / or restitution on the basis of a failure by health boards to discharge their duties to provide nursing home services to which they were entitled under the 1970 Act.

(i) Overview

67. In many respects, the validity of the parallel systems of health services created by the 1970 and 1990 Acts is one of the most difficult issues confronting the State in relation to the provision of nursing home services. Almost every person who was dealt with under s.7 of the 1990 Act would either have full eligibility or limited eligibility for health services under the 1970 Act. The probable invalidity of the 1993 Regulations only compounds this problem since it is the only (if unsatisfactory) attempt to effect some intersection between the two systems. The existence of two different regimes with different criteria for eligibility and cost to patients has undoubtedly given rise to serious anomalies. At a general level, it is very likely that two persons of the same age, income and disability were / are treated very differently: one in a public hospital at no cost (or a minimal cost in respect of maintenance) and the other in a private nursing home with only a modest subvention and bearing a very heavy weekly bill. Indeed, the potential for anomaly is greater: the person in the public hospital at no cost, (or minimal cost), may have greater means than the subvention patient in the private nursing home. When one considers the fact that some patients may not have access to either a public hospital or a subvented private nursing home and that persons with limited eligibility may be required to pay some charges, the possibilities for anomalies are multiplied. This is particularly serious since the cost involved is significant and likely to be an extremely heavy burden on older people and their families.

68. We are not aware of any guidance from central government either in statutory form or by circular as to the allocation of health boards' scarce resources and it appears that the boards were left to do the best they could. No doubt the system was administered with sensitivity on a local basis and efforts were made to allocate places to those most in need. Nevertheless, it appears to us that the system of allocation was essentially *ad hoc*

and it seems highly probable that there were many anomalous decisions. This raises the question whether the entire system, (irrespective of the delegated legislation implementing it), which can give rise to such arbitrary distinctions with enormous impact on individuals and families, can be valid.

69. In our view, the system is so lacking in coherence and consistency that individual determinations are inherently vulnerable to successful challenge. The starting point is that if a health board failed to provide nursing home services to persons with full or limited eligibility, (either in its own hospitals or pursuant to an arrangement made under s.26 of the 1970 Act), in accordance with the financial entitlements of such persons, *prima facie* the board was in breach of its duty under s.52 of the Act. If, as a result, arbitrary and *ad hoc* distinctions were made between essentially similar members of the public, then *prima facie* that would also be, at a minimum, a breach of the guarantee of equality contained in Article 40.1 of the Constitution.[144] *Prima facie*, therefore, there is a potential liability on the part of the State on the grounds that: (i) health boards acted in breach of statutory duty; (ii) health boards and/or the State were unjustly enriched at the expense of persons whose rights under the 1970 Act were infringed; and (iii) the State failed to hold such persons equal before the law.

(ii) Cause of action for breach of statutory duty

70. In assessing potential claims for breach of statutory duty, it is necessary to consider: (a) whether a cause of action exists for breach of duties imposed by the 1970 Act; (b) the significance of the resources which were available to health boards and the Health (Amendment) (No. 3) Act, 1996; (c) health boards' duties under secondary legislation; and (d) the reliefs which may be claimed.

(a) Whether a cause of action exists for breach of duties imposed by the 1970 Act

71. In considering the potential liability of the State for breach of statutory duty on the part of the health boards, it is necessary first to consider whether the Oireachtas intended that such breaches would be remediable at the suit of persons affected thereby. As McMahon and Binchy observe in addressing the question of whether a breach of a

[144] See, e.g., de Burca v. Attorney General [1976] IR 38; Dillane v. Attorney General [1980] ILRM 167; O'B. v. S. [1984] IR 316. *Cf.* O'Brien v. South West Area Health Board, Unreported, Supreme Court, 5 November 2003.

statute gives rise to civil liability, *"the orthodox approach at common law suggests that whether a statute gives a remedy to an injured person is essentially a matter of interpretation in each case."*[145] In this context, the following passage from McMahon & Binchy are instructive:

> *"In certain cases no problem arises. A statutory provision sometimes provides explicitly that a civil action may or may not be taken in relation to breach of certain of its provisions. ... Where, however, the statute is silent as regards any civil remedy, the courts may be called on to determine whether it was the intent of the legislature that such remedy should exist. In truth, the legislature probably had no 'intent' one way or the other on the matter; indeed, its failure to provide explicitly for a remedy might reasonably be considered to imply that it did not intend that any remedy should be available to persons injured by breach of any of the statute's provisions. Nevertheless, there are good reasons why the courts should exercise themselves in the task of pursuing this will o' the wisp of a non-existing legislative intention. ... To describe the Court's deliberation as strictly that of legislative interpretation would be naïve: a considerable element of judicial creativity is also involved."*[146]

72. In X (Minors) v. Bedfordshire County Council,[147] Lord Browne-Wilkinson articulated the following principles for the purpose of determining whether a statutory duty gives rise to a private right of action:

> *"The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no*

[145] McMahon & Binchy, *Law of Torts* (Butterworths, 2000) at 590. See also Quill, *Torts in Ireland* (Gill & McMillan, 2004) at 132 et seq.; and Greenberg (ed.), Craies on Legislation (Sweet & Maxwell, 2004) at 471 et seq.

[146] McMahon & Binchy, *op cit.* at 592.

[147] [1995] 2 AC 633.

general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: Cutler v. Wandsworth Stadium Ltd.[148]*; Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2).*[149] *However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for any breach: see Groves v. Wimborne (Lord)*[150][151]

73. It can be argued that the 1970 Act imposed duties on health boards for the benefit of the public generally and not for any particular class thereof and, accordingly, that a private right of action does not exist for the breach of such duties. In this regard, the following passage from the judgment of O'Higgins C.J. in Siney v. Dublin Corporation[152] is instructive:

> *"[T]he statutory duties imposed by the Housing Act, 1966 are so imposed for the benefits of the public. Under the Act, they are enforceable under section 111 by the Minister. In these circumstances no right of action is given to a private citizen if the complaint is merely that the duties so imposed or any one of them have or has not been carried out. The mere fact that a housing authority has failed to discharge a duty imposed upon it does not give rise to a complaining or aggrieved citizen a right of action for damages."*[153]

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[148] [1949] A.C. 398.

[149] [1982] A.C. 173.

[150] [1898] 2 QB 402.

[151] [1995] 2 AC 633 at 731. See also R. v. Sheffield City Council [2003] 2 WLR 848; and Barrett v. Enfield London Borough Council [2001] 2 AC 550

[152] [1980] IR 400.

[153] *Ibid.* at 412.

74. The following passage from the judgment of Lord Browne-Wilkinson in X (Minors) v. Bedfordshire County Council[154] is particularly instructive in the present context:

> *"Although the question is one of statutory construction and therefore each case turns on the provisions in the relevant statute, it is significant that your Lordships were not referred to any case where it had been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty. Although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not to be treated as being passed for the benefit of those individuals but for the benefit of society in general. Thus legislation regulating the conduct of betting or prisons did not give rise to a statutory right of action vested in those adversely affected by the breach of the statutory provisions, i.e. bookmakers and prisoners: see Cutler's case [1949] A.C. 398;[155] Reg. v. Deputy Governor of Parkhurst Prison, Ex parte Hague [1992] 1 A.C. 58.[156] The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions."*

75. It is possible, however, that the courts would conclude that persons with full eligibility are a discrete class of persons and, particularly having regard to their vulnerable position, that the Legislature did intend that breaches of duties which were imposed for their benefit would be remediable by an action for damages. In the light of the judgment of the Supreme Court in the recent Article 26 Reference, there is a real possibility that the latter argument would find favour with the courts, subject to the defences outlined herein. In this context, the following passage from the judgment of the Court merits particular note:

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[154] [1995] 2 AC 633.

[155] [1949] A.C. 398.

[156] [1992] 1 A.C. 58.

"While the individual circumstances of patients will vary enormously in terms of age and physical and mental capacity, it is obvious that, by enacting the Act of 1970, the Oireachtas was concerned to ensure the provision of humane care for a category of persons who are in all or almost all cases those members of our society who, by reason of age, or of physical or mental infirmity, are unable to live independently. They are people who need care. Even without the benefit of statistical or other evidence, the Court can say that the great majority of these persons are likely to be advanced in years. Many will be sufferers from mental disability. While some will have the support of family and friends, many will be alone and without social or family support. Most materially, in a great number of cases, the patients will have been entitled to and in receipt of the non-contributory social welfare pension."[157]

76. It is also appropriate to note the possibility of causes of action for breach of statutory duty on the basis of the exercise of statutory powers in a manner that was unreasonable, unfair or unjust. The decision of the Supreme Court in Deane v. Voluntary Health Insurance Board[158] merits note in this context. In that case, the plaintiff was awarded damages on the basis that the defendant had exercised their statutory powers unreasonably and unfairly and, thus, had acted in breach of statutory duty. Blayney J. summarized the decision of the High Court (Keane J.) as follows:

"1. The VHI has a duty to use the powers entrusted to them fairly and reasonably.
2. The action of the VHI in October 1991 in withholding all cover from the plaintiffs' hospital was not a fair and reasonable exercise of their powers.
3. In the circumstances, the plaintiffs were entitled to appropriate relief."[159]

77. In addressing the submission on behalf of the VHI that the trial judge had erred in holding that the VHI had exercised their powers unreasonably and unfairly, Blayney J. observed that this conclusion was an inference drawn from the facts and, accordingly, *"what had to be considered was whether there was credible evidence to support the facts from which the inference was drawn and whether the learned trial judge was*

[157] Pages 32 – 35 of the unreported judgment. (Emphasis added).

[158] Unreported, High Court, (Keane J.) 22 April 1993; Unreported, Supreme Court, 28 July 1994.

[159] *Ibid.* at p.27 of the judgment of Blayney J.

correct in the conclusion that he reached."[160] In this regard, Blayney J. noted that it was not suggested that any of the findings of fact were not supported by credible evidence. Accordingly, the only issue was whether the conclusion was justified. Blayney J. had *"no doubt that it was".*[161]

78. It is also appropriate in this context to refer to the judgment of the Supreme Court in Kennedy v. Law Society of Ireland (No. 3).[162] In addressing the issue of a statutory body acting *ultra vires*, Fennelly J.[163] stated as follows:

> *"The delegatees of statutory power cannot be allowed to exceed the limits of the statute or, as here, the secondary legislation conferring the power. The rationale for this is simple and clear. The Oireachtas may, by law, while respecting the constitutional limits, delegate powers to be exercised for stated purposes. Any excessive exercise of the delegated discretion will defeat the legislative intent and may tend to undermine the democratic principle and, ultimately, the rule of law itself. Secondly, the courts have the function of review of the exercise of powers. They are bound to ensure respect for the laws passed by the Oireachtas. A delegatee of power which pursues, though in good faith, a purpose not permitted by the legislation by, for example, combining it with other permitted purposes is enlarging by stealth the range of its own powers. These principles, in my view, must inform any test for deciding whether a power has been exercised ultra vires."*[164]

79. In Kennedy, it was held that, in appointing an accountant to pursue an investigation of fraudulent claims in the applicant's practice, the Law Society had pursued an objective which was not permitted by the Solicitors' Accounts Regulations and, accordingly, had acted *ultra vires*. In addressing the pursuit of this impermissible objective, Fennelly J. stated as follows:

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[160] *Ibid.* at p.31 (Citing Hay v. O'Grady [1992] ILRM 689).

[161] *Ibid.* at 34.

[162] [2002] 2 IR 458.

[163] With whom the other members of the Supreme Court agreed.

[164] [2002] 2 IR 458 at 486. (Emphasis added).

"It is trite law that statutory powers must be exercised reasonably and in good faith and only for the purpose for which they were granted. The pursuit of the impermissible objective was as important to the first respondent as the permissible one. Such an exercise of delegated power cannot be allowed to stand."[165]

80. It is also appropriate in this context to note the possibility of actions for misfeasance of public office and to refer to the decisions of the Supreme Court in Pine Valley Developments Limited. v. The Minister for the Environment[166] and Glencar Exploration plc., -v- Mayo County Council (No. 2).[167] In Pine Valley, Henchy J. stated, *inter alia*, as follows:

> *"The weight of judicial opinion as stated in the decided cases, suggest that the law as to a right to damages in such a case is as follows. Where there has been a delegation by statute to a designated person of a power to make decisions affecting others, unless the statute provides otherwise, an action for damages at the instance of a person adversely affected by an* ultra vires *decision does not lie against the decision maker unless he acted negligently, or with malice (in the sense of spite, ill will or suchlike improper motive) or in the knowledge that the decision would be in excess of the authorised power: see for example, Dunlop v. Woollahara Municipal Council*[168] *& Bourgoinsa v The Minister for Agriculture."*[169]

81. Similarly, Finlay C.J. stated as follows:

> *"The decision making power or duty purporting to have been exercised on this occasion, in my view, falls with regard to the question of damages arising from its performance into a quite difference category. I would adopt, with approval, the clear summary contained in the fifth edition of HWR Wade, Administrative Law at p673, when the Learned Author states as follows:-*

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[165] *Ibid.* at 488. (Emphasis added).

[166] [1987] IR 23.

[167] [2002] 1 IR 84

[168] [1982] AC 158.

[169] [1985] 3 All ER 585.

'The present position seems to be that administrative action which is ultra vires, but not actionable merely as a breach of duty, will found an action for damages in any of the following situations:-

(i) If it involves the commission of a recognised tort, such as trespass, false imprisonment or negligence;

(ii) If it is actuated by malice, eg. personal spite or a desire to injure for improper reasons;

(iii) If the authority knows that it does not possess the power which it purports to exercise.'

I am satisfied that there would not be liability for damages arising under any other heading.

...

Not only am I satisfied that this is the true legal position with regard to a person exercising a power of decision under public statutory duty, but it is clear that there are and have always been weighty considerations of the public interest that make it desirable that the law should be so. Were it not, then there would be an inevitable paralysis of the capacity for decisive action in the administration of public affairs. I will quote, with approval, the speech of Moulten LJ in Everett v. Griffiths,[170] *where at, page 695, he states:-*

'If a man is required, in the discharge of a public duty, to make a decision which affects, by its legal consequences the liberty or property of others, and he performs that duty and makes that decision honestly and in good faith, it is, in my opinion, a fundamental principle of our law that he is protected. It is not constant with the principles of our law to require a man to make such a decision in the discharge of his duty to the public, and then to leave him in peril by reason of the consequence to others of that decision provided that he has acted honestly in making that decision'."

82. These statements of the law were recently reaffirmed by the Supreme Court in Glencar Exploration plc. v. Mayo County Council (No. 2).[171] In that case, Fennelly J comprehensively reviewed the principles for damages for *ultra vires* acts and stated as follows:

[170] [1921] 1 AC 631.

[171] [2002] 1 IR 84

"*As the Trial Judge correctly pointed out, 'there is no direct relationship between the doing of an ultra vires act and the recovery of damages for that act'. This fundamental proposition can be underlined in two ways ... Secondly, the nature of the tort of misfeasance in public office, emphasises that lack of vires is insufficient on its own to ground a cause of action sounding in damages. Keane J observed in his Judgment in McDonnell v. Ireland*[172]*, that 'tort is only committed where the act in question is performed either maliciously or with actual knowledge that it is committed without jurisdiction and with a known consequence that it would injure the Plaintiff ...' The common characteristics of those two alternative elements of that rare and unusual civil wrong are, as explained by Clarke J, in Three Rivers D.C v. Bank of England (No. 3)*[173] *... in a passage cited by the Trial Judge as being that the tort 'is concerned with a deliberate and dishonest wrongful abuse of the powers given to a public officer'.*"

83. Having cited with approval the passages from the judgments of Finlay C.J. and Henchy J. in Pine Valley set out above, Fennelly J. continued as follows:

"*I respectfully agree with those statements. I would add that the absence of the right to automatic compensation for loss caused by an* ultra vires *decision can find further justification from the protection of individual rights afforded by the existence of the remedy of judicial review while the sufferer of loss from which lawful but non-tortious private act is entirely without a remedy, a similarly positioned victim of an* ultra vires *act of a public authority, by way of contrast has, at his disposal the increasingly powerful weapon of judicial review, thus he may be able to secure, as in this case, an order annulling the offending act. In appropriate cases, a court may be able to grant an interlocutory injunction against its continued operation*".

[172] [1998] 1 IR 134 at 156.

[173] [1996] 3 All ER 558.

(b) The resources which were available to health boards and the Health (Amendment) (No. 3) Act, 1996

84. The statutory obligations of health boards pursuant to the Health (Amendment) (No. 3) Act, 1996 (referred to herein as "*the 1996 Act*") are detailed in the Appendix to this Opinion. At this juncture, it is appropriate to consider the effect of those responsibilities in conjunction with health boards' statutory obligations regarding the provision of nursing home care and, also, in the light of the advice provided above. The following provisions of the 1996 Act are particularly relevant to this analysis:

(a) Section 2(1) – which provided that *"[a] health board, in performing the functions conferred on it by or under [the 1996 Act] or any other enactment, shall have regard to: (a) the resources, wherever originating, that are available to the board for the purpose of such performance and the need to secure the most beneficial, effective and efficient use of such resources; [and] (d) policies and objectives of the Government or any Minister of the Government in so far as they may affect or relate to the functions of the health board."*

(b) Section 2(3) – which provided that every enactment relating to a function of a health board *"shall be construed and have effect subject to the provisions of [s.2]."*

(c) Section 5 – which required the Minister in respect of a particular period to determine the maximum amount of net expenditure that can be incurred by a health board for that period and to notify the board in writing of the amount so determined;

(d) Section 6(1) – which required a health board to adopt and submit to the Minister a service plan which, *inter alia*, must be consistent with the financial limits determined by the Minister under s.5;

(e) Section 6(6) – which empowered the Minister to direct a health board (or, where appropriate, the chief executive officer) to make modifications to the service plan where he was of the opinion that, *inter alia*, it (a) proposed net expenditure which exceeded the net expenditure determined by him; or (b) was not in accordance with the policies and objectives of the Minister or of the Government in so far as they related to the functions of the board;

(f) Section 7(3) - which required a health board to supervise the implementation of its service plan in order to ensure that the net expenditure for the relevant period did not exceed the net expenditure determined by the Minister for that period;

(g) Section 8(3) – which required a health board to so conduct its affairs that its indebtedness did not exceed the amount for the time being specified by the Minister;

(h) Section 9(1) – which obliged the chief executive officer of the health board to implement the service plan on behalf of the health board so that: (a) the amount of net expenditure of the board for the financial year did not exceed the amount of net expenditure determined by the Minister; and (b) the indebtedness specified by the Minister;

(i) Section 9(2) – which obliged the chief executive officer to inform the Minister and the board as soon as may be if he was of opinion that a decision of the health board will, or a proposed decision of the board would, if made either: (a) result in net expenditure by the board for a financial year in excess of the amount determined by the Minister; or (b) result in the indebtedness of the board exceeding the amount specified by the Minister under s.8(1) of the 1996 Act;

(j) Section 10 – which provided that if the amount of net expenditure incurred by a health board in a financial year is either greater or less than the amount determined by the Minister for that year, the health board is required to charge the amount of such excess or credit the amount of such surplus in its income and expenditure account for the next financial year;

(k) Section 12(1) – which provided that where the Minister is satisfied, after considering a report on the matter, that a health board is not performing any one or more of its functions in an effective manner or has failed to comply with any direction given by him, the Minister can by order transfer such reserved functions of the board as he may specify to certain persons[174] for such period (not exceeding two years) as may be specified in the order; and

[174] Being the chief executive officer or such other person as the Minister may specify in the order.

(l) Section 13 – which required a health board to comply with any written directions which the Minister may give for any purpose in relation to which directions are provided for by any of the provisions of the 1996 Act or any other enactment and for any matter or thing referred to in the 1996 Act as specified, to be specified, determined or to be determined.

85. It is also appropriate in this context to refer to s.33(1) of the 1970 Act[175] which precluded a health board from borrowing money without the prior consent of the Minister given with the concurrence of the Minister for Finance. The Minister is also empowered[176] to specify terms and conditions in relation to the borrowing of moneys by a health board.[177]

86. In order to assess the nature and extent of a health board's responsibilities in the light of the provisions summarised above and the statutory framework for the provision of nursing home care, it is appropriate to refer to a number of recent authorities which address similar issues. The first case is McC. v. Eastern Health Board[178] which involved a claim by applicants for the adoption of a child that the respondent health board was in breach of its statutory duty to carry out assessments of them as soon as practicable. The High Court dismissed their claim and the Supreme Court upheld this decision on the basis that, *inter alia*, the Oireachtas *"must ... be taken to have legislated on the basis that the resources available to the health boards in terms of suitably qualified and experienced personnel to carry out the necessary assessments were not unlimited."*[179] The Court added that it also *"[had to] be assumed that, when [the Oireachtas] imposed further significant responsibilities on the health boards in the Child Care Act, 1991, they took account of the fact that the health boards were necessarily further constrained in the allotment of these limited resources of personnel to the carrying out of assessments under that Act."*[180]

87. The decision of the Supreme Court in Brady v. Cavan County Council[181] is particularly relevant to the issues under consideration. That case involved an application for an

[175] As substituted by s.17(d) of the Health (Amendment) (No. 3) Act, 1996.

[176] With the concurrence of the Minister for Finance.

[177] Health Act, 1970, s.33(1) as substituted by s.17(d) of the Health (Amendment) (No. 3) Act, 1996.

[178] [1996] 2 IR 296.

[179] *Ibid.*, at 310.

[180] *Ibid.*

[181] [1999] 4 IR 99.

order of mandamus to compel the respondent County Council to put into a good condition and repair a public road in County Cavan in accordance with its statutory obligations.[182] The respondent opposed the application on the grounds that, in view of its difficulties in raising revenue and the failure of central government to advance it the necessary funds, the only way in which it could fulfil its statutory duty within the means available to it was by tackling the road repair programme over a period of years and applying its resources in a rational and systematic order. The respondent also argued that to select one strip of roadway from several hundred in very poor condition would not ensure the fulfilment of its statutory duty but, rather, would result in its admitted responsibilities being discharged in a haphazard and arbitrary manner by the elevation of that particular strip to an unjustified priority in its road repair programme. The High Court granted an order of mandamus and held that, as the Oireachtas had imposed a statutory duty on local authorities, it was required to provide the means of fulfilling that duty. On appeal, however, a majority of the Supreme Court quashed the order and held that the court should not make an order of mandamus against a public authority where it was acknowledged that the public authority did not have the means to comply with the order and where successful implementation of the order would depend on the co-operation of other bodies which were not before the court.[183]

88. Keane J., who delivered the judgment of the majority, referred to R. v. East Sussex C.C. *Ex p.* Tandy[184] where the House of Lords unanimously rejected a contention on behalf of the respondent local authority that the lack of resources available to it precluded the existence of any statutory duty to maintain the home tuition at a level required by a particular child's educational needs.[185] In particular, he quoted the following passage from the judgment of Lord Browne-Wilkinson:

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[182] Section 82 of the Local Government (Ireland) Act, 1898, provides that: *"[i]t shall be the duty of every county and district council, according to their respective powers, to keep all public works maintainable at the cost of their county or district in good condition and repair, and to take all steps necessary for that purpose."*

[183] In this context, Keane J. noted that the Oireachtas was not a party to the proceedings and presumed, having regard to the Separation of Powers, that it could not be a party. He also observed that neither the Government nor the Minister for the Environment was represented. While they possibly would, in response to an order for mandamus, provide the respondent with the necessary funds, he highlighted that neither the judgment of the High Court nor the arguments advanced on behalf of the applicants in the Supreme Court offered any guidance as to what was to happen if they did not.

[184] [1998] AC 714.

[185] The applicant was a schoolgirl who suffered from a condition called myalgic encephalomyelitis (ME) since she was seven, as a result of which she found it very difficult, and at times impossible, to attend school. The respondents, as

"... I believe your Lordships should resist this approach to statutory duties. First, the county council has as a matter of strict legality the resources necessary to perform its statutory duty under s.298. Very understandably it does not wish to bleed its other functions of resources so as to enable it to perform the statutory duty under s.298. But it can, if it wishes, divert moneys from other educational, or other applications which are merely discretionary so as to apply such diverted moneys to discharge the statutory duty laid down by s.298. The argument is not one of insufficient resources to discharge the duty but of a preference for using the money for other purposes. To permit a local authority to avoid performing a statutory duty on the grounds that it prefers to spend the money in other ways is to downgrade a statutory duty to a discretionary power."[186]

89. Keane J. stated that he "*would not quarrel with that approach in any way*",[187] but considered that it had no application to the circumstances of the case before the Court. He noted that there was no suggestion that the respondent could meet the huge financial costs of the road repair programme by diverting resources from other applications which were merely discretionary: *"closing down a public library in Cavan for a day or two each week is not going to have any significant effect on a repair bill of IR£30 million."* Keane J. was satisfied that, while the granting of mandamus is a discretionary remedy, the High Court Judge had erred in principle in the manner in which she exercised that discretion, *"having regard to the futility of granting the order where the respondent had not the means to carry out its undoubted statutory duty."*[188]

90. Murphy J. dissented from the judgment of the majority on the basis that the obligation imposed by the Oireachtas on local authorities to keep roads in good condition and repair was a statutory duty and could be enforced as such. He said that he had no

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the local education authority, were subject to a statutory duty to provide education for children in their area who by reason of illness could not otherwise have received it. In pursuance of the statutory scheme, the local authority provided five hours a week home tuition for the applicant. Following a cut in the local authority's home tuition budget from £100,000 a year to £25,000 a year, the hours of home tuition were reduced from five hours to three hours per week. It was acknowledged on behalf of the respondent that the cut had been dictated purely by financial considerations and not by the child's illness or educational needs.

[186] *Ibid.* at 749.

[187] [1999] 4 IR 99 at 110.

[188] *Ibid.*

difficulty in accepting and applying the following principle referred to in de Smith's *Judicial Review of Administrative Action*:

> *"Latitude will also often be given to a public body with respect to the manner and extent of their performance of their duties, particularly when resources are insufficient to satisfy all claims upon them; in these circumstances, judicial enforcement tends to be limited to situations in which reasonable efforts to perform had not been made."*[189]

91. Murphy J. referred to s.7(1) of the Local Government Act, 1991, which enjoins local authorities to have regard to a number of factors in the performance of their functions. He observed that these are largely sensible provisions with regard to consultation and co-operation with other bodies and the husbanding of precious resources, but stated that s.7(1) did not dilute the statutory burdens placed on the local authority. Any doubt in that regard was laid to rest by s.7(2) which provides that a local authority *"shall perform those functions which it is required by law to perform and [s.7] shall not be construed as affecting any such requirement."*

92. Murphy J. sympathised with the respondent in its effort to remedy a situation which possibly represented the result of neglect over a period of many years, and possibly was caused by or contributed to by geo-technical factors peculiar to their area, without being given the resources or the means of raising the finances necessary to solve the problem. However, he considered that these factors could not change the nature of the statutory duty imposed on it. There was a mandatory requirement to repair the roads and the applicants had identified roads which had not been adequately repaired. At the very least, he concluded, *"the applicants must be entitled to a declaration that the respondent has failed in its statutory duty"*.[190] The question was whether the powers of the court were restricted to that limited and inadequate remedy. In this regard, Murphy J. referred with approval to the following passage from the judgment of Lord Browne-Wilkinson in the Tandy case:

> *"Parliament has chosen to impose a statutory duty, as opposed to a power, requiring the local authority to do certain things. In my judgment the courts should*

[189] de Smith's *Judicial Review of Administrative Action* (5th ed., 1995) at para. 16-010.

[190] [1999] 4 IR 99 at 119.

be slow to downgrade such duties into what are, in effect, mere discretions over which the court would have very little real control. If Parliament wishes to reduce public expenditure on meeting the needs of sick children then it is up to Parliament so to provide. It is not for the courts to adjust the order of priorities as between statutory duties and statutory discretions."[191]

93. Murphy J. stated that *"likewise ... the obligation imposed by the Oireachtas on local authorities in relation to the maintenance and repair of public roads is a duty and must be performed and may be enforced as such."*[192] Murphy J. had no doubt that the discretion to grant an order of mandamus *"should be exercised sparingly in relation to the affairs of a local authority and, in particular, should not be granted at all where any doubt exists as to the existence of a duty or the adequacy of its performance".*[193] In Brady, however, it was common case that the duty to repair existed and, whatever doubt existed as to the standard a local authority was required to achieve, it was clear that the condition of the road in question fell far short of that standard and the respondent did not suggest otherwise. In the circumstances, he held that the applicants were entitled to the relief granted by the High Court.

94. The extent to which the 1996 Act qualifies the duties of a health board under the 1970 Act was also considered by O'Caoimh J. in O'Brien v. South West Area Health Board.[194] As noted above, in O'Brien, the applicants sought, *inter alia*, a declaration that the failure of the respondent health boards to provide domiciliary midwife services (whether by way of direct provision of the service or by defraying all or part of the costs which the applicants were obliged to incur in purchasing such services from an independent domiciliary midwife) constituted a breach of their obligations under s.62 of the 1970 Act. It was argued that the costs of paying for a midwife to assist in a home confinement were less than those of a delivery in a hospital and, on that basis, the policy of the respondents contravened s.2(1) of the 1996 Act. In this context, the applicants relied upon the English cases of R. v. Barnett London Borough Council,[195] R. v. East Sussex

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[191] [1998] AC 714 at 749.

[192] [1999] 4 IR 99 at 124.

[193] *Ibid.* This passage from the judgment of Murphy J. was quoted with approval by Morris P. in Folen v. Garvan, unreported, High Court, 9 November 2001.

[194] Unreported, High Court, (O'Caoimh J.), 2 September 2002.

[195] [2001] 2 FLR 877.

C.C. *ex p.* Tandy[196] and R. v. Gloucestershire County Council, *ex parte* Barry.[197] O'Caoimh J. considered that not much assistance could be derived from those authorities.[198] However, he *"accept[ed] that if a clear statutory obligation exists, ...economic considerations cannot over-ride the requirement of the section and [he was] satisfied that s.2 of the Health (Amendment) No. 3 Act, 1996 cannot be construed as over-riding any clear statutory obligation to provide a specific service."*[199]

95. On appeal, the health board served a notice of cross-appeal from so much of the judgment and order of the High Court as held and ordered that:

> *"1. That the provisions of section 2 of the Health (Amendment) (No. 3) Act, 1996 do not qualify the statutory duty imposed on a health board pursuant to the provisions of section 62 of the Health Act, 1970, and*
>
> *2. that the provisions of section 2 of the Health (Amendment) (No. 3) Act, 1996 cannot be construed as overriding any clear statutory obligation to provide a specific service by a health board in the discharge of its statutory functions or obligations."*

96. It is notable that the Supreme Court expressly declined to consider the cross-appeal. Geoghegan J. commented that *"[t]he cross-appeal raises such wide issues that it would be unwise to express any view on them as a moot"* and that *"[i]f [the] court [was] disposed towards dismissing the appeals, it [was] neither necessary nor desirable to consider the cross-appeal."*[200] The Court ultimately dismissed the appeals and, accordingly, it declined to consider the cross-appeal.

97. Two relatively recent decisions - Kavanagh v. Legal Aid Board[201] and O'Donoghue v. Legal Aid Board[202] concerning section 5 of the Civil Legal Aid Act, 1995 are also of

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[196] [1998] AC 714.

[197] [1997] AC 584.

[198] It is worth noting that the decision of the Supreme Court in Brady was not considered in the judgment of O'Caoimh J.

[199] At p. 34 of the unreported judgment. (Emphasis added).

[200] Unreported, Supreme Court, 5 November 2003 at page 3 of the judgment.

[201] High Court, October 24, 2001.

[202] Unreported, High Court, 21 December 2004.

assistance in this regard. In both cases, the plaintiff contended that the Board had been guilty of a breach of statutory duty because it failed to exercise the function conferred upon it under section 5 of the 1995 Act within a reasonable time. The importance of these cases is that section 5 contains a saver which makes the carrying out of the principal function of the Board subject to the resources available to it. In both cases, claims for breaches of statutory duty were rejected.

98. In Kavanagh, the applicant applied to the Board for legal aid in connection with an application for judicial separation on 23 September 1997. By letter of the same date, the Board indicated that, on account of the demand for legal services in the Tallaght law centre, it was not in a position even to process her application at that time. It was not until almost 20 months later, in May 1999, that her application was processed and granted. In the meantime, in October, 1997, the applicant completed an application for legal services in connection with another matter and was given an appointment with a solicitor under the Board's private practitioner scheme. This scheme was operated by the Board in respect of certain proceedings in the District Court, whereby legal services were provided through private solicitors who were not employees of the Board. In April 1998, a further similar application was made and both applications were granted. While awaiting the outcome of her application for legal aid in relation to the judicial separation proceedings, the applicant was forced to leave the family home because of a violent incident. The court did not see any connection between the applicant being forced to leave home and the delay in the judicial separation proceedings as legal aid was available to her under the private practitioner scheme. The court found that, as a matter of fact, what was suffered by the applicant arising out of the delay in the processing of her application for legal aid in connection with the judicial separation proceedings was the ordinary inconvenience caused by any such delay, namely, not having such an important matter dealt with promptly and not having her affairs settled. By the time the matter came before Butler J., the judicial separation proceedings had been disposed of and the only issue remaining for the court was the question of damages. In the course of his judgment, Butler J. made the following observations:

> *"The grounds upon which relief is sought in these proceedings are entirely based upon an alleged breach of statutory duty. No question arises as to any rights to which the Applicant may be entitled by virtue of the Constitution or by any*

international convention. The claim is solely based upon rights and duties arising from the Legal Aid Act, 1995."

99. Butler J. then proceeded to examine the effect of section 5 of the Act:

> *"I am satisfied that the language of section 5 (1)... is plain and obvious and requires no special interpretation. The Board shall provide, within its resources and subject to other provisions of the Act legal aid to persons who satisfy the requirements of the Act. The words simply mean that legal aid shall be provided within the Board's resources and I am fully satisfied on the basis of the Affidavits (and it seems to me that there is no controversy on this aspect of the matter) that that is precisely what the Board did in this case. The Board had a method of dealing with cases in a certain order of priority and within that scheme the Applicant was given equal treatment to all other Applicants."*[203]

100. The same view was taken by Kelly J. in O'Donoghue where the delay was of the order of two years:

> *"The statutory obligation imposed upon it is not an absolute one. It requires it to carry out its functions within its resources. In the present case there is in my view no doubt but that the delay encountered by the plaintiff was caused exclusively because of the lack of resources made available to the Board. Those lack of resources were directly responsible for the 25 month delay between her first going to the law centre and the grant of the legal aid certificate to which she was undoubtedly entitled.... If the plaintiff here made a claim solely by reference to an alleged breach of statutory duty on the part of the Board (excluding the provisions of s. 28 (5)), she would in my view have to meet a similar fate. The Board in this case did all it could to provide for her and indeed other persons within its resources. The sole cause of the delay encountered by the plaintiff was the lack of resources of the Board. It is hard to think that it could have done anymore than it did to acquaint the relevant parties with its precarious position. The failure to address that position was not the fault of the Board."*

[203] At page 4 of the judgment.

101. Ultimately, however, Kelly J. awarded the plaintiff damages for breach of her constitutional rights, even though she failed in her claim for breach of statutory duty. That was because he found that she had a constitutional entitlement to legal aid in respect of her family law proceedings. Of course, the latter consideration could only arise in the very unlikely context - subject to Article 35 EUFCR - where there was a constitutional right to health care.

102. In the light of the above, it is appropriate to consider how a court might address an application for relief in respect of a health board's alleged failure to fulfil its obligations under the statutory framework for the provision of nursing home care. Notwithstanding the (presumed) invalidity of the Subvention Regulations and Article 4 of the 1993 Regulations, we believe that it is far from certain that a plaintiff would succeed in establishing such a breach of statutory duty on the part of a health board. Any such question would have to be examined in the light of the board's concomitant obligations under the 1996 Act.

103. In our view, there are strong grounds for contending that the duty under s.52 is not absolute in that it is qualified by the terms of the 1996 Act which replaced substantially all of the relevant provisions in Part II, Chapter III (headed "*Finance*"), of the 1970 Act.[204] In this regard, it is appropriate, first, to consider the ambit of s.2(1)(a) and (d) of the 1996 Act. These provisions effectively mirrored s.7(1)(a) and (e) of the Local Government Act, 1991, to which Murphy J. referred in Brady v. Cavan County Council. As noted above, Murphy J. highlighted that it was clear from s.7(2) that the obligation to have regard to the matters referred to in s.7(1) did not dilute the statutory burdens on the local authority. Section 7(2) provides that a local authority *"shall perform those functions which it is required by law to perform and [s.7] shall not be construed as affecting any such requirement."* Section 2 of the 1996 Act contains no such provision, however, and it could be argued, therefore, that the Legislature, aware of the similar provisions of the 1991 Act, consciously allowed for the dilution of the statutory duties of health boards insofar as such duties may impinge upon their financial responsibilities pursuant to s.2 and the other provisions of the 1996 Act. The legislative history of the 1996 Act would

[204] Part II, Chapter III of the 1970 Act comprised ss.27 – 33. Sections 27, 30, 31 and 32(2) – (10) of the 1970 Act were repealed by s.23 of the 1996 Act. Section 33(1) of the 1970 Act was substituted by the s.17(d) of the 1996 Act.

appear to support this view.[205] On the other hand, it could be argued that the omission of a provision similar to s.7(2) from s.2 was an oversight of the Legislature and that, in any event, a health board is merely required to "*have regard*" to the factors referred to therein. However, this argument overlooks the comprehensive framework for the control of health board expenditure provided for elsewhere in the 1996 Act (summarised above at paragraph 84).[206] It is clear from those provisions that health boards operated under *very real* financial constraints and were very much under the control of the Minister. In our view, therefore, the health board's obligations under the legislative framework for the provision of nursing home services must be read in conjunction with its substantial obligations under the 1996 Act. Indeed, it is arguable that in the event of a conflict between those obligations, those arising under the latter should prevail. In this context, it is appropriate to highlight that *"[e]very enactment relating to a function of a health board [must] be construed and have effect subject to the provisions of [s.2 of the 1996 Act]".*[207] It is also appropriate to reiterate the comprehensive nature of the financial controls provided for under that Act.

104. Furthermore, in Brady v. Cavan County Council, the Supreme Court refused to make an Order of Mandamus against the Respondent County Council directing it to carry out its statutory duty of repairing roads because, *inter alia*, it was apparent that the County Council's budget simply could not meet the demand. The figure involved was so huge that it could not be accommodated within the entire budget and would have required self-defeating and unrealistic increase in the rates to many multiples of the existing high level which could not realistically be sustained by the already narrow rating base.

105. On this basis, it might be argued that the 1990 Act is something of an irrelevance. If it did not exist, the fact would remain that there was insufficient places within the public system and no more money could be provided within the budget. In those circumstances, it may be that the best health boards could do was to allocate the places on a first-come, first-served, basis and maintain a waiting list as, indeed, occurs for other

[205] See generally the notes on the enactment of the 1996 Act in the 1996 *Irish Current Law Statutes Annotated*. However, a court would not have regard to the parliamentary debates in construing s.2: see Crilly v. T & J Farrington [2001] 3 IR 251.

[206] When the Bill was being debated in the Seanad, the Minister stated that ss.5-9 thereof provided "the key tools in the planning and management of services and in the control of expenditure". (See 148 Seanad Debates, Col 2064.). Again, *cf.* Crilly v. T & J Farrington [2001] 3 IR 251.

[207] 1996 Act, s.2(3). (Emphasis added).

in-patient services. Viewed in that light, the fact that persons who opt for, or even are forced to pay for, private care, but nevertheless receive some subvention towards such care, is arguably an amelioration of an admittedly difficult situation. It is also true that a court will be slow to attempt to restructure an entire health board budget and insist on a different allocation of scarce resources.

106. At first sight, therefore, Brady, coupled with the 1996 Act, might be thought to provide a defence to any claim based on a breach of statutory duty. However, that conclusion must be qualified. Brady was an exceptional case. It turned, to some extent, on the nature of the particular remedy sought (mandamus), the fact that central government was not a party to the proceedings and that the figure involved was one which simply could not be accommodated within the budget of the County Council but, rather, would have required a multiple of its existing budget. Furthermore, there was no suggestion that there was any arbitrariness or unfairness in the manner in which the limited resources were being allocated.[208] The Supreme Court, however, did not doubt the general proposition that a statutory duty had to be complied with and could not be demoted to the status of a discretionary power. It was simply the scale and magnitude of the amount needed in Brady which led to a different conclusion.

107. In our view, there are strong grounds for contending that 1996 Act did, in particular by s.2(3), qualify the statutory duty created by s.52 of the 1970 Act. However, it is appropriate to highlight that s.2(3) merely required that such duties be construed as having effect subject to the provisions of this section (and not the Act as a whole). Section 2 merely required the Board to *"have regard to [inter alia] the resources, wherever originating, which are available ... [and] the need to secure the most beneficial, effective and efficient use of such resources.*[209] Moreover, as noted above, in O'Brien v. South West Area Health Board,[210] O'Caoimh J. stated (albeit *obiter*) that if a clear statutory obligation exists, economic considerations cannot over-ride the requirement of the section and, also, that s.2 of the 1996 Act cannot be construed as over-riding any

[208] Indeed, as noted above, one of the grounds upon which the respondent opposed the application in Brady was that to select one strip of roadway from several hundred in very poor condition would not ensure the fulfilment of its statutory duty but, rather, would result in its admitted responsibilities being discharged in a haphazard and arbitrary manner by the elevation of that particular strip to an unjustified priority in its road repair programme.

[209] Emphasis added.

[210] Unreported, High Court, (O'Caoimh J.), 2 September 2002; Unreported, Supreme Court, 5 November 2003.

clear statutory obligation to provide a specific service.[211] It is, however, important to note that the Supreme Court expressly declined to consider this issue in that case. It is also notable in this context that the Supreme Court declined to consider the following grounds of appeal in C.K. v. Northern Area Health Board:[212]

> *"5. the statutory duty imposed on a health board pursuant to the provisions of s. 56 of the Health Act 1970, as amended, are [sic.] qualified by the provisions of s. 2 of the Health (Amendment) (No. 3) Act 1996;*
>
> *6. the statutory duty imposed on a health board pursuant to the provisions of s. 50 of the Health Act 1970, as amended, are [sic.] qualified by the provisions of s. 2 of the Health (Amendment) (No. 3) Act 1996 ...."*

108. Clearly, therefore, the Supreme Court has not yet expressed a definitive view on the issue of whether the 1996 Act qualified the statutory duty created by s.52 of the 1970 Act. As indicated above, we consider that there are strong grounds for contending that it did effect such a qualification. Nevertheless, we believe that a broad brush lack-of-financial resources argument would be unlikely, of itself, to provide a valid defence to a claim that a health board had breached its statutory duty by its failure to provide particular health services to persons entitled to such services. Rather, we believe that health boards would have to establish that their failure in this regard was caused by the adoption of a scheme of allocating limited resources in the most "*effective and efficient*" way. It seems unlikely that any *ad hoc* system of allocating resources could satisfy that test. If a health board could show that the allocation of resources was the subject of some rational allocation – e.g. that every space coming available in the public system was offered to persons with full eligibility in a subvented place, with some facility for dealing with particular hardship cases – that might, we think, survive constitutional scrutiny since the allocation of resources would not be arbitrary or discriminatory. In order to successfully advance a resources-based argument in relation to a claim for breach of statutory duty, it would be essential that health boards / the Health Service Executive are in a position to adduce evidence establishing that they made decisions in respect of the provision of nursing home services having regard to the resources which were available to them and on the basis of a plan which in their view achieved the most

[211] O'Brien v. South West Area Health Board, unreported, High Court, 2 September 2002.

[212] [2002] 2 IR 545 (High Court); [2003] 2 IR 544 (Supreme Court).

effective and efficient allocation of those resources in the light of their various statutory obligations.

109. To date, however, the system appears to have been so incoherent, inconsistent and lacking in overall guidance and with such significant disparity of treatment afforded to otherwise similar members of the public that the scheme and the decisions made under it are inherently vulnerable to challenge.

(c) The duties of health boards under secondary legislation

110. Establishing a breach of statutory duty on the part of the health boards is not simply a factor of their multifarious obligations under Acts of the Oireachtas. A plaintiff would also have to address the nature of the health board's obligations under secondary legislation. It is arguable that until a statutory instrument has been amended in relevant part, repealed or declared invalid by the courts, the health boards were required to comply with its provisions. In McDonnell v. Ireland[213] O'Flaherty J. considered the obligation to comply with statutory provisions as follows:

> *"The correct rule must be that laws should be observed until they are struck down as unconstitutional. From [the date upon which a Bill becomes law], all citizens are required to tailor their conduct in such a way as to conform with the obligations of the particular statute. Members of society are given no discretion to disobey such law on the ground that it might later transpire that the law is invalid having regard to the provisions of the Constitution. Every judge on taking office promises to uphold 'the Constitution and the laws'; the judge cannot have a mental reservation that he or she will uphold only those laws that will not someday be struck down as unconstitutional. We speak of something having the 'force of law'. As such, the law forms a cornerstone of rights and obligations which define how we live in an ordered society under the rule of law."*[214]

111. In Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry,[215] Lord Reid stated that *"an order made under statutory authority is as much the law of the land*

[213] [1998] 1 IR 134.

[214] *Ibid.*, at 143 – 144.

[215] [1975] AC 295.

as an Act of Parliament unless and until it has been found to be ultra vires".[216] Similarly, Lord Morris stated that the order at issue "*undoubtedly ha[d] the force of law*" and that *"[o]bedience to it was just as obligatory as would be obedience to an Act of Parliament."*[217] Lord Diplock stated that *"unless there is such challenge and, if there is, until it has been upheld by a judgment of the court, the validity of the statutory instrument and the legality of acts done pursuant to the law declared by it are presumed."*[218]

112. In this light, where a health board failed to provide health services in accordance with it obligations under one Act as a result of its *bona fide* attempts to comply with its obligations under secondary legislation made pursuant to another Act, which in some respects at least conflicts with the former Act, it is far from certain that a court would conclude that the health board had thereby acted in breach of its statutory duties. In this regard, the plaintiff would be venturing into relatively uncharted waters since the precise extent of a health board's obligations in these circumstances has yet to be considered by the Irish courts.

(d) Possible reliefs

113. Even if a plaintiff were to surmount the obstacles outlined above and to succeed in establishing that a health board had acted in breach of its statutory responsibilities, it is an entirely separate question as to what relief would be granted as against the board / the State. In this regard, the decision of the Supreme Court in Brady is particularly significant. Although at first glance, the decision of the majority in this case appears to provide a measure of security to health boards, it arguable that this decision would not shield a health board from a properly mounted claim against it.

114. First, a core part of the reasoning of the majority was that implementation of an order of mandamus would depend on the co-operation of bodies (including the Minister for the Environment) who were not before the Court. It is very likely that the relevant parties and, in particular, the Minister for Health and Children, would be joined to any proceedings concerning a failure by a health board to fulfil its statutory duties, in

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[216] *Ibid.* at 341.

[217] *Ibid.* at 349.

[218] *Ibid.* at 365. See, also, Factortame Ltd. v. Secretary of State for Transport [1990] 2 AC 85 *per* Lord Bridge at 141; and Bennion, *Statutory Interpretation* (3rd ed., Butterworths) at p.185.

particular since the board would have been acting in purported discharge of its obligations under regulations made by that Minister.

115. Secondly, Brady involved an application for an order of mandamus which the courts have traditionally been very reluctant to grant. It is unlikely that proceedings against a health board / the Health Service Executive in respect of a failure to fulfil statutory duties would hinge upon such an application; it is likely that, *inter alia*, declaratory relief would be sought and, if granted, it would ultimately have the same effect as an order for mandamus (since there would be no question of the health board refusing to comply with an order of the Court). In Brady, Murphy J. observed that the applicants in that case were *"at the very least ... entitled to a declaration that the respondent ha[d] failed in its statutory duty".*[219] (In view of the considerations referred to above, however, it is far from certain that a court would even grant such a declaration in respect of a health board.)

116. Thirdly, even if an applicant were to seek an order of mandamus against a health board / the Health Service Executive, it is possible, even within the reasoning of the majority in Brady, that such would be granted. As noted above, Keane J. did not disagree *"in any way"* with the approach of Lord Browne-Wilkinson in Tandy. Lord Browne-Wilkinson stated that the respondent local authority in that case had, as a matter of strict legality, the resources necessary to perform its statutory duty but that it (very understandably) did not wish to bleed its other functions of resources so as to enable it to perform the statutory duty at issue. He observed that the respondent could, if it wished, divert moneys from other educational, or other applications which were merely discretionary so as to apply such diverted moneys to discharge that statutory duty. Thus, the argument was not one of insufficient resources to discharge the duty but of a preference for using the money for other purposes. He added that *"[t]o permit a local authority to avoid performing a statutory duty on the grounds that it prefers to spend the money in other ways is to downgrade a statutory duty to a discretionary power."*[220] In Brady, Keane J. was satisfied that there was no possibility of the respondent meeting the huge financial costs of the road repair programme by diverting resources from other applications which were merely discretionary. It follows, however, that if that possibility did exist, an order of mandamus *may* have been granted. Thus, notwithstanding the financial constraints

[219] Admittedly, Murphy J. dissented in Brady but this point was not addressed by the majority and it is difficult to see how they could have disagreed with his reasoning.

[220] [1998] AC 714 at 749.

upon the health board / the Health Service Executive, it is possible that a court would order it to fulfil its statutory duties in relation to the provision of nursing home services insofar the resources necessary to fulfil those duties could be diverted from other applications which are merely discretionary responsibilities.

117. If, however, no such resources are available and a court, nevertheless granted relief to an applicant against a health board / the Health Service Executive in respect of a failure to fulfil statutory duties, the board / Health Service Executive would, in principle, be entitled to recoup the additional expenditure resulting from the performance of those duties from the Minister for Health and Children. As noted above, the absence of bodies (in particular, the Minister for the Environment) whose co-operation was necessary for the implementation of an order of mandamus was central to the decision of the majority in Brady that such relief should not be granted in that case. It would appear from the judgment of Keane J. that if they had been present and if the court were to exercise its discretion to grant an order of mandamus, it would fall to such bodies to provide the respondent County Council with the funding necessary for the discharge of its statutory responsibilities. Keane J. commented that *"[i]t may be ... that these bodies would, in response to the order, provide the respondent with the necessary funds."*[221] However, neither the judgment of the High Court nor the arguments advanced on behalf of the applicants in the Supreme Court offered any guidance as to what was to happen if they did not. Accordingly, he was not disposed to hold *"that the court should bring the rigours of mandamus to bear on a public authority where it is acknowledged that it has not the means to comply with the order and that its successful implementation depends on the co-operation of other bodies who are not before the court."*[222]

118. Accordingly, if the Minister were a party to proceedings for breach of statutory duty against a health board, (or the State was otherwise represented in such proceedings), there is a strong likelihood that a court would hold that insofar as the health board was found to have breached its statutory duties, the financial repercussions thereof lie exclusively with the Minister (or the State). This is particularly so when both the existence of those duties and the Board's inability to comply with them have resulted from the activities of the Minister and/or the Oireachtas. Thus, insofar as it is incumbent upon health boards to comply with duties provided for by the Oireachtas and/or the

[221] [1999] 4 IR 99 at 106.

[222] *Ibid.*

Minister, it can be strongly argued that it is equally incumbent upon either or both of those bodies to provide health boards with the financial resources necessary for the discharge of those duties.

(iii) Cause of action in unjust enrichment

119. Quite apart from the foregoing and any question of whether a cause of action for breach of statutory would lie, there is a strong likelihood that the State will be faced with actions for damages on the basis that it has been unjustly enriched at the expense of persons who were forced to avail of private nursing home services and merely received a subvention towards the cost thereof notwithstanding the fact that they had (or have) full eligibility for in-patient services and thus an entitlement to the receipt of such services free of all charges. In this context, the following passages from the judgment of the Supreme Court in In re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill, 2004[223] merit note:

> *"This Court is satisfied that our law recognizes a cause of action for restitution of money paid without lawful authority to a public authority. Material elements may be whether the money was demanded colore officii, whether it was paid under a mistake of law, whether the parties were of equal standing and resources, whether the money was paid under protest and whether it was received in good faith. The decision of this Court in Rogers –v- Louth County Council [1981] IR 265 may be relevant. It is not appropriate, in the context of the present reference, to expound the precise contours of that cause of action, in the absence of evidence of particular cases. It will be apparent that a large number of patients who paid unlawful charges enjoy such a cause of action.*
>
> *For the purposes of applying these principles to the cases of the patients concerned with the effects of the Bill, the Court naturally does not have the benefit of evidence regarding the actual circumstances in which individual patients paid charges levied by Health Boards without lawful authority. It is in a position, nonetheless, to draw sufficient inferences from the legislative history and the common experience of all members of our society. While we were informed that some patients protested at having to pay charges, it seems highly unlikely that,*

[223] Unreported, Supreme Court, 16 February 2005.

having regard to the category of persons involved, this happened to any significant extent. The patients in question necessarily belong to the most vulnerable section of society. They are, for the most part old or very old; they are, in many cases, mentally or physically disabled; they are also, very largely, in poor financial circumstances. They are most unlikely to have been aware of the provisions of the Health Acts or their rights to services or the terms on which they are provided."

(iv) Potential defences

120. Against this background, the potential defences of the Statute of Limitations, *laches* and change of position merit note.

(a) Statute of Limitations

121. An action for damages for breach of statutory duty is a tort and section 11(2) of the Statute of Limitations, 1957,[224] as inserted by the Statute of Limitations (Amendment) Act, 1991,[225] ("*the 1991 Act*") provides that *"[s]ubject to [s.11(2)(c)] and to s.3(1) of [the 1991 Act], an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued"*. Neither s.11(2)(c) of the 1957 Act[226] nor s.3(1) of the 1991 Act[227] have any bearing on the issues in respect of which advice is sought and, accordingly, insofar as the contemplated proceedings are founded on tort, the time period under the Statutes of Limitation is a period of six years from the date on which the cause of action accrued. A cause of action encompasses *"every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court"*.[228] It is settled that where a wrongful act is actionable *per se*, without proof of actual damage,[229] the period prescribed by the 1957 Act runs from the time that the act is committed. However, where, as in the case of an action for breach of statutory duty, the tort is actionable only on proof of damage, the limitation period does not begin to run until some damage has occurred. As Griffin J. explained in

[224] As substituted by the Statute of Limitations (Amendment) Act, 1991, s.3(2).

[225] No. 18 of 1991.

[226] Section 11(2)(c) is concerned with an action claiming damages for slander.

[227] Section 3(1) of the 1991 Act introduced a special time limit for actions in respect of personal injuries.

[228] Per Lord Esher M.R. in Read v. Brown (1888) 22 QBD 128 at 131; implicitly accepted by Finlay C.J. in Hegarty v. O'Loughran [1990] 1 IR 148.

[229] E.g., libel, assault or other trespass to the person or trespass to land or goods.

Hegarty v. O'Loughran[230] (in addressing the meaning of the words *"from the date on which the cause of action accrued"* in s.11(2)(b) of the 1957 Act):[231]

> *"The period of limitation begins to run from the date on which the cause of action accrued, i.e. when a complete and available cause of action first comes into existence. When a wrongful act is actionable per se without proof of damage, as in, for example, libel, assault, or trespass to land or goods, the statute runs from the time at which the act was committed. However, when the wrong is not actionable without actual damage, as in the case of negligence, the cause of action is not complete and the period of limitation cannot begin to run until that damage happens or occurs. In personal injury cases the time at which the wrongful act is committed and the time at which the damage occurs will very frequently coincide. For example, where a person involved in a motor accident, or an employee who falls from a scaffold or becomes entangled in a machine in a factory, sustains injuries such as fractured limbs, head injuries, severe lacerations, extensive bruising and the like, it will be apparent that damage has been caused to such person by the wrongful act at the time of its commission, and time will begin to run from that date. ...*
>
> *The relevant date under the subsection is the date on which the cause of action accrues. Until and unless the plaintiff is in a position to establish by evidence that damage has been caused to him, his cause of action is not complete and the period of limitation fixed by that sub-section does not commence to run"*[232]

122. As regards actions in unjust enrichment, section 11(1) of the 1957 Act provides, *inter alia*, that *"[t]he following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued – ... (b) actions founded on quasi-contract ...."*. Accordingly, insofar as the contemplated proceedings are founded on quasi-

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[230] [1990] 1 IR 148.

[231] Section 11(2)(b) provided that *"[a]n action claiming damages for negligence, nuisance or breach of duty (Whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision), where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, shall not be brought after the expiration of three years from the date on which the cause of action accrued."* (Section 11(2)(a) and (b) were substituted by s.11(2)(a), as inserted by the 1991 Act).

[232] [1990] 1 IR 148 at 158.

contract, an action which is also referred to – and more accurately described as – an action in unjust enrichment or restitution, the time period under the Statutes of Limitation is a period of six years from the date on which the cause of action accrued.

123. It should, however, be noted that Part III of the Statute of Limitations provides for the extension of limitation periods in cases of, *inter alia*, disability. For the purposes of the Act, a person is under a disability "*while ... he is of unsound mind*".[233] Section 49(1)(a) provides that *"[i]f, on the date when any right of action accrued for which a period of limitation is fixed by this Act, the person to whom it accrued was under a disability, the action may, subject to the subsequent provisions of this section, be brought at any time before the expiration of six years from the date when the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation has expired."* It is likely that the foregoing will preclude the State from successfully invoking the Statute of Limitations in many of the proceedings which are envisaged.

(b) Laches and Change of Position

124. The State may, however, have good grounds for invoking the defences of laches and Change of Position. In Murphy v. Attorney General,[234] Henchy J. observed that *"[o]nce it has been judicially established that a statutory provision enacted by the Oireachtas is repugnant to the Constitution, and that it therefore incurred invalidity from the date of its enactment, the condemned provision will normally provide no legal justification for any act done or left undone, or for transactions undertaken in pursuance of it; and the person damnified by the operation of the invalid provision will normally be accorded by the Courts all permitted and necessary redress."*[235] Critically, however, Henchy J. added that *"it is not a universal rule that what has been done in pursuance of a law which has been held to have been invalid for constitutional or other reasons will necessarily give a good cause of action."*[236] The reasoning of Henchy J. in this regard (with which Griffin

[233] Section 48(1)(a).

[234] [1982] IR 241.

[235] [1982] IR 241 at 313. In this regard, Henchy J. stated that "*for example, when this Court, in June, 1971, in In re Haughey* [1971] IR 217 *declared s.3.4, of the Committee of Public Accounts of Dail Eireann (Privilege and Procedure) Act, 1970, to be unconstitutional, it proceeded, by way of ancillary relief, to quash a conviction and sentence that had been made and imposed in March, 1971, in pursuance of the condemned statutory provision.*"

[236] [1982] IR 241 at 314. (Citing *The State (Byrne) v Frawley* [1978] IR 326).

and Parke JJ. agreed) is significant. The following passages from his judgment merit particular note:

> *"While it is central to the due administration of justice in an ordered society that one of the primary concerns of the Courts should be to see that prejudice suffered at the hands of those who act without legal justification, where legal justification is required, shall not stand beyond the reach of corrective legal proceedings, the law has to recognize that there may be transcendent considerations which make such a course undesirable, impractical, or impossible.*
>
> *Over the centuries the law has come to recognize, in one degree or another, that factors such as prescription (negative or positive), waiver, estoppel, laches, a statute of limitation, res judicata, or other matters (most of which may be grouped under the heading of public policy) may debar a person from obtaining redress in the courts for injury, pecuniary or otherwise, which would be justiciable and redressable if such considerations had not intervened. To take but two examples, both from a non-constitutional context, where a judicial decision is overruled by a later one as being bad law, the overruling operates retrospectively, but not so as to affect matters that in the interval between the two decisions became res judicatae in the course of operating the bad law[237] or to undo accounts that were settled in the meantime in reliance on the bad law.[238]*
>
> *For a variety of reasons, the law recognizes that in certain circumstances, no matter how unfounded in law certain conduct may have been, no matter how unwarranted its operation in a particular case, what has happened has happened and cannot or should not, be undone. The irreversible progressions and bye-products of time, the compulsion of public order and of the common good, the aversion of the law from giving a hearing to those who have slept on their rights, the quality of legality – even irreversibility – that tends to attach to what has become inveterate or has been widely accepted or acted upon, the recognition that even in the short term the accomplished fact may sometimes acquire an inviolable sacredness, these and other factors may convert what has been done under an unconstitutional, or otherwise void law into an acceptable part of the corpus juris.*

[237] Citing Thomson v St Catherine's College, Cambridge [1919] AC 468.

[238] Citing Henderson v Folkestone Waterworks Co (1885) 1 TLR 329.

This trend represents an inexorable process that is not peculiar to the law, for in a wide variety of other contexts it is either foolish or impossible to attempt to turn back the hands of the clock. As an eminent historian vividly put it, speaking of the pointlessness of seeking to undo or reshape the facts of history: 'The statute has taken its shape and can never go back to the quarry.'

...

In my judgment, the plaintiffs' right to recover the sums by which they claim the State was unjustly enriched, by the collection of the taxes that have now been unconstitutionally imposed, begins for the year 1978-9, that is, the first year for which they effectively objected to the flow of those taxes into the central fund. Up to that year the State was entitled, in the absence of any claim of unconstitutionality, to act on the assumption that the taxes in question were validly imposed, that they were properly transmissible to the central fund, and that from there they were liable to be expended, according to the will of Parliament, for the multiplicity of purposes for which drawings are made on the central fund of the State. Equally, every taxpayer whose income tax was deducted from his earnings throughout a particular tax year, no matter how grudgingly or unwillingly he allowed the deductions to be made from his weekly or monthly income, could not avoid having imputed to him the knowledge that the tax he was paying was liable to be immediately spent by the State. As time went by, his right to complain of the State's unjust enrichment ran the risk of being extinguished by laches on his part.

...

It is one of the first principles of the law of restitution on the ground of unjust enrichment that the defendant should not be compelled to make restitution, or at least full restitution when, after receiving the money in good faith, his circumstances have so changed that it would be inequitable to compel him to make full restitution.

...

it is beyond question that the State in its executive capacity received the moneys in question in good faith, in reliance on the presumption that the now-condemned sections were favoured with constitutionality. In every tax year from the enactment of the Income Tax Act, 1967, until the institution of these proceedings in March, 1978, the State justifiably altered its position by spending the taxes thus collected and by arranging its fiscal and taxation policies and programmes accordingly.

At the end of each tax year up to and including the tax year 1977-78, those charged by the State with auditing, controlling or planning the finances of the State were, in the absence of any formulated proceedings or any other sound reason for doubting the validity of the taxes in question, entitled to close their books for that year in the justified assurance that, if any of the taxes that had been collected, allocated, spent or been made the basis of projections for future taxation or fiscal policy, were to become at some future date judicially faulted for having been unconstitutionally exacted, restitution of those taxes would not be ordered.

For a variety of reasons it would be inequitable, if not impractical, to expect restitution. Each tax year involves a different group of taxpayers, if only because of the deaths of some taxpayers and the accession of new persons to the lists of taxpayers. Restitution could be effected only by means of a special statutory provision, which would involve the imposition of fresh taxation to meet what would become an unquantifiable number of claims with the passage of time. The primary purpose of an order of restitution is to restore the status quo, in so far as the repayment of money can do so. But when, as happened here, the State was led to believe, by the protracted absence of a claim to the contrary, that it was legally and constitutionally proper to spend the money thus collected, the position had become so altered, the logistics of reparation so weighted and distorted by factors such as inflation and interest, the prima facie right of the taxpayers to be recouped so devalued by the fact that, as members of the community, and more particularly as married couples, they had benefited from the taxes thus collected, that it would be inequitable, unjust and unreal to expect the State to make full restitution."[239]

125. The following passage from the judgment of Griffin J. also merits note:

"When a statute has been declared to be void ab initio, it does not necessarily follow that what was done under and in pursuance of the condemned law will give to a person, who has in consequence suffered loss, a good cause of action in respect thereof. Notwithstanding the invalidity of the statute under which such act was done, the Courts recognise the reality of the situation which arises in such cases, and that it may not be possible to undo what was done under the invalid statute - as it was put so succinctly during the argument, 'the egg cannot be

[239] Emphasis added.

unscrambled.' In regard to this aspect of the case, and the plaintiffs' right to recover the sums collected from them in excess of those which should properly have been collected from them if their incomes had not been aggregated, I have had the advantage of reading in advance the judgment of Mr Justice Henchy and I agree with his conclusions and the reasons which he has stated therefor."[240]

126. The Supreme Court distinguished the Murphy case in the Article 26 Reference. Notably, however, in addressing the statement of Henchy J. that *"factors such as prescription (negative or positive), waiver, estoppel, laches, a statute of limitation, res judicata, or other matters (most of which may be grouped under the heading of public policy) may debar a person from obtaining redress in the courts for injury, pecuniary or otherwise, which would be justiciable and redressable if such considerations had not intervened"*, the Court stated as follows:

> *"Each of the circumstances here described is an instance of a defence to a lawful claim, which, therefore, presupposes the existence of a valid claim. It is, of course, possible that patients seeking recovery of charges unlawfully required of them would be met and perhaps defeated by some such defence."*[241]

127. The contours of the defence of change of position have been addressed in some detail by the House of Lords in recent years and it is likely that the Irish courts would have particular regard to its jurisprudence in any consideration of this defence in Irish law. In this light, it is appropriate to note the following passage from the judgment of Lord Goff in the seminal case of Lipkin Gorman (A Firm) v. Karpnail Ltd.:[242]

> *"I am most anxious that in recognising this defence [of change of position] to actions of restitution, nothing should be said at this stage to inhibit the development of the defence on a case by case basis, in the usual way. It is, of course, plain that the defence is not open to who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution and it is commonly accepted the defence should not be open to a wrongdoer. These are*

[240] *Ibid.* at 331. (Emphasis added).

[241] Page 63 of the judgment.

[242] [1981] 2 AC 548 at 558-559.

matters which can, in due course, be considered in depth in cases where they arise for consideration .... I do not wish to state the principle any less broadly than this: the defence is available to a person whose position is so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full. I wish to stress however that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred in the ordinary course of things. I fear that the mistaken assumption that mere expenditure of money may be regarded as amounting to a change of position for present purposes has led in the past to opposition by some to recognition of a defence which in fact is likely to be available only in comparatively rare occasions. In this connection I have particularly in mind the speech of Lord Simmonds in the Ministry of Health v. Simpson.[243],[244]

128. In our view, there are good grounds for contending that the State changed its position in relation to the payments which it received. Indeed, it might well be argued with some force in the case of the illegal health charges that the State changed its position by providing maintenance services in the expectation that the patient accepted the legality of the charges.

(v) Cause of action for breach of constitutional rights

129. As noted above, it is likely that reliefs will be claimed for breaches of constitutional rights and, in particular, the right to be held equal before the law. The significance of establishing a breach of constitutional rights can be illustrated by reference to the decisions in Parsons v. Kavanagh[245] and Lovett v. Gogan.[246]

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[243] [1951] AC 251 at 276. See also the decision of the Privy Council in Dextra Bank & Trust Co Ltd v Bank of Jamaica [2002] 1 All ER (Comm) 193 and the decision of the Court of Appeal in Cressman v Coys of Kensington [2004] All ER 69.

[244] Emphasis added.

[245] [1990] ILRM 561.

[246] [1995] 1 ILRM 12.

130. In Parsons v. Kavanagh,[247] the High Court (O'Hanlon J.) upheld the grant of an injunction by the Circuit Court to restrain the defendants from operating a rival bus passenger service on the basis that the defendants did not have the required licence under the Road Transport Acts, 1932-1933 and an injunction was necessary to vindicate the plaintiff's constitutional right to earn a livelihood. O'Hanlon J. referred to Murtagh Properties v. Cleary,[248] Yates v. Minister for Posts and Telegraphs[249] (in which Kenny J. referred to *"the constitutional right to earn a livelihood"*), *Murphy v. Stewart*[250] *and Byrne v. Ireland*[251] *and concluded that "the constitutional right to earn one's livelihood by any lawful means carries with it the entitlement to be protected against any unlawful activity on the part of an other person or persons which materially impairs or infringes that right."*[252]

131. The approach adopted by O'Hanlon J. was endorsed by the Supreme Court in Lovett v. Gogan,[253] the facts of which were similar to those in Parsons. Finlay C.J.[254] referred to the following passage from the judgment of Walsh J.[255] in Meskell v. CIE, where the Supreme Court held that breaches of constitutional rights sound in damages:[256]

> *"It has been said on a number of occasions in this Court, and most notably in the decision in Byrne v. Ireland, that a right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries within it its own right to a remedy or for the enforcement of it. Therefore, if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional*

[247] [1990] ILRM 561.

[248] [1972] IR 330.

[249] [1978] ILRM 22.

[250] [1973] IR 97.

[251] [1972] IR 241.

[252] [1990] ILRM 560 at 566. (Emphasis added).

[253] [1995] 1 ILRM 12.

[254] With whom the other members of the Court agreed.

[255] With which the other members of the Court agreed.

[256] [1972] IR 241.

right, that person is entitled to seek redress against the person or persons who have infringed that right."[257]

132. Finlay C.J. concluded that the Plaintiff is "*entitled to an injunction [restraining the defendants from operating bus passenger services] if he can establish that it is the only way of protecting him from the threatened invasion of his constitutional rights.*"[258] In the circumstances, Finlay C.J. had no doubt that an injunction was the only remedy which could protect him and, accordingly, dismissed the appeal against the grant of an injunction by Costello J.

133. It can be argued, however, that the constitutional rights at issue can be adequately vindicated at common law and, in these circumstances, it is unnecessary (and would be inappropriate) for the courts to devise causes of action based on breaches of such rights. In this context, the following passages from the judgment of Barrington J. in McDonnell v Ireland[259] are instructive:

> *"The general problem of resolving how constitutional rights are to be balanced against each other and reconciled with the exigencies of the common good is, in the first instance, a matter for the legislature. It is only when the legislature has failed in its constitutional duty to defend or vindicate a particular constitutional right pursuant to the provisions of Article 40.3 of the Constitution that this Court, as the court of last resort, will feel obliged to fashion its own remedy. If, however, a practical method of defending or vindicating the right already exists, at common law or by statute, there will be no need for this court to interfere.*
>
> *It is interesting to recall that during the hearing in Byrne v Ireland [1972] IR 241, the Supreme Court offered to adjourn the case if the Attorney General would give an undertaking that the Government would introduce legislation regulating the*

[257] [1995] 1 ILRM 12 at 20. In Meskell, Walsh J. continued as follows:

> *"As was pointed out by Mr Justice Budd in Educational Company of Ireland Ltd v. Fitzpatrick (No 2) ([1961] IR 345, 368) it follows that 'if one citizen has a right under the Constitution there exists a correlative duty on the part of other citizens to respect that right and not to interfere with it.' He went on to say that the Courts would act so as not to permit a person to be deprived of his constitutional rights and would see to it that those rights were protected."* [1973] IR 121 at 132 - 133. (Emphasis added).

[258] *Ibid.*

[259] [1998] 1 IR 141.

citizen's right to sue the State and that it was only when this undertaking was not forthcoming that the Court proceeded to fashion its own remedy.

There is no doubt that constitutional rights do not need recognition by the legislature or by common law to be effective. If necessary the courts will define them and fashion a remedy for their breach. There may also be cases where the fact that a tort is also a breach of a constitutional right may be a reason for awarding exemplary or punitive damages.

But, at the same time, constitutional rights should not be regarded as wild cards which can be played at any time to defeat all existing rules. If the general law provides an adequate cause of action to vindicate a constitutional right it appears to me that the injured party cannot ask the court to devise a new and different cause of action. Thus the Constitution guarantees the citizen's right to his or her good name but the cause of action to defend his or her good name is the action for defamation. The injured party, it appears to me, has to accept the action for defamation with all its incidents including the time limit within which the action must be commenced. Likewise the victim of careless driving has the action for negligence by means of which to vindicate his rights. But he must, generally, commence his action within three years. He cannot wait longer and then bring an action for breach of his constitutional right to bodily integrity."[260]

134. It is appropriate to note, however, that the foregoing analysis has not been consistently applied by the courts.

(v) Conclusion

135. Apart from challenges to the validity of article 4 of the 1993 Regulations and the Subvention Regulations (which we believe would be successful), there are, in principle, a number of grounds upon which proceedings against health boards / the State arising from the matters addressed herein could be successfully defended. This view is necessarily of a general nature, however, since the question of whether an individual case can be successfully defended is also a factor of the particular circumstances of that

[260] Emphasis added.

case and, perhaps, in particular the state of knowledge of the claimant and the express or implied representations were made to the claimant when payment was demanded.

VI CONCLUSION

136. The advices herein can be summarized as follows:

(i) Duties and rights in respect of the provision of nursing home services

(a) The Health Act, 1970, as amended

137. The import of the provisions of the 1970 Act and jurisprudence in respect thereof can be summarized as follows:

(i) Prior to their dissolution, health boards were under a statutory duty to make *"in-patient services"*[261] available to persons with *"full eligibility"*[262] and persons with *"limited eligibility"*.[263]

(ii) *"In-patient services"* include *"nursing ... supervision, activation and other para-medical services, which are given in an institutional setting and which are above and beyond the range of mere 'shelter and maintenance'"*[264] (referred to herein as ("*nursing home services*").

(iii) Persons with *"full eligibility"* have *"an entitlement to all the services which it [was] the obligation of the appropriate health board to provide and, further, ... these services must be provided for such persons free of all charge"*.[265]

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[261] Within the meaning of the 1970 Act.

[262] *Ibid.*

[263] *Ibid.*

[264] *Per* Henchy J. (Griffin and Kenny JJ. concurring) delivering the judgment of the Supreme Court in *In re* McInerney [1976-7] ILRM 229 at 235 – 236.

[265] *Per* O'Higgins C.J. (Henchy, Griffin, Hederman and McCarthy JJ. concurring) delivering the judgment of the Supreme Court in Cooke v. Walsh [1984] IR 710 at 726. The Chief Justice stated that this interpretation of *"full eligibility"* was *"clear from the scheme of the Act"* and, in this context, he cited sections 52, 56, 58, 59, 60 and 67 of the 1970 Act.

(iv) Persons with *"limited eligibility" "are entitled to avail of health services under the [1970] Act but ... may be charged for the services which are provided for them."*[266]

(v) Health boards were entitled *"to make and carry out an arrangement with a person or body to provide services under the Health Acts, 1947 – 1970, for persons eligible for such services."*[267]

(vi) Prior to the repeal of section 54 of the 1970 Act (by section 15 of the 1990 Act), a person *"entitled to avail himself of in-patient services under section 52 ... [could] if the person ... so desire[d], instead of accepting services made available by the health board, arrange for the like services being provided for the person ... in any hospital or home approved of by the Minister for the purposes of [section 54], and where a person or parent so arrange[d], the health board [was required], in accordance with regulations made by the Minister with the consent of the Minister for Finance, [to] make in respect of the services so provided the prescribed payment."*

138. Against this background, we are clearly of the opinion that the 1970 Act imposed a duty on health boards to make nursing home services available free of charge to persons with full eligibility and that such persons enjoyed a corresponding right to the receipt of such services. Subject to the foregoing, however, we believe that the 1970 Act conferred a discretion on health boards as to whether such services were provided in a public or private setting and, accordingly, that there is no basis for contending that the 1970 Act imposed a duty on health boards to provide access to public nursing homes or a corresponding right of access to such homes. Similarly, as regards persons with limited eligibility, we are of the view that the 1970 Act imposed a duty on health boards to make nursing home services available to persons with limited eligibility and that such persons enjoyed a corresponding right to the receipt of such services subject to the entitlement of health boards to levy charges in respect thereof. Against this background and having regard, in particular, to the jurisprudence surveyed above, we believe that an attempt to argue that the 1970 Act does not confer specific entitlements to health services, but

[266] *Per* O'Higgins C.J. (Henchy, Griffin, Hederman and McCarthy JJ. concurring) delivering the judgment of the Supreme Court in Cooke v. Walsh [1984] IR 710 at 726.

[267] Health Act, 1970, s.26(1).

rather simply provides a framework governing eligibility for such services,[268] would be very unlikely to prevail. However, the ambit of the said entitlements and duties and the extent to which they can form the bases for causes of actions against the State are separate issues which are addressed below.

(b) Article 40.3.1 of the Constitution

139. Prior to the judgment of the Supreme Court in In re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill, 2004,[269] the question of whether the Constitution impliedly guarantees a right to nursing home services free of charge would have merited very little attention because the prospect that the Courts would recognize such a right seemed extremely remote. The Supreme Court did not declare the existence of such a right in the Article 26 Reference but, equally, the court did not hold that the Constitution does not guarantee such a right. Indeed, its analysis of the contentions of Counsel assigned by the Court in this context assumed that such a right does exist but was not breached by the provisions of the Bill. Ultimately, however, we believe that it is very unlikely that the courts will recognise an unenumerated constitutional right to nursing home services free of charge. It is, however, appropriate to note in passing that the entry into force of Article 35 of the EUFCR via the European Constitution may indirectly force a change in this respect.

(ii) The provision of subventions to persons who availed of private nursing home services

(a) The Health (In-patient services) Regulations, 1993 (SI No. 224 of 1993)

140. The Health (In-patient services) Regulations, 1993[270] (the "*1993 Regulations*") were made by the Minister pursuant to s.72(1) of the 1970 Act. Article 4 of the Regulations provides that *"[i]f, under s.52 of the [1970 Act], a health board makes available in-patient services in a home for persons suffering from a physical or mental disability which is a*

[268] This appears to have been the position adopted by the Department of Health and Children in disputing the view of the Ombudsman in 2001 that the Health Acts confer legally enforceable entitlements to hospital in-patient services. See *Nursing Home Subventions – an investigation by the Ombudsman of complaints regarding the payment of nursing home subventions by health boards* (January 2001) Chapter 2, fn. 1.

[269] Unreported, Supreme Court, 16 February 2005.

[270] SI No. 224 of 1993.

home registered under the Health (Nursing Homes) Act, 1990 it shall do so in accordance with the provisions of that Act and any Regulations made under that Act." In our view, this provision merely compounds the problems which were created by the terms of the 1990 Act. That Act sought to achieve its object by simply ignoring the provisions of the 1970 Act and, in particular, the fact that persons falling within the scope of section 7 were entitled to either full eligibility or limited eligibility for health services under Part IV of the 1970 Act. The Act made no attempt to reconcile the two statutory schemes. Indeed, it is notable that section 7 of the 1990 Act does not even refer to the entitlement of the persons under the 1970 Act. Instead, it provides for payment by health boards to nursing homes. However, the 1993 Regulations proceed on the legally dubious presumption that on making an arrangement under section 7 of the 1990, the health board is *"mak[ing] available in-patient services under s.52 of [the 1970 Act]"* and, therefore, performing its duty under that Act. Thus, article 4 purports to channel patients, to whom a health board has opted to provide in-patient services in a private nursing home, through the subvention / charging framework established under the 1990 Act (and regulations made thereunder) notwithstanding the entitlements of such patients under the financial framework established by the 1970 Act.

141. It is clear from the authorities surveyed above, that insofar as article 4 can be regarded as diminishing an entitlement or right enjoyed by a person under the 1970 Act, it will be declared *ultra vires* the Minister, void and of no effect. In our view, it is equally clear (as indicated in sub-section (i) above) that the 1970 Act imposed a duty on health boards to make nursing home services available free of charge to persons with full eligibility and that such persons enjoyed a corresponding right to the receipt of such services.

142. Article 4 of the 1993 Regulations was made pursuant to s.72(1) of the 1970 Act. In Cooke v. Walsh,[271] O'Higgins C.J. stated that the power to make regulations conferred by s.72(1) could not be interpreted as meaning "*that such regulations may remove, reduce or otherwise alter obligations imposed on health boards by the Act*" (since *"[t]o attach such a meaning ... would be to attribute to the Oireachtas, unnecessarily, an intention to delegate in the field of lawmaking in a manner 'which is neither contemplated nor permitted by the Constitution.'"*)[272] That article 4 purports to achieve precisely this result can be illustrated by considering the case of a person with full eligibility for in-

[271] [1984] IR 710.

[272] *Ibid.* at 728, citing Cityview Press v. AnCo [1980] IR 381.

patient services under the 1970 Act who seeks admission to a public hospital in the functional area of a health board. We understand the question of admission to such a hospital is invariably decided solely on the grounds of bed availability on the date of application. Assuming that a bed is not available and the person is, as a result, forced to avail of private nursing home care, the effect of article 4 is to obviate his entitlement to in-patient services free of charge under the 1970 Act (and the corresponding obligation of the health board to provides such services) since, pursuant to the 1990 Act and the Subvention Regulations made thereunder, the person will merely be *eligible to apply for, at most, a subvention* towards the costs of his nursing home care and will not be entitled to all of the costs of such care.

143. The reasoning which resulted in the invalidation of the regulation that was challenged in Cooke applies, in our view, with equal force to article 4. In effect, article 4 purports to add new subsections to ss.52 and 56 of the 1970 Act which exclude, from the benefit of those sections and the statutory entitlement thereby afforded, a category of persons whose exclusion is in no way authorised or contemplated by the Act. Included in this category are persons who by the Act are given full eligibility and full statutory entitlement to avail of the services provided for by the two sections without charge. In this light, article 4 can be seen as *"in reality, an attempt to amend the two sections by ministerial regulation instead of by appropriate legislation"*.[273] In this context, it is relevant to note that, extraordinarily, the explanatory note to the 1993 Regulations states explicitly that *"these Regulations amend s.52 of the Health Act, 1970"*.[274] As the Oireachtas could not, and did not intend to, give power to amend s.52 to the Minister when it enacted s.72 of the 1970 Act, article 4 would, if challenged, almost certainly be declared *ultra vires* the Minister and void.

(b) The Nursing Homes (Subvention) Regulations, 1993 (SI No. 227 of 1993)

144. In our opinion, the Nursing Homes (Subvention) Regulations, 1993 (the "*Subvention Regulations*") are very vulnerable to challenge on the basis that they constitute an unauthorised exercise of legislative power by the Minister contrary to Article 15.2.1 of the Constitution. The Subvention Regulations were made pursuant to s.7 of the 1990 Act,

[273] [1984] IR 710 at 729 (per O'Higgins C.J.).

[274] Emphasis added.

specifically s.7(2), *prior* to the substitution for that subsection of s.7(2)(a) and (b)[275] by s.3(b) of the Health (Miscellaneous Provisions) Act, 2001. Accordingly, the Subvention Regulations were made pursuant to a statutory provision which simply provided that the Minister could by regulations prescribe the amounts that may be paid by health boards under s.7 and that such amounts can be specified by reference to specified degrees of dependency, specified means or circumstances of dependent persons or such other matters as the Minister considers appropriate. A Minister is only entitled to make statutory instruments to the extent that such measures are within the principles and policies of the parent statute.[276] We are of the opinion that s.7(2), as originally enacted, did not contain sufficient principles and policies for the purpose of circumscribing the Minister's legislative power[277] and that, prior to the passing of the 2001 Act, the Subvention Regulations would, if challenged, have been invalidated by the courts. It is also arguable, however, that the Regulations are still open to challenge since they were not made pursuant to the provisions of s.7 of the 1990 Act, as substituted by the 2001 Act, but rather pursuant to s.7 as originally enacted. In this regard, a court may well take the view that the 2001 Act, in effect, provides the principles and policies which were missing from the 1990 Act and thus cures any legislative deficiency which arose.[278] However, a court may consider that there is a certain cart-before-the-horse logic about enacting a statutory provision which is based upon particular regulations and which is simultaneously designed to constrain the Minister's powers to make those regulations. It is possible that, if challenged on the grounds outlined above, a court would seize upon this logic and hold that the "*restoration*" of principles and policies to s.7(2) was inadequate to save the Subvention Regulations from condemnation. The fact that the draft Subvention Regulations were not laid before and approved by the Houses of the Oireachtas in accordance with s.14 of the 1990 Act, as amended, may fortify the views

[275] Section 7(2)(a) effectively mirrors the provisions of the original s.7(2) while s.7(2)(b) stipulates various matters which may be provided for by the regulations.

[276] See Cityview Press Ltd. v. Anco [1980] IR 381. See also Meagher v. Minister for Agriculture [1994] 1 IR 329; Laurentiu v. Minister for Justice, Equality and Law Reform [1999] 4 IR 26; Maher v. Minister for Agriculture [2001] 2 IR 139; [2001] 2 ILRM 481; Leontjava v. D.P.P. [2004] 1 IR; and In re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill, 2004, unreported, 16 February 2005.

[277] Indeed, this possibly explains the reason for the amendment to s.7(2) of the 1990 Act and for the strong parallels between s.7(2)(b) and the Subvention Regulations.

[278] See, *e.g.*, McDaid v. Sheehy [1991] 1 IR 1.

of a court in this regard.[279] Even if the Subvention Regulations were to survive such a challenge, however, it is an entirely separate question as to whether the Regulations are within the principles and policies laid down in the 1990 Act, as amended. It is to this issue that we now turn.

145. The detailed provisions of the Subvention Regulations are referred to in the Appendix to this Opinion. Viewed in the light of s.7(2) of the 1990 Act, as amended, and the jurisprudence of the Superior Courts in this area, the following provisions of the Subvention Regulations are particularly vulnerable to a successful challenge:

(a) Article 3 – insofar as it defines "*means*" for the purpose of the Subvention Regulations as including the imputed value of assets of a person in respect of whom a subvention is sought and, also, the income and imputed income of that person's spouse;

(b) Article 4.1 – insofar as it limits the entitlement to apply for a subvention to person who applied prior to the admission of the patient to a nursing home;

(c) Article 4.3 – which prohibits a person who commenced residence in a nursing home after 1 September 1993 and who had not made an application for a subvention prior to his admission thereto from applying for a subvention sooner than two years from the date of his admission, unless the chief executive officer of the health board determines otherwise;

(d) Article 7 – insofar as it permits an examination of the patient;

(e) Article 8.1 insofar as it requires a health board to assess the means of a person in respect of whom a subvention is sought on the basis of the rules for the assessment of means in the Second Schedule to the Subvention Regulations (encompassing certain income assessment rules and all of the asset assessment rules);

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[279] On one view, s.14 is inapplicable to the Subvention Regulations since it applies only *"[w]henever a regulation is proposed to be made under [the 1990 Act]"* and the Subvention Regulations were already made when that section was inserted. On another view, however, s.14 must be read in conjunction with the additional safeguards inserted into s.7 and that, as a matter of inexorable logic, the Subvention Regulations should be condemned so that new subvention regulations could be passed in accordance with s.7(2)(a) and (b), which regulations would also have to be approved by both Houses of the Oireachtas."

(f) Article 8.3 – insofar as it permits a designated officer of a health board to request information and conduct interviews with a person, other than the prospective patient, who is not acting on behalf of that patient; and

(g) The Second Schedule to the Subvention Regulations – in particular, rules 4 – 22 (encompassing certain income-related provisions and all of the asset related provisions).

146. In our opinion, all of the above provisions of the Subvention Regulations would, if challenged in an appropriate case, be invalidated on the grounds that they were not made within the principles and policies of the 1990 Act. In relation to many of the above provisions, there are simply no principles and policies in the 1990 Act which guide and/or restrict the exercise of the Minister's legislative power and, accordingly, such provisions would almost certainly be condemned as *ultra vires* the Minister. The reference to assets in the definition of "*means*" and the asset assessment provisions in the Second Schedule fall into this category. Indeed, it is arguable that the asset assessment provisions are in fact contrary to the spirit of the legislative framework governing the provision of health services and, therefore, unreasonable in the sense that that word is used in Cassidy v. Minister for Industry & Commerce.[280] In respect of the other provisions, we are of the view that the regulations exceed such principles and powers as may be gleaned from the 1990 Act and would likewise be declared *ultra vires* the Minister. For instance, the crucial term "*means*" is defined in article 3 of the Subvention Regulations as "*the income and imputed value of assets of a person in respect of whom a subvention is being sought and the income and imputed income of his or her spouse*".

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[280] [1978] IR 297. In Cassidy, Henchy J. stated that it is a general rule of law that where Parliament has by statute delegated a power of subordinate legislation, the power must be exercised within the limitations of that power as they are expressed or necessarily implied in the statutory delegation; otherwise it will be held to have been invalidly exercised for being *ultra vires*. He added that "*it is a necessary implication in such a statutory delegation that the power to issue subordinate legislation should be exercised reasonably.*" In this context, Henchy J. cited with approval the following passage from the judgment of Diplock L.J. in Mixnam's Properties Ltd. v. Chertsey Urban District Council [1964] 1 QB 214:

> "*Thus, the kind of unreasonableness which invalidates a by-law (or, I would add, any other form of subordinate legislation) is not the antonym of 'unreasonableness' in the sense in which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say: 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.'*"

See, also, McGabhann v. Law Society [1989] ILRM 854; and Crilly v. T. & J. Farrington Ltd. [2001] 3 IR 251.

The term is not defined in the 1990 Act but it would appear from s.7 of the Act that the Oireachtas contemplated that a health board would only be entitled to assess the means of the person in respect of whom a subvention is sought and no other person.[281] In this light, we are of the opinion that the Oireachtas did not envisage that the income and imputed income of an applicant's spouse should be taken into account for the purpose of assessing his means and, to the extent that the Regulations permit such, they exceed the principles and polices set down in the 1990 Act. Arguably, the assessment of the income and imputed income of an applicant's spouse is relevant to the assessment of an applicant's means. However, the absence of a clear statutory basis for the former assessment is likely to be fatal to the validity of those provisions of the Regulations which purport to permit such an assessment. In this context, it is appropriate to compare s.7(2) with s.45(2) of the 1970 Act which provides that in deciding whether or not a person comes within the category mentioned in s.45(1)(a),[282] "*regard shall be had to the means of the spouse (if any) of that person in addition to the person's own means.*" Nor would the generality of the powers conferred by s.7(2) to make regulations in respect of "*such other matters as the Minister considers appropriate*" be likely to fill this particular breach.

147. In view of the factors referred to above, we believe that, if they were to be challenged in an appropriate case, most of the core provisions of the Nursing Homes (Subvention) Regulations, 1993, would be declared *ultra vires* the Minister and consequently void.

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[281] Section 7(1) provides, *inter alia*, that a subvention may be paid "*following an assessment by a health board of the dependency of a dependent person and of his means and circumstances [where] the health board is of opinion that the person is in need of maintenance in a nursing home and is unable to pay any or part of its costs.*" Similarly, s.7(2)(b) empowers the Minister to make regulations in relation to, *inter alia*, "*(iii) the furnishing by applicants for payments ... of information specified or requested by health boards in relation to the means and dependency of the persons in respect of whom the payments are being sought*"; and "*(iv) the assessment by health boards of the degree of dependency and the means and circumstances of persons in respect of whom payments are being sought*".

[282] Namely, adult persons unable without undue hardship to arrange general practitioner medical and surgical services for themselves and their dependants, (which category has full eligibility for the services under Part IV of the 1970 Act).

(iii) Potential liability of the State

(a) Overview

148. In many respects, the validity of the parallel systems of health services created by the 1970 and 1990 Acts is one of the most difficult issues confronting the State in relation to the provision of nursing home services. Almost every person who was dealt with under s.7 of the 1990 Act would either have full eligibility or limited eligibility for health services under the 1970 Act. The probable invalidity of the 1993 Regulations only compounds this problem since it is the only (if unsatisfactory) attempt to effect some intersection between the two systems. The existence of two different regimes with different criteria for eligibility and cost to patients has undoubtedly given rise to serious anomalies. At a general level, it is very likely that two persons of the same age, income and disability were / are treated very differently: one in a public hospital at no cost (or a minimal cost in respect of maintenance) and the other in a private nursing home with only a modest subvention and bearing a very heavy weekly bill. Indeed, the potential for anomaly is greater: the person in the public hospital at no cost, (or minimal cost), may have greater means than the subvention patient in the private nursing home. When one considers the fact that some patients may not have access to either a public hospital or a subvented private nursing home and that persons with limited eligibility may be required to pay some charges, the possibilities for anomalies are multiplied. This is particularly serious since the cost involved is significant and likely to be an extremely heavy burden on older people and their families.

149. We are not aware of any guidance from central government either in statutory form or by circular as to the allocation of health boards' scarce resources and it appears that the boards were left to do the best they could. No doubt the system was administered with sensitivity on a local basis and efforts were made to allocate places to those most in need. Nevertheless, it appears to us that the system of allocation was essentially *ad hoc* and it seems highly probable that there were many anomalous decisions. This raises the question whether the entire system, (irrespective of the delegated legislation implementing it), which can give rise to such arbitrary distinctions with enormous impact on individuals and families, can be valid.

150. In our view, the system is so lacking in coherence and consistency that individual determinations are inherently vulnerable to successful challenge. The starting point is that if a health board failed to provide nursing home services to persons with full or limited eligibility, (either in its own hospitals or pursuant to an arrangement made under s.26 of the 1970 Act), in accordance with the financial entitlements of such persons, *prima facie* the board was in breach of its duty under s.52 of the Act. If, as a result, arbitrary and *ad hoc* distinctions were made between essentially similar members of the public, then *prima facie* that would also be, at a minimum, a breach of the guarantee of equality contained in Article 40.1 of the Constitution.[283] *Prima facie*, therefore, there is a potential liability on the part of the State on the grounds that: (i) health boards acted in breach of statutory duty; (ii) health boards and/or the State were unjustly enriched at the expense of persons whose rights under the 1970 Act were infringed; and (iii) the State failed to hold such persons equal before the law.

(b) Cause of action for breach of statutory duty

151. In assessing potential claims for breach of statutory duty, it is necessary to consider: (a) whether a cause of action exists for breach of duties imposed by the 1970 Act; (b) the significance of the resources which were available to health boards and the Health (Amendment) (No. 3) Act, 1996; (c) health boards' duties under secondary legislation; and (d) the reliefs which may be claimed.

(i) Whether a cause of action exists for breach of duties imposed by the 1970 Act

152. In considering the potential liability of the State for breach of statutory duty on the part of the health boards, it is necessary first to consider whether the Oireachtas intended that such breaches would be remediable at the suit of persons affected thereby. It can be argued that the 1970 Act imposed duties on health boards for the benefit of the public generally and not for any particular class thereof and, accordingly, that a private right of action does not exist for the breach of such duties. It is possible, however, that the courts would conclude that persons with full eligibility are a discrete class of persons and, particularly having regard to their vulnerable position, that the Legislature did intend that breaches of duties which were imposed for their benefit would be remediable by an

[283] See, e.g., de Burca v. Attorney General [1976] IR 38; Dillane v. Attorney General [1980] ILRM 167; O'B. v. S. [1984] IR 316. *Cf.* O'Brien v. South West Area Health Board, Unreported, Supreme Court, 5 November 2003.

action for damages. In the light of the judgment of the Supreme Court in the recent Article 26 Reference, there is a real possibility that the latter argument would find favour with the courts, subject to the defences outlined herein.

153. It is also appropriate to note the possibility of causes of action for breach of statutory duty on the basis of the exercise of statutory powers in a manner that was unreasonable, unfair or unjust. Possible causes of action for misfeasance of public office also merit note in this regard.

(II) The 1996 Act

154. Notwithstanding the (presumed) invalidity of the Subvention Regulations and Article 4 of the 1993 Regulations, we believe that it is far from certain that a plaintiff would succeed in establishing that a health board acted in breach of its duties under section 52 of the 1970 Act. Any such question would have to be examined in the light of the board's concomitant obligations under the Health (Amendment) (No. 3) Act, 1996 ("*the 1996 Act*"). In our view, there are strong grounds for contending that the duty under s.52 is not absolute in that it is qualified by the terms of the 1996 Act. It is appropriate to note, however, that the Supreme Court has not yet expressed a definitive view on this issue.

155. Nevertheless, we believe that a broad brush lack-of-financial resources argument would be unlikely, of itself, to provide a valid defence to a claim that a health board had breached its statutory duty by its failure to provide particular health services to persons entitled to such services. Rather, we believe that health boards would have to establish that their failure in this regard was caused by the adoption of a scheme of allocating limited resources in the most "*effective and efficient*" way. It seems unlikely that any *ad hoc* system of allocating resources could satisfy that test. If a health board could show that the allocation of resources was the subject of some rational allocation – e.g. that every space coming available in the public system was offered to persons with full eligibility in a subvented place, with some facility for dealing with particular hardship cases – that might, we think, survive constitutional scrutiny since the allocation of resources would not be arbitrary or discriminatory. In order to successfully advance a resources-based argument in relation to a claim for breach of statutory duty, it would be essential that health boards / the Health Service Executive are in a position to adduce evidence establishing that they made decisions in respect of the provision of nursing

home services having regard to the resources which were available to them and on the basis of a plan which in their view achieved the most effective and efficient allocation of those resources in the light of their various statutory obligations.

156. To date, however, the system appears to have been so incoherent, inconsistent and lacking in overall guidance and with such significant disparity of treatment afforded to otherwise similar members of the public that the scheme and the decisions made under it are inherently vulnerable to challenge.

(III) The duties of health boards under secondary legislation

157. Establishing a breach of statutory duty on the part of the health boards is not simply a factor of its multifarious obligations under Acts of the Oireachtas. A plaintiff would also have to address the nature of the health board's obligations under secondary legislation. It is arguable that until a statutory instrument has been amended in relevant part, repealed or declared invalid by the courts, the health boards were required to comply with its provisions. Where a health board failed to provide health services in accordance with it obligations under one Act as a result of its *bona fide* attempts to comply with its obligations under secondary legislation made pursuant to another Act, which in some respects at least conflicts with the former Act, it is far from certain that a court would conclude that the health board had thereby acted in breach of its statutory duties. In this regard, the plaintiff would be venturing into relatively uncharted waters since the precise extent of a health board's obligations in these circumstances has yet to be considered by the Irish courts.

(IV) Possible reliefs

158. Even if a plaintiff were to surmount the obstacles outlined above and to succeed in establishing that a health board had acted in breach of its statutory responsibilities, it is an entirely separate question as to what relief would be granted as against the board. In this regard, the decision of the Supreme Court in Brady is significant. Although at first glance, the decision of the majority in this case appears to provide a measure of security to health boards, it arguable that this decision would not shield a board from a properly mounted claim against it.

(c) Cause of action in unjust enrichment

159. Quite apart from the foregoing and any question of whether a cause of action for breach of statutory would lie, there is a strong likelihood that the State will be faced with actions for damages on the basis that it has been unjustly enriched at the expense of persons who were forced to avail of private nursing home services and merely received a subvention towards the cost thereof notwithstanding the fact that they had (or have) full eligibility for in-patient services and thus an entitlement to the receipt of such services free of all charges.

(d) Potential defences

160. The State may, however, be able to invoke a number of defences – and, in particular, the Statute of Limitations, *laches* and change of position – to defeat claims which are likely to be brought against it. Significantly, in the Article 26 Reference, the Supreme Court acknowledged the possibility that *"patients seeking recovery of charges unlawfully required of them would be met and perhaps defeated by some such defence[s]."* It should be noted, however, that State may be unable to successfully invoke the Statute of Limitations in many of the proceedings which are envisaged on the basis that the plaintiffs were of unsound mind and thus under a disability within the meaning of section 48 of that Act.

(e) Cause of action for breach of constitutional rights

161. It is likely that reliefs will be claimed for breaches of constitutional rights and, in particular, the right to be held equal before the law. However, *"constitutional rights should not be regarded as wild cards which can be played at any time to defeat all existing rules"*[284] and, on the basis that the constitutional rights at issue can be adequately vindicated at common law, we believe there are good grounds for contending that a plaintiff "*has to accept the [relevant] action ... with all its incidents*"[285] and that it is unnecessary (and would be inappropriate) for the courts to devise new causes of action based on breaches of constitutional rights.

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[284] *Per* Barrington J. (Hamilton C.J. concurring) in McDonnell v. Ireland [1998] 1 IR 134 at 148.

[285] *Ibid.*

(f) Conclusion

162. Apart from challenges to the validity of article 4 of the 1993 Regulations and the Subvention Regulations (which we believe would be successful), there are, in principle, a number of grounds upon which proceedings against health boards / the State arising from the matters addressed herein could be successfully defended. This view is necessarily of a general nature, however, since the question of whether an individual case can be successfully defended is also a factor of the particular circumstances of that case and, perhaps, in particular the state of knowledge of the claimant and the express or implied representations which were made to the claimant when payment was demanded.

18 March 2005

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VII APPENDIX

LEGISLATIVE FRAMEWORK

163. This Appendix outlines the relevant statutory and regulatory framework within which the issues on which we have been asked to advise must be considered. Two points merit emphasis in this regard. First, questions concerning the validity of certain legislative provisions referred to herein are addressed in the body of the Opinion and, for the purpose of this Appendix, all of the provisions referred to herein are assumed to be valid and capable of surviving judicial scrutiny (save insofar as they have been validly repealed). Secondly, it is possible that the Department of Health and Children is aware of other legislative provisions which are relevant to the issues on which we have been asked to advise and, if so, those provisions should be brought to our attention at the earliest opportunity.

(i) The Health Act, 1947

164. According to its long title, the Health Act, 1947 (hereinafter referred to as "*the 1947 Act*") is an Act *"to make further and better provision in relation to the health of the people and to provide for the making of regulations by virtue of which certain charges may be made."* Section 1(1) of the 1947 Act provides that the expression *"institutional services" "includes: (a) maintenance in an institution;*[286] *(b) diagnosis, advice and treatment at an institution; (c) appliances and medicines and other preparations; and (d) the use of special apparatus at an institution."*

(ii) The Health Act, 1953

165. The Health Act, 1953 (hereinafter referred to as "*the 1953 Act*") was passed to amend and extend the 1947 Act and certain other enactments.[287] Section 3(2) provides that the 1947 Act and the 1953 Act *"shall be construed together as one Act"*. Section 3(3)

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[286] An "*institution*" means a hospital, sanatorium, maternity home, convalescent home, preventorium, laboratory, clinic, health centre, first-aid station, dispensary or any similar institution: Health Act, 1947, s.2(1). The latter definition was amended by s.6 of the Health Act, 1953 but s.6 was subsequently repealed by the Health Act, 1970.

[287] See the long title thereto.

provides that without prejudice to the generality of s.3(2), a reference in the 1947 Act to that Act *"shall, save where the context otherwise requires, be construed as including a reference to [the 1953 Act]."*

166. Part III of the 1953 Act (ss.14 – 33) concerned the provision of health services but it was repealed in its entirety by s.3 of the Health Act, 1970.

167. Section 54(2) of the 1953 Act provides that a person who is unable to provide shelter and maintenance for himself or his dependants is eligible for institutional assistance. For the purpose of s.54, *"institutional assistance"* means *"shelter and maintenance in a county home or similar institution."*[288] A health board has a duty (subject to s.54 and the regulations thereunder) to give to every person in its functional area who is eligible for institutional assistance such institutional assistance as appears to it to be necessary or proper in each particular case.[289] Section 54(4) empowers the Minister to make regulations *"governing the giving of institutional assistance and such regulations [can], in particular, provide for requiring persons to contribute in specified cases towards the cost of providing them with institutional assistance."*

168. Pursuant to *"the powers conferred on him by the Health Acts 1947 and 1953"*, the Minister made the Institutional Assistance Regulations, 1954[290] which came into operation on 1 August 1954. Article 4 of the Regulations provides that institutional assistance under s.54 of the 1953 Act can be made available by a health authority: (a) by providing such assistance in a county home or other similar institution maintained by that authority; or (b) by making arrangements under s.10 of the 1953 Act for the provision of such assistance in other institutions.[291]

169. Article 12(1) of the 1954 Regulations[292] provides that where a person, while receiving institutional assistance, is in receipt of an income in money exceeding £1 a week, he can be required out of so much of the income as exceeds £1 a week, to contribute such amount as the health authority consider appropriate towards the cost incurred by the

[288] Health Act, 1953 s.54(1).

[289] Health Act, 1953, s.54(3).

[290] SI No. 103 of 1954.

[291] Section 10 of the 1953 Act was repealed by s.3 of the Health Act, 1970.

[292] As substituted by article 3 of the Institutional Assistance Regulations, 1965 (SI No. 177 of 1965) (which came into operation on 1 August 1965).

health authority in providing him with institutional assistance. In determining the amount of income in money received by a person for the purpose of the foregoing, a health authority is required to deduct any amounts payable by such person in respect of rent, ground rent, rates (including water rates), land purchase annuities, charges, mortgages, cottage purchase annuities, hire purchase agreements, credit sales agreements and insurance or assurance policies.[293]

(iii) The Health Act, 1970 and the relevant regulations made thereunder

170. The Health Act, 1970 (hereinafter referred to as "*the 1970 Act*") was, according to its long title, passed to amend and extend the Health Acts, 1947 – 1966 and certain other enactments, to provide for the establishment of bodies for the administration of the health services, and for other matters connected therewith. Section 1(3) provides that the Health Acts, 1947 – 1966 and the 1970 Act are to be construed together as one Act.

171. Section 4(1) of the 1970 Act (which was repealed by the Health Act 2004[294]) empowered the Minister to make regulations establishing health boards, specifying the title of such boards and defining their functional areas. Pursuant to s.4, the Minister made the Health Boards Regulations, 1970.[295]

172. Section 6(1) of the 1970 Act (which was repealed by the Health Act, 2004) provided that, subject to s.17,[296] a health board was required to perform the functions conferred on it under the 1970 Act and any other functions which, immediately before its establishment, were performed by a local authority (other than a sanitary authority) in the functional area of the health board in relation to the operation of services provided under, or in connection with the administration of, certain Acts including the Health Acts, 1947 – 1966.

173. Section 26(1) of the 1970 Act (which was repealed by the Health Act, 2004) provided that *"[a] health board may, in accordance with such conditions (which may include provision for superannuation) as may be specified by the Minister, make and carry out*

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[293] Institutional Assistance Regulations, 1954, article 12(2), as amended.

[294] No. 42 of 2004.

[295] SI No. 170 of 1970.

[296] Section 17 was repealed by the Health (Amendment) (No. 3) Act, 1996, s.23.

an arrangement with a person or body to provide services under the Health Acts, 1947 – 1970, for persons eligible for such services."

174. Part IV of the 1970 Act is concerned with health services and chapter I thereof is concerned with eligibility for such services. Section 45(1)[297] provides that *"[a] person in either of the following categories and who is ordinarily resident in the State shall have full eligibility for the services under Part IV of the Act: (a) adult persons unable without undue hardship to arrange general practitioner medical and surgical services for themselves and their dependants, [and] (b) dependants of the persons referred to in paragraph (a)".*

175. Section 45(2) provides that, in deciding whether or not a person comes within the category mentioned in subsection (1)(a), *"regard shall be had to the means of the spouse (if any) of that person in addition to the person's own means."*

176. In addition to the categories of persons specified in s.45(1), certain persons can be deemed to fall within those categories. Thus, the Minister is empowered to make Regulations (with the consent of the Minister for Finance) specifying a class or classes of persons who shall be deemed to be within these categories. In addition, where a person who does not fall under either of the categories mentioned in s.45(1) or who is not ordinarily resident in the State but, in relation to a particular service which is available to persons with full eligibility, is considered by the chief executive officer of the appropriate health board to be unable, without undue hardship, to provide that service for himself or his dependants, he or she will, in relation to that service, be deemed to be a person with full eligibility.[298]

177. Section 45(5A) of the 1970 Act[299] provides that *"[a] person who is not less than 70 years of age and is ordinarily resident in the State shall have full eligibility for the services under [Part IV] and, notwithstanding subsection (6),[300] references in [Part IV] to persons with full eligibility shall be construed as including references to such persons."*

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[297] As amended by s.2 of the Health (Amendment) Act, 1991 (No. 15 of 1991).

[298] Health Act, 1970, s.45(7), as amended by s.2 of the Health (Amendment) Act, 1991 (No. 15 of 1991).

[299] As inserted by s.1(1) of the Health (Miscellaneous Provisions) Act, 2001 (No. 14 of 2001). This section came into operation on 1 July 2001.

[300] Section 45(6) provides that references in Part IV to persons with full eligibility shall be construed as referring to persons in the categories mentioned in subsection (1) or deemed to be within those categories.

178. As originally enacted, s.46 empowered the Minister to make regulations defining in such manner as he thought fit categories of persons with *"limited eligibility"*. In the exercise of those powers, the Minister made the Health Services (Limited Eligibility) Regulations, 1979[301] which provided that *"[a] person who is without full eligibility shall have limited eligibility for services under [Part IV of the 1970 Act]"*. These Regulations were revoked by s.10 of the Health (Amendment) Act, 1991[302] and the following was inserted for s.46 of the 1970 Act: *"[a]ny person ordinarily resident in the State who is without full eligibility shall, subject to s.52(3),[303] have limited eligibility for the services under [Part IV of the 1970 Act]"*.[304]

179. The Act provides for appeals against a decision of an officer of the health board that a person does not come within a category specified by or under the relevant section.[305] The Minister is empowered to issue guidelines to assist the relevant persons[306] in deciding whether a person is ordinarily resident in the State for the purposes of ss.45 and 46.[307]

180. Section 48 provides that *"[f]or the purpose of determining whether a person is or is not a person with full eligibility or a person with limited eligibility, or a person entitled to a particular service provided under the Health Acts, 1947 to 1970, a health board may*

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[301] SI No. 110 of 1979.

[302] No. 15 of 1991.

[303] Section 52(3)[303] provides that, subject to s.54, (which was repealed by the Health (Nursing Homes) Act, 1990) where, in respect of in-patient services, a person with full eligibility or limited eligibility for such services does not avail of some part of those services but instead avails of like services not provided under s.52(1), then the person shall while being maintained for the said in-patient services, be deemed not to have full eligibility or limited eligibility for those services.

[304] Health (Amendment) Act, 1991, s.3.

[305] Health Act, 1970, s.47.

[306] Namely (a) the chief executive officers of health boards, or (b) persons appointed or designated by him under s.47(1).

[307] Health Act, 1970, s.47A, as inserted by the Health (Amendment) Act, 1991, s.4. The provisions of Part IV of the 1970 Act (as amended) relating to a person being ordinarily resident in the State are without prejudice to the due application of the provisions of Council Regulation (EEC) No. 1408/71 of 14 June 1971 (as replaced by the text in Annex I to Council Regulation (EEC) No. 2001/83 of 2 June 1983) and of any provision made before, on or after the passing of the 1991 Act which extends, replaces or consolidates (with or without modification) Council Regulation 1408/71: Health (Amendment) Act, 1991, s.9.

require that person to make a declaration in such form as it considers appropriate in relation to his means and may take such steps as it thinks fit to verify the declaration."

181. Section 49(1) provides that *"[w]here a person is recorded by a health board as entitled, because of specified circumstances, to a service provided by the board under the Health Acts, 1947 to 1970, he shall notify the board of any change in those circumstances which disentitles him to the service."* It is an offence to knowingly contravene this requirement.[308] Where a person has obtained a service under the Health Acts, 1947 – 1970, and it is ascertained that he was not entitled to the service, the appropriate health board can make a charge for that service which has been approved of or directed by the Minister.[309]

182. Chapter II of Part IV of the 1970 Act is concerned with hospital in-patient and out-patient services. Section 51 provides that in Part IV, *"in-patient services"* means *"institutional services provided for persons while maintained in a hospital, convalescent home or home for persons suffering from physical or mental disability or in accommodation ancillary thereto."* As noted above, the expression "*institutional services*" *"includes: (a) maintenance in an institution;*[310] *(b) diagnosis, advice and treatment at an institution; (c) appliances and medicines and other preparations; and (d) the use of special apparatus at an institution."*[311]

183. Section 52(1) provides that *"[a] health board shall make available in-patient services for persons with full eligibility and persons with limited eligibility."*[312]

184. Section 53 of the 1970 Act provides as follows:

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[308] Health Act, 1970, s.49(2).

[309] *Ibid.*, s.50.

[310] An "institution" means a hospital, sanatorium, maternity home, convalescent home, preventorium, laboratory, clinic, health centre, first-aid station, dispensary or any similar institution: Health Act, 1947, s.2(1). The latter definition was amended by s.6 of the Health Act, 1953 but s.6 was subsequently repealed by the Health Act, 1970.

[311] Section 2(1) of the 1947 Act.

[312] In relation to the provision of in-patient services in a home for persons suffering from a physical or mental disability which is a home registered under the Health (Nursing Homes) Act, 1990, see article 4 of the Health (In-Patient Services) Regulations, 1993 (SI No. 224 of 1993).

"(1) Save as provided for under subsection (2) charges shall not be made for in-patient services made available under section 52.

(2) The Minister may, with the consent of the Minister for Finance, make regulations –

(a) providing for the imposition of charges for in-patient services in specified circumstances on persons who are not persons with full eligibility or on specified classes of such persons, and

(b) specifying the amounts of the charges or the limits to the amounts of the charges to be so made."[313]

185. Pursuant to s.53 of the 1970 Act and, also, s.5 of the 1947 Act, the Minister made the Health (Charges for In-Patient Services) Regulations, 1976[314] and the Health (In-Patient Charges) Regulations, 1987.[315]

186. Article 3(1) of the 1976 Regulations[316] provides that a charge towards the cost of in-patient services provided under s.52 of the Act can be made on a person who is not a person with full eligibility where: (a) the person has no dependants; and (b) the person has been in receipt of in-patient services for 30 days or for periods aggregating in total 30 days within the previous 12 months. A charge under article 3(1) must be at a rate not exceeding the income of the person, less a sum of £2.50 a week or less such larger sum as may be determined by the chief executive officer of the appropriate health board having regard to the circumstances of the case.[317]

187. Pursuant to article 4(1) of the 1987 Regulations, a charge must be made for in-patient services provided under s.52 of the 1970 Act for persons other than certain classes of

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[313] Emphasis added.

[314] SI No. 180 of 1976.

[315] SI No. 116 of 1987.

[316] As amended by the Health (Charges for In-Patient Services) (Amendment) Regulations, 1987 (SI No. 300 of 1987), the Health (Inpatient Charges) Regulations 1999 (SI No. 401 of 1999), the Health (Inpatient Charges) Regulations, 2001 (SI No. 582 of 2001), the Health (Inpatient Charges) Regulations (SI No. 367 of 2002), the Health (Inpatient Charges) Regulations 2003 (SI No. 654 of 2003) and the Health (Inpatient Charges) Regulations 2004 (SI No. 825 of 2004).

[317] Health (Charges for In-Patient Services) Regulations, 1976, article 3(2).

persons.[318] The charge referred to has been amended since 1987 – most recently in December 2004 – and currently is at the rate of €55 in respect of each day, subject to a maximum payment of €550 in any period of twelve consecutive months, during which the person is maintained as an in-patient, provided that in calculating the charge, where such a person is so maintained for a single period of more than one day, no account can be taken of the final day.[319]

188. Section 54 of the 1970 Act (which was repealed by s.15 of the Health (Nursing Homes) Act, 1990) provided as follows:

> *"A person entitled to avail himself of in-patient services under section 52 or the parent of a child entitled to allow the child to avail himself of such services may, if the person or parent so desires, instead of accepting services made available by the health board, arrange for the like services being provided for the person or the child in any hospital or home approved of by the Minister for the purposes of this section, and where a person or parent so arranges, the health board shall, in accordance with regulations made by the Minister with the consent of the Minister for Finance, make in respect of the services so provided the prescribed payment."*

189. Section 55[320] provides that a health board can, subject to any regulations made under s.55(2),[321] make available in-patient services for persons who either (a) do not establish entitlement to such services under s.52; or (b) are deemed under s.52(3) not to have full eligibility or limited eligibility for such services. The board is required to charge for any

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[318] Namely: (a) persons with full eligibility; (b) women receiving services in respect of motherhood; (c) children up to the age of six weeks; (d) children suffering from diseases or disabilities prescribed under s.52(c) of the 1970 Act; (e) children in respect of defects noticed at a health examination held pursuant to the service provided under s.66 of the 1970 Act; (f) persons receiving services for the diagnosis or treatment of infectious diseases prescribed under Part IV of the 1947 Act; (g) persons who are subject to a charge under the 1976 Regulations; and (h) persons who are deemed, pursuant to s.45(7) of the 1970 Act to be persons with full eligibility in relation to an in-patient service.

[319] Health (In-Patient Charges) Regulations, 1987, article 4(2), as amended by article 2 of the Health (Charges for In-Patient Services) (Amendment) Regulations, 1987 (SI No. 335 of 1990), article 2 of the Health (In-Patient Charges) (Amendment) Regulations, 1991 (SI No. 366 of 1991), article 2 of the Health (In-Patient Charges) (Amendment) Regulations, 1994 (SI No. 38 of 1994) and article 2 of the Health (In-Patient Charges) Amendment) Regulations, 1997 (SI No. 510 of 1997).

[320] As inserted by the Health (Amendment) Act, 1991, s.6.

[321] Section 55(2) empowers the Minister to make regulations prescribing the manner in which any in-patient services are to be made available and provided by health boards.

services so made available and provided to any such person in accordance with charges approved of or directed by the Minister.[322]

190. Pursuant to s.56(2) of the 1970 Act,[323] a health board is required to make out-patient services available for persons with full eligibility and persons with limited eligibility, subject to any regulations relating to such services under section 56(5). For the purposes of s.56, "*out-patient services*" means *"institutional services other than in-patient services provided at, or by persons attached to, a hospital or home and institutional services provided at a laboratory, clinic, health centre or similar premises, but does not include: (a) the giving of any drug or medicine or other preparation, except where it is administered to the patient direct by a person providing the service or is for psychiatric treatment; or (b) dental, ophthalmic or aural services."*[324]

191. Chapter VI of the 1970 Act contains miscellaneous provisions regarding services. Section 72(1) provides that *"[t]he Minister may make regulations applicable to all health boards or to one or more than one health board regarding the manner in which and the extent to which the board or boards shall make available services under this Act and generally in relation to the administration of those services."* Regulations under s.72 can *"provide for any service under [the 1970 Act] being made available only to a particular class of the persons who have eligibility for that service."*[325] Section 72(3) of the Act provides that, notwithstanding any other provision thereof, regulations made under the 1953 Act shall continue in operation and shall be deemed to have been made under the 1970 Act and to be capable of amendment or revocation accordingly.

192. Any charge which may be made or contribution which may be levied by a health board under the Health Acts, 1947 – 1970, or regulations thereunder, can, in default of payment, be recovered as a simple contract debt in any court of competent jurisdiction from the person in respect of whom the charge is made, from the person's spouse (if any) or, in case the person has died, from his legal personal representative.[326]

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[322] Health Act, 1970, s.55(1), as inserted by the Health (Amendment) Act, 1991, s.6.

[323] As inserted by the Health (Amendment) Act, 1987, s.1.

[324] Health Act, 1970, s.56(1). Section 56 has been amended by the Health (Amendment) Act, 1987 and the Health (Amendment) Act, 1991.

[325] *Ibid.*, s.72(2).

[326] *Ibid.*, s.74.

193. It is an offence for a person to do the following for the purpose of obtaining any service under the Health Acts, 1947 – 1970, (whether for himself or some other person) or for any purpose connected with those Acts: (a) knowingly make any false statement or false representation or knowingly conceal any material fact; or (b) produce or furnish, or cause or knowingly allow to be produced or furnished, any document or information which he knows to be false in a material particular.[327]

(iv) The Health (Nursing Homes) Act, 1990 and the regulations made thereunder

(a) The 1990 Act

194. The Health (Nursing Homes) Act, 1990[328] (referred to herein as "*the 1990 Act*") contains various provisions concerning the operation of nursing homes in the State. For the purposes of the 1990 Act, (except where the context requires otherwise) a *"nursing home"* means an institution for the care and maintenance of more than two dependent persons excluding certain specified institutions and premises.[329] A *"dependent person"* means a person who requires assistance with the activities of daily living such as dressing, eating, walking, washing and bathing by reason of the following: (a) physical infirmity or a physical injury, defect or disease; or (b) mental infirmity.[330] The word "*dependency*" is construed in accordance with this definition of "*dependent persons*". Section 3 of the 1990 Act[331] prohibits a person from carrying on a nursing home unless the home is registered and the person is the registered proprietor thereof. Health boards are required to establish and maintain a register of nursing homes in their functional areas.[332]

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[327] *Ibid.*, s.75.

[328] No. 23 of 1990. The Act came into effect on 1 September 1993: see the Health (Nursing Homes) Act, 1990 (Commencement) Order, 1993 (SI No. 222 of 1993).

[329] Health (Nursing Homes) Act, 1990, s.2(1), as amended by Schedule 6, Part IV of the Health Act, 2004 (no. 42 of 2004). The Minister is empowered to amend by regulations the definition of "nursing home" if he is of the opinion that the 1990 Act ought to apply to a class of institution for the care and maintenance of persons to which it does not apply: s.2(2).

[330] Health (Nursing Homes) Act, 1990, s.1(1), as amended by the Health Act, 2004.

[331] As amended by s.20 of the Health (Amendment) (No. 3) Act, 1996 (No. 32 of 1996).

[332] Health (Nursing Homes) Act, 1990, s.4(1).

195. Section 7(1) of the 1990 Act provides that where, following an assessment by a health board of the dependency of a dependent person and of his means and circumstances, the health board is of opinion that the person is in need of maintenance in a nursing home[333] and is unable to pay any or part of its costs, it may, if the person enters or is in a nursing home, and subject to compliance by the home with any requirements made by the board for the purposes of its functions under section 7, pay to the home such amount in respect of maintenance as it considers appropriate having regard to the degree of the dependency and to the means and circumstances of the person. Section 7(2)[334] provides that the Minister may by regulations specify the amounts that may be paid by health boards under s.7 and such amounts may be specified by reference to specified degrees of dependency, specified means or circumstances of dependent persons or such other matters as the Minister considers appropriate.

(b) The Subvention Regulations

196. Pursuant to section 7 of the 1990 Act, the Minister made the Nursing Homes (Subvention) Regulations, 1993[335] (referred to herein as "*the Subvention Regulations*"). All references to the Subvention Regulations herein are (unless otherwise stated) references to the said Subvention Regulations as amended by the Nursing Homes (Subvention) (Amendment) Regulations, 1996,[336] the Nursing Homes (Subvention) (Amendment) Regulations, 1998[337] and the Nursing Homes (Subvention) (Amendment) Regulations, 2001.[338]

197. Article 4.1 of the Subvention Regulations provides that with the exception of certain persons,[339] an application for a subvention shall be made to the responsible health

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[333] In this context, a "nursing home" includes premises in which a majority of the persons being maintained are members of a religious order or priests of any religion (other than premises in relation to which a payment has been made under s.7): s.7(1)(b)

[334] This section was substituted by s.3 of the Health (Miscellaneous Provisions) Act, 2001 (No. 14 of 2001) but s.3 has yet not been commenced.

[335] SI No. 227 of 1993.

[336] SI No. 225 of 1996.

[337] SI No. 498 of 1998.

[338] SI No. 89 of 2001.

[339] Namely, those persons referred to in articles 4.2, 4.3 and 4.4 of the Subvention Regulations. See below.

board[340] by or on behalf of a person prior to his admission to a nursing home.[341] A person who was resident in a nursing home on 1 September 1993 or a person acting on his behalf is entitled to make an application for a subvention to the responsible health board.[342] A person who commenced residence in a nursing home after 1 September 1993 and had not made an application for a subvention prior to his admission thereto cannot apply for a subvention sooner than two years from the date of his admission, unless the chief executive officer of the health board determines otherwise.[343]

198. A person who is admitted to a nursing home in emergency circumstances or a person acting on his behalf can apply to the responsible health board for a subvention provided that the health board is satisfied that the person needed to be admitted as a matter of emergency and that the registered proprietor or person in charge[344] had no option but to admit the person at that time.[345]

199. On receipt of an application for a subvention in respect of any person, the responsible health board is required to make arrangements for the carrying out of an assessment of the dependency and the means of the person to whom the application refers, as provided for under the Subvention Regulations.[346]

200. An applicant for a subvention is required to furnish on request to the responsible health board all relevant information as regards the means and dependency of the person in

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[340] For the purpose of the Subvention Regulations, "responsible health board" means the health board in whose functional area the person, in respect of whom a subvention is being sought, ordinarily resides: Subvention Regulations, article 3.

[341] Unless otherwise indicated, all references herein to a nursing home are references to a nursing home registered in accordance with s.4 of the 1990 Act.

[342] Subvention Regulations, article 4.2.

[343] Subvention Regulations, article 4.3.

[344] "Person in charge" means the person in charge of the care and welfare of patients in a nursing home: Subvention Regulations, article 3.

[345] Subvention Regulations, article 4.4.

[346] *Ibid.*, article 4.5. The words "and circumstances" were deleted from article 4.5 by the Nursing Homes (Subvention) (Amendment) Regulations, 1998 (SI No. 498 of 1998). The words were also deleted from articles 10.4, 10.5, 10.6, 11.3, 13.1, 14.6, 14.7, 19.1, 21.1, 21.2 and 21.3 of the Subvention Regulations. Article 3 thereof was amended by deleting the word "circumstances" and the definition thereof. For an overview of the background to the making of these amending Regulations see generally the Report of the Ombudsman entitled *Nursing Home Subventions – an investigation by the Ombudsman of complaints regarding the payment of nursing home subventions by health boards* (January 2001).

respect of whom a subvention is being sought to enable the health board to make a determination as regards his qualification for a subvention.[347] A health board is entitled to refuse to consider an application for a subvention unless the relevant information has been supplied by the applicant to enable the health board to make a determination as regards qualification for a subvention.[348]

201. A person in respect of whom a subvention is being sought will not qualify for a subvention unless the responsible health board is of the opinion that the person to whom the application refers is: (a) sufficiently dependent to require maintenance in a nursing home, and (b) unable to pay any or part of the cost of maintenance in a nursing home.[349]

202. In assessing the level of dependency of a person who has applied for a subvention or on whose behalf an application has been made, the responsible health board is required to follow the procedures set out in the First Schedule to the Subvention Regulations.[350] In this regard, the health board is required to determine whether a person is sufficiently dependent to require maintenance in a nursing home and, if so, to which of the three levels of dependency set out in the First Schedule the person's level of dependency corresponds.[351] For the purpose of establishing the dependency of a person in respect of whom a subvention is being sought, a designated officer of a health board can request information, conduct interviews and carry out an examination of the person.[352]

203. A health board is required to assess the means of the person in respect of whom a subvention is being sought on the basis of the general rules for the assessment of means in the Second Schedule to the Subvention Regulations.[353] For the purposes of the Subvention Regulations, "*means*" is defined as the income and imputed value of

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[347] Subvention Regulations, article 5.1.

[348] *Ibid.*, article 5.2.

[349] *Ibid.*, article 6.1.

[350] *Ibid.*, article 7.1

[351] *Ibid.*

[352] *Ibid.*, article 7.2. Only a designated officer who is a medical practitioner is entitled to inspect any medical record relating to a person in respect of whom a subvention is being sought: article 7.3. Only a designated officer who is a medical practitioner, a registered nurse, an occupational therapist or a chartered physiotherapist is entitled to carry out an examination of a person in respect of whom a subvention is being sought: article 7.4.

[353] Subvention Regulations, article 8.1.

assets of a person in respect of whom a subvention is being sought and the income and imputed income of his or her spouse.[354]

204. The Second Schedule sets out various rules which a health board is required to apply in the case of every application for a subvention to determine: (a) whether a person qualifies for a subvention; and (b) if he does, the amount of the subvention to be paid. In calculating the means of a person, a health board is required to take all sources of income into account[355] in the twelve months preceding the date of application.[356] The income of a married or cohabiting person must be assessed as half the combined income and imputed income of the couple.[357] A health board can take into account any income in respect of which a person claiming a subvention has deprived himself to qualify for a subvention or to be paid a higher amount of subvention.[358] The means of a person (and his or her spouse, if any,) must be assessed net of PRSI, statutory contributions and statutory levies.[359]

205. A health board is entitled to consider any asset of the person as a source of funding for nursing home care.[360] Specifically, a health board can take the value of the following assets into account in assessing the means of a person:
(a) house property, excluding normal household chattels;
(b) stocks, shares or securities;
(c) money on hand, in trust, lodged, deposited or invested;
(d) interests in a company or business of any kind, including a farm;
(e) interest in land;
(f) life assurance or endowment policies;
(g) valuables held as investments;
(h) current value of equipment of a business or machinery, excluding a car, not covered under a previous heading.[361]

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[354] *Ibid.*, article 3.

[355] Including wages, salary, pension, allowances, payments for part time and seasonal work, income from rentals, investments and savings and all contributions from whomsoever arising.

[356] Second Schedule, rules 2 and 3.

[357] *Ibid.*, rule 4.

[358] *Ibid.*, rule 5.

[359] *Ibid.*, rule 6.

[360] *Ibid.*, rule 7.

[361] *Ibid.*, rule 8.

206. A health board is required to disregard the first £6,000 of any asset(s) owned or enjoyed by the person in assessing the value of assets available to a person applying for a subvention.[362] The value of any asset(s) transferred from the ownership of the person in the five years preceding the application can be assessed by a health board.[363] The health board can also assess any benefit or privilege to the person arising from the transfer of an asset to another person.[364]

207. A health board is required to disregard the principal residence in the assessment of a person's means if it is occupied immediately prior to or at the time of the application and continues to be occupied by certain specified persons.[365] If the principal residence is not so occupied, a health board can impute an annual income equivalent to 5% of the estimated market value of the residence.[366]

208. In assessing the means of a person who owns or whose spouse owns a farm or business, the income from the farm or business must be calculated on the basis of the accounts where available and on a notional basis where such accounts are not available.[367]

209. A health board can refuse to pay a subvention to a person if the value of his assets, excluding the principal residence, exceeds £20,000.[368] A health board can also refuse to pay a subvention to a person if his principal residence is valued at £75,000 or more and

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[362] *Ibid.*, rule 9

[363] *Ibid.*, rule 10.

[364] *Ibid.*, rule 11.

[365] Namely, a spouse, a son or daughter aged less than 21 or in full time education or a relative in receipt of the Disabled Person's Maintenance Allowance, Blind Person's Pension, Disability Benefit, Invalidity Pension or Old Age Non-Contributory Pension. (Rule 12).

[366] Second Schedule, rule 13. The imputed income of a principal residence must be calculated net of mortgage, loan, rental or purchase repayments existing prior to or at the time of application.

[367] Second Schedule, rule 15. See rules 16 and 17 in relation to the calculation of a notional income. If a person has transferred the ownership of a business within the 5 years prior to the making of an application without an agreement on benefit or privilege, the health board can take into account any payment on transfer or can impute a notional value of 5% of the market value of the business on the date of transfer, whichever is the higher (rule 18). If a person has transferred the ownership of a farm in the five years preceding the application, the health board can take into account any payment on transfer and/or any continuing income form the earnings of the farm (rule 19).

[368] Second Schedule, rule 21.

is not occupied by certain persons[369] and the person's income is greater than £5,000 per year.[370]

210. In calculating the amount of a subvention to be paid, a health board is required to ensure that income equivalent to one-fifth of the weekly rate of the Old Age Non-Contributory Pension payable at the time, is disregarded for the purposes of such assessment; the person in question is entitled to retain that sum for his or her own personal use.[371] For the purpose of establishing the means of a person in respect of whom a subvention is being sought, a designated officer of a health board can request information and conduct interviews with the person and his or her spouse and child or children, if any.[372]

211. The maximum rates of subvention payable in respect of each of the three levels of dependency of persons assessed as requiring maintenance in a nursing home are as set out in the Fourth Schedule to the Regulations.[373] In calculating the rate of subvention to be applied in respect of a person who qualifies for a subvention, a health board is required to base its decision on the level of dependency of that person.[374]

212. A health board is required to inform an applicant in writing within 8 weeks of the receipt of the application[375] of its decision as to whether a subvention will be paid and the amount of any such subvention.[376] When a health board has determined that a person does not qualify for a subvention or does not qualify for the maximum rate appropriate to that person's level of dependency, it must inform the applicant of the grounds for its

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[369] Namely, a spouse, a son or daughter aged less than 21 or in full time education or a relative in receipt of the Disabled Person's Maintenance Allowance, Blind Person's Pension, Disability Benefit, Invalidity Pension or Old Age Non-Contributory Pension.

[370] Second Schedule, rule 22.

[371] Subvention Regulations, article 8.2 (as substituted by article 5 of the Nursing Homes (Subvention) (Amendment) Regulations, 1998.

[372] Subvention Regulations, article 8.3.

[373] As substituted by the Nursing Homes (Subvention) (Amendment) Regulations, 2001.

[374] As assessed in accordance with the First Schedule to the Subvention Regulations: Subvention Regulations, article 10.2. See generally the provisions concerning the calculation of the amount of a subvention in article 10 of the Subvention Regulations.

[375] If all the information sought was not provided with the application, the health board is required to inform the applicant within 8 weeks of the receipt of the information requested.

[376] Subvention Regulations, article 11.1

decision.[377] When a health board has determined that a person does not qualify for a subvention, or qualifies for less than the maximum rate of subvention on the grounds of means or pursuant to article 10.5, it must inform the applicant of his right to appeal the decision under article 19.1 of the Subvention Regulations.[378]

213. When a health board has determined that a person qualifies for a subvention under the Subvention Regulations and has not made the person an offer of accommodation under article 17.1 thereof, it is required to pay the subvention to the nursing home of the person's choice.[379] A health board cannot pay a subvention towards the cost of maintaining a person in a nursing home without the prior agreement of the registered proprietor or person in charge to the admission of the person in respect of whom a subvention is to be paid.[380] Where a health board which is paying a subvention in respect of a particular person is requested to transfer the subvention to another nursing home and the registered proprietor or person in charge of the other nursing home has agreed to admit the particular person, the health board is required to accede to such request.[381]

214. When a health board has determined that a person qualifies for the payment of a subvention and has not offered the person alternative accommodation,[382] the health board is required to pay a subvention towards the cost of maintaining that person in a nursing home.[383] The subvention is payable from the date the person qualifies for a subvention[384] until the person is discharged from the nursing home or dies, or until the

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[377] *Ibid.*, article 11.2.

[378] *Ibid.*, article 11.3.

[379] *Ibid.*, article 12.1. If the person is unable to exercise a choice, the health board is required to pay the subvention to the nursing home chosen by the person acting on his behalf.

[380] Subvention Regulations, article 12.2.

[381] *Ibid.*, article 12.3.

[382] Where a health board has determined that a person who was resident in a nursing home on 1 September 1993 qualifies for a subvention, it can, instead of paying the subvention, offer that person accommodation in a health board institution providing nursing care within the board's functional area: Subvention Regulations, article 17. A health board which proposes to make such an offer is required to have regard to the general welfare and religious affiliation of the person qualifying for a subvention and the general welfare of his or her spouse and child or children, if any: *ibid.*

[383] *Ibid.*, article 13.1.

[384] Or, if the person was resident in the nursing home on 1 September 1993, from the date the person applied for a subvention.

health board withdraws the subvention following a review of the dependency and means of the person.[385] The subvention must be paid on behalf of the person concerned to the registered proprietor of the nursing home to which that person has been admitted.[386]

215. A health board can pay a subvention in respect of a person whom it has determined as qualifying for a subvention in a nursing home in its own functional area, or in the functional area of another health board.[387]

216. A person who qualified for a subvention under the Subvention Regulations and who was benefiting from a payment under s.54 of the 1970 Act at the time of application cannot benefit from such payments from the date the subvention was paid.[388]

217. A health board which is paying a subvention in respect of a person can, with the exception of certain persons, review the dependency and/or means of that person[389] no sooner than six months from the date on which a subvention was first paid and at six monthly intervals thereafter.[390] A health board is required to review the dependency and/or means of a person after six months from the date on which a subvention was paid or no sooner than six months after the last review if requested to do so by the person in receipt of the subvention, a person acting on his behalf or a person in charge of the home.[391] If, following a review after the relevant six month period, a health board

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[385] Subvention Regulations, article 13.1.

[386] *Ibid.*, article 13.2.

[387] *Ibid.*, article 13.3.

[388] *Ibid.*, article 13.5.

[389] In carrying out any such reviews, a health board is required to assess the dependency in accordance with articles 7.1 – 7.4 of the Subvention Regulations and the means in accordance with articles 8.1 – 8.3 of the Subvention Regulations.

[390] Subvention Regulations, article 14.1. The excepted persons are referred to in articles 14.2 and 14.3. The former provides that a review of dependency and/or means can be carried out sooner than six months from the date on which the subvention was first paid if the health board has informed the person and the nursing home proprietor before the first payment of the subvention that, in the opinion of the board, the person is in need of convalescent respite care. Article 14.4 provides that if a health board is of the opinion that a major change has occurred in the dependency and/or means of a person in respect of whom it is paying a subvention, it may, having informed the person concerned and the registered proprietor of the nursing home, initiate a review sooner than six months from the date on which a subvention was first paid or six monthly intervals thereafter.

[391] Subvention Regulations, article 14.2.

determines that the dependency status and/or the means of the person have changed, the health board can either:

(a) increase or decrease the amount of the subvention in accordance with the provisions of the Subvention Regulations;

(b) withdraw the subvention;

(c) make the person an offer of accommodation in a health board institution providing nursing care in its functional area in accordance with article 17 of the Subvention Regulations; or

(d) make arrangements for the care of the person in his home.[392]

218. Where a health board has decided to carry out a review, it must, for the duration of such review, continue to pay a subvention at the same rate to the person whose dependency and/or means are being reviewed.[393] If a health board does not carry out a review, it must continue to pay a subvention at the same rate on behalf of the person concerned.[394]

219. Where a health board has carried out a review and determines that a person no longer qualifies for a subvention, qualifies for a lower rate of subvention or qualifies for a higher rate of subvention, it must inform the person (or person acting on his or her behalf) in writing of its decision and of the grounds for its decision.[395]

220. A person who qualifies for a subvention from a health board or a person acting on his behalf is required to inform the health board if there is any change in the means of the person.[396]

221. A registered proprietor or person in charge is precluded from seeking any payment in addition to the amount of the subvention determined by a health board and the contribution of the person in receipt of a subvention payable under article 13.1 of the Subvention Regulations for any service which is considered to be essential to the

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[392] *Ibid.*, article 14.6.

[393] *Ibid.*, article 14.7.

[394] *Ibid.*, article 14.8.

[395] *Ibid.*, article 14.10. Where the board has determined that a person on the basis of his means no longer qualifies for a subvention or qualifies for a lower rate of subvention, the health board is also required to inform the person (or a person acting on his behalf) of his right to appeal the decision under article 19.1 of the Subvention Regulations.

[396] Subvention Regulations, article 14.10.

maintenance of a person in a nursing home and common practice in nursing homes.[397] A service which is considered to be essential to the maintenance of a person in a nursing home and common practice in most nursing homes "include[s] bed and board, nursing care appropriate to the level of dependency of the person, incontinence wear and bedding, laundry service and aids and appliances necessary to assist a dependent person with the activities of daily living."[398] A registered proprietor or person in charge cannot discriminate against a person in the nursing home in receipt of a subvention from a health board in favour of a person in the nursing home not in receipt of such a subvention as regards the provision of any such service.[399] A special service or item of equipment required by a person in receipt of a subvention in a nursing home will be the subject of a separate arrangement between the health board and the registered proprietor or person in charge and must be detailed in the contract of care.[400]

222. A health board can refuse to pay a subvention, cease payment of a subvention or reduce the rate of subvention if it is of the opinion that false or misleading information was given in respect of any application for a subvention or on review of a subvention as regards the dependency and/or the means of the person to whom the application refers.[401]

223. Article 20 of the Subvention Regulations provides that if, under s.31 of the 1970 Act, the Minister specifies a limit on the expenditure to be incurred in providing services under the Act, a board can, in respect of persons qualifying for a subvention after the date on which the limitation on expenditure is specified, pay such amounts as would enable the board to contain its expenditure within the specified limit. However, s.31 of the 1970 Act was repealed by s.23 of the 1996 Act. Accordingly, article 20 cannot be relied upon as a basis for limiting expenditure.

224. A health board can recoup a specified amount from a person in respect of whom it has paid a subvention if it becomes of the opinion that the person did not disclose in full his

[397] *Ibid.*, article 16.1.

[398] *Ibid.*, article 16.2.

[399] *Ibid.*, article 16.3.

[400] *Ibid.*, article 16.4.

[401] *Ibid.*, article 18.

or her means at the time of application for subvention or review.[402] A health board is also entitled to recoup that amount from the estate of a person in respect of whom it had paid a subvention after his death if it becomes of the opinion that the person did not disclose fully his means at the time the application for subvention was made.[403]

225. Article 23 of the Subvention Regulations provides that they are to be enforced and executed in the functional area of each health board by the chief executive officer of the health board concerned or by a person acting as deputy chief executive officer of that board in accordance with s.13 of the 1970 Act.

(v) The Health (Amendment) (No. 3) Act, 1996

226. Section 2(1) of the Health (Amendment) (No. 3) Act, 1996[404] (referred to herein as "*the 1996 Act*") (which was repealed by the Health Act, 2004) provided that *"[a] health board, in performing the functions conferred on it by or under [the 1996 Act] or any other enactment,[405] shall have regard to:*

(a) the resources, wherever originating, that are available to the board for the purpose of such performance and the need to secure the most beneficial, effective and efficient use of such resources,

(b) the need for co-operation with voluntary bodies providing services, similar or ancillary to services which the health board may provide, to people residing in the functional area of the health board,

(c) the need for co-operation with, and the co-ordination of its activities with those of, other health boards, local authorities and public authorities, the performance of whose functions affect or may affect the health of the population of the functional area of the health board, and

(d) policies and objectives of the Government or any Minister of the Government in so far as they may affect or relate to the functions of the health board."

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[402] The amount specified is the difference between the amount of the subvention paid in respect of the person and the amount of the subvention he would have been entitled to if the person's means had been fully disclosed at the time of application or review. Subvention Regulations, articles 21.1 and 21.3.

[403] Subvention Regulations, article 21.2.

[404] No. 32 of 1996.

[405] The word "functions" included powers and duties and a reference to the performance of functions includes, with respect to powers and duties, a reference to the exercise of powers and the carrying out of duties: Health (Amendment) (No. 3) Act, 1996, s.1(1) and (2), (which was repealed by the Health Act, 2004)

227. Section 2(2) (which was repealed by the Health (Amendment) Act, 2004[406]) provided that the provisions of section 2 applied to both reserved functions and executive functions.

228. Section 2(3), (which was repealed by the Health Act, 2004), provided that every enactment relating to a function of a health board *"shall be construed and have effect subject to the provisions of [s.2]."*[407]

229. Pursuant to s.5 of the 1996 Act, (which was repealed by the Health Act, 2004), the Minister was required, in respect of a financial year of a health board,[408] to determine the maximum amount of net expenditure[409] that may be incurred by the board for that financial year and to notify the board in writing of the amount so determined within a specified time period.[410] However, if the Minister considered it appropriate, such a determination could relate to such period (other than the financial year of the health board concerned) as could be specified in the relevant notification.[411] The Minister was also empowered to amend a determination by varying the maximum amount of net expenditure that a health board may incur for a particular financial year.[412] If the Minister so varied that amount, he was required to notify the health board concerned in writing of the extent of the amendment as soon as may be and the determination applied and had effect as so amended.[413]

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[406] No. 19 of 2004.

[407] Health (Amendment) (No. 3) Act, 1996, s.2(3).

[408] "Financial year" means a period of 12 months ending on 31 December in any year and, in a case where the Minister makes a determination in respect of a period other than a financial year, is construed as a reference to that period: Health (Amendment) (No. 3) Act, 1996, s.1(1).

[409] "Expenditure", in relation to a health board, means: (a) the gross non-capital expenditure of the board for a financial year, and (b) the gross capital expenditure of the board for that year. "Net expenditure" in relation to a health board for a financial year, means the expenditure of the board for the year less the income of the board for that year. "Income", in relation to a health board, means all of the income of the board for a financial year other than any grant made to the board for that year under s.32 of the 1970 Act. See Health (Amendment) (No. 3) Act, 1996, s.1(1)

[410] 1996 Act, s.5(1). The Minister is required to notify the health board not more than 21 days after the publication by the Government of the Estimates for Supply Services for that financial year.

[411] 1996 Act, s.5(2).

[412] *Ibid.*, s.5(3).

[413] *Ibid.*

230. Pursuant to s.6(1) of the 1996 Act, (which was repealed by the Health Act, 2004), a health board was required, not later than 42 days[414] from receipt of a determination,[415] to adopt and submit to the Minister a service plan.[416] A service plan had to be prepared in such form and contain such information as could be specified by the Minister from time to time. In particular, a service plan had to: (a) include a statement of the services to be provided by the health board and estimates of the income and expenditure of the board for the period to which the plan relates; and (b) be consistent with the financial limits determined by the Minister under s.5 of the 1996 Act.[417] If a service plan was not submitted by a health board in accordance with s.6(1), the Minister could direct the board to submit one to him within such period (not exceeding 10 days) from the receipt of such direction as may be specified therein.[418] The Minister was also empowered to direct the chief executive officer to prepare and submit a service plan to him where the health board failed to do so[419] and the chief executive officer was required to comply with such a direction. Such a service plan submitted by the chief executive officer was deemed to have been adopted and submitted by the relevant health board. The Minister was also empowered to direct the health board (or, where appropriate, the chief executive officer) to make modifications to the service plan where he was of the opinion that it:

(b) did not contain the required information;[420]

(c) proposed net expenditure which exceeded the net expenditure as determined by the Minister; or

(d) was not in accordance with the policies and objectives of the Minister or of the Government in so far as they related to the functions of the board.[421]

231. A health board was required to supervise the implementation of its service plan in order to ensure that the net expenditure for the financial year concerned did not exceed the net expenditure determined by the Minister for that year.[422] A health board could amend a

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[414] The Minister can direct a shorter period (not being less than 21 days) in a particular case.

[415] "Determination" and cognate words are construed in accordance with s.5 of the 1996 Act.

[416] 1996 Act, s.6(1).

[417] *Ibid.*, s.6(2), as repealed by the Health Act, 2004.

[418] *Ibid.*, s.6(3), as repealed by the Health Act, 2004.

[419] Whether in accordance with s.6(1) or pursuant to a direction from the Minister under s.6(3).

[420] Specifically, the information referred to in s.6(2).

[421] Health (Amendment) (No. 3) Act, 1996, s.6(6), as repealed by the Health Act, 2004.

[422] *Ibid.*, s.7(3), as repealed by the Health Act, 2004.

service plan, but in so doing, it had to ensure that the net expenditure for the financial year concerned did not exceed the net expenditure determined by the Minister for that year.[423]

232. Whenever the Minister made a determination, he was required to specify the amount of the indebtedness that the health board concerned could incur[424] and to notify the board in writing of that amount.[425] A health board was required to so conduct its affairs that its indebtedness did not exceed the amount for the time being specified by the Minister.[426]

233. The chief executive officer was required to implement the service plan, or amended service plan, on behalf of the health board so that: (a) the amount of net expenditure of the board for the financial year did not exceed the amount of net expenditure determined by the Minister; and (b) the indebtedness specified by the Minister under s.8(1) of the 1996 Act.[427] The chief executive officer was required to inform the Minister and the board as soon as may be if he was of opinion that a decision of the health board would, or a proposed decision of the board would, if made either: (a) result in net expenditure by the board for a financial year in excess of the amount determined by the Minister; or (b) result in the indebtedness of the board exceeding the amount specified by the Minister under s.8(1) of the 1996 Act.[428]

234. If the amount of net expenditure incurred by a health board in a financial year was either greater or less than the amount determined by the Minister for that year, the health board was required to charge the amount of such excess or credit the amount of such surplus in its income and expenditure account for the next financial year.[429]

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[423] *Ibid.*, s.7(4), as repealed by the Health Act, 2004.

[424] "Indebtedness" in relation to a health board, meant the amount owed by the health board to creditors, calculated in accordance with accounting standards specified by the Minister, less an amount equal to the value, so calculated, of the current assets of the board determined in such manner as may be so specified": Health (Amendment) (No. 3) Act, 1996, s.1(1).

[425] Health (Amendment) (No. 3) Act, 1996, s.8(1), as repealed by the Health Act, 2004.

[426] *Ibid.*, s.8(2), as repealed by the Health Act, 2004. The function of the health board in this regard was a reserved function: *ibid.*, s.8(3), as repealed by the Health (Amendment) Act, 2004.

[427] *Ibid.*, s.9(1), as repealed by the Health Act, 2004.

[428] *Ibid.*, s.9(2), as repealed by the Health (Amendment) Act, 2004.

[429] *Ibid.*, s.10, as repealed by the Health Act, 2004.

235. A health board was required to keep all proper and usual accounts of all moneys received or expended by the board including an income and expenditure account and balance sheet and, in particular, to keep all such special accounts as the minister could from time to time direct.[430] A health board was also required to prepare annual financial statements in accordance with accounting standards specified by the Minister.[431]

236. Where the Minister was satisfied, after considering a report on the matter, that a health board was not performing any one or more of its functions in an effective manner or had failed to comply with any direction given by the Minister, the Minister could by order transfer such reserved functions of the board as he specified to certain persons[432] for such period (not exceeding two years) as he specified in the order.[433]

237. The Minister could give directions in writing to a health board for any purpose in relation to which directions were provided for by any of the provisions of the 1996 Act or any other enactment and for any matter or thing referred to in the 1996 Act as specified, to be specified, determined or to be determined.[434] A health board was required to comply with any such direction given to it and to furnish the Minister with such information as he could reasonably require for the purpose of satisfying himself that any such direction had been complied with by the board.[435]

(vi) The Health (Miscellaneous Provisions) Act, 2001

238. As noted above, section 1(1) of the Health (Miscellaneous Provisions) Act, 2001 inserted subsection (5A) into section 45 of the 1970 Act which provides that: *"[a] person who is not less than 70 years of age and is ordinarily resident in the State shall have full eligibility for the services under [Part IV] and, notwithstanding subsection (6),*[436]

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[430] *Ibid.*, s.11(1), as repealed by the Health Act, 2004.

[431] *Ibid.*, s.11(2), as repealed by the Health Act, 2004.

[432] Being the chief executive officer or such other person as the Minister may specify in the order.

[433] Health (Amendment) (No. 3) Act, 1996, s.12(1), as repealed by the Health (Amendment) Act, 2004.

[434] *Ibid.*, s.13(1), as repealed by the Health Act, 2004. The Minister could also, by direction in writing, amend o revoke any such direction.

[435] *Ibid.*, s.13(3), as repealed by the Health Act, 2004.

[436] Section 45(6) provides that references in Part IV to persons with full eligibility shall be construed as referring t persons in the categories mentioned in subsection (1) or deemed to be within those categories.

references in [Part IV] to persons with full eligibility shall be construed as including references to such persons."

(vii) The Health (Amendment) Act, 2004

239. The Health (Amendment) Act, 2004 provides for: (i) the cessation of office of members of the health boards; (ii) the performance of the functions of health boards by their Chief Executive Officers and, in certain circumstances, by the Minister; and (iii) the amendment of the 1970 Act, the 1996 Act, 1996, the Health (Eastern Regional Health Authority) Act, 1999 and other enactments.

(viii) The Health Act, 2004

240. The Health Act, 2004 provides for the establishment of a Health Service Executive which takes over responsibility for the management and delivery of health services from the health boards and a number of other specified agencies. The Health Service Executive was established on 1 January 2005 pursuant to the Health Act, 2004 (Establishment Day) Order, 2004[437] and the health boards were dissolved on the same date. Under section 59 of the Act, the functions which, immediately before the establishment day, were the functions of a health board under or in connection with any enactment referred to in Schedule III of the Act (which includes the Health Acts, 1947 – 2001), transferred to the Health Service Executive on the establishment day.

[437] SI No. 885 of 2004.