Tithe an Oireachtais

An Comhchoiste um Shláinte agus Leanaí

Tuarascáil Eatramhach maidir leis an Tuarascáil ón Saincheisteanna Áirithe Bainistíochta agus Riaracháin sa Roinn Sláinte & Leanaí a bhaineann leis an gCleachtas i dtaobh Táillí do Dhaoine i gCúram Fadchónaí i bhForais Bhoird Sláinte agus le Nithe Gaolmhara.

Márta 2005

Houses of the Oireachtas

Joint Committee on Health & Children

Interim Report on the Report on Certain Issues of Management and Administration in the Department of Health & Children associated with the Practice of Charges for Persons in Long-Stay Care in Health Board Institutions and Related Matters.

March 2005

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Interim Report on the Report on Certain Issues of Management and Administration in the Department of Health & Children associated with the Practice of Charges for Persons in Long-Stay Care in Health Board Institutions and Related Matters.

March 2005

FOREWORD BY CHAIRMAN.

At its meeting on 9th March 2005, the Joint Committee on Health & Children met to discuss a Report on 'Certain Issues of Management and Administration in the Department of Health & Children associated with the Practice of Charges for Persons in Long-Stay Care in Health Board Institutions and Related Matters'.

The Report was presented to the Committee by Ms. Mary Harney, T.D., Tánaiste and Minister for Health & Children. This was subsequent to a Notice of Motion passed by Dáil Éireann on 9th March 2005 that the Joint Committee or a sub-Committee thereof, to consider, including in public session, the Report on Certain Issues of Management and Administration in the Department of Health & Children associated with the Practice of Charges for Persons in Long-Stay Care in Health Board Institutions and Related Matters and to report back to Dáil Eireann within three months concerning the legislative and administrative implications of the Report, its findings and conclusions.

The text of the Report on 'Certain Issues of Management and Administration in the Department of Health & Children associated with the Practice of Charges for Persons in Long-Stay Care in Health Board Institutions and Related Matters' is contained in Appendix 2 of an Interim Report which the Committee agreed to publish on 9th March 2005.

The Interim Report was then laid before both Houses of the Oireachtas.

_____

John Moloney T.D.
Chairman,
Joint Committee on Health & Children,
9th March 2005.

APPENDICES

Appendix 1: Motion of Referral to the Joint Committee of the Report on certain issues of management and administration in the Department of Health & Children associated with the practice of charges for persons in long-stay care in Health Board Institutions and related matters.

Appendix 2: Text of the Report on certain issues of management and administration in the Department of Health & Children associated with the practice of charges for persons in long-stay care in Health Board Institutions and related matters.

Appendix 3: The Orders of Reference of the Joint Committee on Health & Children

Appendix 4: The list of members of the Joint Committee on Health & Children.

APPENDIX 1

DÁIL ÉIREANN

Dé Céadaoin, 9 *Márta,* 2005
Wednesday, 9*th March,* 2005

10.30 a.m.

I dTOSACH GNÓ PHOIBLÍ
AT THE COMMENCEMENT OF PUBLIC BUSINESS

Fógra Tairisceana : Notice of Motion

***a*9.** "Go n-iarrann Dáil Éireann ar an gComhchoiste um Shláinte agus Leanaí, nó ar Fhochoiste den Chomhchoiste sin, breithniú a dhéanamh, lena n-áirítear breithniú i seisiún poiblí, ar an Tuarascáil maidir le Saincheisteanna Áirithe Bainistíochta agus Riaracháin sa Roinn Sláinte agus Leanaí a bhaineann leis an gcleachtas i dtaobh táillí do dhaoine i gcúram fadchónaí i bhForais Bhoird Sláinte agus le nithe gaolmhara, agus tuairisc a thabhairt do Dháil Éireann laistigh de thrí mhí i dtaobh chiallachais reachtacha agus riaracháin na Tuarascála, a cinntí agus a tátail.

That Dáil Éireann requests the Joint Committee on Health and Children, or a sub-Committee thereof, to consider, including in public session, the Report on Certain Issues of Management and Administration in the Department of Health and Children associated with the practice of charges for persons in long-stay care in Health Board Institutions and related matters, and to report back to Dáil Éireann within three months concerning the legislative and administrative implications of the Report, its findings and conclusions."

— ***Tomás Ó Ceit, Aire Stáit ag Roinn an Taoisigh***.

APPENDIX 2

REPORT ON CERTAIN ISSUES OF MANAGEMENT AND ADMINISTRATION IN THE DEPARTMENT OF HEALTH AND CHILDREN ASSOCIATED WITH THE PRACTICE OF CHARGES FOR PERSONS IN LONG-STAY CARE IN HEALTH BOARD INSTITUTIONS AND RELATED MATTERS

PREPARED AT THE REQUEST OF AN TÁNAISTE AND MINISTER FOR HEALTH AND CHILDREN Ms. MARY HARNEY, T.D.

MARCH 2005

Mary Harney T.D.,
Tánaiste and Minister for Health & Children,

Dear Tánaiste,

On 16 December 2004 you asked me to examine and to report to you on certain matters relating to the practice of "in-patient charges in health board institutions". You provided me with terms of reference for the examination of the matters concerned. These are set out at Appendix 1 of this report.

I refer to our meeting of Friday 4th March when I presented to you first copies of my report. I indicated at my meeting with you that I have not had a final opportunity to read the report from cover to cover before presenting you with these copies. I stated that I wished to undertake a final read of the entire report over the weekend in order to pick up any typographical errors or any points where clarification might be needed to facilitate a fuller understanding of the content of the report.

There are two points of clarification I have now added to the report for the purpose outlined. These are:

1. At paragraph 4.57 on page 49 where I had referred to the three draft statements provided to me by the Secretary General of the Department of Health and Children. I consider that I should add a sentence of clarification in relation to the various draft statements received from the Secretary General as follows: "*In providing the different drafts the Secretary General made clear, and I fully accepted, that the provisions of drafts was to facilitate me in the completion of my report at the earliest possible time, while at the same time, allowing the Secretary General to reflect more fully on the drafts to ensure that they represented his best recollection of the matters covered in his statement".*

2. At paragraphs 5.43 and 7.4(3) at pages 78 and 92 respectively of the report where I have added in each case some four sentences as follows: "*While this, at least, seems clear a more difficult question surrounds any possible conclusion on where lies the balance of morality involved. Attempting to arrive at any such conclusion does not fall within the Terms of Reference of this report. Were it to do so I, certainly would not be equipped to provide an answer. Who exactly would be so equipped appears highly indeterminate".*

With the inclusion of these two points my report is now fully completed.

I am privileged to submit the report beneath as requested.

John Travers
7th March 2005

REPORT ON CERTAIN ISSUES OF MANAGEMENT AND ADMINISTRATION IN THE DEPARTMENT OF HEALTH AND CHILDREN ASSOCIATED WITH THE PRACTICE OF CHARGES FOR PERSONS IN LONG-STAY CARE IN HEALTH BOARD INSTITUTIONS AND RELATED MATTERS

REPORT ON CERTAIN ISSUES OF MANAGEMENT AND ADMINISTRATION IN THE DEPARTMENT OF HEALTH AND CHILDREN ASSOCIATED WITH THE PRACTICE OF CHARGES FOR PERSONS IN LONG-STAY CARE IN HEALTH BOARD INSTITUTIONS AND RELATED MATTERS.

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INTRODUCTION

1. On the 16th December 2004 I was asked by the Tánaiste and Minister for Health and Children, Ms. Mary Harney, T.D. to examine and report on the management, within the Department of Health and Children, of the long-term practice of inpatient charges in health board institutions. I was provided with terms of reference for the examination and report requested. In particular, I was asked to consider and report on the following matters:

   "(a) The date the Department of Health and Children first knew of the existence of legal concerns relating to the imposition of charges by Health Boards on relevant persons.

   (b) All actions and decisions taken by the Department of Health and Children in response to the legal issues that arose concerning the imposition of charges by Health Boards on relevant persons.

   (c) The reasons for the period of time that elapsed from the date such knowledge was first acquired up to the request by the Department of Health and Children for legal advice from the Attorney General on the 27th October 2004.

   (d) Such changes in practices and procedures, in the Department of Health and Children, that are necessary or desirable for the purpose of prioritising the response of the Department to matters of significant policy, financial or legal importance".

2. For the purpose of the examination and report requested a "*relevant person*" was defined as a person "*who is fully eligible, within the meaning of the Health Acts, and who is in receipt of inpatient services in a public hospital, nursing home or private nursing home pursuant to a contractual arrangement between that nursing home and a Health Board*".

3. A copy of the Terms of Reference for the examination and report requested is set out at Appendix 1. An extract from the Second Stage Speech in Dáil Eireann by An Tánaiste and Minister for Health and Children, Mary Harney, T.D. in moving the Health (Amendment) (No.2) Bill 2004 dealing with the examination and report requested is set out at Appendix 2.

4. At the outset it is important to make clear that, for the purpose of this report I have taken the term "Department of Heath & Children" to be the entire corporate entity that operates under the title of that Department encompassing both the Ministers and officials of the Department.

5. In undertaking the task assigned to me I wrote to the administrative heads of a number of bodies I considered could be of assistance to me in effectively and efficiently completing that task. In doing so I enclosed copies of the Terms of Reference for the examination and report and the extract from the speech of An Tánaiste and Minister for Health and Children referred to in the previous paragraph. I requested from them a list of all relevant records available in their

organisations in relation to the matters set out in the Terms of Reference assigned to me. A list of the administrative heads to whom I wrote is set out at Appendix 3.

6. I also wrote to the heads of all the political parties in Dáil Eireann not in Government enclosing copies of the Terms of Reference and the extract from the speech of An Tánaiste and Minister for Health and Children to which reference is made in the previous paragraph and inviting any submissions they wished to make in the context of the task assigned to me. A list of the heads of political parties to whom I wrote is set out at Appendix 4.

7. I wrote to and met with the Minister and two of the Ministers of State appointed to the Department of Health and Children immediately prior to the appointment in September 2004 of the present Minister for Health and Children, An Tánaiste Ms Mary Harney T.D. These were Mr Micheál Martin, T.D. currently Minister for Enterprise, Trade & Employment, Mr Ivor Callely, T.D. currently Minister of State at the Department of Transport and Mr Tim O'Malley T.D. currently Minister of State at the Department of Health and Children. I discussed with them and with An Tánaiste the matters I was required to examine in the task assigned to me and sought their cooperation in elucidating my understanding of these matters.

8. I also met with a number of officials whom I considered would be of assistance to me in clarifying certain matters germane to the examination I was asked to undertake. A list of these officials is set out at Appendix 5.

9. I have read, within the limitations of the time available, a good deal of documentation, records and files provided to me during the course of the preparation of this examination and report. These include documentation specifically brought to my attention by the Government Departments and Offices with which I have been in contact. In the case of the Department of Health and Children, they also include material from files which I have selected at random from the large register of files to which the Department drew my attention. It cannot be the case that I have, within the time available, read every document of relevance from the mass of such documentation in the possession of the relevant Government Departments and Offices going back over 30 years. I am, however, satisfied that the documentation I have read and the meetings I have had with Ministers and officials are adequate and sufficient to allow me to meet, in a fair and balanced way, the terms of reference for the examination and report I have been asked to undertake.

10. I have received good cooperation from all of those from whom I sought information and views in the conduct of the examination I was requested to undertake. In this regard the Secretary General and the officials of the Department of Health and Children with whom I was in contact were helpful and professional in the dealings I had with them as were those of the Department of Finance, the Department of An Taoiseach, the Attorney General's Office, the Office of the Ombudsman and the Chief Executives of the former Health Boards. An Tanáiste and the other three Ministers with whom I discussed matters relevant to the Terms of Reference of the examination I was asked to undertake were also helpful and cooperative. Research and

administrative support for the work I have undertaken was provided by Ms Roisin Heuston, Higher Executive Officer, in the Department of Health and Children. Ms Heuston was assiduous in the performance of her work which she performed with a high level of skill, dedication and professionalism. Mr Christopher Doyle, Legal Advisor in the Office of the Attorney General provided me with invaluable advice on matters relating to the process involved in undertaking the task assigned to me. I remain solely responsible for facts selected for inclusion in the report, for the conclusions drawn from the facts presented and for the recommendations made.

John Travers
1 March 2005

11. On 1 March 2005 I received a statement describing certain events relevant to the Terms of Reference of this report from the Secretary General of the Department of Health and Children following on previous discussions I had with him. The content of the Statement, which is fully set out in Chapter 4 of this report, raised matters that made in necessary for me to meet again with a number of persons with information and knowledge bearing on the matters set out in the Statement of the Secretary General. I so informed the Tánaiste and, accordingly, held back the report I was to submit on 1 March 2005. I have met again with the persons it was necessary for me to meet arising out of the Statement of the Secretary General. I have incorporated into my report the outcome of the additional discussions I held with all the persons concerned.

John Travers
4 March 2005

CHAPTER 1

THE PRACTICE OF CHARGES FOR LONG-STAY PATIENTS IN HEALTH BOARD INSTITUTIONS AND THE LEGAL BASIS OF SUCH CHARGES

The Practice of Levying Charges and the Underlying Principle

1.1 Charges have been raised from certain categories of persons provided with long-term care services in the institutions owned or operated by the State health authorities for over 50 years. The practice of making such charges is based upon an underlying principle of the perceived fairness of requiring a reasonable financial contribution to the costs of public health services on the part of those persons receiving such services taking account of their ability to make such a payment. The principle is reflected in the first comprehensive legislative foundations for the provision of health services in Ireland contained in the Health Act 1947[1]. It also underlies many of the provisions in subsequent Health Acts and Regulations made under these Acts right through the years to the present time. The underlying principle is re-stated succinctly in the national health strategy published by Government in 2001[2]: *"....it is fair that all those in receipt of publicly provided residential long-term care should make some payment towards accommodation and daily living costs, if they can afford to do so, just as they would if they were living in the community"*. The strategy report goes on to further state that the adoption of this principle in the provision of health services "*supports the aim to provide as high quality a service as possible and to make the most equitable use of resources and thus to help maximise the availability of these services*".

The Eligibility Status of Persons for Health Services

1.2 The current system of eligibility for health services derives from Section 45 of the Health Act 1970 as amended by subsequent health acts. The Health Act, 1970 first introduced the concepts of "*full eligibility*" and "*limited eligibility*". It provided for two categories of persons with eligibility for public health services viz.: (i) those with "*full eligibility*" and (ii) those with "*limited eligibility*". Until the Health (Miscellaneous Provisions) Act 2001 was enacted the determination of the eligibility category to which a person was assigned was, since the enactment of the Health Act, 1970, a matter for the Chief Executive Officer of the Health Board area in which the person resided. The determination of "*full eligibility*" was based on hardship grounds as set out in Section 45 of the Health Act, 1970 and on the interpretation of such grounds by the relevant Chief Executives of the Health Boards. The Health (Miscellaneous Provisions) Act 2001 (the 2001 Health Act) extended the status of "*full*

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[1] ***The Long Title to the Health Act, 1947 states that it 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".***

[2] ***Quality and Fairness: A Health System for You - published by Stationary Office, Dublin 2001.***

eligibility" under the Health Act, 1970 as a **statutory** entitlement to everybody ordinarily resident in the State who is not less than 70 years of age. The 2001 Health Act effectively removed the determination of the status of "*full eligibility*", or otherwise, in the case of people not less than 70 years of age ordinarily resident in the State from being a matter for administrative determination by the Chief Executives of Health Boards. The determination of "*full eligibility*" status in the case of people other than those not less than 70 years of age remained a matter for the Chief Executives of the relevant Health Boards until these Boards were dissolved and replaced by the Health Services Executive on 1 January 2005 under the provisions of the Health Act, 2004.

1.3 "*Full eligibility*" entitles people to a medical card and to a wide range of public health services free of charge. Over the years since the enactment of the Health Act, 1970 the category of persons defined as having "*limited eligibility*" under the Health Acts was extended to the point of universal provision. At the present time, any person ordinarily resident in the State who is not in the "*full eligibility*" category falls into the "*limited eligibility*" category (subject to certain provisions). People with "*limited eligibility*" are eligible to avail of a wide range of public health services under the health acts but may be charged for the services provided to them.

Charges for Long-Stay Care in Health Board Institutions: The Relevant Regulations under Legislation

1.4 For the purpose of the examination which is the subject-matter of this Report charges have been levied for long-stay care in health board institutions under two separate legislative provisions viz.:

- the Institutional Assistance Regulations
- the charges for In-Patient Services Regulations.

The power to make such regulations rests, under a number of Health Acts, with the Minister for Health and Children who exercises this power with the consent of the Minister for Finance in the case of Charges for In-Patient Services Regulations.

Charges under the Institutional Assistance Regulations

1.5 "*Institutional Assistance*" is defined in Section 54 of the Health Act, 1953 as "*shelter and maintenance in a county home or similar institution*". The Act provides that regulations can be made by the Minister for Health with the consent of the Minister for Finance to allow charges to be made for such services. Regulations were first made for this purpose in 1954 with amending Regulations being made in 1965. The regulations provide that charges for institutional assistance are payable by all persons irrespective of means. In practice this means that they apply whether the persons concerned have medical cards or not. They apply to people with "*full eligibility*" for health services as well as to those with "*limited eligibility*" under the Health Act, 1970. The charges are payable from the date of admission to a relevant institution. Since 1976 [Re. Maud McInerney, a Ward of Court (1976-7) ILRM 229] the concept of *"shelter and maintenance"*, for the purpose of charges under the

Institutional Assistance Regulations, was to be interpreted as non-medical care in a long-stay care home or institution of a health board.

Charges under the In-Patient Services Regulations

1.6 Section 53 of the Health Act, 1970 makes provision for regulations to be made by the Minister for Health with the consent of the Minister for Finance to enable charges to be levied for *"in-patient services"*. "*In-patient services"* are defined in Section 53 (i) of the Act as *"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"* are defined in Section 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; and
(d) the use of special apparatus at an institution".

1.7 The Health (Charges for In-Patient Services) Regulations 1976 (SI No. 180/1976), as amended by the Health (Charges for In-Patient Services) Regulations 1987 (SI No. 300/1987), were made pursuant to the provisions of the Health Act, 1970, and the Health Act, 1947 to enable health boards to levy charges for in-patient services on a person who is not a person with "*full eligibility*" and where, *inter alia,* "the person has no dependants". Charges were payable initially under the 1976 Regulations after 90 days (later reduced to 30 days under the 1987 Regulations). The in-patient services charges are payable only by persons who do not have "*full eligibility*" under the Act i.e. medical card holders are fully exempt as are persons with dependants.

1.8 The significant differences between the Institutional Assistant Charges and the In-Patient Service Charges as described in the previous paragraphs are that:

(i) the in-patient service charges are payable only by persons who are not "*fully eligible*" **whereas** the institutional assistance charges are payable by all persons including those with "*full eligibility*" (i.e. medical card holders).

(ii) the in-patient service charges are payable only after a person has been in receipt of in-patient services for more than a certain number of days determined by regulation (currently 30 days) in any one year *whereas* the institutional assistance charges are payable from the date of admission into a relevant institution.

These distinctions and, in particular, that relating to the eligibility status of persons are highly germane to the matters that are subject to examination in this report.

The Cover Letter (Circular 7/76) issued by the Department of Health with the 1976 Regulations in August 1976.

1.9 The In-Patient Services Regulations issued by the Department of Health in August 1976 to Health Boards were accompanied by a cover letter (Circular 7/76). (Copy attached at Appendix 11). Circular 7/76 drew attention to a number of points including:

(i) health boards continued to be authorised to levy charges under the Institutional Assistance Regulations (described in earlier paragraphs of this report).
(ii) the charges proposed under the 1976 In-Patient Service Regulations do **not** apply to "persons with *full eligibility*".
(iii) in the context of the definition[3] of a person with full eligibility set out in the 1970 Health Act, *"a person who, while he was providing for himself in his own home, was deemed to have full eligibility could be regarded as not coming within that definition when he is being maintained in an institution where the services being provided include medical and surgical services of a general practitioner kind, with consequential liability for charges under the regulations"*. (Italics added by Report Author).

1.10 Circular 7/76 identifies the legal foundations under which charges were to be levied by the health boards as:

(i) the Institutional Assistance Regulations 1954 and 1965 made under Section 54 of the Health Act, 1953
(ii) the Health (Charges for In-Patient Services) Regulations, 1976 made under Section 52 of the Health Act,1970.

Furthermore, Circular 7/76 invited the health boards to regard persons deemed to have "*full eligibility*" (i.e. medical card status) while residing at home to have lost that "*full eligibility*" status and, consequently, their entitlement to free in-patient services when they had been admitted to an institution which provided them with services which include *"medical and surgical services of a general practitioner kind"*. The clear objective of such an interpretation of the relevant legislative provisions was to enable health boards to charge such persons under the In-Patient Service Regulations. The reasons for wishing to do this become clear when the June 1975 High Court decision (confirmed by the Supreme Court in December 1976) in the Case of Ms Maud McInerney, Ward of Court is considered together with its consequential legal and financial implications. These matters are considered in the next Chapter of this Report.

[3] ***Section 45(1) of the Health Act 1970 defines "full eligibility" as a person in either of the following categories:***
"(a) adult persons unable with undue hardship to arrange general practitioner medical and surgical services for themselves and their dependants.
(b) dependant of the persons referred to in paragraph (a)".

CHAPTER 2

THE HIGH COURT DECISION IN JUNE 1975 (CONFIRMED BY THE SUPREME COURT IN DECEMBER 1976) IN RELATION TO LONG-STAY PATIENT CHARGES IN THE CASE OF MS MAUD McINERNEY, WARD OF COURT AND THE LEGAL AND FINANCIAL IMPLICATIONS OF THAT DECISION

The Approach to Charges for Persons in Long-Stay Care in Health Board Institutions prior to the Health Act, 1970.

2.1 As described in Chapter 1, prior to 1970 charges, under the law, could be levied on persons in public long-term care institutions under the Institutional Assistance Regulations made by Ministers of Health in consultation with Ministers of Finance. Charges can still be levied at the present time under the same regulations. These regulations were, and today still are, required to be in conformity with the Health Acts. The charges were (and are) applicable to every person in receipt of long-term care facilities in the form of *shelter and maintenance in a county home or similar institution* irrespective of the means of the persons concerned. The level of charges for the institutional assistance provided and the modalities of its application were (and are) at the discretion of the health authority providing the long-term care services. In exercising this discretion the circumstances of the persons in receipt of long-term care were (and are) taken into account.

The Provision for Charges under the Health Act, 1970: A New Approach.

2.2 The Health Act, 1970 introduced the concept of "*in-patient services*" (see definition in paragraph 1.6 above). It also made provision for the levying of charges for such services by the health boards established under the Act. Such charges required the making of regulations by the Minister for Health in consultation with the Minister for Finance. Self-evidently, any such regulations would, under the Constitution and the laws of Ireland, require to be in conformity with the provisions and policies of the primary legislation governing the making of the regulation. The Health Act, 1970 made clear that charges for "in-patient services" could **not** be levied on persons with "*full eligibility*"[4] under the Act. The eligibility status of a person ("full" or "limited") was to be determined by the Chief Executive Officers of health boards in conformity with the provisions of the Act.

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[4] ***The Health Act 1970 defines two categories of persons to be accorded the status of "full eligibility": "(a) adult persons unable without undue hardship to arrange general practitioner medical and surgical services for themselves and their dependants.***
(b) dependants of the persons referred to in paragraph (a)".

Uncertainties in Relation to Charges Arising from the Health Act, 1970

2.3 The provisions of the Health Act 1970 with respect to charges gave rise to some uncertainty in relation to whether the provisions for charges under the Institutional Assistance Regulations, which operated in conformity with the Health Act 1953, applied in all circumstances to persons receiving *"shelter and maintenance in a county home or similar institution"*. Under the Institutional Assistance Regulations it had been the practice of health authorities, prior to the enactment of the Health Act, 1970, to levy charges on persons in long-stay care in the institutions under their aegis taking due account of individual circumstances. Such charges were applied to persons who, subsequently, would be considered to have "*full eligibility*" for in-patient services under the provisions of the Health Act, 1970. Following the enactment of the Health Act, 1970 questions were increasingly raised in relation to the validity of charging persons in long-stay care under the Institutional Assistance Regulations in situations where such persons were in receipt of in-patient services and fell into the category of those with "*full eligibility*" under the 1970 Act.

The 1975 High Court Judgement on Charges in a long-Stay Care Institution

2.4 These questions were adjudicated on by the President of the High Court, Mr Justice Finlay, in a highly significant judgement in June 1975 [5] in respect of charges that had been levied on a person (a ward of Court[6]) in long-term care since 1958 in a health-board institution (St Brigid's Home at Crooksling, Co. Dublin). The decision of the High Court turned on whether the services being received by the person concerned represented "institutional assistance" (i.e. chargeable to the person) as defined under the Health Act 1953 or "in-patient services" as defined under the Health Act 1970 (i.e. not chargeable to persons in the "*full eligibility*" category).

2.5 The President came to his conclusions on these matters on the basis of two tests. These tests related to:

(i) the nature of St Brigid's Home itself as an institution and
(ii) the nature of the services being provided to the person concerned in St. Brigid's Home.

2.6 In relation to the first test the President concluded that St Brigid's Home was **not** a *"county home or similar institution"* as referred to in Section 54 of the Health Act 1953 under which the Institutional Assistance Regulations were made. He concluded instead that St Bridgid's Home was more in the category of institution referred to in Section 51 of the Health Act, 1970 i.e. a place where *"in-patient services"* are provided for a person while being maintained

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[5] ***McInerney Case: Re. Maud McInerney, A Ward of Court [1976-7] ILRM 229.***

[6] ***A Ward of Court is a person whom the Courts decide, on the application of a family member or other specified person (e.g. the person's solicitor or doctor), is not capable of managing his or her property because of mental capacity and for whom a Committee is appointed by the Courts to control the assets of the Ward on behalf of the Ward. The President of the High Court is the person in whom the jurisdiction of the High Court in relation to Wards of Court is vested under the Courts (Supplementary Provisions) Act 1961.***

"in a hospital, convalescent home or home for persons suffering from physical or mental disability or in accommodation ancillary thereto".

2.7 In the case of the second test (i.e. the "nature of services" test) the President concluded that the services being provided for the person in question in St Brigid's Home went beyond the concept of *"shelter and maintenance"* (which Justice Finlay construed narrowly *"as not involving any ingredient of medical care or nursing")* as set out in Section 54 of the Health Act, 1953. He found that the services being received were *"a form of medical care which, though not as intensive as might be appropriate to a hospital or even to a psychiatric wing of a hospital, is none the less beyond the conception of mere shelter and maintenance which appears…. to be contained in Section 54 of the 1953 Act"*.

2.8 On the basis of the considerations summarised in the previous paragraphs the President of the High Court, in his judgement, concluded that the person in question was **not** chargeable for the long-stay-care services provided at St Bridget's Home.

Supreme Court Judgement Upholding Judgement of High Court

2.9 The judgement of the President of the High Court was upheld on appeal by the Supreme Court in a judgement delivered in December 1976.

Supreme & High Court Judgements: Implications for Health Board Finances and Services

2.10 The 1975 High Court judgement, as described, was immediately seen to have serious financial and administrative consequences for the funding and provision of health services generally including, in particular, those relating to the provision of long-term care in Health Board institutions. This is apparent from the files of the Department of Health and from correspondence between a number of Health Boards and the Department at the time. The conclusion was quickly drawn that the High Court judgement on charges went well beyond the situation of Wards of Court in long-stay care in health board institutions who held "*full eligibility*" status under the Health Act, 1970 but extended also to all other persons with "*full eligibility*" status in long-stay care in these institutions. Since the vast majority of persons in long-stay care in health board institutions fell into either of these two categories the potential negative financial implications for the budgets of Health Boards **and** the consequential impact on the quality and extent of the health services provided by the Boards were very serious indeed.

Supreme & High Court Judgements: Response of Department of Health

2.11 As outlined in Chapter 1 the Department of Health addressed the issues arising from the High Court decision in 1975 through two principal and interrelated means:

(i) through the making of regulations to deal with charges for in-patient services under Section 53 of the Health Act 1970 and
(ii) through the contemporaneous issuing of guidelines to Health Boards for the interpretation of these regulations.

The nature of the regulations made and the guidelines issued have been described in Chapter 1.

2.12 It is clear from the files of the Department that a major concern of both the Department and the Health Boards at the time was to protect, as a source of income for the work of the Health Boards, the income generated from charges on persons in long-stay care in health board institutions at a level commensurate with that which obtained before the 1975 High Court judgement. This concern is well expressed in a letter sent from the Department of Health on 9th April 1976 seeking the consent of the Minister for Finance to the regulations proposed by the Minister for Health to enable the Health Boards to charge for in-patient services in conformity with the Health Act, 1970. The letter states clearly that the aim of making the new regulations is to ease the financial difficulties of the health boards and to reduce budgetary pressure in relation to the budgetary situation in 1976. The underlying principle for the charges is also clear from the letter which states: *"it seems reasonable that where a patient, who has not full eligibility and has not dependants, is in hospital on a long-stay basis, he should contribute towards the cost".* The Minister for Finance gave his consent to the making of the regulations and these came into effect from August, 1976.

2.13 From that time charges were levied by health boards on persons in long-stay care in health-board institutions under either the Institutional Assistance Regulations or the In-Patient Services Regulations as described in Chapter 1. In the case of the In-Patient Services Regulations (which over time appear to have become the main instrument used to levy long-stay charges) an essential statutory/legal requirement under the Health Act, 1970 was that the charges were to be levied only on persons who did not have "*full eligibility*". In the case of persons deemed to be persons with "*full eligibility"* before entering a long-stay care institution the CEOs of Health Board, with whom the legal responsibility to determine the "*full eligibility*" status of a person rested, were invited by the Department of Health by way of a circular (Circular 7/76) issued with the In-Patient Regulations 1976 to regard such persons as not coming within the definition of "*full eligibility*" once they were being maintained in an institution where the services provided include *"medical and surgical services of a general practitioner kind"*[7]. It is clear that the intention of interpreting "*full eligibility*" in the way advocated in Circular 7/76 was to ensure that persons who had been accorded the status of "*full eligibility*" before entering a health-board long-stay care institution became subject to charges once they had become long-stay care patients of the institutions and in receipt of "in-patient services".

[7] ***This is the "hardship" clause cited in the footnote on page 6 above in Section 45 (1) of the Health Act, 1970.***

2.14 The approach adopted by the Department of Health in advising health boards to deal with the charging issues as described in the previous paragraph appears to have been based on its belief that the approach was fair and reasonable both in principle and in operational terms. The adoption, or otherwise, of such a principle for operational purposes is, of course, a matter of policy to be determined by the Minister for Health and Government and provided for in legislation as necessary. The legal validity of the approach and practice adopted, irrespective of the desirability or otherwise of the underlying principle, is a different matter. The degree to which there was clarity on the required statutory and legal underpinning for the approach adopted and the weight attaching to this issue by the Department of Health is considered in the next Chapter of this Report.

CHAPTER 3

"LEGAL CONCERNS" WITH RESPECT TO THE PRACTICE OF CHARGES FOR CERTAIN LONG-STAY PATIENTS IN HEALTH BOARD INSTITUTIONS: EXTENT AND TIMING OF THE KNOWLEDGE OF THE DEPARTMENT OF HEALTH AND CHILDREN

Terms of Reference

3.1 The first significant issue set out in the Terms of Reference for this Report (see Page 1 above) which I was requested to examine and report upon was: ***"the date the Department of Health and Children first knew of the existence of legal concerns relating to the imposition of charges by Health Boards on relevant persons".***

The Existence of Substantive Legal Concerns Apparent from Outset (1976)

3.2 It is clear from the files made available to me by the Department of Health and Children for the purpose of this Report that the Department (and the Health Boards) were well aware from the outset of the making of the In-Patient Service Regulations in 1976 that "legal concerns" surrounded their application and operation. These "legal concerns" persisted right up to the introduction of the Health (Amendment (No.2) Bill in Dáil Eireann on 16 December 2004. The legal concerns related, in particular, to the means used to withdraw "*full eligibility*", as defined in the Health Act, 1970, from many people in respect of in-patient services in a health board institution in order to make them chargeable under the Health (In-Patient Services) Regulations 1976 as advocated in Circular 7/76 issued by the Department of Health in August 1976. A central feature of the legal concerns has been that the use of secondary legislation in the form of a ministerial regulation as a means of setting aside a substantive provision of primary legislation is *ultra vires.* A number of references drawn from the files of the Department, as described in the following paragraphs, may be cited to support the above conclusions. The references cited are in no way exhaustive of the content of the files of the Department on this issue. There are many other such references that tell a similar story.

January 1976: Legal Clarification Advocated

3.3 In January 1976 officials in the Department noted in the relevant files that if the Supreme Court upheld the decision of the High Court in the McInerney case described in Chapter 2 (i.e. essentially that in-patient services are not chargeable to persons with "*full eligibility*" under the Health Act, 1970) then *" the **law** on the subject may have to be clarified in any event".* (Emphasis in bold typeface added by author of this Report).

June 1976: Legal Concerns Raised by Legal Advisor to Department

3.4 In June 1976 the files in the Department note:

(i) the view of Department officials that there is *"a sustainable case for charging all people (including medical card holders) who are over 3 months in hospital for their maintenance if they have an income from any source"*. Attention is drawn to views expressed by the Eastern Health Board of an underlying requirement that *"the **law** be changed to enable this to be done"*. (Emphasis added by author of this Report).

(ii) the additional view of Department officials that under the 1976 In-patient Regulations then being drafted to allow charges to be raised for in-patient services not much money would be raised because of their then belief that charges would be confined to persons with limited eligibility with no dependants who are over 3 months in hospital. Officials expressed the view that the number of such persons availing of in-patient services in health board institutions was considered to be low.

(iii) that in response to a query as to whether a person accorded "*full eligibility*" status under the Health Act, 1970 continued to retain "*full eligibility*" status while being maintained in hospital for a long period the legal advisor to the Department, *inter alia*, advised that:

(a) "a person's full eligibility can continue irrespective of how long he is in hospital"

(b) "that health boards could decide to terminate a person's full eligibility while receiving hospital treatment only if they were satisfied that he could arrange general practitioner services for himself and dependants e.g. if his income had accumulated so that he could afford to do this".

(c) *"it is quite clear …… that **regulations could not be made providing for charges on persons with full eligibility**"*. (Emphasis in bold typeface added by Report author).

July 1976: In-Patient Service Regulation Made and Issued with Interpretative Circular 7/76 from Department of Health

3.5 The In-patient Services Regulations were made in July 1976. They were issued to Health Boards in August 1976 together with Circular 7/76 discussed in Chapter 1 and Chapter 2 of this Report. Circular 7/76 effectively invited the Health Board CEOs to remove "*full eligibility*" status from persons availing of long-stay care services in health board institutions as described earlier in this Report.

3.6 It seems clear from the files of the Department that, initially the Department considered dealing with the negative consequences of the High Court decision in the McInerney Case for the financial position of the health boards through primary legislation. In the event, however, the Department opted to deal with the issue arising through the making of regulations as provided for in the Health Act, 1970 and through the issue of Circular 7/76 contemporaneously with the issue of the regulations to health boards. It will be recalled that Circular 7/76 provides advice on how "*full eligibility*" under the Health Act, 1970 might be interpreted in the case of people in long-stay care who had "*full*

eligibility" status before being admitted to that care. The approach adopted by the Department appears to be at variance with the substantive advice of its own legal advisor and was adopted, apparently, without the benefit of any alternative legal advice to be found, at this time, in the files of the Department made available for the purpose of this Report.

July 1977: Legal Concerns Raised by Health Boards and by Legal Advisor to the Department of Health

3.7 In July 1977 a number of Health Boards drew the attention of the Department to objections being raised on the part of patients to the raising of charges on people with "*full eligibility*" under the 1976 Regulations. Concern was expressed in relation to the approach to the interpretation of how "*full eligibility*" might be determined as suggested in the 1976 Circular 7/76 from the Department of Health accompanying the Regulations. In responding to an internal Department request for advice on the issues arising the Legal Advisor to the Department advised that, while *"the Regulations themselves were alright"*, the accompanying circular from the Department *"would not stand up in court"*.

April 1978: Legal Concerns Raised by Senior Counsel Thomas McCann and Ronan Keane and by the Eastern Health Board

3.8 In response to a challenge in respect of two persons to the validity of the powers of the Eastern Health Board to levy charges for in-patient services on persons with *full eligibility* under the Health Act, 1970, in line with the 1976 Regulations and the Department of Health interpretative Circular 7/76 of August 1976, the Board in early 1978, sought the opinion /advice of two eminent Senior Counsel, at the time, Mr Thomas S McCann, S.C. and Mr Ronan Keane, S.C. The advice of the Counsel was to the effect that the interpretation of "*full eligibility*" as advocated in Circular 7/76 from the Department of Health would, if adopted, mean in practice that:

(i) a qualification of a highly important nature had been added to the definition of "*full eligibility*" under the Health Act, 1970

(ii) a purported amendment of Section 45 of the Health Act, 1970, altering the definition of "*full eligibility*" under the Act, had taken place.

3.9 The two Counsel advised the Eastern Health Board against attempting to defend in Court their approach to charges for in-patient services under the 1976 Regulations and Circular 7/76 on the grounds of likely failure and cost. They expressed the view that:

(i) the difficulties being experienced in levying charges on persons for long-stay care in health board institutions "*arises from the failure of the legislature to deal with the question of charges for maintenance…. in a clear and unambiguous fashion when the 1970 legislation was being passed"* and

(ii) the difficulties in such cases "*can only be resolved by amending legislation"*.

July 1978: Advocacy by Eastern Health Board for Change in Legislation

3.10 The Eastern Health Board wrote to the Department of Health in July 1978 enclosing a copy of the advices of Senior Counsel McCann and Keane. In their letter the Board pointed to the negative financial implications of the situation arising from challenges being made against the Board' practices of charging long-stay care patients under the current arrangements. It stated that while the legislation remained ambiguous any assessment of charges against long-stay patients would remain open to challenge with inevitable loss of income. The Board strongly advocated that "*consideration be given to introducing amending legislation and at ending the present confused and ambiguous situation*"

October 1978: Legal Concerns Raised by the Registrar of the Wards of Court and by the President of the High Court

3.11 In October 1978 the Department of Health prepared a memorandum for a meeting with the CEOs of Health Boards outlining the position that the Registrar of the Office of the Wards of Court had taken in relation to the 1976 In-Patient Services Regulations. The Memorandum stated that:

(i) The Registrar had indicated to a number of Health Boards that under the "*direction of the President of the High Court….. it is not intended to make any payments where the income of the Ward is under £25 per week"*.

It was noted that the £ 25 threshold established by the Registrar before he would consider allowing payment to be made for in-patient services for Wards of Court was higher than the threshold being adopted by health boards for other patients in the same institution giving rise to a significant anomaly in the application of the Regulations.

(ii) The Registrar had "*queried Circular 7/76 in a legal context*".

(iii) The Registrar had indicated that his decision was not a judicial decision but that the matter could be clarified in the Courts by the Health Boards at their discretion.

3.12 In the event the invitation of the Registrar to the health boards and to the Department to challenge in the Courts the views and actions of the Registrar was not taken up.

June 1979: Legal Concerns Re-iterated by Legal Advisor, Department of Health

3.13 In June 1979 the then Legal Advisor to the Department expressed the view that the decisions of the Registrar of the Wards of Court, under the Direction of the President of the High Court, indicated that he (the President) did not accept the Department of Health's interpretation set out in the 1976 Circular 7/76 and that the most satisfactory course would be to amend the Health Act, 1970. The files made available to me for this Report indicate that the Legal Advisor to the Department of Health consistently over a number of years drew attention to his dissatisfaction, on legal grounds, with the practice of charges based on the

combination of the 1976 Regulations and the interpretative Circular 7/76 issued with the Regulations by the Department of Health in August 1976.

January 1982: Review of Practice of Charges under the Health (In-Patient Services) Regulations, 1976

3.14 In January 1982 the Department undertook a review of the practice of charges under the Health (In-Patient Services) Regulations 1976 in the context of queries raised in respect of the imposition of charges on persons with *full eligibility* in long-stay care in psychiatric hospitals. The relevant papers on file indicate that the issue being addressed was *"the legality of the procedure whereby the health boards currently impose charges on such long stay patients even though they enjoy full eligibility status under the Health Act, 1970"*.

3.15 The papers go on to note that the Health (In-Patient Services) Regulations 1976 *"were introduced in order to overcome the legal obstacle to the imposition of charges on long-stay social cases in public psychiatric and other hospitals which had been created by the McInerney High Court judgement"*. They state that *the "intent of the Regulations was that full eligibility cases were also to be dragged into the net"* of charges but that *"for political reasons this was not stated explicitly"*.

3.16 The papers express the view that "*there is no legal basis whatever for informally changing a person's status from full to limited eligibility merely because he has been hospitalised for a certain number of days in excess of a defined statutory limit"*. The papers state that the 1976 Regulations *"achieve nothing at all as regards the provision of a legal and sound basis for the imposition of charges on long stay in-patients with full eligibility"*. The papers refer to proposals having been put forward by the Department in 1979 *"to effect a suitable change in the definition of full eligibility"* in the Health Act, 1970. They ascribe without documentary substantiation, to the then Minister the view that he was *"not keen to pursue this course of action".* The papers note that *"nothing came of the review during 1978, 1979 and 1980 of the adequacy of the present legal position"*. It would appear from the papers on file that nothing came either from the review of the same issue undertaken by the Department in 1982.

February – March 1987: Government Memoranda and Decisions in Respect of Health (Amendment) Bill, 1987 dealing with Charges for In-Patient Hospital Services and Other Matters

3.17 The requirement for a Government Memorandum and associated legislative proposals arose, in the first instance, from the need for certain legislative changes required to implement a number of decisions announced in the Budget on prescription charges, out-patient charges and eligibility for medical cards. In the course of the preparation of the Memorandum early in 1987, the content was expanded beyond the inclusion of the Budget provisions at what appears to be the specific and personal initiative of the then Minister, to deal, *inter alia*, with in-patient hospital service charges. The relevant Head of Bill circulated

with the Government Memorandum on this particular matter provided for the imposition of charges for in-patient services in certain circumstances on all persons irrespective of eligibility status under the Health Act, 1970 i.e. the absolute exclusion of persons with *full eligibility* from charges for in-patient services under the 1970 Act would be dropped so that charges could be levied on such persons in certain circumstances to be specified by the Minister for Health. The accompanying Memorandum to the draft Bill noted the following: *"Up to now it has been the practice in long-stay institutions to impose charges on patients irrespective of eligibility status. The legal basis for such charges is by virtue of Section 54 of the Health Act, 1953 which enabled charges to be levied for 'institutional assistance' which has been defined as shelter and maintenance in a county home or similar institution. However, medical card holders have in certain instances refused to pay the charges levied on the basis that they consider that all services provided in the institution are medical or nursing services and hence free of charge.* ***The Department has been reluctant to challenge such a premise in the courts for fear of an adverse decision".*** [Note: Emphasis in bold typeface added by the author of this report].

3.18 The *Scheme for Heads of Bill* accompanying the memoranda included a conventional explanatory note relating to the proposal to amend Section 53 of the Health Act, 1970 in order to provide for *"the imposition of charges for in-patient services in specified circumstances……".* The note stated: *"Section 53(2)(a) of the Health Act, 1970 provides for the imposition of charges for in-patient services in specified circumstances on persons who have not full eligibility. The Head seeks to extend this provision to all persons irrespective of eligibility status, in specified circumstances. This Head is specifically designed to cater for the position of long stay patients in institutions. It has been claimed that such patients are receiving a medical and nursing service and hence may not be charged for services received, in accordance with Section 52 and 53 of the Act.* ***It has been the practice to make appropriate charges for such patients and this Head seeks to provide the necessary powers****".* [Note: Emphasis in bold typeface added by the author of this report].

3.19 The Memorandum did not provide any indication or details of the level of finance involved under the charging regime which the proposed amending legislation was designed to make good. Neither does it convey any real sense of the underlying and evolving strength of legal and, indeed, official concerns in relation to the legal sustainability of the charging practices in place. It does, however, draw the attention, to a limited and quite opaque extent, of other Government Departments and Offices to some of the legal uncertainties underpinning the charging regime in question.

3.20 The Government, in a formal decision of 5th February 1987 agreed, *inter-alia,* to proceed with the inclusion of the in-patient service charges as outlined in the proposed Health (Amendment) Bill 1987.

3.21 Following a change of Government on 10 March 1987, the proposed Heads of Bill and accompanying Memorandum were again considered by the then Government. The Memorandum and Heads of Bill included provisions *"to enable charges to be made for in-patient services in specified circumstances not provided for in existing legislation".* The Government formally decided

(S.25052) on 27th March 1987, *"**on the basis in so far as is now relevant**"*, to authorise the drafting of a Bill to amend the Health Act, 1970 to, *inter-alia, "enable charges to be made for in-patient hospital services in specified circumstances not provided for in existing legislation"*. The meaning of the proviso "as it now relevant" is unclear from the Government decision itself, from the original draft the decision (i.e. the "pink slip") or from the Memorandum itself. The Department of An Taoiseach has made papers available to me that indicate that, at the time of the Government decision, provision was made for further discussion on the matter by the then Taoiseach, Minister for Health and Minister for Finance. No record of the content or outcome of these discussions was available in the documentation made available to me by the Departments of Health and Children, Finance or An Taoiseach and I was informed that no such record exists on their files.

3.22 In the event the introduction of a Bill, or provisions within a Bill, to give effect to the proposed change to the Health Act, 1970 in relation to charges for in-patient hospital services did not proceed. The documentation from the Departments of Health and Children, Finance, An Taoiseach or from the Office of the Attorney General which were made available to me for the purpose of this report do not provide any information in relation to the reasons for this. The files do indicate that the then Department of Health did write to the Office of the Attorney General on 30 March 1987 drawing attention to the fact that the Government at its meeting of 27 March 1987 approved the drafting of a Bill to amend Section 56 of the Health Act, 1970 to provide for charges for **out-patient** services. The files also indicate that the then Department of Health wrote to the Department of Finance on 8 April 1987 seeking the required statutory approval of the Minister for Finance to the making of the Health (In Patient Charges) Regulations, 1987. These Regulations provide for certain charges for in-patient services in certain circumstances but they specifically exclude, *inter alia*, persons regarded as persons with "*full eligibility*" under the Health Act, 1970 as do the Regulations on Outpatient Charges made at the same time. The letter of 8 April 1987 from the Department of Health and Children to the Department of Finance makes no reference to the proposed legislative changes in respect of in-patient charges for people with *full eligibility* as proposed in the Government Memorandum previously. There is no indication in the records made available to me that the Department of Finance, on receipt of the letter of 8 April 1987, raised any queries in relation to the original proposal for a change in the legislation.

September 1989: Report of the Commission on Health Funding

3.23 On 5th June 1987 the then Minister for Health announced the establishment of a Commission on Health Funding. The Commission was provided with a wide ranging terms of reference in relation to the funding and administration of the health services. Its Chairman was Miriam Hedderman-O'Brien. It comprised also a number of other eminent people knowledgeable in the areas of health, finance and public administration.

3.24 The Commission Report published in September 1989 comprised an insightful and sharp analysis of the issues coming within the ambit of its terms of

reference. Among the many areas it considered was that of *Services for the Elderly.* In that context, the Commission examined the issue of charges for long term care services. Having described the legislation which empowers health boards to charge for long term residential care, it concluded that the position which arose from legislative and operational factors *"gives rise to confusion and difference of interpretation".* Arising from its analysis the Commission recommended: "*that the law should be revised to specify clearly the circumstances in which charges are payable and to standardise the amount of personal allowable income above which the charges should be levied*."

1991-1992: Review of Long-Stay Charges by Department of Health

3.25 On 30th May 1991 the then Minister for Health announced in the course of the Dáil debate on the Health (Amendment) Bill 1991 that the Department of Health would carry out a review of the charges applicable to persons in long-stay care in health board institutions. This review was completed and its findings set out in a comprehensive report prepared by the Department in August 1992. The Report of the Department may be referred to as: The Review of Long-Stay Charges Report (RLSC Report) August 1992. A number of findings of the Report are relevant to the matters which are the subject-matter of this Report. Among such findings are the following:

(i) The RLSC Report in its opening paragraph well sets out the fundamental case for undertaking the review when it states: *"the present system of long-stay charges is unsatisfactory. It is based on an out-dated distinction between* ***Institutional Assistance*** *and* ***Institutional Services*** *which is both confusing and unnecessary. There is a wide variation in the application of the two sets of charges, and the level of charge often depends upon what health board area the long-stay resident happens to live in.* ***There is considerable uncertainty about the legal validity of the application of the charges in very many cases as issues which arose from the Supreme Court judgement have not subsequently been satisfactorily resolved.*** *There has been extensive criticism of the system culminating in the decision in 1991 by the then Minister for Health to instigate a comprehensive Review"* (Bold italics inserted by author of this Report).

(ii) The RLSC Report identifies a number of key principles which it suggests should underpin any system of long-stay charges. Among these is the following: *"all persons who can afford to do so should be required to contribute towards the cost of their maintenance in long-stay care, including persons eligible for medical cards, since the health board is taking over the responsibility for providing shelter and maintenance, for which they themselves would be responsible if living in the community".*

(iii) Having considered various options the *RLSC Report* recommends, *inter-alia,* that the two existing long-stay charges (i.e. those arising under the institutional assistance regulations and those arising under the in-patient services regulations discussed in previous chapters of this Report) be replaced by a single charge.

(iv) The RLSC Report makes clear that the implementation of the recommendations it put forward "*will be dependant on an amendment of*

the Health Act, 1970 to allow for contributions towards long-stay maintenance costs to be levied on persons with full eligibility".

April 1994: Government Health Strategy: *Shaping a Healthier Future*

3.26 In April 1994 the Government Health Strategy: *Shaping a Healthier Future* was published. In considering the issue of charges for persons in long-stay care it had the following to say: *"those in public care are still governed by legislation which is now recognised as inadequate. The principle has always been accepted that people taken into long-term care should contribute from their incomes towards the cost of their maintenance; however, the legislation gives rise to anomalies and inequities as regards the charges that can be made. The legislation will be amended to provide a clearer and fairer basis for these contributions towards the cost of long-term maintenance".*

January 2001: Report of the Ombudsman in Relation to Nursing Home Subventions

3.27 In January 2001 the Ombudsman published a Report to the Dáil and Seanad arising from his investigation of complaints regarding payment of nursing home subventions by Health Boards. The focus of the Report was the payment of subventions by Health Boards to patients in private nursing homes as provided for in the Health (Nursing Homes) Act, 1990. Its concern, therefore, was with a matter different from that which is the subject-matter of the present Report i.e. charges for persons in long-stay care in Health Board institutions. In its findings, however, it did draw attention to a number of issues which may be considered to have relevance to the practice of charges for long-stay care in Health Board institutions. Among such issues are the following:

(i) The view of the Ombudsman that the Department of Health had engaged in *"the making of regulations containing provision which are likely to have been invalid (ultra vires)".*

(ii) The View of the Ombudsman that the Department of Health had provided for *"the inclusion in a regulation of a provision which was almost immediately negatived by advice issued by the Department"*. (This may be considered analogous to the Health (In-Patient Services) Regulation 1976 which provided that no charges for in-patient services were to be levied on persons with "*full eligibility*" under the Health Act, 1970. The provision was, however, set to one side in practice by adherence to advice set out in Circular 7/76 which was issued by the Department of Health concurrently with the Regulations and, which, in effect, invited the CEOs of Health Boards to remove "*full eligibility*" from persons who were provided with long stay care services in health board institutions).

(iii) A failure, in the view of the Ombudsman, on the part of the Department of Health to review practices in relation to the operation of nursing home subventions where legal concerns had been raised in relation to these practices by different Health Boards, by its own legal advisor and by others.

(iv) A failure, in the view of the Ombudsman, on the part of the Department of Health to reflect the advice of its own Legal Advisor in the making of Regulations.

(v) The view of the Attorney-General's Office that since "*secondary legislation must comply with the policies and principles of the parent Act the Regulations made by the Minister for Health in relation to nursing home subventions were i.e. ultra vires*".

3.28 The Department of Health took substantive issue with a number of the findings in the Report of the Ombudsman in relation to administrative issues. In particular, the Department made known its view of the distinction between the concepts of eligibility and entitlement under the Health Acts where the advice that the Department had available from the Attorney General on the issue differed from the position put forward by the Ombudsman. The legal uncertainties in this complex area do not appear yet to be fully resolved. However, the main thrust of the findings of the Ombudsman in relation to the legal invalidity of a number of other practices adopted by the Department and the Health Boards in determining nursing home subventions for relevant persons was accepted. The significance of this for the present Report lies, perhaps, in a reasonable expectation that the very fundamental questioning of the practices and approach of the Department and Health Boards to the making and interpretation of regulations under the Health Acts generally and, in particular, those relating to nursing home subventions might give rise to a review of practice and approach in other areas, such as the charges for long-stay care in health board institutions, where "legal concerns", of a nature not dissimilar to those raised in the context of the nursing home subvention scheme, had already been raised.

November 2001: Government Health Strategy: *Quality & Fairness – A Health System for You*

3.29 The Government Health Strategy published in November 2001 stated that *"it is fair that all those in receipt of publicly provided residential long-term care should make some payment towards accommodation and daily living costs, if they can afford to do so, just as they would if they were living in the community".* The Strategy noted that the system of eligibility for services within the health system is complex. It committed to the introduction of new legislation to provide for clear statutory provisions on entitlement to health services generally and, within that legislation, to a "*clear framework for financing of long-stay care for older people".* It clearly positioned the eligibility and associated issues surrounding long-term care in health board institutions within a much wider framework of eligibility for health services generally.

May 2001: Health (Miscellaneous Provisions) Act, 2001.

3.30 The 2001 Health Act extended the status of "*full eligibility*" under the Health Act, 1970 as a **statutory entitlement** to every person ordinarily resident in the State who is not less than 70 years of age. This meant that the determination of

"*full eligibility*" for such persons was no longer a matter for determination by the CEOs of Health Boards under the provisions of the Health Act 1970, the related regulations made under that Act and any advice or directions provided by the Department of Health in relation to such determination. The provision of the 2001 Act gave legislative effect to the announcement by the Minister for Finance in his 2001 Budget speech in December 2000 of the extension of the medical card scheme to cover all persons aged 70 years and over. The Department of Health and Children have informed me that it was made aware of the decision underlying the Budget announcement some days in advance of Budget Day but that the Department was not involved in the development of the proposal before the decision to introduce it was announced in the Budget.

3.31 The combined provisions of the Health Act, 1970 which excludes persons with "*full eligibility*" under the Act from any charges for in-patient services and the 2001 Health Act which provides a statutory entitlement to "*full eligibility*" for all persons not less than 70 years of age meant that no charges could be levied on such persons for long-stay care in Health Board institutions. This would appear to be a relatively clear and straight-forward interpretation of the combined provisions of both Acts.

3.32 The fact that the conclusion outlined in the previous paragraph was shared by the Department of Health and Children appears to be reflected in an internal memorandum prepared in the Department for submission to the Secretary-General at the time but, which I was informed, was not submitted. In response to my queries Department officials indicated that they believe the memorandum was prepared in June 2001. It states clearly that *"no-one over 70 would be liable to …'long-stay' charges as a result of having full eligibility on age grounds"* under the 2001 Health Act. The memorandum points out that "*this could lead to an inequitable situation where a person with relatively little means under 70 could be charged whilst no-one over 70 would be liable to these 'long stay' charges*". To address what the Department appears to have perceived as the problem arising from this situation the memorandum proposed that the Health (Charges for In-Patient Services) Regulation 1976 be amended to allow for charges to be levied on persons with "*full eligibility*" under the Health Act, 1976. Such an amendment would, of course, have been *ultra vires* by attempting to set aside a clear provision of primary legislation through the use of a regulation (secondary legislation).

3.33 In the event, the proposal outlined in the previous paragraph did not proceed. There is no indication in the files made available to me for the purpose of this Report, or from my discussions with Department officials, of the status of this memorandum or to the extent to which it was considered within the Department. Nevertheless, it does indicate a realisation at senior level within the Department of Health and Children that the 2001 Health Act precluded the levying of charges for long-stay care in health board institutions on persons not less than 70 years of age and the Department's concern in relation to its perception of inequity arising from this. The Secretary General of the Department has informed me that the memorandum referred to was not submitted to him. This was confirmed by a number of officials in the Division within which the memorandum was prepared. Nor is there any indication from the documents I have read or from my discussions with officials of the

Department that any such briefing was provided to the Minister. I was informed by officials of the Department that the reason for this was that the conclusion was drawn that the proposed solution to the problem perceived by the Department of Health and Children was *ultra vires* because it involved a proposed change of primary legislation by way of a statutory instrument, i.e. a regulation. It was, therefore, decided simply not to put forward any proposal. However, another internal document prepared around the same time in the same Section of the Department as the "aborted" memorandum referred to in previous paragraphs did, in fact, propose that the issue be dealt with by way of a change in legislation. I was informed that this particular proposal was left in abeyance, however, in the context of proposals to deal with the wider issue of eligibility generally through legislation. The explanations provided by the Department of Health and Children in relation to the matters described in this paragraph are difficult to understand.

3.34 Notwithstanding the position referred to in the previous paragraph in relation to the non-chargeability of persons not less than 70 years of age for long-stay care in health-board institutions, the Chief Executives of the Health Boards were asked, in late June, I understand verbally, by the Department for their views on the practice of such charges in the context of the 2001 Health Act. Previously, the Health Boards had written to the Department earlier in 2001 seeking the Department's advice on the same issue. Accordingly, the decision of the Department to verbally seek the advice of the Health Boards on the matter and for the Health Boards to provide it seems strange in retrospect. This approach was in contrast with the position adopted in 1976 when the Department, in exercise of its policy-making and coordination functions, took the lead in drafting and issuing Circular 7/76 as an advisory document for operational practice. In response, the Health Board CEOs expressed the following view in a letter dated 2nd July 2001 to the Secretary-General of the Department of Health and Children. (Copy attached at Appendix 12): *"we believe the arrangement as they pertained up to the end of June can continue from 1st July and that arrangements are not necessarily changed as a result of the introduction of the automatic entitlement to medical cards of the over 70s".* In putting forward this view the CEOs drew attention to Circular 7/76 issued by the Department in August 1976 in conjunction with the Health (In-Patient Service Charges) 1976. Whilst, perhaps, somewhat opaque in wording the letter seems to have been taken to mean that persons of 70 years of age or over could continue to be charged for long-stay care on the same basis as before the enactment of the 2001 Health Act. From my discussions with a number of the Health Board CEOs I understand that legal advice was not sought before the views expressed in their letter of 2nd July 2001 were prepared and forwarded to the Secretary-General of the Department. It is of interest to note that on at least one occasion in early 2002 the Department wrote in response to representations concerning the levying of charges on persons in long stay care that "*persons aged 70 years and over …. since 1 July last automatically have full eligibility (and) are exempt from in-patient charges for services*". The fact that practice generally did not appear to conform with such stated views of the Department on the matter does not appear to have been of concern.

October 2002: Legal Advice Provided to South Eastern Health Board on Charges for Long-Stay Care in Health Board Institutions & Related Matters

3.35 In 2002 the South Eastern Health Board (SEHB) sought opinion and legal advices from an eminent Senior Counsel arising out of a number of legal claims being made against the Board. These claims, in general, related to charges and payments in respect of long-stay care in health-board institutions and/or in private nursing homes towards which the SEHB provided subvention payments. In the course of advising the Board on these matters the Counsel undertook a substantive overview of the relevant statutory and regulatory framework for the provision of nursing home care. Among the advices provided by the Counsel to the Board which may be considered of particular relevance to the subject-matter of this Report are the following:

(i) *"The issues concerned are considered to be of fundamental importance to the Department of Health and the State with reference to the present and future provision of (geriatric) care under the present provisions".*

(ii) *"It is a remarkable feature of the health services in Ireland that such vast sums of money are expended on a system, the statutory basis for which is so confused and haphazard and where practice seems so dislocated from statutory theory".*

(iii) Referring to the implications of the High Court and Supreme Court judgements in the McInerney case Counsel asserts that *"if it was not intended that long-stay care was to be treated as in-patient services"* and, therefore, free of charge to persons of *full eligibility*, "*then the statutory definition could readily have been amended by legislation".*

(iv) In considering certain provisions of the Health (Amendment) (No. 3) Act, 1996 Counsel refer to a High Court judgement (O'Caoimh, J.) of September 2002 and note the view expressed in the judgement that *"if a clear statutory obligation exists……economic considerations cannot override the requirement of the section".*

(v) In referring to the difficulties arising from insufficiency of resources to fund the provision of certain health services for which there is universal eligibility Counsel avers that *"there appears to be no guidance from central government..…as to the allocation of these scarce resources……. It appears that the system of allocations is essentially ad hoc….. This raises the question whether the entire system…. which can give rise to such arbitrary distinctions with enormous impact on individuals and families can be valid. .....the system is so lacking in coherence and consistency that it is likely that individual determinations will always be open to successful challenge. …. If the result is that arbitrary and ad hoc decisions are made between essentially similar members of the public, then prima facie that would be, at a minimum, a breach of the guarantee of equality contained in Article 40.1 of the Constitution".*

(vi) In referring to persons who are not less than 70 years of age Counsel advise that *"the Board is not entitled to deprive patients of their medical cards or otherwise to levy charges or seek contributions from such persons"* in respect of medical care.

(vii) *"We are not aware of any statutory justification for the practice of removing medical cards from patients in receipt of long-term care".*

(viii) "*The entire system is…..vulnerable to attack. It seems….a direct challenge would, on balance, not succeed by reason of the effect of the 1996 Act. However, it may be difficult to show that the allocation of places to public hospitals is carried out in accordance with any comprehensive scheme and that the allocation is beneficial, efficient or effective as is arguably required"* under *"the 1996 Act. Individual allocations may, therefore, be particularly vulnerable and by that route, the entire system may become unworkable".*

(ix) "*The only conclusive solution is the introduction of a comprehensive legislative framework which squarely addresses the problem of long-term care for the aged*".

3.36 The advices received by the South Eastern Health Board as outlined appears to have been discussed with the Department towards the end of 2002 and/or early 2003. The advices received were also communicated widely to other Health Boards at the time in line with the normal practice of Health Board CEOs to share information on matters of common interest.

3.37 While it is appropriate, for the purpose of this Report, to maintain neutrality with respect to the precise validity or otherwise of the advices received by the South-Eastern Health Board it is reasonable to point out that the advices do address in a comprehensive way highly substantive legal issues related to the practices of levying charges for long-stay care in health board institutions. It, therefore, raises the expectation of a commensurate response from the Department of Health and Children to the issues raised. This matter is further discussed in the following chapter of this report.

April 2003: Report of the Human Rights Commission: Older People in Long Stay Care

3.38 In April 2003 the Human Rights Commission published a substantive research report on *Older People in Long Stay Care*. The report was prepared by Ms Ita Mangan, a Barrister who specialised in welfare law and citizens rights. Among the comprehensive set of findings of the report were the following:

(i) *"The law on entitlement to health board long stay care is not clear. There is an absence of clarity in the admission procedures and the rules about the resident's liability to contribute to his/her care are also unclear. This lack of clarity means that there is an unacceptable risk of arbitrariness in decision making".*

(ii) *"Commitments to clarify entitlements have been given in the Health Strategy, 1994 and again in the Health Strategy, 2001 but have not been implemented".*

(iii) *"Medical cards are sometimes withdrawn when people enter health board long stay care. This withdrawal is justified on the basis that the people concerned no longer meet the criterion for the award of a medical card set out in Section 45 of the Health Act, 1970. The rights of people over the age of 70 are not dependent on this criterion so their medical cards should not be withdrawn in any circumstances. There is evidence in recent complaints to the Ombudsman that the health boards are*

continuing to withdraw medical cards from people aged 70 and over and then charging long-stay charges. ***This is clearly illegal***." [Note: Emphasis in bold typeface added by the author of this report].

3.39 The Report also drew attention to the provision of the manual prepared by the North Western Health Board under the provisions of the Freedom of Information Act, 1997 and which, *inter alia*, stated that persons admitted to long-stay health board institutions "*will be liable to a charge for non-acute and long-term care even if they hold a medical card"*.

3.40 The Commission report in making comment on this provision of the Health Board's Manual states the following:

> "*this extract is notable for its statement about charges. This gives the impression that everyone admitted to a community hospital, community nursing home or welfare home is liable for charges under the Institutional Assistance Regulations. This is not so.* ***Medical Card Holders who are receiving in-patient services are not legally liable for any charges***". [Note: Emphasis in bold typeface added by the author of this report].

3.41 The Commission invites the observations of the Department of Health and Children on its report. The Department provided these observations in a substantive nine page response in June 2003. These are referred to in the next chapter of this report.

1975-2004: Reluctance of the Department of Health and Children and Health Boards to Defend Practices on Charges for Long-Stay Care in Health Board Institutions in the Courts

3.42 Over the years since 1976 a significant number of legal challenges have issued against the practices of the Health Boards in levying charges against persons in long-stay care in health board institutions but, otherwise, in the "*full eligibility*" category under the Health Act, 1970. The files of the Department of Health and Children indicate clearly that when Health Boards from time to time sought advice on whether they should seek to resist these challenges by seeking Court adjudication on the issues the advice tendered by the Department over the years has generally been not to go to Court on the grounds of an expectation of a Court adjudication against the validity of the practices.

3.43 It is of interest to note that, for the most part and from the limited, and not necessarily representative, number of files that I have read in the course of preparing this Report, these challenges appear to have been based in most cases on the legality issues surrounding the charges rather than on any underlying principle as to whether or not it would, otherwise, have been fair and reasonable for persons in a position to do so to make a contribution from their income to their maintenance in health board institutions taking full account of their circumstances. There is also material to hand which indicates that the primary concern of many people in need of long-term care, and that of their families, related to the importance to them of gaining access to the long-term care services of health board institutions with little, if any, concern in relation

to the practice of seeking a contribution from the income of such people within a long-standing charging framework. It is important to emphasise that drawing attention to these attitudes implies absolutely no tolerance, support or endorsement for any unlawful charging practices in relation to older people in long term care in health board institutions. Indeed, it may be considered that absence of challenge to any such unlawful practices arose, to a large extent, because of the physical and/or mental vulnerability of the people concerned.

November 2004: Advice of the Attorney General

3.44 Following a submission from the Department of Health and Children in October 2004 requesting advice on the legal validity of much of the practice of charges for long-term care in health board institutions and, in particular, of persons otherwise accorded the status of "*full eligibility*" under the Health Act, 1970 as described in this Report the Attorney-General advised that these practices were, in essence, *ultra vires.*

Overview & Conclusions

3.45 As indicated at the outset of this Chapter it seems clear from the files, documentation and records made available to me by the Department of Health and Children for the purpose of this Report that the Department and the Health Boards were well aware from the outset of the introduction of the Health (In-Patient Services) Regulations 1976 and the contemporaneous distribution of the Department's interpretative Circular 7/76 with them that there were significant legal concerns with many aspects of the practice of charges for long-stay care in health board institutions. I have not found in the documentation and records made available, notwithstanding having pressed the matter with Department officials, any substantive legal opinion or advice that would appear to provide strong support or comfort for the practice of charges that obtained from 1976 until December 2004 under the Health (In-Patient Services) Regulation 1976 and the Circular 7/76. I emphasise, however, that this is a view formulated from a perspective of management/administration, rather than a legal, expertise.

3.46 In response to my queries the Department did direct me to a note on file together with a number of addenda on the matter in question. The initial note is in typescript and signed by an official of the Department on 31 May1977. It sets out to record a discussion which two officials of the Department, including the official who signed the note, held with the Legal Advisor to the Department on 23 May 1977. The Legal Advisor is recorded as having, *inter alia*, made the following points:

(1) *"an amendment of the 1970 Act would be necessary if it was proposed to give health boards power to charge a person with full eligibility for in-patient services".*
(2) *"the Health (Charges for In-Patient Services) Regulations 1976 could be extended but not to persons with full eligibility".*

(3) *"He"* (i.e. the legal advisor) *"did not agree with the view that a person with full eligibility before admission to an institution ceased to have full eligibility because he did not then need general practitioner services".*

(4) *"He did not rule out the possibility, however, of an interpretation of full eligibility being adopted in practice in such circumstances that would enable charges to be levied on some such cases".*

3.47 An elaboration of the point listed at Number 4 in the previous paragraph is inserted as manuscript form on the file. It is unsigned and undated. It reads:

"Legal Advisor said CEOs could decide in individual cases that persons in long-stay institutions who have medical services provided for them are not persons with full eligibility. This could, however, be challenged and would not be as satisfactory as amending the 1970 Act".

3.48 Elsewhere on the files of the Department, both before and after the date of the note to which reference is made in the preceding paragraphs, the Legal Advisor personally records in the form of a typed or written note a consistency of advices in accord with the points numbered 1 to 3 in paragraph 3.45. As regards point number 4 in paragraph 3.45, the Legal Advisor made clear elsewhere that the type of change of circumstances which would justify a Health Board CEO withdrawing "*full eligibility*" from a person entering a health board institution for long term care would encompass something like the person coming into the possession of a large sum of money.

3.49 It is to be noted that the file notes referred to in previous paragraphs were prepared some 10 months after Circular 7/76, referred to in previous paragraphs of this Chapter, was issued. It is also to be noted that, following consideration of the points set out on file as summarised in the preceding paragraphs of this report, the official who prepared and signed the note referred to in the above paragraph completes the set of notes by requesting his colleague dealing with the matter to discuss a "*possible amendment of the 1953 and 1970 Acts to enable persons to be charged for maintenance in an institution after a period specified by the Minister*".

3.50 In the context of the many "legal concerns" expressed, over a long number of years, in relation to the practice of charges that obtained in the case of long term care in health board institutions, the apparent absence of any definitive legal advice or opinion to the contrary, may be considered to be a matter of some surprise. The actions and decisions taken by the Department to address these "legal concerns" are set out in the following chapter of this report.

CHAPTER 4

"LEGAL CONCERNS" WITH RESPECT TO CHARGES: RESPONSE OF THE DEPARTMENT OF HEALTH AND CHILDREN: ACTIONS & DECISIONS

Terms of Reference

4.1 The second significant issue set out in the Terms of Reference for this Report (See Page 1 above) which I was requested to examine and report upon was in relation to: *"**all actions and decisions taken by the Department of Health and Children in response to the legal issues that arose concerning the imposition of charges by Health Boards on relevant persons**".*

4.2 In responding to this particular element of the Terms of Reference I have taken that the terms of reference encompass a requirement to include in my examination any failure to take some appropriate action or decision in response to the existence of clearly defined legal concerns as an action or decision by default. I have also considered it useful to deal with the actions and decisions of the Department of Health and Children in relation to the matters which are the subject of this chapter of the report by reference to the sequence of events which indicate a knowledge of "the legal concerns" surrounding the making of charges for long stay care in health board institutions as set out in the previous chapter to this report (Chapter 3).

The Foundation Decision

4.3 At the outset it can be stated, for the purpose of the matters which are the subject of this report, that the primary, fundamental and foundation response of the Department of Health to the legal issues surrounding the making of charges on persons with "*full eligibility*" under the Health Act, 1970 in respect of long-stay care in health board institutions came at the time of the High Court Judgement in June 1975 in the McInerney case discussed in Chapter 2. The response was essentially encompassed within Circular 7/76 issued by the Department of Health in August 1976 at the same time as it issued the Health (In-Patient Services) Regulations 1976. The Regulations provided a statutory basis for the making of charges for in-patient services. The interpretation in relation to "*full eligibility*" which the Department of Health advised in the Circular was the means by which persons entitled to free in-patient services, because of their "*full eligibility*" under the Health Act, 1970, were brought within the net for charges by the Health Boards.

4.4 The decision of the Department of Health to proceed in the way described in response to the problems arising from the High Court judgement in the McInerney case did not conform with the views expressed by a number of officials in the Department at the time nor with those of the Department's own legal advisor. It lay the foundations for the current significant legislative, administrative and financial challenges at present facing the Department of

Health and Children and the Government as may be discerned from the decision of the Supreme Court of 16 February 2005 in respect of the Health (Amendment) (No.2) Bill, 2004. It was the cause of the absorption of a significant level of scarce administrative resources within the Department of Health over the following years in attempting to defend a legally suspect charging regime and in undertaking a sequence of reviews of a practice clearly seen to be problematic. The many internal reviews undertaken by the Department, on the initiative of both Ministers and officials, while indicative of some unease with the practices concerned, never, until December 2004, appear to have progressed beyond expressed intentions or promises of action to rectify matters. In some cases following such reviews the files, which I have had an opportunity to read, indicate that matters did not progress even to the stage of an expressed intention or promise to take action. The failure to take effective action at any time over the years following from any of the reviews appears, at this time, somewhat surprising. This is especially the case when it is considered that much of the difficulties outlined appear to have been amenable to solution by a simple legislative change. The reasons why this has been so are not simple 'black and white' reasons. These reasons, to the extent that can reasonably be established, at this point in time, from the records made available to me and the discussions I have had with Ministers and officials, are considered in Chapter 5. The precise basis for, and source of, the decisions which gave rise to the approach adopted in 1976 and continued right up to December 2004 are, at this time, unclear from the files which were available to me for this report. The only reasonable conclusion, at this time, is one of overall systemic corporate responsibility and failure within the Department of Health and Children at the highest levels over more than 28 years.

The Need for Amending Legislation to Deal with the Difficulties Arising from the Practice of Charges under Circular 7/76 Articulated by Senior Counsel Thomas McCann and Ronan Keane in 1978: Response.

4.5 The advice provided by Senior Counsel McCann and Keane to the Eastern Health Board and communicated to the Department of Health in 1978 is summarised at paragraphs 3.8 and 3.9 of Chapter 3 of this Report. It signaled clearly that the difficulties arising in relation to charges for long-stay care patients in health board institutions:

(i) *arose "from the failure of the legislature to deal with the question of charges for maintenance …. in a clear and unambiguous fashion when the 1970 legislation was being passed".*

(ii) *"can only be resolved by amending legislation".*

In submitting the advice to the Department of Health the Eastern Health Board advocated clearly that *"consideration be given to introducing amending legislation and at ending the present confused and ambiguous situation".*

4.6 No effective response to the legal advice provided or to the administrative advocacy by the Eastern Health Board was taken by the Department of Health and Children at the time other than to continue with the approach and practice initiated in 1976.

The Legal Concerns in Relation to Circular 7/76 Raised by the Registrar of the Wards of Court and by the President of the High Court: October 1978

4.7 The legal concerns raised by the Registrar of the Wards of Court and by the President of the High Court in October 1978 are described in paragraphs 3.11 and 3.12 of Chapter 3. In essence their concerns "queried *Circular 7/76 in a legal context*".

4.8 Again no effective response to these concerns was taken by the Department of Health at the time other than to continue with the approach and practice initiated in 1976.

Review of Practice of Charges under the Health (In-Patient Services) Regulation, 1976: January 1982.

4.9 The Department reviewed *"the legality of the procedure whereby the health boards……impose charges on ……long stay patients even though they enjoy "full eligibility" status under the Health Act, 1970"* as described in paragraphs 3.14 to 3.16 of Chapter 3. The review concluded that: *"there is no legal basis whatever for informally changing a person's status from full to limited eligibility merely because he has been hospitalised for a certain number of days in excess of a defined statutory limit"*. It draws attention to proposals put forward by the Department in 1979 *"to effect a suitable change in the definition of full eligibility"* in the Health Act, 1970. In that context it adverts to a note on the file ascribed to the then Minister the view, not otherwise corroborated by direct documentary evidence, that he was *"not keen to pursue this course of action".*

4.10 The papers reviewed for the purpose of this Report provide no indication of the formulation of proposals at the time to rectify the problems identified. No follow-up action ensued.

Government Memoranda & Decisions: Proposed Legislation in Relation to Charges for In-Patient Hospital Services: January-March 1987

4.11 In February and March 1987 the Department and Ministers of Health put forward for Government decision proposals for introducing charges for in-patient services for persons with "*full eligibility*" under the Health Act, 1970 with the objective, *inter alia,* of addressing the legal uncertainties surrounding the regime of charges for persons in long-stay care in health board institutions as described in Chapter 3. The proposals were put forward in February and March to two separate Governments.

4.12 The then Government decided on February 5th 1987 to proceed, *inter alia,* with the implementation of the proposal noted in the previous paragraph. A different Government on 27th March also decided on a similar course of action but subject to the somewhat unclear proviso that this should happen *"on the basis in so far as is now relevant".*

4.13 In the event, as described in Chapter 3, the proposal to introduce new legislation to provide for the charging for in-patient services of persons with "*full eligibility*" under the Health Act, 1970 was not implemented. The documentation which I examined in the course of preparing this report does not provide any explanation for the decision not to proceed with the legislative changes as proposed and which successive Governments in February and March 1987, at least initially, decided to implement. Nor does it indicate that any Government Department or Office, aware of the content of the Memorandum for Government at the time, queried the decision not to proceed with the legislation proposed to rectify matters. It is, however, important to note in this context that the legal uncertainties referred to in the Memorandum were at a high level of generality and, expressed in quite opaque terms. They provide little indication of, or information on, the deeper underlying legal and administrative problems associated with the then well-established practice of charges for long stay care in health board institutions. If these proposed changes in legislation had then been implemented it seems reasonable, at this distance in time, to conclude that much of the legal difficulties arising out of the approach and practice to charges for long-stay care in health board institutions for persons with "*full eligibility*", as described earlier in this Report, may, to an extent, have been overcome.

Commission on Health Funding: September 1989

4.14 As discussed in Chapter 3 an eminent Commission on Health Funding came to the conclusion in September 1989 that the practice of charges for persons in long stay care in health board institutions "*gives rise to confusion and differences of interpretation"*. It found that this confusion derived from the existing legislative foundations for the system of charges in operation. The Commission went on to recommend "*that the law should be revised to specify clearly the circumstances in which charges are payable and to standardise the amount of personal allowable income above which charges should be levied*".

4.15 The well-argued and well-articulated recommendation of the Commission on Health Funding in this area was not implemented in the following period.

1991-1992: Review of Long Stay Charges by Department of Health

4.16 As described in Chapter 3 of this report, the Review of Long-Stay Charges on persons in long-stay care in health-board institutions was announced in the Dáil by the then Minister for Health in May 1991 and carried out over the following 15 month period. The Review Report provided a comprehensive analysis of principle and practice in relation to long-stay charges. It acknowledged at the outset that: *"there is considerable uncertainty about the legal validity of the application of the charges in very many cases as issues from the Supreme Court judgement* (i.e. relating to the McInerney case in 1976*) have not been satisfactorily resolved"*. It put forward a comprehensive set of recommendations to improve existing practice and made clear that the implementation of these recommendations "*will be dependant on an*

amendment of the Health Act, 1970 to allow for contributions towards long-stay maintenance costs to be levied on persons with full eligibility".

4.17 This substantive review, by the Department of Health itself, of the principles and practice underlying long-stay care charges in health board institutions together with a series of well-formulated and convincing recommendations to deal with the problems identified in the operation of the charging regime, including the legal uncertainties at the heart of the system, gave rise to no follow-up action. Nor is there any record on the papers which I have reviewed for the purpose of this Report which explains the reasons for this inaction.

Government Health Strategy: April 1994

4.18 The inadequacy of the legislation underlying the regime of charges for persons in long-term care in health-board institutions is again acknowledged in the Government Health Strategy published in April 1994 as outlined in Chapter 3 of this report. A commitment is made in the Strategy Report to the effect that "*legislation will be amended to provide a clearer and fairer basis for these contributions towards the cost of long-term maintenance"*.

4.19 It does not appear that any effective steps were subsequently taken to implement the commitment set out in the Strategy and described in the previous paragraph.

Report of Ombudsman on Nursing Home Subventions: January 2001

4.20 The Report of the Ombudsman in relation to nursing home subventions in January 2000 is described in Chapter 3 in so far as it has relevance to the matters which are the subject-matter of this Report. Among the issues of relevance, in this respect, are the conclusions of the Ombudsman in relation to:

(i) the issue of regulations that are *ultra vires.*
(ii) a perceived lack of consistency between statutory regulations made on the initiative of the Department and the advice provided by the Department in relation to related operational issues.
(iii) a failure to review practices in relation to charging in nursing homes undertaken with the approval of the Department even where significant legal concerns in relation to these practices have been raised by legal and other sources.

4.21 The concerns raised by the Ombudsman, as summarised, together with the clear validity and acceptance of a number of his findings might have been expected to provide an impetus for the Department to review custom and practice in other areas of its operations where legal concerns had been raised. High among such areas was the issue of charges for long-term care in health board institutions. The Department did introduce a number of significant changes arising out of the Report of the Ombudsman in the case of a number practices relating to nursing home subventions. However, the expected impetus that might have been expected from the Report of the Ombudsman to ensure that

other closely-related areas of work of the Department be examined from a perspective of legal and operational validity does not, however, appear to have materialised.

Health Miscellaneous Provisions Act, 2001: May 2001

4.22 The Health (Miscellaneous Provisions) Act, 2001 (the "2001 Act") gave effect, as described in Chapter 3, to the Government decision in the Budget for 2001to essentially provide 'medical cards' (i.e. "*full eligibility*") under the Health Act, 1970, to every person ordinarily resident in the State who is not less than 70 years of age. The decision became operative from 1 July 2001. The decision to extend "*full eligibility*" in this way by primary legislation rather than by statutory regulation was taken on the advice of the Attorney General on the grounds that extending "*full eligibility*" as proposed could not legally be accomplished through secondary legislation.

4.23 The effect of the now Act was to remove from the CEOs of Health Boards any discretion with respect to removing the status of "*full eligibility*" under the Health Act, 1970 from persons of 70 years of age or over. This, in turn, meant that such persons were no longer chargeable under the various Health (In-Patient Services Charges) Regulations made under the 1970 Act and implemented in the context of the advice set out in Circular 7/76 issued by the Department of Health and Children discussed previously. The records made available to me indicate that the Department of Health and Children was, fairly immediately, aware of this consequence of the 2001 Act for the practice of charging in place since 1976 as described in earlier chapters of this report.

4.24 In response, the Department appears to have verbally sought the views of the Health Board CEOs on the matter. The response, by letter dated 2 July 2001 (copy attached in Appendix 12) essentially said that *"the arrangements as they pertained up to the end of June can continue from 1st July and that arrangements are not necessarily changed as a result of the introduction of automatic entitlement to medical cards for the over 70s"*. The letter on behalf of the CEOs draws attention to Circular 7/76 issued by the Department in August 1976 – presumably as a support for their interpretation of the consequences (or perhaps, more correctly, the non-consequences as they saw it) of the 2001 Act for the practice of charging for long-term care in health board institutions. As indicated in Chapter 3, it appears that no legal advice was sought before the position set out in the letter forwarded on behalf of the CEOs on 2nd July 2001 was arrived at. Neither, it appears from the records made available to me for the purpose of this report, did the Department question the approach to charging which the CEOs had indicated they would continue to apply to long-term charges in health board institutions including to the over 70s from 1 July 2001. This was despite the fact that the records of the Department suggest that it was aware that the application of any such charges would be unlawful. In early 2002 the Department wrote in response to representations on at least one occasion that persons of 70 years of age and over had "*full eligibility*" for in-patient services and were not subject to charge. Clearly, the charging practice by the health boards following 1 July 2001 did not conform with what the Department knew the situation should be.

4.25 It may be important to point out, to the extent that this might otherwise not be apparent, that the problems surrounding the custom and practice of charges for long-term care in health board institutions did not start with, or derive from, the 2001 Act. These problems, as indicated, had their origins in the decisions taken many years previously. What the 2001 Act did, as it happens, achieve was to bring the underlying problems associated with the custom and practice of charges in health board long term care institutions to the surface in a way that effectively forced their resolution. The parameters of that resolution are still evolving as this report is being prepared. The process of resolution at present underway may, perhaps, have been a somewhat unintended consequence of the 2001 Budget decision which gave rise to the 2001 Act.

4.26 The introduction of the 2001 Act in July 2001 might, in retrospect, have been seen as a possible 'trigger' for the Department of Health and Children to revisit and make good the underlying basis for the long-term custom and practice of charges for long-term care in health board institutions. The records of the Department show that work to achieve this was undertaken in the Department in 2002 including the preparation of a draft Memorandum for Government and associated Heads of Bill which provided a proposed clear legislative basis for charging persons of "*full eligibility*" in long stay care in health board institutions. I have been informed, however, that the Memorandum was not submitted to MAC or the Minister for approval. It was, instead, held pending progress on the issue of health services eligibility generally (see below).

Government Health Strategy: *Quality & Fairness*: November 2001 and Follow-On

4.27 The Government Health Strategy published in November 2001 clearly indicated its belief in the underlying principle that "*it is fair that those in receipt of publicly provided residential long-term care should make some payment towards accommodation and daily living costs, if they can afford to do so, just as they would if they were living in the community*".

A significant feature of the 2001 Health Strategy is that it placed the issues surrounding charges in long stay care institutions clearly within a much wider framework of issues surrounding eligibility for health services generally. This effectively "parked" the prospect of taking any action to deal with the issues surrounding charges for long stay care in health board institutions within a much more complex legal and operational framework. Progress on developing policy proposals and legislation on the wider eligibility issues are well behind schedule. In the meantime, until its hand was forced, largely by external events in December 2004, the Department failed to bring forward the simple legislative amendment which would, at least prospectively, have remedied the charges for long term care issue even though it had prepared the required draft Memorandum for Government and associated Heads of Bill. The actions of the Department in relation to the mater are difficult to understand or explain.

4.28 Following the publication of the Strategy Report in 2001 an implementation group, The Health Strategy Implementation Team (now renamed the Health Strategy and Reform Unit) was established within the Department of Health and Children to monitor and report progress on its implementation. The officials within the Department of Health and Children dealing with charges for long-term care issues first prepared, during the first half of 2002, a draft Memorandum for Government entitled Charges for Residential Long-Term Care and associated Heads of Bill. The purpose of the draft Memorandum was to establish a clear statutory foundation for charges on persons with "*full eligibility*" status in health board long-stay care institutions. Among the content of the draft Government Memorandum and Heads of Bill were the following:

(i) As of 2001 "*the income from Long Stay Charges represents 21 per cent*" of the amount of money allocated to health boards in 2001 for long stay residential care.

(ii) The draft Memorandum draws attention to the Supreme Court judgement of 1976 which made clear that the charging of persons with "*full eligibility*" for in-patient services in health board long-term care institutions was excluded under the Health Act, 1970. It goes on to say that "*in order to maintain the principle that such persons should contribute to the cost of their maintenance is has, therefore, been the practice to regard them as not meeting the criterion for full eligibility while being maintained, since necessary general practitioner and surgical services are provided for them*".

(iii) In referring to the "*automatic entitlement to medical cards by persons aged 70 years and over*" in the Health (Miscellaneous Provisions) Act, 2001 the draft Memorandum states that "*this entitlement means that there is now no mechanism to require persons over seventy with means in health board long stay residential care to contribute towards the cost of care*".

(iv) In dealing with the underlying principle the draft memorandum states that "*the principle of co-financing applies to all, including medical card holders, on the grounds that it is fair that all residents of publicly provided long term care units should make some payment towards accommodation and daily living costs, just as they would if they were living in the community if they can afford to do so*".

(v) In order to give effect to this principle and in order to deal with what is termed "*the anomalies and inequities as regards the charges which can be made and the basis upon which they can be made"* the draft memorandum proposes certain changes in the Health Act, 1970 *"that will permit charges to be made for long stay care on persons with full and limited eligibility*".

4.29 The draft Memorandum was widely distributed for the views and observations of officials within the Department. Its content was also discussed with representatives of the Health Boards in December 2002. It is clear from the records of the Department that it was initially envisaged that the draft Memorandum would be considered by the MAC of the Department with a view to getting a decision on whether or not it should be submitted to Government. I have been informed that this did not happen but that the officials involved in its preparation instead decided to pass it on to the section of the Department

considering the wider issues of eligibility for the health services generally which the 2001 *Health Strategy* indicated would be dealt with by the introduction of new legislation. In turn, the timeframe for the completion of work on this proposed legislation was delayed by the shortage of personnel and the high priority accorded in the work-programme of the Department to the health reform agenda.

4.30 I have been informed that the draft Memorandum again became active as a stand-alone proposition when a working group was established within the Department in early 2003 to consider the legal opinion and advices received from the South Eastern Health Board (SEHB) in relation to the charging regime for persons in health board long stay care institutions as discussed in Chapter 3. In that context, it was intended that the working group meet with a group of Health Board CEOs who were also considering the implications of the legal opinion and advices received by the SEHB. In the event, I have been informed that it did not prove possible to arrange such a meeting because of the pressure of other work. In the event, the Joint Department/Health Board consideration of the legal opinion and advices received by the SEHB took place at the MAC/CEO meeting of 16 December 2003.

April 2003: Report of the Human Right Commission: Older People in Long Stay Care

4.31 In its report on *Older People in Long Stay Care* published in April 2003, the Human Right Commission drew attention to a number of legal and other issues surrounding the practice of charges for long stay care in health board institutions as outlined in Chapter 3.

4.32 The Department of Health and Children issued a substantive response to the report in June 2003. It did not, however, deal specifically with the detailed points relating to the legality or otherwise of the practice of levying charges on persons with "*full eligibility*" set out in the Commission's report. Among the points made in the response of the Department which relate to the charges for long-stay care issue were the following:

"The Health Strategy acknowledges the need to clarify and simplify eligibility arrangements and sets down a commitment to introduce new legislation to provide for clear statutory provisions on eligibility and entitlement for health and personal social services. As part of the implementation process, a review of all existing legislation is ongoing in the Department. The outcome will inform the approach to the drafting of a new legislative framework on eligibility and entitlement to health and personal social services. The review is expected to be completed in the current year and proposals for reform will then be submitted to Government".

In the event, because of the pressure of other work associated in particular with the implementation of the Health Reform Programme, and the complexity of the issues involved, the Review was not completed in 2003 as indicated, nor has it been completed since for substantially similar reasons.

Legal Advice Provided to the South Eastern Health Board (SEHB) on Charges for Long Stay Care in Health Board Institutions and Related Matters: October 2002 and following:

4.33 As indicated in Chapter 3 the SEHB was provided in October 2002 by two eminent Counsel (Senior and Junior) with substantive legal advices in relation to the practice of charges for long-stay care in health board institutions and related matters. The substantive nature and content of certain elements of these advices is set out in the Chapter. Insofar as the subject matter of this report is concerned, the advices provided argued that many of the practices relating to charges for long-stay care in health board institutions were invalid (a conclusion, *inter alia*, repeated by the Attorney General in November 2004 when the matter was put to him and by the Supreme Court in February 2005). The advices to the SEHB stated clearly, *inter alia*, that "*the only conclusive solution is the introduction of a comprehensive legislative framework which squarely addresses the problem of long-term care for the aged*".

4.34 The legal advices which the SEHB had received were conveyed in writing to the Department of Health and Children in March 2003 and the matter may have come up in discussions between SEHB and Department officials before that time. The general thrust of the advices were also conveyed to other health boards at the time.

MAC/CEO Meeting of 16 December 2003

4.35 On receipt of the legal opinion and advices to the SEHB the Department established a work group to consider the issues arising as discussed in earlier paragraphs. The Department of Health and Children considered that an appropriate forum to further consider the advices received would be at a meeting of the Management Advisory Committee (MAC) of the Department with the CEOs of the Health Boards. The papers received were marked down for that purpose. Such meetings normally took place every two to three months but I was informed that this did not happen in 2003 because of the pressure of other work associated with the implementation of the Health Reform Programme. Normally, I understand, that the Ministers of the Department would try to be present for one or two of these meetings each year.

4.36 In the event, the next appropriate meeting of the MAC/CEO Group following receipt of the legal opinions and advices to the SEHB took place on 16 December 2003 and the Ministers of the Department were invited to attend. The meeting was under the joint chairmanship of the Secretary General of the Department of Health and Children and the Acting Chairman of the Group of Health Board CEOs. Background papers on the various items on the agenda for the meeting were circulated by e-mail on the afternoon of 15 December (i.e. the day immediately before the day of the meeting) to all those expected to attend including the offices of the Ministers. In the case of the long-term care issue, these papers included excerpts from the legal opinion and advices received by the SEHB earlier referred to in this report together with an internal SEHB paper on the issue.

4.37 The agenda for the meeting on 16 December (a copy of which is attached at Appendix 13) is broken into two parts: *Part 1* and *Part 2*. *Part 1* appears to have been intended as the main business of the meeting with two main items: "*Service Plans 2004*" and the (Health) "*Reform Programme*". *Part 2* seems to have been intended to deal with matters of secondary importance with Item 4 listed as "*Items for Brief Mention*".

Listed under *Items for Brief Mention* were five sub-items as follows:

- *Maternity Services*
- *Domiciliary Births*
- *Proposed Amendments to Infectious Diseases Regulations 1981*
- *Long Stay Charges – Over 70s*
- *Emergency Planning*

It appears that it was not intended that a great deal of discussion would be devoted to the *Long Stay Charges – Over 70s* item in a very full agenda. I have been informed by a number of persons who attended the meeting that this, in fact, turned out to be the case.

4.38 A copy of the minutes of the MAC/CEO meeting that took place on 16 December 2003 is set out in Appendix 13 of this report. This shows the full attendance at the meeting, the issues discussed, the sequence of discussion and the conclusions which the meeting arrived at in relation to the matters discussed. The minutes do not record who was present for discussion on varying items of the agenda but I have been informed by those who attended, and to whom I spoke: that a number of people came and went during the course of the meeting; that at the time the Minister for Health and Children, Mr Martin, arrived at the meeting the discussion on long stay charges in health board institutions including those relating to persons of 70 years or age and over had been completed. It is generally agreed by those who attended the meeting and to whom I spoke that the main business of the meeting related to the Health Reform Programme and that discussion on items under *Part 2* of the Agenda was limited.

4.39 The Minutes of the MAC/CEO meeting of 16 December 2003 record that the discussion and decision in relation to *Long Stay Charges – Over 70s* as follows:

- *It was brought to the attention of the Group that the Ombudsman has challenged a health board's interpretation of how persons over 70 should be charged for long stay care in health board institutions.*
- *The varying views of different legal advisors were noted in the context of the legalisation clarifying the existing eligibility framework.*
- *The Department indicated that it would make an assessment of the need for a stand-alone Bill on this aspect of eligibility in light of overall priorities in the legislative programme and the relative urgency of that particular issue. It would be necessary to get a definitive legal assessment of the present arrangement as a first step.*

4.40 The manuscript notes taken by the person who acted as recording secretary for the meeting indicate that, arising out of what, I was told was a relatively brief discussion of the long term care charges issue, Minister of State Callely stated that he would speak with the Taoiseach and with Minister Martin. Minister Callely has informed me that his purpose in saying this at the meeting was to keep Minister Martin, who was not present at the meeting for the discussion on long stay charges, and the Taoiseach, informed that legal advice was being sought by the Department on the issue of charges for persons in long stay care in health board institutions. Minister Callely informed me he recalls that he briefly mentioned the eligibility issue of long stay care of the over 70s medical card holders in the course of a Dáil vote on an unrelated matter to An Taoiseach in December 2003, to the effect that his Department officials informed him that there was different legal advices on "eligibility versus entitlement". He said it was made clear to him that the various issues could not be addressed until the legal position was defined and it was Minister Callely's understanding that the Department of Health and Children was seeking clarity and definite legal opinion. In the case of Minister Martin, Minister Callely said that the norm would be that the Department's officials would deal directly with Minister Martin. He said that Minister Martin's officials and advisors were at the meeting and the Minister himself later arrived at the meeting so he saw no need subsequently to speak with the Minister about it.

4.41 Minister O'Malley told me in discussing the MAC/CEO meeting of 16 December 2003 that he had read the papers relating to *Long Stay Charges – Over 70s* in advance of the meeting. He said that he was aware that if the opinion and legal advices to the SEHB were correct that they would give rise to significant legal, operation, financial and political implications. He said that he agreed with the decision of the meeting to refer matters to the Attorney General for advice. He said that he assumed this would happen as a matter of course. He indicated that he took no further interest in the follow-up to that decision because, while he assumed it would happen, the issues involved did not fall within his areas of responsibility in the Department.

Follow-Up to MAC/CEO Meeting of 16 December 2003

4.42 The Secretary General of the Department, with admirable speed, established a working group of Departmental officials following the meeting of 16 December. The purpose of the working group was to prepare a background note on the legal issues surrounding the practice of charges for long-term care to be issued with the proposed request to the Attorney General for legal advice. The work was completed and submitted with a covering note to the Secretary General on 27 January 2004 with the draft of a letter to the Attorney General for the Secretary General's signature. A manuscript note on file in the Section of the Department that dealt with the matter states that "*Legal Advisor is satisfied that we go to Attorney General directly for advice on this issue*". In response to my query as to what was meant by this, the Legal Advisor stated: "*While I have no specific recollection of this matter, from time to time, officials ask me if it is in order for legal issues to be referred directly to the Attorney General rather than referred to me. In the absence of a specific recollection, I have no reason to doubt the accuracy of the note*".

4.43 The Secretary General recalls receiving the submission on 27 January 2004. He indicated that he has a long-standing operational practice of dealing with and turning over submissions to him within 24 hours or, more exceptionally, within 48 hours. He considered that he had no reason to refer the papers in question to any other official in the Department and that if he was to refer the papers to anyone within the Department, it would be to the Minister.

4.44 In response to my query as to why he would consider it necessary to refer his letter and attachment seeking legal advice to the Minister in the first instance he said that the rationale that would attach to making such a referral would be to alert the Minister to the possibility of an adverse legal opinion given the significant legal, financial and political consequences which could ensue. He said that he would regard this course of action as a normal precaution to take in such circumstances. The Secretary General has, surprisingly, however, no recollection of doing this. Neither does the Minister have any recollection of receiving them. The Secretary General does express the "*belief*" that he "*would have brought it to the attention of the Minister in advance of issuing the letter*".

4.45 Neither the file recording system in the Secretary General's Office or that in the Minister's Office has any record of the papers being sent by the one office or received by the other. The Secretary General has told me that he has no personal record of the papers either and that he does not know what happened to them. He states that his "*belief is that I would have brought it to the attention of the Minister in advance of issuing the letter*". The Secretary General has informed me that the files issued from his office are normally logged. However, he said that "*on occasion, files with a particular urgency which he considers require personal discussion with someone else are handed personally by him to the individual or office involved*".

4.46 The Secretary General told me that he clearly recollects discussing the legal issues arising from the opinion and advices of the South East Health Board with the Minister on two separate occasions:

- The first of these occasions, he said, was on the day of the MAC/CEO Meeting of 16 December 2003 in the Gresham Hotel. On the occasion the Minister was late arriving for the meeting. Discussion on the agenda item on "*Long Stay Charges – Over 70s*" had been completed by the time the Minister arrived. The Secretary General said he had left the meeting to meet the Minister on his arrival at the entrance to the hotel and to bring him to the meeting. His recollection is that he left the meeting for a short period (10 minutes or so) at this point. He said that he briefed the Minister on the discussion to that point in time, including the discussion on nursing home charges as well as on the mood generally at the meeting.

- The second occasion was on 10 March 2004 at the time that the Minister signed off on the Business Plan of the Department for 2004. The Secretary General has stated that he has a "*clear recollection*" of a discussion with the Minister on what the best solution might be if it proved necessary to introduce amending legislation, on the basis of legal advice to deal with the charges for long stay care issue on a stand-alone

basis separate from the general overhaul of eligibility legislation. The Secretary General said he had suggested to the Minister that it should be possible to incorporate an amendment, if needed, into the Bill providing for new health structures later in 2004.

4.47 I discussed his recollection of the meeting of 10 March 2004 with the Secretary General. In response to my query as to what the outcome of the discussion was in relation to this proposal, the Secretary General said that it was not that kind of discussion on the matter, i.e. where decisions were being taken. In response to my query as to whether the discussion on 10 March 2004 would have reminded him of the papers and letters that were to be sent to the Attorney General, he said that, in retrospect, it should have done so but it had not.

4.48 Two meetings were scheduled between the Minister and the Secretary General for 10 March 2004 according to their diaries. Each was scheduled for one hour in Leinster House. The first meeting was scheduled at 9.30 a.m. to discuss "New Units" (i.e. the staffing, equipment etc of new units in hospitals). The minutes of the meeting indicate that no discussion in relation to the Business Plan or long term care charges took place at that meeting. The second meeting was scheduled for 7.00 p.m. in the Secretary General's diary. It was scheduled in manuscript in the Minister's diary indicating, according to office procedure, that it had been scheduled close to the time of the meeting on the day in question rather than some days in advance. No topic was flagged for the meeting, either in the diary of the Minister or that of the Secretary General. To the extent that the Business Plans were discussed at that meeting, it is to be noted that it does not appear that this or any other topic was flagged in advance.

4.49 The Business Plan of the Department for 2004 was approved by MAC and submitted to the Minister on 10 March 2004. It was approved by the Minister on the same date. The Business Plan sets out the high-level objectives for each Division of the Department. For each objective the steps and specific actions planned to be undertaken during the year to support the achievement of the objective are set down. In the case of each specific step and action planned completion dates are, where appropriate, set out, together with the names of those responsible for undertaking the planned action. The outputs or key performance indicators expected to arise from the implementation of the actions are also set down. All in all, the Business Plan comprises many hundreds of pages setting out a detailed blue-print of action for each division and unit of the Department.

In the case of the Work Plan for the Planning & Evaluation Unit of the Department for 2004, one of the Divisional Objectives adopted was to undertake the "*administration of current policy on eligibility including contribution to preparation of legislation of the* ***Long Stay Charges***". Within that objective the Planning & Evaluation Unit committed to taking steps that would contribute to the preparation of legislation on the wider eligibility issues and indicated that it would support the Legislation Unit in that task by sharing its knowledge with that Unit. No completion dates were set in the Business Plan for that particular action.

The Business Plan also included proposed activities by the Strategy Legislation Unit to "*set out proposals for a new legislation framework on eligibility*" to be developed from September 2004 based on the revision of the earlier discussion document and "*to commence drafting Scheme and Heads of Bill*" relating to this issue. It made clear that progress of these actions would depend on progress in relation to the two key elements of the Health Reform Programme, i.e. the Health (Amendment) Bill 2004 and the Health Bill 2004. These two pieces of legislation were enacted in 2004.

4.50 In the event because of the pressure of other work it appears that little headway was made in 2004 by the Department of the Health and Children in advancing the proposed legislation on eligibility issues. It is fair to say that a reading of the Business Plan of the Department for 2004 would suggest that the level of priority attached to dealing by way of legislation with either the general issues of eligibility to health services or that relating to charges for long stay care in health board institutions appears relatively low. That this was the case is also reflected in the fact that the Business Plan submitted by the Department to the Minister on 10 March 2004 contains no action proposal to seek the advice of the Attorney General in relation to the legal opinion and advices provided to the SEHB as decided on by the MAC/CEO meeting on 16 December 2003.

4.51 A meeting of the MAC/CEO Group took place on 29 March 2004. This was the follow-up meeting to the meeting of 16 December 2003 attended by Ministers and their advisors where it was decided to seek the Attorney General's advice in relation to the long stay charges issue. On this occasion, only full-time officials of the Department and Health Boards were in attendance. The meeting was jointly chaired by the Secretary General and by a Health Board CEO. A copy of the minutes of the meeting are at Appendix 16 of this report. The minutes of the meeting show, *inter alia*,:

(i) "*The minutes of the meeting of 16 December 2003 were approved*."
(ii) "*It was mentioned that the Department has sought legal advice in relation to the Long Stay Charges issue*".

The reference to the Department having sought legal advice clearly appears incorrect. I was informed that this information had been mentioned in genuine good faith by one official who had assumed that the decision taken at the meeting of 16 December 2003 had been acted upon. No other person from the Department at the meeting who would have been aware of the correct position appears to have intervened to correct the mistake.

4.52 The next meeting of the MAC/CEO Group following the meeting o 29 March 2004 took place on 18 October 2004. The Secretary General was again joint Chairman of the meeting. At this meeting also only full-time officials of the Department and the Health Boards attended. The draft minutes of the meeting show that there was no correction of the information conveyed at the meeting of 29 March that the "*Department had sought legal advice in relation to the Long Stay Charges issue*". The draft minutes of the meeting of 18 October state: "*The CEO Group expressed concern about the legal advice they have received in relation to the long stay charges issue. The Department acknowledged the pressure building on this and stated that the legal options*

are still being reviewed. It was highlighted that particular attention should be paid to individual cases of all Health Boards". The position as outlined by the Department again appears to be incorrect. Again, no person from the Department who would have known the correct position, appears to have intervened to put matters straight.

4.53 Neither the then Minister for Health and Children, his Private Secretary, his Assistant Private Secretary or the then Minister's two Special Advisors recall any submission on the matters outlined in the previous paragraphs. The Minister has indicated that he is not clear, in any event, why a letter and attachment to the Attorney General seeking legal advice on long-standing operational practice would need to be seen by him.

4.54 One official of the Department who worked in the unit dealing with charges for long stay care recalls being in the office of the Secretariat to the Minister on an occasion early in 2004, being approached by a particular official in the office in relation to the papers at issue and being asked what they were about. The official concerned from the Secretariat recalls a conversation between them in the office some time early in 2004 but cannot recall the specific subject matter of the conversation. The official concerned in the Secretariat to the Minister has no recollection of seeing papers such as those which he understood had been submitted to the Secretary General in the office of the Secretariat at any time.

4.55 The papers in question appear to have disappeared. No-one during or up to towards the end of October 2004 at any level in the Department seems to have enquired in relation to the outcome of the submission to the Secretary General or, indeed in relation to the action expected to arise from the decision of the MAC/CEO meeting on 16 December 2003 to seek the advice of the Attorney General on an issue of substantive operational, legal, financial and political importance. Even a Parliamentary Question raised for written answer by Deputy Roisin Shortall on 5 May 2004 asking about the "*Circumstances under which medical card holders may be charged for stays in long term care when receiving treatment*" failed to evince any apparent interest anywhere in the Department on what the views of the Attorney General might be on the matter. More explicitly, what appears to be strikingly incorrect information was conveyed by the Department on the matter to the MAC/CEO meeting on 29 March 2004 and again to the MAC/CEO meeting on 18 October 2004. I have heard no satisfactory explanations from the Department on these matters.

4.56 In response to my queries on these points, the general response within the Department was of the nature: "*it was assumed that the matter was in process*". Effectively no one took responsibility to ensure there was effective follow-up on an issue considered to be of significant legal, financial and operational importance. It was pointed out to me by the Secretary General, in part explanation for this, that responsibilities at Assistant Secretary level on the matter interchanged for a short period in early 2004 due to illness reasons and also that the official who had prepared the draft letter and attached papers from the Secretary General for submission to the Attorney General had on completion of this task moved on to other unrelated work in the Department.

Statement by Secretary General on Follow-up to Submission for Attorney General of January 2004

4.57 Following a number of discussions with the Secretary General in relation to the matters set out in the previous paragraphs, I invited him to provide a statement for inclusion in the report. The Secretary General provided me with draft statements on Friday, 25 February, Monday 28 February and the morning of Tuesday, 1 March 2005. These are set out at Appendix 16, 17 and 18 respectively of this report. In providing the different drafts the Secretary General made clear, and I fully accepted, that the provisions of the drafts was to facilitate me in the completion of my report at the earliest possible time, while at the same time, allowing the Secretary General to reflect more fully on the drafts to ensure that they represented his best recollection of the matters covered in his statement. The Statements represent an elaboration and extension of certain points made to me verbally in discussion previously. The final statement by the Secretary General provided to me on the early afternoon of 1 March 2005 is set out in full in the following paragraphs:

"1. The year 2004 was, even by normal standards in the Department of Health and Children, a period of intense and persistent pressure on the Department. This arose principally from the combined effect of the normal run of business pressures, the Health Reform Programme and the EU Presidency. In my judgement, the staff of the Department have worked extraordinarily hard and have, overall, a record of solid achievements to show for it. My hope is that the report on the particular item under examination will have regard to this context and that the extent of the Department's positive achievements in 2004 will also be acknowledged.

In my experience, the culture of the Department places a high value on integrity and officials of the Department display a strong sense of personal integrity in the way they discharge their responsibilities. It is also the case that in the past and present, the need to secure an adequate level of funding to support service levels in accordance with Government policy and public commitments and to operate services strictly within budget allocations has been a significant on-going pressure on the Department and on health boards.

2. On the submission of January 2004, the facts as best I can clearly recollect them are as follows:

(1) The papers circulated to everyone attending the Ministers/MAC/CEO meeting on 16th December 2003 included a summary of the legal opinion obtained by the South Eastern Health Board and an accompanying document from an official of the health board. On reading the papers in preparing for the meeting, the importance of clarifying the legal situation definitively became clear to me. That view was confirmed as a result of the discussion at the meeting. My recollection is that Minister Martin was late in arriving at the meeting and the substantive discussion on this item had already concluded before his arrival. There were a number of very significant items on the agenda for that meeting, including the

allocations/service plans 2004 and the health reforms, including dissolution of the health boards.

On Minister Martin's arrival at the meeting venue (Gresham Hotel), I was contacted by his Private Secretary and I left the meeting room for a short period (10 minutes or so) during which I met with him at the entrance to the hotel and briefed him on the discussion so far, including nursing home charges, as well as on the mood generally at the meeting.

Given the participation of Ministers of State Callely and O'Malley and Advisors in the earlier part of the meeting they would also have been in possession of the information necessary to brief the Minister or to follow up any concerns they had in their own right. Notes taken by the Secretary at the meeting indicate that Minister of State Callely had indicated his intention to brief both the Taoiseach and the Minister on the problem. The minutes of the meeting circulated in draft form also made reference to the outcome of the discussion on charges.

(2) Following on the meeting, I asked one of the Assistant Secretaries to take the lead in getting the relevant people together in the Department to do whatever preparatory work was necessary to progress the question of definitive legal advice. Because the most relevant Assistant Secretary was absent at the time, I asked another Assistant Secretary to take this on and he agreed to do so. It was necessary to pull this group together because the issues arising around the nursing home charges had implications for a number of different areas of the Department.

(3) I recollect reading the submission and draft covering letter for my signature at end of January/early February 2004. While conscious of the importance of dealing with it, I was equally conscious of its potential legal, financial and political consequences in the event that legal advice from the Office of the Attorney General turned out to support the opinion obtained by the South Eastern Health Board.

(4) My practice is not to hold folders or files in my office. Unless due to longer absence from the Office, my aim is to clear items submitted to me, if not within 24 hours, then within 48 hours. Exceptionally, I may hold an item longer to reflect on it but this item would not have required reflection, since what needed to be done was clear from the submission made.

I did not retain the folder and my firm belief is that I referred it elsewhere in the Department. I can think of no reason why I would have sent it to any official in the Department. However, given its potential consequences, my belief is that I would have brought it to the attention of the Minister, in advance of issuing the letter.

(5) I have a clear recollection of a subsequent discussion with the Minister on what the best solution might be, if it proved necessary on the basis of legal advice to introduce amending legislation, as a stand-alone item from the general overhaul of eligibility legislation. That discussion took place on 10th March 2004 in the context of the Minister signing off on the Department's Business Plan for 2004 which makes reference to this item. It was a one-to-one discussion on the Business Plan, of which there is no formal record other than that the meeting was diaried and that the Business Plan was agreed at it. On that occasion I suggested to the Minister that it should be possible to incorporate an amendment, if needed, into the Bill providing for new health structures later in 2004.

The content of the Business Plan, and particularly priority items identified for 2004 would have been the subject of discussion at MAC meetings in early 2004. The Minister and/or his advisors usually attended MAC meetings.

(6) A folder containing the January 2004 submission was observed by another official of the Department (who would have recognised it and was aware of its significance) in the outer office of the Minister's Office at some point in early 2004. As a trusted and experienced member of the Department's staff I have no reason to doubt the validity of the very clear and explicit recollection described by this official.

This official describes a brief conversation about the folder with the officer in the Minister's Office who normally stood in for the Private Secretary during any period of her absence. This arrangement applied both to short-term absences e.g. while the Private Secretary was in Leinster House or longer term absences while the Private Secretary was on leave. This officer can recollect a number of conversations in early 2004 with the official who observed the folder but not the exact subject matter of such discussions.

(7) A high volume of correspondence, internal papers and items of Oireachtas business is processed by my Office each week. While normally items referred from my Office are logged on a correspondence tracking system, I have also on occasion personally delivered items/folders to another individual or office where I believed there was a particular urgency or I wanted to have a personal word with someone in particular. For that reason, the logging system, other than for Oireachtas business items, captures most but not all items that issue from my Office.

(8) Over the following weeks and months, had the folder with the submission been returned to me, I am confident that it would have prompted the appropriate response on my part. I accept that the failure to keep track of and follow-up on the submission is open to criticism. My view then and now is that this was a period of

corporate and personal overload where the Department attempted to get through too much in too little time. This followed from the very ambitious timetable set down for the Health Reform Programme in particular. Combined with normal business requirements and the EU Presidency, the time and work pressures on the Department were very intense over the course of the year.

The fact that output expectations were otherwise largely realised should also form part of the judgement made in relation to the Department's performance in 2004. I set a high standard for my own performance and for those reporting to me. I regret that on this occasion that standard has not been met but believe that any objective evaluation must have regard to the overall business context in which this occurred.

(9) My recollection is that the matter of nursing home charges was next raised with me in October 2004. "

End of Statement of Secretary General

Statement by Minister Micheál Martin on Matters which are the Subject Matter of this Report

4.58 I held a number of meetings with Minister Micheál Martin in relation to the matters which hare the subject of this report. These included the events of late 2003 and early 2004 discussed earlier in this chapter of the report. In the course of the discussion I drew the Minister's attention to a number of points in the Statement which the Secretary General had provided to me. On 3 March 2005 the Minister provided me with a statement for similar inclusion in the report as follows:

"Rather than be repetitive in relation to the specifics and our discussions, I think it might be helpful to make a number of observations about how serious issues were dealt with in the Department of Health & Children while I was Minister there.

The agenda of any Minister in that Department is extremely wide and, in addition to general work, involves a large amount of reacting to issues which suddenly emerge as requiring substantial and immediate attention.
The record shows that I was fully accessible to staff and willing to address issues even at short notice. At no time did I shy away from sensitive issues because they might have cost implications or because they might reflect badly on governments. This is a policy which I have followed at all times and you will note, for example, that I was the first Minister for Education willing to face up to the State's historical responsibility for the treatment of children in residential institutions.

In the normal course of events with an emerging issue, the relevant officials would seek a meeting with me through the Private Secretary directly or through an advisor. Where the issue was seen as particularly serious the

Secretary General would attend in addition to the relevant advisor and officials in charge of the issue. As the record of my diary shows, meetings on matters of substance were noted, specific briefing notes were prepared and a record of decisions will have been taken.

All of the information which has emerged on the treatment of this particular issue confirms that it was at no stage treated as serious enough to merit being raised with me in line with this normal practice. The absence of any mention whatsoever of the issue in the October 2004 briefing materials for An Tanaiste Mary Harney clearly confirms that it was not being treated as an active matter. It appears that this may have been the same manner in which the issue was dealt with at different times since 1976.

Throughout the course of the year there are regular MAC/CEO meetings. Ministers are invited to attend twice a year (in July and December). The normal business of these meetings would be dealt with in my absence. In relation to the December 16th 2003 meeting, I was not actually in a position to be able to attend all of the meeting. I received briefing from the Secretary General that the main item of concern was the Health Reform Programme, and in particular its implications for the personal positions of the CEOs. The Hanly Report was also a key issue. I spoke on both topics during the meeting and I had a meeting on Hanly with the CEO of the Mid-Western Health Board immediately after the conclusion of the meeting.

That this item was placed on the agenda of the meeting as "for brief mention only" seems to indicate that it was not viewed as a substantive matter. In fact, it appears that it was dealt with before I attended specifically because it was viewed as capable of being dealt with quickly. In light of the scale of briefing materials, and the lateness of its arrival, the role of my advisors would have been to concentrate on the major matters rather than items presented as requiring only brief mention.

In that the item was dealt with quickly in advance of my attendance and was referred on for clarification, it is clear that any mention of the discussion which may have taken place was at very most brief and undetailed. When I arrived at the place where the meeting was held I was met in the foyer by the Secretary General and he walked me up the stairs to the meeting and reemphasised his advice about the handling of the future position of the CEO's and their concerns for their careers. In particular he advised that I should give them reassurance about having roles in the future Health Service Executive.

In relation to the file seeking advice from the Attorney General, I am not aware of any precedent in the period January 2000 to October 2004 where such a file might have been handled in the suggested manner. As a matter of course it was the outcome of advice which was, when relevant, referred to me, and clearly in the context of the seeking of a decision. It is difficult to understand what purpose would have been served by referring such a file to my office as I was not being requested to sign the proposed letter or to contribute on the matter.

It is clear that I was not shown or asked to comment on the file. It was my experience of the officials in the Private Office that they handled

correspondence efficiently. It is my understanding that no person from the Private Office remembers having sight of or handling the file. I have no reason to doubt this.

It should be noted that during 2004 lengthy meetings were held on the HSE legislation including, on one occasion a half-day meeting. At no stage was it ever suggested at one of these sessions that we consider adding a stand-alone measure relating to long-stay charges or that such a measure was required to regularise an improper levy.

Obviously I am not in a position to comment on matters going back to 1976. However, I would agree that there was a very heavy workload and intense pressure on the staff in the Department of Health and Children in the period 2003-2004.

In more general terms, it is almost impossible to discuss health affairs without discussing eligibility criteria. It is a regular item for discussion in the Dáil and in policy discussions. It is addressed in every significant statement of health policy for at least the last twenty years. However, this is very different from discussing the specific point that a charge was being illegally levied since 1976 and that action was required to regularise the situation. The fact is that this was not drawn to my attention either formally or informally at any time."

End of Statement by Minister Micheál Martin

Ministerial Changes: September 2004

4.59 With the appointment of the Tánaiste as the new Minister for Health in September 2004, a set of briefing papers was prepared by the Department for the Tánaiste on key issues of policy and operational matters. They were discussed with the Tánaiste in early October. The papers are of a relatively high level of generality and do not delve into more detailed operational issues which, instead, might be expected to arise in follow-up meetings between the Tánaiste and different divisions of the Department. The introductory briefing papers for the Tánaiste contain no references to the long term care charges issue. Indeed, similar introductory briefing papers prepared by the Department for other Ministers during the 1990s are also silent on this issue indicating that it was not a high priority policy or operational issue for the Department.

4.60 Following the raising of the long term care charges issue in the Dáil and in newspapers on 27 October 2004, the Tánaiste made enquiries from officials of the Department and immediately directed that the Attorney General's advice be sought on the matters concerned. The letter and background papers arising from this direction from the Tánaiste and forwarded by the Department to the Attorney General were essentially those prepared in January 2004 as referred to in earlier paragraphs of this chapter. Also forwarded by the Department at the time were a number of more detailed background papers and references.

4.61 The advices of the Attorney General received on 5 November 2004 and on 8 December 2004 were clear, detailed and comprehensive. In essence, the

advices were, *inter alia,* to the effect that the practice of charges of persons with "*full eligibility*" under the Health Act, 1970, as discussed earlier in this report, was *ultra vires*. The Supreme Court, in its judgement of 16 February 2005, in considering proposed amending legislation prepared to rectify the situation arising out of the Attorney General's advices, came, *inter alia*, to a similar conclusion.

Health Amendment (No. 2) Bill 2004: 16 December 2004

4.62 In the course of addressing the Dáil in her Second Stage Speech on the Health (Amendment) (No. 2) Bill 2004, the Tánaiste and Minister for Health, Mary Harney, T.D., outlined recent developments in relation to the issues surrounding the charging of persons in health board long stay care institutions. These are clearly set out in the speech, a copy of which is attached at Appendix 14 together with the four annexes to the speech:

(1) Background note on history of legal bases for the charges
(2) Circular of the Department of Health, 1976
(3) Report of the Secretary General of 13 December 2004
(4) Minutes of the Department of Health and Children / CEOs meeting of 16 December 2003

The Tánaiste may wish to review certain aspects of her speech, the annexes circulated with it and any related answers to Parliamentary Questions in the context of the information set out in this report.

4.63 The Bill passed all the required stages in the Parliamentary process in the Oireachtas on 17 December 2004. On 22 December 2004 the President referred the Bill to the Supreme Court following consultation with the Council of State, for a decision on the question as to whether any provision of the Bill is repugnant to the Constitution.

4.64 The Supreme Court in delivering its judgement on 16 February 2005 decided, *inter alia*:

(i) The provisions of the Bill that provide for prospective charging for in-patients is constitutional. These are the provisions that allow charges to be levied in certain circumstances on persons with "*full eligibility*" under the Health Act, 1970 and who are availing of long term care in health board institutions. The Bill, therefore, provides for the first time for the levying of such charges on a lawful basis in contradistinction with the widespread, but flawed, practice of charges that obtained since 1976.
(ii) The provisions of the Bill which proposed that charges levied prior to 14 December 204 under Section 53 of the Health Act, 1970 are, and always have been lawful (i.e. the provision of retrospective legality on certain charges found to have been unlawful) are unconstitutional.

4.65 At the time of writing of this report, the Department of Health and Children and An Tanáiste were working on developing a new Bill which is consistent with the decisions of the Supreme Court and which will provide for the

charging of persons with "*full eligibility*" under the Health Act 1970 when they avail of long term care services in health board institutions.

Overview and Conclusions

4.66 The Department of Health and Children failed, at the highest levels, over more than 28 years to deal effectively with a flawed legal foundation for charges levied on persons with "*full eligibility*" under the Health Act, 1970 availing of long term care facilities in health board institutions. On a number of occasions over that period the need to rectify the position was recognised. Proposals to do so were initiated but never brought to conclusion. The actions of the Department, more recently were highly deficient in responding in a timely and effective way to the legal opinion and advices provided to the South East Health Board (SEHB) which placed another highly significant questionmark over the practices of charges for long term care in health board institutions initiated in 1976. The failure to follow-up the decision of the MAC/CEO meeting of 16 December 2003 to seek the advice of the Attorney General on the matter appears inexplicable. That failure rests primarily with the management of the Department. Absolutely no documentation was made available to me to demonstrate or to indicate that the Minister had been fully and adequately briefed by the Department on the serious nature of the issues arising which the management of the Department acknowledge carried significant potential legal, financial and political consequences. Such briefings that did take place appear to be at the most superficial of levels. The Special Advisors to the Minister might have been expected to be more active in examining and probing the underlying issues. The underlying reasons for this systemic corporate failure are discussed in Chapter 5 of this report.

CHAPTER 5

"LEGAL CONCERNS" WITH RESPECT TO CHARGES: RESPONSE OF THE DEPARTMENT OF HEALTH AND CHILDREN: UNDERLYING REASONS

Terms of Reference

5.1 The third significant issue set out in the Terms of Reference for the Report (see page 1 above) which I was required to examine and to report upon, was in relation to "***the reasons for the period of time that elapsed from the date that such knowledge was first acquired up to the request by the Department of Health and Children for legal advice from the Attorney General on 27th October 2004***". The reference to "such knowledge" in the previous sentence means knowledge in relation to legal concerns about the practices surrounding charges for person in long stay care in health board institutions.

The Business of the Department of Health and Children: Scale and Complexity

5.2 The business of the Department of Health and Children is distinguishable from that of other Departments of State by the breadth, complexity, scale and public sensitivity of its activities. It funds a wide range of services beyond those funded by health ministries in other countries. Its expenditure budget alone for 2004, including that of the Health Boards and other bodies to which it provides finance, amounts to some €10.08 billion. This was some 24 per cent of total expenditure by Government Departments and equivalent to some 8.3 per cent of the nation's GNP. The total number of persons in health service employment in September 2004 amounted to over 98,000 (full-time equivalents) and of these, some 623 were employed in the Department of Health and Children.

5.3 The estimated cost of long stay care provided in the then health board (now HSE) institutions for the year 2004 amounted to an estimated €1.138 billion. This figure represents the estimated annual cost of long term residential care for such groups as older persons, those with a mental health illness and those with an intellectual disability and/or a physical/sensory disability. Charges levied by health boards for these services in 2004 are estimated at €110 million.

5.4 The issues which fall within the ambit of the business of the Department of Health and Children are notable for their wide scope and complexity. The life and death nature of the issues with which it is concerned, the scale, the breadth and complexity of the policy agenda, the number of unpredictable events to be handled and the constant media and political attention all combine to produce and environment of immense organisational and individual work pressures in which the urgent constantly conspires to drive out the important.

5.5 The range and depth of work in the Department of Health and Children has increased significantly in recent years and, particularly, since the Government decision in June 2003 to undertake a fundamental restructuring of the health

system. The introduction of the reform programme coincided with a number of additional challenges for the Department. Among the areas of such additional work that arose over the 2003/2004 period were:

- The introduction of new tobacco legislation, covering, *inter alia*, the workplace smoking ban. This gave rise to opposition from certain interest groups and a number of legal challenges. The result was significant additional workloads for the Department during late 2003 and the first half of 2004 to successfully implement this radical environmental health measure.
- The hosting of the EU Presidency during the first half of 2004 required a very significant effort on the part of the Department's staff which absorbed a lot of Departmental time and resources from September 2003 to June 2004.
- The ongoing negotiations with the Medical Defence Union on medical indemnity issues and related high-profile disputes with medical consultants also absorbed the energies of the Department.

5.6 By far the most demanding additional load has however, resulted from the Government's decision in June 2003 on the Health Reform Programme. From Autumn 2003 to December 2004 that entailed:

- Major project planning and communications programme
- Abolition of health boards
- Establishment of Health Service Executive
- Establishment of Health Information and Quality Authority
- Addressing related HR and IR issues
- Restructuring of Department itself
- Mainstreaming of a range of other health bodies and functions
- Development of national frameworks for governance and Service Planning and Reporting

5.7 It is clear that each of the areas listed above placed a particularly heavy additional burden at the top management level of the Department including, in particular, the Secretary General. Each member of the MAC team was required to lead the actioning of a particular aspect of the reform programme during 2004 in addition to their ongoing responsibilities as head of their division. The Secretary General and Minister also felt the intensity of the combined effect of this set of additional pressures. The Secretary General has described the period as involving both a corporate and personal overload for these reasons. The many considerable achievements of the Department over that period of intense work pressure need to be acknowledged in the context of the examination which is the subject matter of this report and any conclusions that derive from it.

Why the Unlawful and Unsustainable Practices Persisted for so Long: 1976-2004

5.8 In looking today at the practice of charging for long stay care in health board institutions as it has evolved over more than 30 years it is difficult to understand how the problems associated with the charging regime in place for

so long, and that have now become so clear with the advices provided by the Attorney General in November 2004 and the decision delivered by the Supreme Court in February 2005, could have been allowed to evolve and develop over such a long period of time without resolution. Indeed, it is hard to appreciate how a definitive court decision on the practices now found to be unlawful did not emerge until February 2005.

5.9 In considering this matter it is clear that there was no personal advantage attaching to the public officials involved over the years in overseeing, managing and implementing a system of charges over which serious operation and legal question-marks were increasingly raised. On the contrary, maintaining and defending that system in an administration under significant operational pressures involved non-trivial opportunity costs. These arose through the diversion of the scarce and expensive time of public officials towards the defense of an essentially unlawful system of charges over which strong legal uncertainties persisted. This diversion of resources represented an additional burden on a system of health sector administration under considerable inherent operational pressures, in any event, arising out of the scale, complexity and sensitivity associated with the activities of the sector as described in earlier paragraphs.

5.10 Neither is it clear that the political difficulties that, it might be considered, would attach to the introduction of the technically minor legislative changes needed to make lawful the unlawful practices long in operation represented any major challenge. This is because legislation to allow for the levying of charges for long term care in health board institutions on persons with "*full eligibility*" (i.e. medical card holders) under the Health Act, 1970 would be consistent with a widely accepted principle that persons who could afford to make some contribution to the cost of providing such care, taking their individual circumstances into account, should do so. It would, of course, also be consistent with operational practice and *status quo* and would, in fact, serve to legitimise existing practices and, by doing so, make more certain and secure the income to health boards which arose from it.

5.11 There are no simple answers to the question of *why* what has happened *has* happened. It appears to me from a reading of many documents bearing on the issue in the possession of the Department of Health and Children and other Departments, from discussions with officials of these Departments – both those serving at present and those who have retired or moved elsewhere – and from discussions with the Ministers listed in Appendix 5 of this report that the explanation for what has happened lies in a combination of the following factors:

(1)	Principle / Belief	(6)	The Effluxion of Time
(2)	Income / Finances	(7)	Risk Assessment
(3)	Health Service Provision	(8)	Work Prioritisation
(4)	Legality	(9)	Transparency / Analysis
(5)	Political Sensitivity	(10)	Judgement

The contribution of these factors to the practices initiated in 1976 and maintained subsequently is discussed in the following practices.

The Principle is Right

5.12 There is a strong underlying belief running through the records of the Department of Health and Children over many years in relation to charges for long term care that the principle of charging those who can afford to make some contribution to the cost of services is fair and reasonable. This is a principle which is widely shared across political parties and more widely in our society. It is a principle that is deeply embedded in the Health Acts of this country for more than 30 years. The principle is, of course, wholly admirable. The fundamental question in the context of the Terms of Reference for this report is whether the principle has been supported in operational practice by a sound legal foundation. In the light of the issues discussed in earlier chapters of this report, the validity of the underlying legal foundations must be regarded as problematic.

Maintaining Financial Income is Critical

5.13 The Irish health system is widely accepted as being characterised by a chronic shortage of both finance and of systems of management and delivery which can optimise the finance available. Arising from these factors a major theme which runs through the records I have seen and the discussions that I have held with officials is the strongly perceived importance of sources of non-Exchequer "own income" finance as an instrument of flexibility and substance in supporting the provision of essential public health services. Such "own income" includes income arising from long stay charges. The relative importance of such income arises because the availability of non-Exchequer finance provides health boards with greater flexibility in balancing supply and demand for services in an environment where finance is in short supply and where the demand for services fluctuates widely. There is a strong and, perhaps, well-founded belief that any diminution in the own income of health boards would not be compensated by increased Exchequer allocations. Accordingly, there has been an understandable tendency for the former health boards, with the support of the Department of Health, to be pragmatic and inventive in identifying sources of income. The argument is, therefore, made that the practice of charges for long stay care over many years was essentially brought about by a shortage of Exchequer finance and justified by a belief that the practice put in place were underpinned by a "defensible legal case" and by the principle of equity discussed in the previous paragraph.

5.14 While the sentiments underlying the financial argument outlined above are understandable, they admit of two significant flaws:

(i) Firstly, the underlying "defensible case" assumed does not appear to have been based on any sort of authoritative legal advice that is apparent in the records of the Department of Health and Children that I have seen and as discussed in earlier chapters.

(ii) Secondly, a financial income based on a flawed legal foundation carries with it a major uncertainty. This has become increasingly clear to the health boards and the Department of Health and Children for many years

in the face of an increasing number of individual challenges to the payment of charges. The result has been increased rather than less uncertainty in relation to own income There has also been a loss of potential income as individual cases of refusal to pay the charges levied have been settled by health boards rather than risk going to court and exposing the flawed legal foundations associated with the practice of charges.

5.15 The reluctance to go to court has, of course, represented a tacit acknowledgement on the part of the health boards and the Department, of the legal uncertainty of the underlying foundations to the practice of charging. It begs the question as to why a simple legislative amendment to the Health Act, 1970 was not introduced before now. Such an amendment would have brought certainty to the prospective (if not retrospective) "own income" of health boards and would have enhanced its scale by avoiding costly "leakages" through legal challenges.

5.16 There may, of course, have been some concern that if new legislation to underpin existing practice was introduced or if existing practices were challenged successfully in court that the issue of retrospection in relation to payments already made might be a factor for consideration. There is some indication that the issue of retrospection did come to mind within the Department in the late 1970s but it was not highlighted in any significant way in the papers I have seen. Subsequently, it does not appear to have featured on the files of the Department and no concerns on this matter are recorded in any of the records that I have read.

Health Service Provision Needs to be Protected

5.17 As indicated elsewhere in this report, there was no personal advantage to officials or to successive Ministers of Health in the introduction or maintenance of the practice of charges for long term care in place since 1976. There was a clear desire to protect an important source of "own income" that provided resources and flexibility to better enable health boards to provide the public health services they were charged with providing. It is clear from the documentation that I have read that the overriding purpose of trying to protect "own income" through charges for long term care was to better meet the obligations of the health boards and the Department of Health in providing health services in a sector clearly perceived as under-funded relative to demand and to need. These objectives were wholly admirable. It would be unfortunate if the fact that the practices put in place in relation to charges in long stay care institutions were put in place for highly positive and admirable reasons was lost sight of in considering any administrative / managerial shortcomings at a number of corporate levels within the Department of Health and Children over the years.

The Issue of Legality

5.18 The issue of the legality or otherwise of the practices in place has been discussed in some detail in earlier chapters of this report. The Supreme Court judgement of February 2005 leaves absolutely no room for doubt, at this time, but that the practices of charges for long stay care in health board institutions based on Circular 7/76 were unlawful. The legal concerns which surrounded the introduction of these practices were known by the Department and the health boards from the outset and these concerns were reinforced by events and advices on many occasions subsequently. As discussed elsewhere in this report, I did not find in the documentation of the Department of Health and Children any authoritative piece of legal advice which supported the practices initiated in 1976. But any unease on the part of the Department of Health and the health boards over these legal concerns was, on the basis of administrative judgement, outweighed by the issues of principle, finance and delivery of essential health services in a financially constrained environment referred to earlier.

5.19 The position adopted in relation to the raising of charges in 1976 must, however, be placed in the context of its times rather than attempt to evaluate it only in the context of the present[8]. For many years prior to 1976 there had been strong political debate and even stronger debate between Church, State and the medical profession in relation to issues such as that of the desirability or otherwise of free medical services and in relation to the appropriate scope and extent of the eligibility of persons for various medical services. Much of that debate was highly ideological and reads strangely at this distance in time. At the time the Catholic Church and the medical profession were strongly opposed to public control of the health services and, by extension, to any move towards the provision of universally free health services. Writing in 1972 the then Secretary of the Department of Health said[9] "*in Ireland it has never been Government policy to provide or endeavour to provide a fully free health service*". The burden of financing the health services from local rates was a central issue in the1973 general election. A new Coalition Government announced that the share of health costs paid for by the rates would be phased out by 1977. The rapid increase in the costs of health services by over 50 per cent between 1965/66 and 1969/70 and from 3.73 per cent of GNP in 1971 to 7.01 per cent in 1979 was another reason why caution was considered necessary in removing all price barriers to the use of services. It is reasonable to suggest at this distance in time that the practice of charges initiated in 1976 was well in conformity with the ethos of the time.

5.20 There also appears to be a further underlying factor which contributed to the relatively low weight attached to the known legal concerns in proceeding with the practices of charging initiated in 1976 and maintained in place, for almost 30 years, subsequently. These practices were based on what is now clearly seen to have been flawed interpretations of the Health Act, 1970. At the time of the foundation decisions in 1976 discussed earlier in this report, the 1970

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[8] ***Much of the information in this section of the report is drawn from: Health, Medicine & Politics: Ruth Barrington, Institute of Public Administration, 1987.***

[9] ***The Health Services of Ireland (Stationery Office, Dublin, 1972).***

Act which was then regarded as radical and visionary in many respects, and which, even today, is still regarded as containing many elements of good health sector legislation was in its early stages of implementation. Officials who had been involved in the formulation and guidance of the legislation through the Oireachtas were, at the time, still working at senior level in the Department of Health. In describing key elements of the Health Act, 1970 in a book on the evolution of the Irish health services between 1900 and 1970 published in 1987 and referred to in a previous paragraph of this chapter, a then official of the Department of Health states in relation to the provisions of the Act "*One important change seems to have passed unnoticed …. This was the provision to change the definition of eligibility for health services by ministerial regulation*" It is not clear that this was a correct interpretation of the 1970 Act but it does seem to represent an official Department of Health and Children perception made in good faith over the years since the Act was passed. It has been said to me by former officials of the Department of Health that because of the difficulty of drafting legislation and having it enacted that there was a tradition in the Department to try to have as much operational flexibility as possible built into the legislation through enabling regulations.

5.21 In retrospect, it may be the case that, in this context, an undue confidence was placed in the capacity of the Act to provide adequate legal foundations for what were perceived as the good principles which underlay the practices of charges put in place in 1976 and which were embedded in the Health Act, 1970 and in many other previous Health Acts. Among the principles were those of the reasonableness and fairness of charges through which persons who availed of health services made some financial contribution to their provision. It is now clear that the placing of any such confidence in the capacity of the 1970 Act to provide a legal foundation for the practices introduced in 1976 was misplaced. A similar conclusion may be drawn in relation to the administrative capacity of the Department of Health at the time, and subsequently, to interpret the provisions of the Act correctly.

Political Sensitivity

5.22 The view has been expressed to me by a number of officials in the course of preparing this report that the introduction of legislation which would provide for charges, in certain circumstances, on medical card holders would raise significant political sensitivities and that any actions by the Department to advocate such an approach would not be welcome by the Ministers in question.

5.23 Having read a good deal of the documentation made available to me on the files of the Department of Health and Children and considered the issue more widely, I have concluded that the concerns put forward in discussion in this area tend to be over-stated. This is so for the following reasons:

(i) The legislation required was a technically uncomplicated amendment to the Health Act, 1970 which would simply have provided a sound legal foundation for existing practice. It would not have given rise to any significant change in what was happening on the ground in any event.

(ii) The principle underlying the legislative change required was, and remains, well-accepted as fair and reasonable. It has been set out without controversy in successive statements of health strategy over the years, i.e. that people make a contribution to the cost of health services when they are in a position to do so, taking individual circumstances into account.

(iii) In the context of the many difficult and controversial decisions taken by successive Governments and successive Ministers of Health over the years a legislative change on the lines required to, effectively, legitimise existing practice could not, plausibly, be regarded as one of undue political difficulty.

5.24 The raising of the issue of political sensitivity as a barrier for civil servants in ever raising substantive issues of policy formulation and implementation in a clear and substantive way begs a question in relation to the role of public servants to which I will return later in this report.

The Effluxion of Time

5.25 The practices of charges for long stay care in health board institutions, which are the subject of this report, were initiated in 1976 in the way they were for certain reasons already discussed in this report. The legal concerns surrounding these practices were clear from the start. It is apparent from the documentation I have read that there was some resistance to the charges levied on the part of individuals affected. Indeed, in the case of the Registrar of the Wards of Court highly significant concerns were raised in relation to the legal basis for the charges. While reluctantly accepting these charges, the Registrar insisted upon conditions of minimum income thresholds before charges could be levied. These income thresholds were higher in the case of Wards of Court than for the generality of persons in receipt of in-patient services. This two-tier system created immediate anomalies in relation the charging of people of generally similar circumstances. The level and scope of resistance was, however, not of major proportions given the number of reasons subjected to charges. This may well have been, to a real but unknown extent, because of physical or mental frailty on the part of those being charged.

5.26 As discussed in earlier chapters the overall practices in question were reviewed by the Department of Health and Children over the years. Despite the growing body of legal concerns over time no decision to change the practices or otherwise legitimise them was taken over the years. This appears to have happened because a higher weighting was attached to the issues of perceived fairness of the underlying principles, the importance of maintaining "own income" financial resources and the importance of protecting the provision of health services in a highly resource-constrained situation than to addressing in a definitive way the growing body of legal concerns. As time went by the belief appears to have grown that, whatever the level of concerns being expressed, the charging system "was working". This belief strengthened with, what might be termed the "effluxion of time". It was also the case that the financial, administrative, political and, most importantly, the socio-medical pressures on the work of the Department of Health continued to intensify over time for a host of reasons which it is not necessary to go into for the purpose of

this report. It is arguable that the scale, complexity, sensitivity and difficulty of operational and managerial pressures that apply in the area of activity of the Department of Health and Children are greater than are to be found in any other area of public sector, or indeed private sector, activity in Ireland. In these circumstances dealing with the issues surrounding long stay charges were given a low priority relative to the many other operational challenges and, indeed, crises arising from other areas of the wide-ranging activities of the Department of Health and Children. The perception increased over time that while the charging regime for long term care may have been imperfect, at least, "it was working".

5.27 At this remove and looking back over the documentation on the files of the Department of Health and Children, it is clear that it was only a matter of time before the unsustainability of the charging practices at issue in this report became clear and were forced to resolution. This, of course, happened in late 2004 driven, *inter alia*, by the inexorable build-up of legal concerns and the somewhat unintended contribution of the Health (Miscellaneous Provisions) Act, 2001 in highlighting the underlying anomalies.

Risk Assessment

5.28 Risk assessment, in organisational terms, represents the systematic evaluation and periodic review of all areas of activity in an organisation that might, reasonably, be considered to give rise to operational, legal, financial and associated threats to the efficient and effective achievement of the objectives for which the organisation is responsible. There is an intrinsic responsibility of good corporate governance on all organisations, including Government Departments, to have in place an effective system of risk assessment. The necessity of having such systems in place has become more apparent in recent years with the identification of high-profile cases of fraud, inadequate accounting practices and other failures of corporate governance in both the private sector and the public sector domains.

5.29 The systematic practice of risk assessment is not well formulated across the public sector and, indeed, across many areas of the private sector, in Ireland. The Department of Health and Children is no exception in this regard. The responsibility, however, to have an effective risk assessment system in place is, arguably, higher in the Department of Health and Children than in other Departments of State because of the impact of its activities on the very lives and quality of living of large numbers of people in our society. It is, of course, self-evident that any formal system of risk assessment is no substitute for the good judgement and detailed operational knowledge of competent and committed people in assessing and resolving operational risk. However, a formal system can support and strengthen the competency of people in this area and help to create a corporate culture of good risk assessment and resolution.

5.30 The files of the Department of Health and Children that I have examined for the purpose of this report indicate an absence of the type of formalised systematic risk assessment process referred to in the previous paragraphs. This is not to say that risk factors were not taken into account across the many

activities for which the Department is responsible. It has not been of the systematic and formalised nature required. From the papers which I have read there appears to have been a recognition of the need for such a system in the deliberations of the MAC early in 2004 and the process of putting a risk assessment system in place is underway. It requires to be strongly advanced in the Department and to fully encompass the operational as well as the financial elements of risk assessment. If a systematic, formalised, transparent and pragmatic system of risk assessment had been in place it might have been expected that the significant legal, financial and equity risks associated with the practices of charging for long stay care initiated in 1976 would have been resolved before now.

Work Prioritisation

5.31 The management and operational challenges associated with the work of the Department of Health and Children are among the most complex and difficult found anywhere in the public or private sectors in Ireland. They extend across areas as diverse as primary care, acute hospitals, mental health, long term care services, adoption services, children in care, the homeless and travelers, as well as the regulatory and commercial aspects of the private health insurance market. They include the additional burden of a high probability of unpredictable, high-profile, health-related crises forcing their way into operational and public perception in a way that demand immediate resolution. Accordingly, an effective system of prioritisation in relation to the wide array of issues that the Department of Health and Children requires to deal with is essential.

5.32 The Department has operated, and continues to operate, a system of prioritisation for operational purposes but, as indicated, the issue of resolving the problems surrounding charges for long stay care never featured highly on the prioritisation agenda. The reasons for this derive from a number of factors also already discussed including: the absence of the type of forthright analysis and presentation referred to in the previous chapter; the strong underlying belief that the principle underpinning the practices of charges in operation were fair and reasonable; a perception that even if questions were being asked, the regime of charges in place continued to work well; and, finally, a failure to appreciate the potential adverse consequences of maintaining the *status quo* because of inadequate risk assessment procedures.

Transparency / Analysis

5.33 The legal and other concerns surrounding the practices of charges for long stay care, until they were first addressed in October 2004, were of long standing. The frequent process of internal review of the practices undertaken by the Department of Health and Children, over the years invariably resulted in the conclusion that amending legislation was required to rectify matters. The persistence with which reviews were undertaken over the years appears to reflect the ongoing concerns on the part of the Department. However, as discussed earlier in this report, these concerns did not translate into the required remedial actions. The reviews undertaken in 1982 and in 1991/1992, as

described in Chapter 3 and Chapter 4 of this report, are particularly illuminating and clear-cut in this regard. The weight of legal concerns about the practices continued to increase inexorably over the years. The opinion and advices provided to the South East Health Board (SEHB) in October 2002 as described in Chapter 3 and Chapter 4 are particularly well articulated and persuasive and added another brick to the weight of evidence which pointed clearly to the conclusion that the practices of charges in place for so long was unsustainable. The analysis set out in the opinion and advices to the SEHB predicted, in many ways, what has happened in recent months.

5.34 Set against the strong weight of evidence against the legality of the practices initiated in 1976, the reliance of the Department on some perception of having a "defensible case" on legal grounds seems weak. It does not appear, that any probing or examination of the validity of the basis for this perception was undertaken over many years. I have pressed the Department for evidence of any specific piece of supporting legal advice without success. What is missing anywhere on the files of the Department that I have seen is any clear, sharp insightful analysis of the problem which:

- brings together all the relevant facts;
- spells out the consequences and risks associated with maintaining the *status quo* and
- provides a clear set of recommendations on the actions required to rectify matters.

If such a comprehensive analysis had been clearly and forthrightly set out and presented to Ministers, it is difficult to believe that the appropriate actions to rectify matters would not have been taken. It is reasonable to conclude that good and well presented analysis would have brought much-needed transparency to a situation which appears to have trundled along in somewhat of an administrative and operational fog for far too many years. The responsibility to prepare and present such an analysis rested clearly and unambiguously on the officials of the Department of Health and Children.

5.35 I have come across many expressions of views in the course of preparing this report, that suggest that over the years Ministers were "informed", "advised", "briefed", "told" in relation to the issues concerned. Such views carry with them an inherent plausibility that some measure of the underlying problems associated with the practices for long stay care charges were conveyed to different Ministers over the years, even if there is little or no documentary evidence to support these contentions. However, even if all such contentions are correct (and it must be noted that the nature, content and force of argument included in undocumented "briefings" and "advices" are, by definition, difficult to gauge) they would be completely inadequate to what was required given the nature, substance, risks and inevitable negative consequences of the practices in place.

5.36 The failure to provide and present the analysis required in a clear, cogent and authoritative written format is not just a recent one but appears to have been endemic over many years. It is a failure of long standing which, as indicated in earlier paragraphs, could not but result in a forced and unstructured resolution

of the fundamental underlying problems – a process that eventually and inevitably came to pass in 2004.

Judgement

5.37 For the purpose of this report, "judgement" is regarded as the taking of an appropriate course of action in the context of verifiable facts and an assessment of likely future outcomes and which, if appropriate action is not taken, will give rise to problems and difficulties for individuals and for organisations. Ultimately, the failure to take decisive administrative action to resolve the problems surrounding the charges for long stay care, at a time when it still lay without the domain of discretion of the Department of Health and Children, represents a series of failures of judgement over many years. These failures have been manifest in a number ways. At *administrative* level there have been:

- failures to establish in the first instance in 1976 a robust legal foundation for charging practices that were not untrivial either in the round in so far as the total level of financial income generated is concerned, or at the level of individual persons where the greater part of the income of many older persons was collected
- failures to probe the validity of the underlying legal basis in the face of mounting and authoritative legal concerns about that basis
- failures over many years to prepare and present to Ministers a formal, clear, unequivocal analysis of the problems associated with the charging regime in place, the consequences of these problems and the solutions available to deal decisively with them
- failures to take the opportunities that arose from time to time over the years to rectify matters by bringing forward the required and relatively simple legislative change.

At *political* level there were undoubtedly also some lapses of judgement on the part of Ministers over the years. There is, however, no evidence on the files which I have seen in carrying out this examination that any Minister over the period covered in this examination was fully briefed to the required extent on the relevant issues surrounding the problems associated with the long stay care charges. I have pressed, without success, the Department of Health and Children for documentation on any such briefing. The suggestion of the Department is that briefings related to the matter would have been done verbally without record. Leaving aside the questionable rationale for such a contention, it appears both plausible and likely that some indications of the difficulties involved were conveyed to Ministers over the years. A number of these issues were in the public domain in any event from the many concerns raised in individual cases and from a number of external and internal reports prepared over the years. Accordingly, Ministers and their Special Advisors might have been expected to more actively probe and analyse the underlying issues involved. This represents a shortcoming of judgement. The shortcomings of Ministers in this area, however, are at a significantly lesser scale, substance and order of magnitude to that of the system of administration. This is so for two main reasons:

(i) The primary responsibility to provide a clear, authoritative analysis of the issues involved along the lines discussed in earlier paragraphs rested with the Department of Health and Children. The failure to do so over so many years is difficult to understand and represents a major failure of administration.

(ii) The main information base and corporate memory on the issues involved lay with the administrative system of the Department of Health and Children. Ministers could not reasonably be expected to be aware of the full extent of the issues that surrounded the practices of charges for long stay care in health board institutions held in the information base of the Department if these were not brought forward in a clear, convincing and recordable format.

The Events of 2003 – 2004

5.38 The terms of reference for this report require the establishment of "*the reasons for the period of time that elapsed*" between the time that knowledge of the legal concerns surrounding the practice of charges for long stay care in health board institutions "*was first acquired up to*" the time of "*the request by the Department of Health and Children for legal advice from the Attorney General on 27 October 2004*".

5.39 I have, in previous paragraphs of this chapter, set out what I consider were the reasons that action was not taken over many years between 1976 and 2004 to address the many legal concerns expressed in relation to the practice of charges which is the subject of this report. As discussed, the Health (Miscellaneous Provisions) Act, 2001 and the legal opinion and advices provided to the South East Health Board (SEHB) in October 2002 in relation to the consequences of the 2001 Act for the long term practice of charges in relation to persons of not less than 70 years of age and others and related matters were the proximate causes which ultimately led to the decision to seek the legal advice of the Attorney General on 27 October 2004. Because the substance of the opinion and advices of the SEHB were known to the Department of Health and Children since early 2003 it is necessary, in order to meet the Terms of Reference for this report, to consider the sequence of events over the period 2003/2004 which bear on the subject matter of this report.

5.40 The sequence of events over 2003/2004 which I consider most relevant to the subject matter of this report are as follows:

(1) **Preamble:** A series of written requests were made to the Department of Health and Children by a number of health boards over the period 2001/2002 seeking the advice of the Department on the implications of the 2001 Health Act for the practice of charges for long term care. These requests did not result in the issue of any authoritative reply or advice on the part of the Department. The SEHB in 2002 commissioned its own advice on this and related matters. This advice was received in October 2002. It was made available to the Department of Health and Children and other health boards and, subsequently, in written form to the Department in early March 2003.

(2) The Department of Health and Children and the Health Boards, during the course of 2003, each set up working groups to consider the implications of the opinion and advices.

(3) Proposals were made for a joint meeting between the working groups of the Department and the Health Boards but this, apparently, did not prove possible in 2003 for, what I was informed, were pressures of work.

(4) Within the Department of Health and Children a draft Memorandum for Government, which had been available since at least mid-2002, was brought forward for consideration in the context of the SEHB legal advice and opinions. The draft Memorandum for Government included proposals for legislation and draft Heads of Bill which would, prospectively, but **not** retrospectively, have rectified the unlawful practices.

(5) The draft Memorandum for Government was "parked" in 2002 and again in 2003 pending the bringing forward of legislation to deal with the much wider issue of eligibility for health services generally. Commitments in relation to the introduction of such legislation on the wider issue of eligibility were set out in the Government's *Health Strategy 2001*. It was envisaged that proposals for such legislation would be introduced in 2002. The eligibility issues surrounding long stay care charges were "folded into" the arrangements to deal with the wider eligibility issue.

(6) Developing proposals to deal with the wider eligibility issue proved more complex and difficult than had, apparently, been envisaged and the staff resources available in the Department to advance the matter were constrained and/or reassigned to other priority areas. These resources were largely diverted to deal with the Health Reform Programme in 2003 and 2004. The result was that progress in dealing with the wider eligibility issue was considerably delayed and remains so.

(7) In the context of the delays outlined in dealing with the wider eligibility issue the Department chose not to advance the proposals (including draft Heads of Bill) it had set out in a draft Memorandum for Government in 2002 which contained proposals to rectify, at least prospectively, the legal issues associated with the practice of long stay charges in health board institutions. The reasons for this remain unclear.

(8) The Department has indicated that it came to the conclusion by April/May of 2003 that the implications of the legal opinions and advices received by the SEHB should be jointly considered at high level between the Department and the health boards at a MAC/CEO Group meeting. These meetings were normally convened every two to three months. In 2003 because of the pressure of work from the health reform programme only two such meetings took place. The first of these meetings was in February 2003 and the second in December 2003.

(9) No further action of substance was taken by the Department of Health and Children during 2003 in relation to the long term care charges issues that can be discerned from the documentation which I have read or from the discussions which I have undertaken in preparing this report.

(10) A MAC/CEO Group meeting was convened and took place at the Gresham Hotel on the afternoon of 16 December 2003. The matters discussed, the attendance at the meeting and the decisions arrived at are

set out in the minutes of the meeting. These are included at Appendix 13 of this report.

(11) I have been informed by the Department of Health and Children that the agenda and papers for the meeting were circulated to all of those listed as being in attendance at the meeting on the afternoon of 15 December 2003, i.e. the afternoon of the day immediately before the meeting. The papers were sent to their offices in the case of Ministers.

(12) Not all of those listed as being in attendance at the meeting were present for all of the meeting. Minister Martin was not present at the meeting for the discussion under the agenda item entitled *Long Stay Charges – Over 70s* in the minutes of the meeting.

(13) The decision taken by the meeting in relation to the *long stay charges* issue was as follows:

> *"The Department indicated that it would make an assessment of the need for a standalone bill on this aspect of eligibility, in light of overall priorities in the legislative programme and the relative urgency of that particular issue. It would be necessary to get a definitive legal assessment of the present arrangement as a first step".*

(14) A working group was established within days of the decision referred to in the previous paragraph to develop a paper on the background to the issues concerned and on the advices to be sought from the Attorney General.

(15) Arising out of the work of the working group, a background paper setting out a number of relevant issues and the advices required was prepared together with a draft letter from the Secretary General to the Attorney General on the matters involved. This was submitted to the Secretary General on 27 January 2004.

(16) I have not been able to establish what happened to the letter and papers submitted to the Secretary General on 27 January. The position seems to be as follows:

- There is no formal record of their movement anywhere in the Department.
- The recollection of the Secretary General on this and related matters is set out in chapter 4 of this report.
- The papers were not sent to the Attorney General at the time.
- The Secretary General has stated that he does not recollect giving them to the Minister but states "*my belief is that I would have brought it to the attention of the Minister, in advance of issuing the letter*".
- The Minister has no recollection of receiving them from the Secretary General or from anywhere else.
- Neither of the Minister's two Special Advisors at the time recollect seeing any such papers.
- The conflicting views of two officials as to whether they were seen in the office of the Secretariat to the Minister early in 2004 are described in chapter 4 of this report.
- There is no record in the office of the Secretariat that the papers were ever in that office.

- No other Division of the Department appears to have seen them subsequent to 27 January either.
- There appears to have been no substantive follow-up of any sort at any level in the Department in the following months in relation to the missing papers or, indeed, in relation to the issues which were the subject matter of the papers until external events in the form of Parliamentary Questions and the intervention of An Tánaiste forced events in October 2004..

(17) At the two subsequent MAC/CEO Group meetings which followed the MAC/CEO meeting of 16 December 2003, where it was decided that the Attorney General's advice be sought on the long term charges issue, strikingly incorrect information appears to have been conveyed to the meetings by the Department. This was to the effect, in the case of the 29 March 2004 meeting, that the "*Department has sought legal advice in relation to the Long Stay Charges issue*". In the case of the meeting of 18 October 2004, the draft minutes of the Department, *inter alia*, stated that "*the legal options are still being reviewed*".

5.41 The net effect of the sequence of events that occurred in the Department of Health and Children in 2003/2004, as described in the previous paragraphs was that the substantive issues surrounding the practice of charges for persons in long stay care in health board institutions which once more came to the fore with the legal advices and opinions provided to the SEHB in October 2002 were again left in abeyance, apparently by default, until they were brought forward for resolution in October 2004. In arriving at this conclusion it is important to note that the issues that were left unresolved over the 2003/2004 period were essentially the same issues that had remained unresolved since 1976 and, probably, for the same or for similar reasons as those discussed in earlier paragraphs of this chapter of the report.

5.42 In reviewing the documentation available to me and in discussing the issues of relevance to this report with officials and Ministers over the past two months, the conclusions I have arrived at in relation to the sequence of events relating to the period 2003/2004 as set out in the previous paragraphs are as follows:

(1) The legal opinion and advices provided to the SEHB in October 2002 were of substance and significant potential legal, financial, political and other consequences as they related to the practice of charges for long stay care in the health board institutions and the respective roles of the Department of Health & Children and the Health Board in establishing and operating those practices.

(2) The opinion and advices arose at that time out of the actions taken by the SEHB to seek legal clarification in relation to such charges in the context of the implications of the 2001 Health Act and other charging practices going back to 1976.

(3) The nine-month period of time, from March to December 2003, that it took the Department of Health and Children to have the issues arising out of the opinion and advices provided to the SEHB considered at the

appropriate levels between the Department and Health Boards appears to represent an undue delay given the substance and potential consequences of the opinion and advices provided to the SEHB and the fact that they were consistent with a number of other legal advices available to the Department over the years and which also raised serious questions about the validity of the practices in operation.

(4) The decisions taken by the Department to put the issues arising from legal opinion and advices provided to the SEHB "in process" rather than attempt to deal decisively with them in early 2003 appears to have represented a missed opportunity. In so doing the position does not appear to have been dissimilar to many other such missed opportunities over the years as indicated in chapter 4 of this report.

(5) The apparent failure to take decisive action in early 2003 must be seen in the context of the fact that the Department had already prepared since 2002 a draft Memorandum for Government and associated draft Heads of Bill for new legislation which would have provided prospectively, if not retrospectively, a feasible solution to the difficulties arising.

(6) The draft Heads of Bill contained many of the provisions in the part of the Health Amendment (No. 2) Bill 2004 designed to make lawful the practice of charging persons in long stay care who are persons with "full eligibility" under the Health Act, 1970. This part of the Bill was found to be constitutional in the Supreme Court judgement of February 2005.

(7) The decision not to activate the draft Memorandum for Government at an early stage following receipt of the legal opinion and advices to the SEHB appears, in retrospect, difficult to understand.

(8) I have seen no records in the documentation I have read in undertaking the examination which is the subject of this report which would indicate that the Minister for Health and Children was provided with full information in relation to the issues surrounding the practices of charging for long term care in health board institutions including the legal uncertainty surrounding these practices and the potential legal, financial and other consequences associated with the practice.

(9) The agenda item and SEHB papers circulated for the MAC/CEO Group Meeting of 16 December 2003 provided an ideal opportunity for the Department of Health and Children to present the Minister with a fundamental analysis of all the issues involved but there is no evidence that this opportunity was taken.

(10) It is difficult to understand why no adequate briefing appears to have been prepared by the Department of Health and Children for the Minister in advance of that meeting given the substance of the issues involved and the time that had been available to the Department since receiving the SEHB submissions some nine months previously.

(11) The late circulation of the agenda and papers for the MAC/CEOs Meeting on 16 December 2003 on the afternoon of the preceding day represents poor administration, particularly given the substance and import of the papers circulated on a number of issues including the long term care charges issue. The late circulation of papers made it extremely unlikely that all those scheduled to attend the meeting would have an opportunity to read the background papers in any detail or even, in some cases, of receiving the papers in advance. Ministers Martin and Callely have indicated in my discussions with them that they did not have such an opportunity to read the papers in advance and this is credible and understandable in the circumstances outlined.

(12) The decision taken at the MAC/CEOs Meeting of 16 December 2003 to refer the legal issues arising in relation to the practices of charges for long stay care in health board institutions to the Attorney General for his advice was entirely correct. It was also a highly predictable decision. It should not have been necessary for the Department of Health and Children to wait nine months before this decision was taken.

(13) The failure of the Department of Health and Children to seek the advice of the Attorney General as decided on 16 December 2003 until external events and Ministerial intervention in October 2004 forced the issue, represents a significant failure of administration.

(14) There appears to be no reason why the Department of Health and Children should not have moved quickly and decisively to seek the advice of the Attorney General as decided at the meeting of 16 December 2003. Given the substance and import of the issues involved there was a responsibility on the Department to do so. This would be the case even if a Minister, for some unspecified reason, was opposed to the seeking of such advice which had major potential consequences for the finances of the Department and the State. In this instance, there is no substantive documentary evidence that the full substance of the issues involved were put to the Minister and/or that he expressed any negative view on the question of seeking the advice of the Attorney General. Indeed, it would be highly surprising if he did so.

(15) The Secretary General of the Department has indicated that he discussed the long term care charges issue on two occasions with the Minister (see Statement by the Secretary General in Chapter4).

- Firstly, on 16 December 2003 when he met the Minister at the entrance to the Gresham Hotel on the late arrival of the Minister for the meeting. The Secretary General has stated that he briefed the Minister quickly "*on the discussion of this item (nursing home charges) as well as the mood generally at the meeting*".
- The second occasion referred to by the Secretary General is on 10 March 2004 "*in the context of the Minister signing off on the Department's Business Plan for 2004". The Secretary General states: "It was a one-to-one discussion on the Business Plan, of which there is no formal record. On that occasion I suggested to the*

Minister that it should be possible to incorporate an amendment, if needed, into the Bill providing for new health structures later in 2004".

(16) As regards the discussion on 16 December 2003, the Minister agrees that he received a short briefing from the Secretary General as they moved from the hotel foyer to the meeting room. His recollection is that the focus of the briefing related to the concerns of the Health Board CEOs in relation to their concerns about their career prospects in the context of the establishment of the HSE. He also recalls receiving a short verbal briefing on the mood and business generally of the meeting. The Minister says his clear recollection is that there was nothing of substance said to him on the charges issue that might in any way indicate that significant problems were arising. As regards the meeting on 10 March 2004, the Minister has no recollection that the issue of health board charges was raised. He recalls signing off on the Business Plan for 2004 as requested and that he was comfortable to do this without undue formality. The Minister has emphasised that he certainly considers that if he had been told that any substantive problems were arising in relation to health board charges that were not capable of being dealt with by normal administrative action, he would have remembered it. He notes that no formal record of the meeting was taken by the Secretary General.

(17) There is some divergence of recollection between the Minister and the Secretary General in relation to the meeting of 10 March as noted. The Secretary General has stated that there was no formal record of the discussion that took place. There is, however, a formal record of the note sent to the Minister with the Business Plan on 10 March and requesting his approval to the Plan to which the Minister added the word "agreed" and initialed his approval also on 10 March. To the extent that discussion did take place or that any decisions were arrived at on issues of substance failure to establish and maintain a formal record would represent a significant administrative failure. This would, especially, be the case if it was considered that the issues involved were likely to have "*potential legal, financial and political consequences*". The Secretary General in his statement has indicated that he so considered. It is noted that there appears to be no suggestion that the letter and papers prepared for submission to the Attorney General, submitted to the Secretary General on 27 January 2004 and which, subsequently, went missing, were brought up for discussion at the meeting of 10 March 2004.

(18) The Secretary General in his statement as set out at chapter 4 well sets out the reasons why he considers that the letter and papers prepared for submission to the Attorney General were not so submitted. The work pressures under which the Secretary General, the Department of Health and Children generally and the Minister were operating at the time were enormous. The particular pressures on the Secretary General over the 2003/2004 period would appear of significant relevance to some of the matter which are the subject matter of this report. Accordingly, I refer in them in some detail in the following paragraphs.

(19) The position of Secretary General in the Department of Health and Children is, even under normal circumstances, a very demanding one. Apart from complexity, the scale and intensity of the business of the Department demands a personal commitment extending to very long hours and significant weekend commitment. The additional demands placed on this role during 2004 were substantive. Major Health Reform Programmes were under way in which the Secretary General was required to play a leading and central role. With what, I understand, was the agreement of the Minister, the Secretary General also played a prominent role in the EU Presidency events in 2003/2004 and participated actively in EU meetings. This gave rise to greater absences than normal from the Department's offices. The Secretary General also led the difficult negotiations with the Medical Defence Union (MDU) and, in turn, discussions with the two national medical organisations (IHCA and IMO) on medical indemnity issues.

(20) While the period 2003/2004 was undoubtedly a period of intense and unrelenting pressure from a variety of sources on the Secretary General and other senior staff of the Department, it was also a period of very solid achievement on many fronts. It is to be acknowledged, in the context of the subject matter of this report that some dilution of the normal scale of attention to individual items of work is understandable given the work loads that obtained over the 2003/2004 period.

(21) Taking full account of the sequence of events outlined in previous paragraphs it seems inexplicable that there was no follow-up of any substance, at any level in the Department of Health and Children during 2004 in relation to the submissions which the MAC/CEO Meeting decided should be sent to the Attorney General and which a number of officials in the Department worked so assiduously, efficiently and effectively to prepare for onward transmission to the Attorney General. Not even the Parliamentary Question put down by Deputy Róisín Shortall for written answer on 5 May 2004 and which again raised the issue of "*the circumstances under which medical card holders may be charged for stays in long-term care when they are receiving treatment"* evinced any apparent interest within the Department on what might be the views of the Attorney General on the matter. I have heard no satisfactory explanation on this apparent lack of concern or even apparent interest from officials of the Department or the Senior Advisors to the Minister.

(22) I am satisfied that the sequence of events I have articulated and the conclusions I have drawn in the previous paragraphs of this section of the report are fair and balanced in the context of the documentation and records I have received, the information otherwise made available to me and the requirements of the Terms of Reference set for the examination I was requested to conduct.

(23) I do not consider it likely that I have identified every possible matter that might be considered of relevance to the work I was asked to undertake given the mass of material available going back over 30 years. But I am

satisfied that the material to which I have had access is adequate and sufficient for the purpose of the examination I was asked to undertake.

(24) Some of the conclusions I have drawn may be considered harsh in a number of areas where they relate to the decisions, actions or otherwise that took place in the Department of Health and Children. But it should be noted that even where this is the case the conclusions I have drawn are based on facts, materials and views provided to me so fairly, honestly and professionally by officials of the Department. In that sense the inquiry or examination I have undertaken is one in which many excellent officials in the Department have shared and who have made their time and views available to me in a full and frank way for which I am grateful.

(25) In arriving at a number of conclusions set out in the report, it may appear that I have been, perhaps, more censorious than might have been the case if the inquiry had been conducted by someone who had not worked for a significant period of time in the Irish public service. The Irish public service has a long tradition of high standards of professional administration. It is important, in fairness to our fellow citizens and to those directly affected by the decisions of public servants, that these standards are not compromised. The Department of Health and Children has played an important public service role in the shaping and delivery of a national health system in difficult circumstances over many years. With the implementation of the Health Reform Programme from early 2005 the Department is at a new beginning. In that context, it is hoped that the lessons learned from the subject matter set out in this report can be of some benefit. I return to these issues in Chapter 6.

Overview and Conclusions

5.43 In summary, the fundamental reason for the period of time that elapsed from the date at which legal concerns about the practice of long stay charges in health board institutions were known up to the request by the Department of Health and Children for legal advice from the Attorney General on 27 October 2004 lies in long term systemic corporate failure at the overall level of the Department of Health and Children. That failure is principally a failure of public administration which, essentially, failed to identify, recognise and acknowledge the difference between actions and practices widely regarded as fair and reasonable and supportive of the development and protection of essential public health services *and* actions and practices that were legally valid. It may be considered that there have also been shortcomings over the entire period since 1976 at political level on the part of the Ministers of the Department of Health and Children in not probing, or having probed, more strongly and assiduously the issues underlying the practice of charges for long term care in health board institutions. The overall failure of administration was compounded by the fact that the solution to the dichotomy between what was, perhaps, admirable and desirable from an operational, societal and public health service perspective and what was legally valid was readily amenable to remedy through the introduction of a simple legislative amendment. The failure was further compounded by ignoring for many years a range of legal

advices and opinions which pointed to the remedy of the problems arising but which were left to one side in the persistent belief that the practices at issue were at least "defensible" in a legal sense even if this, ultimately, proved to be incorrect. In summary, it was a case of "good intentions" not being supported by the requisite legal foundations. The fact that no particular personal or organisational advantage accrued from the practices now clearly found to be unlawful is important to acknowledge. The problems that have accrued from the practices of charges for long term care in health board institutions initiated in 1976 and maintained subsequently arose from the failure to resolve in a satisfactory way the good aims and objectives of administrative process with those of due legal process. While this, at least, seems clear a more difficult question surrounds any possible conclusion on where lies the balance of morality involved. Attempting to arrive at any such conclusion does not fall within the Terms of Reference of this report. Were it to do so, I certainly would not be equipped to provide an answer. Who exactly would be so equipped appears highly indeterminate.

CHAPTER 6

DEPARTMENT OF HEALTH AND CHILDREN: REQUIRED CHANGES IN PRACTICES AND PROCEDURES

6.1 The fourth and final significant issue set out in the Terms of Reference for this Report (see Page 1 above) which I was required to examine and to report upon was in relation to: "***Such changes in practices and procedures in the Department of Health and Children that are necessary or desirable for the purpose of prioritising the response of the Department to matters of significant policy, financial or legal importance***".

The Lessons to be Learned

6.2 It is clear from the discussion in earlier chapters of this report that the failure of the Department of Health and Children to deal effectively with the legal, financial and operational issues and uncertainties that surround the practice of charges for long stay care in health board institutions represents a persistent and systemic corporate failure within the Department of Health and Children for almost 30 years. The reasons why that was the case were discussed in Chapter 4 of this report. The fact that what has happened *has* happened should not preclude a recognition of the good work accomplished by the Department of Health and Children in many other areas of importance to the public health services in Ireland over the years. Even in the case of long stay care in health board institutions there are many thousands of individuals and families who have benefited greatly from the access to those facilities over the years at a fraction of the true economic costs even if charges were unfortunately and unlawfully levied.

6.3 The lessons to be learned from the way that the charges for long term care in health board institutions was managed within the Department of Health and Children for almost 30 years can best be considered under a number of headings, with summary comment, as follows:

(1) **Legal Basis:** Get the legal basis for decisions right.
(2) **Analytical Capability:** Ensure that the analytical input into important decisions taken at the level of Department, Minister and Government is commensurate with the policy and operational importance of the decisions being taken.
(3) **Transparency:** Ensure that briefings for Ministers on important issues of policy or operation are comprehensive, fully inclusive of *all* relevant facts and adequately recorded.
(4) **Records:** Ensure at least a *de minimus* recording of decisions at official level and Ministerial level within the Department.
(5) **Risk Assessment:** Ensure a practical and effective system of risk assessment covering operational, legal and financial issues in relation to all areas of activity of the Department.

(6) **Decision Making:** Ensure that decisions are taken and recorded in a clear, transparent and timely way. Avoid the temptation to put important issues where decisions are required into an "in process" mode. Bring reviews of policy and operational issues to a clear conclusion and record decisions taken and their rationale.

(7) **Issues of Singular Importance:** Isolate issues of singular importance which have significant operational, legal, financial or wider social and economic (including political) implications and deal decisively with them.

(8) **Issues of Political Sensitivity:** Be aware of issues of political sensitivity. Be responsive in dealing with them but do not allow issues of political sensitivity to compromise the integrity of the analysis undertaken and brought forward, the options for any associated decisions that require to be taken or the full articulation of the likely consequences of alternative decisions.

(9) **Internal Organisation:** Rebuild the MAC (i.e. the Department's top management group – the Management Advisory Committee) as a cohesive, effective and positive force of operational management, policy development and organisational leadership in the Department. The MAC should also be the pivot of *internal and external communication* in relation to the management and operational activities of a Department which has an immense influence on the quality of life of many citizens and their perception of the public service.

(10) **Logging / Recording of File Movements:** Put in place and effective and easily accessible logging system for recording the establishment and movement of all files (electronic and paper) and the periodic and timely review of "files in process" until they are brought to appropriate conclusion.

(11) **Ministerial:** Ministers should seek assurance that the management and administration of the Department encompasses the fairly minimalist procedures and practices set out in the points listed above. They should probe, in an insightful and effective way, areas of policy implementation, operations and administrative difficulty – using an external source of review if considered necessary. Ministers should insist on full and periodic briefings on key issues of policy and operational performance. They should seek to be provided with periodically updated profiles of the key areas of operational, legal, financial, social and economic risk associated with the portfolio of activities for which they are responsible and seek assurance from the Secretary General of the Department that these areas of risk are under active management. Ministers and their Special Advisors should avoid becoming involved to too great an extent in the day-to-day operations and administration of the Department. In that context, Ministers should consider whether their involvement with the MAC should be on the basis of, perhaps, quarterly meetings which are well formulated and structured to focus on the key policy and operational issues of the Department. The Minister's key conduit of contact with the overall organisational arrangements for the Department should be through the Secretary General.

6.4 The reasons for the actions and practices advocated in the immediately preceding paragraph are self-evident from the discussions set out in previous paragraphs of this report. The practices of charges for long stay care in health board institutions in place since 1976 has been unequivocally found to be unlawful in the highest court of the land. The reasons why this has happened are outlined in earlier chapters of this report to the extent that the examination of events and documentation I have conducted and the discussion I have undertaken with officials and Ministers allows this to be done. Certain operational deficiencies of operation in each of the areas listed on the previous paragraph contributed to the way that the system of unlawful charges for long stay care in health board institutions was initiated, developed, managed and maintained over the years. The proposals put forward to rectify these deficiencies set out in the previous paragraphs represent straight-forward good practice. It is unlikely that any administrators or Ministers are likely to have great difficulty in accepting them as reasonable operational guidelines. The issue, however, has not been any particular absence of knowledge of what constitutes good administrative practice but rather a sustained commitment to the persistent implementation of these practices over time. The proposals put forward address the deficiencies of overall administration and management identified during the course of this examination in consultation with the many Ministers and officials with whom I discussed these matters. They draw also on the experience of the author of this report in working with Government Departments and agencies, with Ministers and Taoisigh and with external bodies in Ireland and other countries over many years. To the extent that they require elaboration I will be glad to provide this.

6.5 The system of professional public administration in Ireland has been pivotal in the system of democratic government which has served this country well since its foundation. Whatever its shortcomings, and many such shortcomings are to be acknowledged, its underlying strengths have been well demonstrated over many years and provide the fundamental foundations for a public administrative system which compares favourably with that of most countries of the world in terms of its professionalism and integrity. The officials of the Department of Health and Children have been an intrinsic part of this wider corporate base of public administration, a defining characteristic of which is one of high standards of integrity and operational practice. Where it becomes clear these standards fall short, it is essential that effective and immediate action is taken to rectify matters. The following paragraphs of this chapter consider these issues in the context of the lessons to be learned from the factors underlying the persistence of the unlawful practices in place since 1976 in relation to charges for long stay care in health board institutions.

Practices and Procedures in the Department of Health and Children: The Changes Required

6.6 The Department of Health and Children has a long and proud tradition of public administration of the health services extending back in time for more than 50 years. It has made a major contribution to the standards of living and quality of life of the people resident in this country over that period of time during which, for the most part, the availability of financial resources to

provide good and adequate health services and to meet constantly increasing citizen expectations, has been severely constrained. The Department has many fine achievements of good administration to its credit over the years which require to be generously acknowledged. Having said that, it is clear the administration of the practices of charges for long stay care in health board institutions could not be construed as featuring among such meritorious achievements.

6.7 With the implementation of the Health Reform Programme and the establishment of the Health Service Executive (HSE) and other bodies as part of that Programme, the Department of Health and Children is embarking upon a new departure. This provides a once-off opportunity that will not recur for many years to put into place new structures of best practice administration and a new operational ethos in the Department that will serve to underpin the health services of what, today, is one of the most advanced economies and societies in the world. This is not an easy task and the challenges that face the development of good health policy and its implementation are immense as described in chapter 5 of this report. Work to design and put these new organisational structures in place in the Department is well under way. This work is not, in any way, the subject matter of this report. The proposals on practices and procedures set out in the following paragraphs which do derive from the subject matter of this report will subsequently require to be considered within the context of the new organisational structures being put in place and integrated with them. The following proposals in relation to key areas of practice and procedures are, accordingly, recommended for consideration:

(1) **Legal Basis for Decisions**

- Review all existing practices that operate *within* the Department to ensure that the legal foundations on which they are based is valid.
- Review all existing practices that impact on persons or organisations *external* to the Department to ensure that the legal foundations on which they are based are valid.
- Review the work of the Legal Advisor section of the Department to ensure that the resource base available is adequate to the requirements of the Department for legal advice.
- Include the Department's Legal Advisor as a member of the MAC.
- Review the resource base of the Legislation Unit of the Department to ensure adequate resources for the timely formulation of legislative proposals.
- Consider if some consolidation of Health Acts is required.
- Ensure that all legal advices used as a basis for administrative action are properly and clearly articulated *at first hand* by the appropriate legal authority.
- Avoid administrative actions based simply on ascribed legal opinion at second hand.

(2) **Analytical Capability**

- Ensure that the staff of the Department have appropriate training in good analytical techniques and the clear presentation of the results of analyses.

- Where important decisions of policy or operation require the approval or other input of the Minister ensure that the submissions to the Minister are comprehensive, clear and invite an appropriate decision for formal noting and recording.
- Prepare and disseminate widely within the Department, templates and case studies of good analysis in the health services sector.
- Establish cross-divisional focus groups on the conduct and presentation of good analysis.
- Consider the need for the establishment of a strong unit in health services economics.

(3) **Risk Assessment**

- Establish as a matter of priority a formal risk assessment process specially designed for the particular needs of the Department of Health and Children and the specific and high-level nature of the risks associated with the health sector.
- Ensure that the risk assessment procedures of the Department are subjected to periodic external review at annual intervals.

(4) **File Logging**

- Establish a clear and transparent system for logging the origination and movement of all files within the Department, including, in particular, the movement of files to and from the offices of the Minister and the Secretary General.

(5) **Decision Making**

- Ensure that decisions are taken and recorded in a clear, transparent and timely way.
- Establish an ethos of *decision* taking rather than *process* formulation in the Department.
- Bring reviews of policy and operational issues to clear conclusion and record the decisions taken and their rationale.

(6) **Issues of Singular Importance**

- Isolate issues of policy and operations which are of singular importance because of their operational, legal, financial or wider social and economic (including political) implications.
- Deal decisively with these issues on the basis of quality analysis.

(7) **Issues of Political Sensitivity**

- Be aware of, take due cognisance of and be responsive to issues of political sensitivity.
- Ensure that the Minister is fully briefed on all the factors relevant to politically sensitive issues that are within the operational remit of the Department of Health and Children.
- Be vigilant to ensure that issues of political sensitivity are not allowed to compromise the integrity of the analyses undertaken and brought forward for the consideration of the Minister on significant issues of policy or operation. Analyses should include a clear articulation of the options available for any associated decisions that

require to be taken together with the consequences of relevance likely to arise from alternative decision options.

(8) **Internal Reorganisation**

- ***Preamble***: There is a widespread perception both within the Department of Health and Children and external to it that the MAC of the Department of Health and Children has for various, mainly historic, reasons been dysfunctional in many respects for some time. This is an untenable situation within a Department that is now responsible for policy (and previously for operational issues) that directly affects the lives of every citizen in this country. The Secretary General is credited with significant achievement in addressing this issue in recent years and in bringing greater focus and coherence to the MAC through the arrangement put in place to shape and deliver the Health Reform Programme announced by the Government in 2003. The progress achieved requires to be built upon in the context of the new policy focused role of the Department.
- Consider appointing *external members* to the MAC with good skills in business analysis and communications to bring a wider and more questioning external perspective to the work of the MAC.
- Consider cross membership between the MAC and the Board of HSE in whatever pragmatic format is feasible and operational in order to ensure full understanding and good cooperation between the two main organisational entities charged with the formulation and implementation of health policy.
- Upgrade the capacity of the MAC to act as an important organ and facilitator of *communication* both internally with the Department and external to it.
- Reconsider the frequency with which the Ministers of the Department of Health and Children attend MAC meetings and consider holding joint official / Ministerial meetings between the MAC and Ministers on (say) a *quarterly* basis with a focus on significant policy and operational issues jointly determined in advance by the Minister and Secretary General.
- Use the MAC as an important instrument in keeping major items of policy and operation that are "in process" under review.
- Encourage members of the MAC to take a corporate view of the activities of the Department and to take a business and analytical interest in areas of activity of the Department which lie outside their individual areas of responsibility.
- Develop a policy of moving members of the MAC between different areas of activity of the Department of Health and Children more frequently than has previously been the case in order to strengthen the corporate ethos of the MAC, enhance and widen the competencies of individual MAC members and encourage innovation, inventiveness and new perspectives of thinking in undertaking the business of the Department.

(9) **Ministerial**

- A number of recommended practices and procedures in relation to Ministerial activities in the Department of Health and Children are suggested in some detail in paragraph 6.3(11) of this chapter.

(10) **Special Advisors**

- Be clear that Special Advisors to the Minister, appointed to the Department for no longer than the Minister's term of office in the Department, are *not* part of the line management system of the Department.
- The briefing of Special Advisors by Department officials and the fact that Special Advisors attend particular meetings should *not* be considered, and should not be accepted as, an alternative to the direct briefing of the Minister on important areas of policy and operation.

The Wider Public Service

6.8 There are a number of issues that arise out of the examination which has been the subject matter of this report which appear of some relevance to the wider public sector and may require consideration in that context.

These include:

(1) **Civil / Public Service Wide Corporate Responsibility**: The upper management levels of the civil and public service in Ireland represents a powerful national pool of capability and talent. Within any particular Government Department (or agency of state) there can occur from time to time clusters of management excellence or, indeed, gaps in the scope and depth or management competencies, available to deal with particularly challenging issues. Such gaps may occur in areas that have significant national social or economic impact. Where this happens it may not be sufficient to attempt to deal with the issues arising simply at the level of the individual Department or agency. An intervention at central Government level may be required involving the Department of Finance and, perhaps, the Department of An Taoiseach. This is an issue that may require some consideration in the context of the findings of this report by Secretary Generals across Departments and by the Departments of Finance and An Taoiseach.

(2) **Legality Issues**: Individuals and legal entities of different kinds have become far more conscious of their constitutional and legal rights than was the case in former years. There is a greater readiness to probe administrative practice and to mount legal challenges to them. The experience of the Department of Health and Children in relation to the practice of charges for long term care in health board institutions makes clear that longevity of practice is no guarantee of its legal validity. It would be sensible to establish a systematic review of legal validity of practices across Departments based on formal systems of risk assessment. Good risk assessment will identify those areas of activity which carry the

most significant legal, financial and operational implications. The "legality proofing" of activities should be prioritised on the basis of the potential scale of risks involved. There is no intrinsic reason why effective and efficient risk assessment procedures should not be consistent with timely, decisive and efficacious administrative action.

(3) **Ministerial/Top Management Relationships**: The relationship between a Minister and the top management of a Department and, in particular, the Secretary General is the critical relationship that can determine the relative success of both Minister and Department during any particular period of government. That relationship must be built on mutual trust, loyalty and confidence. Both Minister and management need to know that they can discuss certain issues of sensitivity in confidentiality. Any over-emphasis on note-taking and the recording of minutiae in this relationship would undermine the establishment of the mutual confidence essential to a productive working relationship. At the same time, it is essential from the perspective of good public administration, public sector corporate governance and the strengthening of the democratic process in Ireland, that firm ground-rules are set in each Department on the *de minimus* recording of all decisions, taken or **not** taken, either singularly or jointly by the Minister and top management of a Department. This is particularly essential where important turning points in policy development or operational practice are taking place. The need for such a sensible decision-making and decision-recording system represents a clear lesson to be drawn from the experience of the Department of Health and Children in relation to practices of charges for long stay care in health board institutions over the years.

(4) **Personal v. Corporate Responsibility**: A further serious dilemma that arises from the subject matter of this report surrounds the issue of what an individual official can, or should, do in a situation where there are seriously unresolved uncertainties in relation to the strict legality of particular actions even if these actions are, in many respects, otherwise desirable and good. It may be considered that it is likely that the corporate entity involved will take appropriate steps to resolve the issue of legal uncertainty. But *what if* the corporate entity concerned *does not* take appropriate steps to deal with the uncertainties that exist? What can, or should, individual officials within the corporate entity do in such a situation? Indeed, what should officials external to the corporate entity but working elsewhere in the public service do if they become aware of serious legal uncertainties surrounding particular actions or practices? These are all issues that arise from the subject matter of this report and that may require wider consideration than can be given within the terms of reference set for a report such as this.

CHAPTER 7

SUMMARY OF FINDINGS AND RECOMMENDATIONS

Terms of Reference for Examination and Report

7.1 The Terms of Reference for the examination and report which An Tánaiste asked me to prepare are set out at page 1 above. I was asked to report on the four key issues:

> *"(a) The date the Department of Health and Children first knew of the existence of legal concerns relating to the imposition of charges by Health Boards on relevant persons.*
>
> *(b) All actions and decisions taken by the Department of Health and Children in response to the legal issues that arose concerning the imposition of charges by Health Boards on relevant persons.*
>
> *(c) The reasons for the period of time that elapsed from the date such knowledge was first acquired up to the request by the Department of Health and Children for legal advice from the Attorney General on the 27th October 2004.*
>
> *(d) Such changes in practices and procedures, in the Department of Health and Children, that are necessary or desirable for the purpose of prioritising the response of the Department to matters of significant policy, financial or legal importance".*

My findings in relation to the first three of these issues and my recommendations in relation to the fourth issue listed are set out in the following paragraphs.

The Date the Department of Health and Children First Knew of the Existence of Legal Concerns Relating to the Imposition of Charges by Health Boards on Relevant Persons.

7.2 ***Findings***

(1) The Department of Health and Children was well aware that legal concerns surrounded the practices of charges for long term care in health board institutions from the outset of the introduction of these practices in 1976.

(2) Such legal concerns persisted and continued to be articulated anew on many occasions over the years right up to the present. These concerns were expressed by legal opinion external to the Department, by legal opinion provided to the health boards, by officials within the Department itself and, not least, by the Department's own Legal Advisors.

(3) I have not found any substantive legal opinion in the documentation provided to me by the Department and which covers a period of some 30 years which appears to provide strong support for the practice of charges for long term care in health board institutions that prevailed from 1976 to December 2004. However, the section of this report in Chapter 5 which deals with the Issue of Legality may provide some explanation for this and some understanding of the underlying foundations for the practices put in place in 1976 and, subsequently, maintained.

Actions and Decisions Taken by the Department of Health & Children in Response to the Legal Issues that Arose Concerning the Imposition of Charges by Health Boards on Relevant Persons

7.3 ***Findings***:

(1) The *foundation decision,* taken in response to the decision of the High Court in 1975 effectively ruling out the levying of charges on persons with "*full eligibility*" (i.e. medical card holders) under the Health Act, 1970 when they were in receipt of "in-patient services", was the decision by the Department of Health and Children to prepare and distribute a circular (Circular 7/76) to the Health Boards which effectively advised them to remove "*full eligibility*" from persons in long term care so that they could be charged in line, otherwise, with the law.

(2) The decision to introduce Circular 7/76 as the basis for the practice of charges for long term care in health board institutions was taken in the context of advice to the contrary by the Legal Advisor to the Department of Health – advice which the Legal Advisor repeated on many occasions subsequently.

(3) The Department of Health & Children undertook many reviews of practice under Circular 7/76 over the years to 2004. All of these concluded that the legal basis for the practices in place was, at the very least, uncertain and that this uncertainty should be rectified by the introduction of new amending legislation.

(4) An increasing number of legal opinions expressing concerns about the practices of charging under Circular 7/76 over the years from external sources were submitted to the Department but did not give rise to any decision to change the advice in Circular 7/76 or the practices which derived from it.

(5) The Department of Health and Children avoided any opportunity to test the legal validity of the practices operated under Circular 7/76 when invited to do so, e.g. by the Registrar of the Wards of Court in 1978 operating under the aegis of the President of the High Court. The approach of the Department was to advise the Health Boards to settle out of Court when the practice of charges under Circular 7/76 was challenged by individuals.

(6) Proposals to deal with the legal concerns surrounding the issue of charges for long stay care in health board institutions through a stand-alone legislative change were "parked" at the time of the 2001 Health Strategy. This was done by placing the resolution of the charges for long stay care issues within the framework of a much more complex set of issues surrounding eligibility for health services generally. This, effectively, might be considered as an administrative stratagem for not taking more immediate action in relation to the legal concerns surrounding the charges for long stay care in health board institutions.

(7) The Department of Health and Children prepared in 2002 a draft Government Memorandum and associated Heads of Bill which would, effectively, have rectified the situation if presented to the Minister and Government and the requisite legislation was enacted. No submission was made to the Minister on the matter by the Department.

(8) The Health (Miscellaneous Provisions) Act, 2001 (the "2001 Act") made provision to extend "full eligibility" (i.e. medical cards) to persons of not less than 70 years of age. The Department of Health and Children had full knowledge that this meant that such persons could not be charged for in-patient services in health board institutions. This meant that the long term practice of charging such persons under the unlawful device of the 1976 Circular 7/76 would become doubly unlawful. A number of health boards sought in writing the advice of the Department on the implications of the 2001 Act in this respect. The Department ignored these requests and did not, apparently, make known to the health boards the conclusions the Department itself had drawn on the matter. Instead the Department verbally sought the advice of the health boards on the matter some days in advance of the operative date of the new legislation. The Health Boards indicated their belief (without any apparent legal advice) that previous practices under the 1976 Circular 7/76 could continue. The Department neglected to correct an interpretation that it knew to be incorrect.

(9) There is no documentation that I have seen in the records made available to me that indicated that the Minister was informed in any substantive way in relation to these matters prior to the circulation of papers for the MAC/CEO Group meeting of 16 December 2003.

(10) Having unsuccessfully sought the advice of the Department of Health and Children on issues surrounding the levying of charges on persons of not less than 70 years of age under the 2001 Act the South East Health Board (SEHB) in 2002 commissioned its own legal opinion and advices on that issue and on a number of related issues. The opinion and advices received by the SEHB posed substantive questionmarks over the practices of charges generally for persons in long term care in health board institutions and, particularly, for those persons of 70 years of age or more. The relevant opinion and advices were presented in writing to the Department of Health and Children in March 2003. They were not brought forward for substantive joint consideration between the top

management of the Department and the Health Boards for more than nine months until December 2003.

(11) The joint meeting between the Department and Health Board CEOs in December 2003 decided that the advice of the Attorney General be sought on the legal issues raised by the legal opinion and advices received by the SEHB with a view to considering whether or not amending legislation should be introduced to rectify matters. Officials in the Department prepared a letter and background paper for submission to the Attorney General. The Secretary General, who was under intense pressure of work, did not send the letter to the Attorney General and cannot fully recollect what happened to the letter and attachment. No substantive follow-up in relation to the proposed submission to the Attorney General took place at any level in the Department for nine months. The letter and attachment were sent by the Secretary General to the Attorney General on 27 October on the initiative of An Tánaiste following the raising of related matters in the Dáil by way of Parliamentary Questions.

(12) No documentary evidence was made available during the course of the examination which is the subject matter of this report that any memorandum or similar document was ever prepared and submitted to Ministers which fully and clearly sets out the substance and nature of the operational, legal and financial issues surrounding the practice of charges for long stay care in health board institutions together with the identification of options and actions for dealing with the problems arising.

The Reasons for the Period of Time that Elapsed from the Date of Knowledge of Legal Concerns up to the Request by the Department of Health And Children for Legal Advice from the Attorney General on 27 October 2004

7.4 ***Findings***:

(1) There is no single reason that explains the delay of almost 30 years between the time when legal concerns about the practices of charges for long stay care in health board institutions were first raised in 1976 and the seeking of legal advice from the Attorney General in 2004. The explanation lies in a constellation of reasons.

(2) Among the underlying reasons were the following:

- A belief that the underlying principle was right.
- A strong desire to protect what was regarded as an important source of "own income" by the health boards as a means of protecting the provisions of essential health services in a health system widely regarded as being under-funded.
- A failure to attach due weight to the legal concerns expressed about the practices because of what appears to be a somewhat unfounded belief that there was a defensible legal case for the practice. This belief appears to be based on a perception of the fairness and reasonableness of the underlying principle that persons who *can*

afford to make a contribution to the public services they avail of *should* make such a contribution. There also appears to have been some belief that the interpretation of the Health Act, 1970 made by the Department which formed the basis for the practice of charges initiated in 1976 was correct even if the legal advice available indicated otherwise.

- An undue concern about political sensitivity.
- The embedding of the practices over time appears to have weakened any inclination by the Department of Health and Children to question what became regarded almost as the "historic" legal foundations.
- Weakness of the Risk Assessment Procedures in place in the Department of Health and Children in relation to the operational, legal, financial and political significance of the issues surrounding the practice of charges for long-stay care in health board institutions and their resolution.
- Weakness in the analysis of the issues involved undertaken by the Department of Health and Children and in making transparent the substance and potential consequences of the issues concerned.
- Ultimately, poor overall corporate judgement in the Department of Health and Children in relation to the operational, legal, financial and political significance of the issues surrounding the practice of charge for long stay care in health board institutions.
- A failure on the part of the Department of Health and Children to act decisively in 2003/2004 in seeking the advice of the Attorney General.
- There were also shortcomings at political level over the years since 1976 in not probing and questioning more strongly and assiduously the issues underlying the practices of charges for long stay care in health board institutions even if, or perhaps even because, the analyses and briefings being provided by the officials in the Department of Health and Children appears to have been deficient in many respects. These shortcomings were, however, of a nature, scale, substance and order of magnitude considerably less than those of the system of public administration.

(3) In summary, the fundamental reason for the period of time that elapsed from the date at which legal concerns about the practice of long stay charges in health board institutions was known up to the request by the Department of Health and Children for legal advice from the Attorney General on 27 October 2004 lies in long term systemic corporate failure. That failure is principally a failure of public administration which, essentially, failed to identify, recognise and acknowledge the difference between actions and practices widely regarded as fair and reasonable and supportive of the development and protection of essential public health services and actions and practices that were legally valid. The failure of administration was compounded by the fact that the solution to the dichotomy between what was, perhaps, admirable and desirable from a public health, operational and societal perspective and what was legally valid was readily amenable to remedy through the introduction of a simple legislative amendment. The failure was further compounded by ignoring for many years a range of legal advices and opinions which

pointed to the remedy of the problems arising but which were left to one side in the persistent belief that the practices at issue were at least "defensible" in a legal sense even if this, ultimately, proved to be incorrect. In summary, it was a case of "good intentions" not being supported by the requisite legal foundations. The fact that no particular personal or organisational advantage accrued from the practices, now clearly found to be unlawful, is important to acknowledge. The problems that have accrued from the practices of charges for long term care in health board institutions initiated in 1976 and maintained subsequently arose from the failure to resolve in a satisfactory way the good aims and objectives of administrative process with those of due legal process. While this, at least, seems clear a more difficult question surrounding any possible conclusion on where lies the balance of morality involved. Attempting to arrive at any such conclusion does not fall within the Terms of Reference of this report. Were it to do so, I certainly would not be equipped to provide any answer. Who exactly would be so equipped appears highly indeterminate.

Changes in Practices and Procedures in the Department of Health and Children Necessary or Desirable for the Purpose of Prioritising the Response to Matters of Significant Policy, Financial or Legal Importance

7.5 The Department of Health and Children has operated under enormous pressures over many years in attempting to resolve effectively it policy role with its operational role in a severely financially constrained environment. The financial and other, including organisational/management constraints, that have operated have essentially assured an intrinsic gap between the potential of the health system to deliver good services and what happens on the ground in many situations. These issues have been well rehearsed in the series of reports underlying the Health Reform Programme announced by Government in June 2003.

7.6 The new structures now being put in place provide the potential to address many of the issues of practice and procedures that arise from the subject matter of this report. They provide a major, one-off opportunity for the Department to develop an ethos of excellence and capability in carrying out the new functions which fall to it under the Health Reform Programme. There is little doubt but that the many excellent officials of the Department, released from the almost impossible burden of juggling policy with operational responsibilities, can rise to the new challenge.

7.7 Already the design of new organisational structures to reflect the new role of the Department of Health and Children is well under way. This report has nothing to say on these except that the structured approach in place appears to hold out good prospects for the successful completion of the organisational restructuring under way.

7.8 Arising from the examination which forms the subject matter of this report, a number of recommendations in relation to practices and procedures in the Department of Health and Children are set out in Chapter 6, together with those

that relate to the wider public service. A number of these can be summarised as follows:

(1) **Legal Basis:** Get the legal basis for decisions right.

(2) **Analytical Capability:** Ensure that the analytical input into important decisions taken at the level of Department, Minister and Government is commensurate with the policy and operational importance of the decisions being taken.

(3) **Transparency:** Ensure that briefings for Ministers on important issues of policy or operation are comprehensive, fully inclusive of *all* relevant facts and adequately recorded.

(4) **Records:** Ensure at least a *de minimus* recording of decisions at official level and Ministerial level within the Department.

(5) **Risk Assessment:** Ensure a practical and effective system of risk assessment covering operational, legal and financial issues in relation to all areas of activity of the Department.

(6) **Decision Making:** Ensure that decisions are taken and recorded in a clear, transparent and timely way. Avoid the temptation to put important issues where decisions are required into an "in process" mode. Bring reviews of policy and operational issues to a clear conclusion and record decisions taken and their rationale.

(7) **Issues of Singular Importance:** Isolate issues of singular importance which have significant operational, legal, financial or wider social and economic (including political) implications and deal decisively with them.

(8) **Issues of Political Sensitivity:** Be aware of issues of political sensitivity. Be responsive in dealing with them but do not allow issues of political sensitivity to compromise the integrity of the analysis undertaken and brought forward, the options for any associated decisions that require to be taken or the full articulation of the likely consequences of alternative decisions.

(9) **Internal Organisation:** Rebuild the MAC (i.e. the Department's top management group – the Management Advisory Committee) as a cohesive, effective and positive force of operational management, policy development and organisational leadership in the Department. The MAC should also be the pivot of *internal and external communication* in relation to the management and operational activities of a Department which has an immense influence on the quality of life of many citizens and their perception of the public service.

(10) **Logging / Recording of File Movements:** Put in place and effective and easily accessible logging system for recording the establishment and movement of all files (electronic and paper) and the periodic and timely review of "files in process" until they are brought to appropriate conclusion.

(11) **Ministerial:** Ministers should seek assurance that the management and administration of the Department encompasses the fairly minimalist procedures and practices set out in the points listed above. They should probe, in an insightful and effective way, areas of policy implementation, operations and administrative difficulty – using an external source of review if considered necessary. Ministers should insist on full and periodic briefings on key issues of policy and

operational performance. They should seek to be provided with periodically updated profiles of the key areas of operational, legal, financial, social and economic risk associated with the portfolio of activities for which they are responsible and seek assurance from the Secretary General of the Department that these areas of risk are under active management. Ministers and their Special Advisors should avoid becoming involved, to too great an extent, in the day-to-day operations and administration of the Department. In that context, Ministers should consider whether their involvement with the MAC should be on the basis of, perhaps, quarterly meetings which are well formulated and structured to focus on the key policy and operational issues of the Department. The Minister's key conduit of contact with the overall organisational arrangements for the Department should be through the Secretary General.

7.9 At the wider level of the public service a number of issues also arise out of the subject matter of this report. These issues are discussed in Chapter 6 and include:

(1) Civil/Public Service Wide Corporate Responsibility
(2) Legality Issues
(3) Ministerial / Top Management Relationships
(4) Personal v. Corporate Responsibility

7.10 Because of the crush of time and events over the past two months, and those of recent weeks and days in particular, and because, perhaps, also of personal deficiencies of analysis and articulation, there are undoubtedly parts of this report that could be better founded, better developed or better expressed. I consider, however, that the report does meet the substance of the Terms of Reference set for it. I am very grateful for the support and help I have received from the many officials and politicians with whom I met in the course of preparing the report and many others, both directly and indirectly involved, whom I do not mention but who will know themselves who they are. I hope the report can make some contribution to resolving the issue of public administration and associated political responsibilities that arise from its subject matter.

John Travers
4 March 2005

APPENDICES

APPENDIX 1

REPORT ON CERTAIN ISSUES OF MANAGEMENT AND ADMINISTRATION IN THE DEPARTMENT OF HEALTH AND CHILDREN ASSOCIATED WITH THE PRACTICE OF CHARGES FOR LONG-STAY PATIENTS IN HEALTH BOARD INSTITUTIONS.

TERMS OF REFERENCE

" To examine, consider and report on the following matters:

(a) The date the Department of Health and Children first knew of the existence of legal concerns relating to the imposition of charges by Health Boards on relevant persons.

(b) All actions and decisions taken by the Department of Health and Children in response to the legal issues that arose concerning the imposition of charges by Health Boards on relevant persons.

(c) The reasons for the period of time that elapsed from the date such knowledge was first acquired up to the request by the Department of Health and Children for legal advice from the Attorney General on the 27th October 2004.

(d) Such changes in practices and procedures, in the Department of Health and Children, that are necessary or desirable for the purpose of prioritising the response of the Department to matters of significant policy, financial or legal importance".

In carrying out this task the examiner will consider all relevant documents and, as appropriate, interview persons whom the examiner considers can aid the effective and efficient discharge of the task. He will furnish a detailed report to the Tánaiste and Minister for Health and Children setting out all relevant facts, their implications for public administration and any recommendations deemed appropriate to improving public administration in this area and shall do so by the 1st March 2005.

For the purposes of these Terms of Reference a relevant person means a person who is fully eligible, within the meaning of the Health acts, and who is in receipt of inpatient services in a public hospital, nursing home or private nursing home pursuant to a contractual arrangement between that nursing home and a Health Board".

APPENDIX 2

HEALTH (AMENDMENT) (No. 2) BILL 2004

SECOND STAGE SPEECH BY AN TÁNAISTE AND MINISTER FOR HEALTH AND CHILDREN, MARY HARNEY, T.D. DÁIL EIREANN, 16TH DECEMBER, 2004.

EXTRACT

"Management Report"

Clearly, serious issues arise from how this important legal issue was handled in the Department of Health and Children.

The government propose to deal with the charges by new law and by making *ex-gratia* repayments. There is also a responsibility on us to deal with public management and administration issues.

I have asked Mr John Travers, a retired head of Forfás with a distinguished career in the public service, to examine the management of this issue in the Department and the reasons why the Attorney-General's advice was not sought at the earliest possible time.

I will ask him to identify lessons that can be learnt and applied from these events, in the interests of more effective public administration in the Department of Health and, indeed, elsewhere. I intend to give him the greatest latitude possible for recommendations in this regard. I expect to receive his report by 1st March next year and I will publish it also.

I am not interested in blame. I am interested only in achieving excellence in public administration, in the interests of patients, public and staff.

There is every reason for the Department of Health to strive for and to achieve excellence, particularly at this time of change when its role will be more focused on policy, legislation and evaluation. I look forward to this report helping us to achieve that.

APPENDIX 3

LIST OF HEADS OF ORGANISATIONS REQUESTED TO PROVIDE RECORDS RELEVANT TO THE TERMS OF REFERENCE FOR THE REPORT

(1) Secretary-General, Department of Health and Children

(2) Secretary-General, Department of Finance

(3) Office of Attorney General

(4) Office of Ombudsman

(5) Office of Comptroller and Auditor General

(6) CEOs of Former Health Boards/Authorities:

- Eastern Regional Health Authority:
  - East Coast Area Health Board
  - Northern Area Health Board
  - South Western Area Health Board

- Midland Health Board

- Mid-Western Health Board

- North-Eastern Health Board

- North-Western Health Board

- South-Eastern Health Board

- Southern Health Board

- Western Health Board

APPENDIX 4

LIST OF HEADS OF POLITICAL PARTIES IN DÁIL EIREANN INVITED TO CONSIDER MAKING SUBMISSIONS RELEVANT TO THE TERMS OF REFERENCE OF THE REPORT

Leader Fine Gael Party

Leader Labour Party

Leader Sinn Fein Party

Leader Green Party

Leader Socialist Party

APPENDIX 5

LIST OF MINISTERS AND OFFICIALS CONSULTED AND INTERVIEWED IN RELATION TO MATTERS RELEVANT TO FULFILLING THE TERMS OF REFERENCE FOR REPORT

Ministers

An Tánaiste & Minister for Health and Children, Ms Mary Harney, T.D.

Mr Micheál Martin, T.D., Minister for Enterprise, Trade & Employment and former Minister for Health and Children

Mr Ivor Callely, T.D., Minister of State at the Department of Transport and former Minister of State at the Department of Health and Children

Mr Tim O'Malley, T.D., Minister of State at the Department of Health and Children

Officials

Department of Health and Children

Mr Michael Kelly, Secretary-General, Department of Health and Children

Mr Frank Ahern, Assistant-Secretary, Department of Health and Children

Dr. Ruth Barrington, Chief Executive, Health Research Board

Ms Catherine Burns, Higher Executive Officer, Department of Health and Children and former Private Secretary to Mr Micheál Martin, T.D., Minister for Enterprise, Trade & Employment and former Minister for Health and Children

Ms Eileen Duffy, Assistant Principal, Department of Health and Children

Mr Jimmy Duggan, Principal, Department of Health and Children

Ms Deirdre Gillane, Special Advisor to Micheál Martin, T.D., Minister for Enterprise, Trade & Employment and former Minister for Health and Children

Mr Charlie Hardy, Principal, Department of Health and Children

Mr John Hurley, Former Secretary General, Department of Health and Children

Ms Teresa Hynes, Assistant Principal, Department of Health and Children

Mr Christy Mannion, Special Advisor to Micheál Martin, T.D., Minister for Enterprise, Trade & Employment and former Minister for Health and Children.

Mr Tom Mooney, Deputy Secretary, Department of Health and Children

APPENDIX 5 (Contd.)

LIST OF MINISTERS AND OFFICIALS CONSULTED AND INTERVIEWED IN RELATION TO MATTERS RELEVANT TO FULFILLING THE TERMS OF REFERENCE FOR REPORT

Officials

Department of Health and Children (contd.)

Ms Frances O'Brien, Executive Officer, Department of Health and Children

Mr John O'Brien, Special Advisor to An Tánaiste and Minister for Health and Children, Ms Mary Harney, T.D.

Mr Oliver O'Connor, Special Advisor to An Tánaiste and Minister for Health and Children, Ms Mary Harney, T.D.

Mr Jerry O'Dwyer, Former Secretary General, Department of Health and Children

Ms Angela O'Floinn, Legal Advisor, Department of Health and Children

Mr Dermot Smyth, Assistant-Secretary, Department of Health and Children.

Health Boards

Mr Pat Gaughan, Chief Executive of the Former Midland Health Board

Mr Pat Harvey, Chief Executive of the Former North-West Health Board

Ms Maureen Windle, Chief Executive of the Former Northern Area Health Board.

Department of Finance

Mr Colm Gallagher, Assistant Secretary, Health Boards (Former)

Department of An Taoiseach

Mr Dermot McCarthy, Secretary-General

Office of the Ombudsman

Ms Emily O'Reilly, Ombudsman & Information Commissioner

Ms Patrick Whelan, Director-General

Mr Michael Brophy, Senior Investigator.

Office of the Attorney General

Mr Christopher Doyle, Legal Advisor

APPENDIX 6

LIST OF PEOPLE WHO MADE WRITTEN SUBMISSIONS IN RELATION TO THE MATTERS TO BE CONSIDERED UNDER TERMS OF REFERENCE FOR THE REPORT

Ms Liz McManus, T.D., Deputy Leader of the Labour Party and Spokeswoman on Health.

APPENDIX 7

LIST OF MINISTERS OF HEALTH 1947-2005*

Listed below are all people who have held the position of Minister for Health or Minister for Health and Children since the establishment of the Department of Health in 1947

NAME	TENURE
Dr James Ryan, T.D.	January, 1947 – February, 1948
Dr Noel Browne, T.D.	February, 1948 – April, 1951
Mr John A Costello, T.D.	April, 1951 – June, 1951
Dr James Ryan, T.D.	June, 1951 – June, 1954
Mr Thomas F O'Higgins, T.D.	June, 1954 – March, 1957
Mr Sean MacEntee, T.D.	March, 1957 – April, 1965
Mr Donagh O'Malley, T..D.	April, 1965 – July, 1966
Mr Sean Flanaghan, T.D.	July, 1966 – July, 1969
Mr Erskine Childers, T.D.	July, 1969 – March, 1973
Mr Brendan Corish, T.D.	March, 1973 – July, 1977
Mr Charles J Haughey, T.D.	July, 1977 – December, 1979
Dr Michael Woods, T.D.	December, 1979 – July, 1981
Mrs Eileen Desmond, T.D.	July, 1981 – March, 1982
Dr Michael Woods, T.D.	March, 1982 – December, 1982
Mr Barry Desmond, T.D.	December, 1982 – January, 1987
Mr John Boland, T.D.	January, 1987 – March, 1987
Dr Rory O'Hanlon, T.D.	March, 1987 – November, 1991
Mrs Mary O'Rourke, T.D.	November, 1991 – February, 1992
Dr John O'Connell, T.D.	February, 1992 – January, 1993
Mr Brendan Howlin, T.D.	January, 1993 – November, 1994
Dr Michael Woods, T.D.	November, 1994 – December, 1994
Mr Michael Noonan, T.D.	December, 1994 – June, 1997
Mr Brian Cowen, T.D.	June, 1997 – January, 2000
Mr Michael Martin, T.D.	January, 2000 – September, 2004
Ms Mary Harney, T.D.	September, 2004 – Present

* As of 1st March 2005

APPENDIX 8

LISTOF SECRETARIES/SECRETARIES-GENERAL DEPARTMENT OF HEALTH AND CHILDREN 1947-2005*

NAME	TENURE
Mr Patrick Kennedy	1947 – 1959
Mr Patrick Murray	1959 – 1973
Mr Brendan Hensey	1973 – 1981
Mr Dermot Condon	1981 – 1985
Mr Liam Flanagan	1985 – 1990
Mr John Hurley	1990 – 1994
Mr Jerry O'Dwyer	1994 – 2000
Mr Michael Kelly	2000 –

*As of 1st March 2005

APPENDIX 9

LIST OF MINISTERS OF FINANCE 1947-2005*

Listed below are all people who have held the position of Minister for Finance since the establishment of the Department of Finance in 1947

NAME	TENURE
Mr Frank Aiken, T.D.	1947 – 1948
Mr Patrick McGilligan, T.D.	1948 – 1951
Mr Sean McEntee, T.D.	1951 – 1954
Mr Gerard Sweetman, T.D.	1954 – 1957
Dr James Ryan, T.D.	1957 – 1965
Mr John (Jack) Lynch, T.D.	1965 – 1966
Mr Charles J Haughey, T.D.	1966 – 1970
Mr George Colley, T.D.	1970 – 1973
Mr Richie Ryan, T.D.	1973 – 1977
Mr George Colley, T.D.	1977 – 1979
Mr Michael O'Kennedy, T.D.	1979 – 1980
Mr Gene Fitzgerald, T.D.	1980 – 1981
Mr John Bruton	1981 – 1982
Mr Ray McSharry, T.D.	1982
Mr Alan Dukes, T.D.	1982 – 1987
Mr Ray McSharry, T.D.	1987 – 1988
Mr Albert Reynolds	1988 – 1991
Mr Bertie Ahern, T.D.	1991 – 1993
Mr Ruairi Quinn, T.D.	1994 – 1997
Mr Charlie McCreevy, T.D.	1997 – 2004
Mr Brian Cowen, T.D.	2004 -

*As of 1st March 2005

APPENDIX 10

LISTOF SECRETARIES/SECRETARIES-GENERAL
DEPARTMENT OF FINANCE
1947-2005*

NAME	TENURE
Mr James J McElligot	1947 – 1953
Mr Owen Joseph Redmond	1953 – 1956
Mr Thomas Kenneth (T.K.) Whitaker	1956 – 1969
Mr Charles Henry (C.H.) Murray	1969 – 1976
Mr M.N. O'Murchú	1976 – 1977
Mr Thomás F O'Cofaigh	1981 – 1987
Mr Maurice F Doyle	1987 – 1994
Mr Paddy Mullarkey	1994 – 2000
Mr John Hurley	2000 – 2002
Mr Tom Considine	2002

*As of 1st March 2005

APPENDIX 11

CIRCULAR LETTER OF AUGUST 1976 ISSUED BY DEPARTMENT OF HEALTH IN RELATION TO HEALTH BOARD CHARGES FOR CERTAIN SERVICES

Circular letter dated 6 Lunasa 1976, re-typed for purposes of clarity

Circular 7/76

6 Lunasa 1976

Chief Executive Officer
Each Health Board

Health (Charges for In-Patient Services) Regulations, 1976

A chara

I am directed by the Minister for Health to forward herewith copies of the above regulations recently made by him which empowers health boards to impose a charge towards the cost of in-patient services provided under Section 52 of the Health Act 1970 in the case of long-stay patients without dependants.

It will be noted that in accordance with section 53(2)(a) of the Act, the regulations do not relate to 'persons with full eligibility'. However in this respect the precise definition of a person with full eligibility in section 45(1)(a) of the Act should be carefully noted. A person who, while he was providing for himself in his own home, was deemed to have full eligibility could be regarded as not coming within that definition when he is being maintained in an institution where the services being provided include medical and surgical services of a general practitioner kind, with consequential liability for charges under the regulations.

In answer to inquiries it is desired to point out that health boards remain authorised to require persons to contribute towards the cost of institutional assistance in county homes and similar institutions including welfare homes. The relevant regulations, which are still in operation, are the Institutional Assistance Regulations 1954 as amended by the Institutional Assistance Regulations 1965.

Mise le meas

D Whelan

APPENDIX 11

CIRCULAR LETTER OF AUGUST 1976 ISSUED BY DEPARTMENT OF HEALTH IN RELATION TO HEALTH BOARD CHARGES FOR CERTAIN SERVICES

Department of Health
Custom House, Dublin 1

An Roinn Sláinte
Teach an Chustaim, Baile Átha Cliath 1

TEL. (01) 742961 EXTN
TELEX
REF.

Circular 7/76

6 Lunasa 1976

Chief Executive Officer
Each Health Board

Health (Charges for In-Patient Services) Regulations, 1976

A Chara

I am directed by the Minister for Health to forward herewith copies of the above regulations recently made by him which empowers health boards to impose a charge towards the cost of in-patient services provided under Section 52 of the Health Act 1970 in the case of long-stay patients without dependants

It will be noted that in accordance with section 53(2)(a) of the Act the regulations do not relate to 'persons with full eligibility'. However in this respect the precise definition of a person with full eligibility in section 45(1)(a) of the Act should be carefully noted. A person who, while he was providing for himself in his own home, was deemed to have full eligibility could be regarded as not coming within that definition when he is being maintained in an institution where the services being provided include medical and surgical services of a general practitioner kind, with consequential liability for charges under the regulations.

In answer to inquiries it is desired to point out that health boards remain authorised to require persons to contribute towards the cost of institutional assistance in county homes, and similar institutions including welfare homes. The relevant regulations, which are still in operation, are the Institutional Assistance Regulations 1954 as amended by the Institutional Assistance Regulations 1965.

Mise le meas

APPENDIX 12

LETTER OF 2ND JULY 2001 ISSUED ON BEHALF OF THE CEOs OF THE HEALTH BOARDS TO THE SECRETARY-GENERAL, DEPARTMENT OF HEALTH AND CHILDREN IN RELATION TO THE PRACTICE OF CHARGES FOR LONG-STAY CARE IN HEALTH BOARD INSTITUTIONS FOLLOWING THE ENACTMENT OF THE HEALTH (MISCELLANEOUS PROVISIONS) ACT 2001

Re-typed for purposes of clarity

2nd July, 2001

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

Dear Mr Kelly

Re: Maintenance Charges for Institutional Care – Over 70's

We had a discussion on this at the CEO Group teleconference this morning. We believe the arrangements as they pertained up to the end of June can continue from 1st July and that arrangements are not necessarily changed as a result of the introduction of the automatic entitlement to medical cards for the over 70's.

I would draw your attention to the circular letter 7/76 signed by D. Whelan to the Boards dated the 6 Lunasa 1976 – copy enclosed. The letter is self explanatory.

This is our interpretation and if you feel that we need further discussion or clarification on this matter please feel free to get in touch with me.

Kind regards
Yours sincerely

Pat Harvey

Pat Harvey
Chief Executive Officer

c.c. CEO's - DRAFT

North Western Health Board
Bord Slainte an Iar-Thuaiscirt
CEO's Office
Manorhamilton, Co. Leitrim.
Tel. (072) 20422
Fax. (072) 55627

2nd July 2001

Mr. Michael Kelly
Secretary General
Department of Health & Children
Hawkins House
Dublin 2

Dear Mr. Kelly

Re: Maintenance Charges for Institutional Care – Over 70's

We had a discussion on this at the CEO Group teleconference this morning. We believe the arrangements as they pertained up to the end of June can continue from 1st July and that arrangements are not necessarily changed as a result of the introduction of the automatic entitlement to medical cards for the over 70's.

I would draw your attention to the circular letter 7 / 76 signed by D. Whelan to the Boards dated the 6 Lunasa 1976 – copy enclosed. The letter is self explanatory.

This is our interpretation and if you feel that we need further discussion or clarification on this matter please feel free to get in touch with me.

King Regards
Yours sincerely

Pat Harvey
Chief Executive Officer

c.c. CEO's - DRAFT

APPENDIX 13

MAC/CEO GROUP MEETING WITH MINISTER AND THE MINISTERS FOR STATE ON 16 DECEMBER 2003

AGENDA FOR THE MEETING

Part 1

1. Minutes of Meeting on 26th February 2003

2. Service Plans 2004

3. Reform Programme

- Current Status
- Next Steps and Timetable
- Implications for Health Boards in 2004
- Communications to/within the system
- Critical Change Events 2004

Part 2

4. Items for Brief Mention

- Maternity Services
- Domiciliary Briths
- Proposed Amendments to Infectious Diseases Regulations 1981
- Long Stay Charges – Over 70s
- Emergency Planning

5. Items for Update

6. Any Other Business

7. Date for Next Meeting

APPENDIX 14

MAC/CEO GROUP MEETING WITH THE MINISTER AND THE MINISTERS OF STATE ON 16 DECEMBER 2003: MINUTES OF THE MEETING.

MAC/CEO Group meeting with the Minister and the Ministers of State

Tuesday 16th December 2003, 2.00pm – 5.00pm
The Gresham Hotel

Attendance:

Department	CEO Group
Minister M. Martin	Mr. D. Doherty (HeBE)
Minister I. Callely	Mr. M. Lyons
Minister T. O'Malley	Mr. P. Donnelly
Mr. M. Kelly (Secretary General)	Ms. M. Windle
Dr. J. Kiely (CMO)	Mr. M. Gallagher
Mr. F. Ahern	Mr. P. Robinson
Ms. F. Spillane	Mr. P. Harvey
Mr. N. Usher	Mr. S. Hurley
Mr. D. Devitt	Dr. S. de Burca (Chair)
Mr. P. Barron	Mr. P. Gaughan
Mr. B. Carey	Mr. P. McLoughlin
Mr. T. Mooney	Dr. S. Ryan
Mr. D. Magan	
Mr. C. Hardy	Apologies
Ms. D. Gillane	Minister B. Lenihan
Mr. C. Mannion	Mr. D. Smyth
Ms. F. O'Brien	Mr. J. Collins

1. Minutes

- The minutes of the meeting of 26th February 2003 were approved.

2. Domicilary Births

- It was stated that the expert group has finished the first draft report which will be going to the steering group today. It is hoped that it will be brought to the Department of Health and Children in early January.
- It was highlighted that there is an urgent need for a standardised procedure to be in place nationally, in order to avoid different approaches being taken by each Health Board.
- The matter of Health Boards issuing grants was raised. It was stated that Health Boards still have a legal obligation if there are complications after the birth.
- The idea of a contract between the expectant mother and the Health Board was suggested. This would be in the form of a simple legal document to accompany the payment of the grant.

3. Proposed Amendments to Infectious Diseases Regulations 1981

- A brief overview was given of the proposed changes. It was explained that the language used to describe various diseases would be updated and there would be provision for clinical notification of infectious diseases through laboratories.
- It was suggested that it would not be possible for the Health Boards to take on the control aspects of the new regulations without additional resources. However, it was agreed that this issue is an internal Health Board matter.

4. Long Stay Charges – Over 70's

- It was brought to the attention of the group that the Ombudsman has challenged a health board's interpretation of how persons over 70 should be charged for long stay care in health board institutions.
- The varying views of different legal advisors were noted in the context of the legislation clarifying the existing eligibility framework.
- The Department indicated that it would make an assessment of the need for a stand-alone bill on this aspect of eligibility, in light of overall priorities in the legislative programme and the relative urgency of that particular issue. It would be necessary to get a definitive legal assessment of the present arrangement as a first step.

5. Emergency Planning

- It was suggested that a group could be set up in early January. This group would prepare for the possibility of another SARs outbreak.
- It was mentioned that HeBE have a project group already in existence to deal with emergency planning.

6. Service Plans 2004

- The CEOs were thanked for their efforts in completing Service Plans for 2003.
- It was emphasised that core funding and core service funding should be examined in order to determine if any funding can be re-prioritised.
- In relation to the recent Controller and Auditor General report on waiting lists, concern was expressed that a majority of Health Boards who had done very well with performances of up to 90% reduction in waiting lists did not receive recognition for same in media coverage.

7. Reform Programme

- The importance of informing people at an early stage about their future was discussed-people's fears and anxieties must be addressed.
- It was agreed that a sustained communication process is essential in 2004.
- The following Critical Change Events in 2004 were mentioned:
    - The announcement concerning the National Steering Committee should happen in the next week or so;
    - The announcement of the Hanley 2 Group immediately after Christmas;
    - Finalising the Boards' position – look at the project plan and identify key events.

APPENDIX 15

MAC/CEO GROUP MEETING OF 29 MARCH 2004
MINUTES OF MEETING

MAC/CEO Group Meeting
Monday 29th March 2004, 2.00pm.
Hawkins House

Attendance:

Department	CEO Group	Apologies
Mr. M. Kelly (Secretary General)	Dr. S. de Burca (Chair)	Mr. J. Collins
Dr. J. Kiely (CMO)	Mr. D. Doherty (HeBE)	Mr. S. Hurley
Mr. F. Ahern	Mr. M. Lyons	Dr. S. Ryan
Ms. F. Spillane	Mr. P. Donnelly	
Mr. N. Usher	Ms. M. Windle	
Mr. D. Devitt	Mr. M. Gallagher	
Mr. P. Barron	Mr. P. Robinson	
Mr. B. Carey	Mr. P. Harvey	
Mr. T. Mooney	Mr. P. Gaughan	
Mr. D. Smyth	Mr. P. McLoughlin	
Ms. F. O'Brien (Secretary)		

1. Minutes

- The minutes of the meeting of 16th December 2003 were approved.

2. Brief Overview on Developments since last Meeting

It was stated that a steering group is now in place to deal with emergency planning. It is hoped that they will address the issue of the Avian Flu and SARS.

It was mentioned that the Department has sought legal advice in relation to the Long Stay Charges issue.

It was stated that the expert group on domiciliary births issue have written to the Department and the Health boards on this issue and are awaiting feedback.

3. Health Reform Programme

Update

- The Health Boards were thanked for their co-operation and work done in 2003.
- The idea of taking the reports of the action projects as a basis for implementation was mentioned.
- In relation to the restructuring of the Department it was stated that the action projects have brought their ideas to MAC concerning the design structure of the new Department. It was mentioned that the Department are in the process of selecting a design organisation to carry out an independent review.
- It was stated that the Service Plan Group are dealing with the Department's elements of the service plan.
- The setting up of HIQA was discussed. An interim structure will be set up this year.

- The Health (Amendment) Bill 2004 was discussed. It was stated that the Bill is at an advanced stage and ready to go to Government. It was highlighted that the second Bill, which is the main bill, provides a statutory basis for HSE and HIQA. It was stated that all the existing reserved functions rest with CEOs, but that there is provision in the Bill to empower the Minister to decide when to commence various items in it.

- The issue of HR/IR, codes of practice and top-level posts of HSE was discussed. The fact that there is an ongoing dispute between the Medical Defence Union and the Department was mentioned.
- The need to clearly identify a prioritised list of agencies in relation to streamlining was discussed.
- The importance of communications in relation to the Reform programme was discussed. It was suggested that a type of press office be set up (for the Minister).
- It was mentioned that progress has been made in relation to the financial transition. It is in the early stages at present.
- The Cabinet Committee on Health would be meeting in April to make a formal report.
- It was noted that the Department and the Interim HSE should set up an information process on the implementation of the Reform.
- The fact of HIQA having an overview of the whole system (Quality and Fairness and Reform Agenda) was highlighted as being helpful in the future in regard to accountability and standards.

Consequences of deployment of senior managers to HSE

- The issue of significant players in the system being taken away this year from day to day management was discussed. The fact that the level of capacity and capability within the system is not the same was expressed as an issue for concern.
- While people in management posts are being removed it is important to ensure that all elements of the service plan still apply e.g. budgeting. It was also mentioned that dealing effectively with the transition of services to HSE must be a priority for HEBE and Health Boards/ERHA.
- It was mentioned that projects and assignments will have to be agreed with HSE. The importance of 'collectiveness' and the need to share information was highlighted.
- It was discussed that in order to have HSE up and running next January, there is a need to establish a running order – identify priorities and key issues.
- It is necessary to have communication between all groups – HEBE, Health Boards, Department and HSE discuss issues together. It was suggested that there be some sort of framework in place to deal with discussions to identify critical issues.
- The need to be realistic and establish what is achievable between now and the end of the year was mentioned. It was suggested that projects that do not migrate into the future system should not be started for the present.

4. Health Board/Department relationship to year end 2004

- The importance of continuing to have frequent contact with a purposeful agenda was mentioned. The importance of a regular MAC/CEO meeting cycle every 2 months was discussed.
- It was suggested that there should be Department reps at each of the monthly CEO meetings. It was also suggested that the agenda and minutes be put on the internet.

5. Bill relating to HB membership

- It was mentioned that that the health boards have had talks with HR sections who expressed concern regarding the issue of not filling vacancies (grade VIII and above), stating that it could lead to staff morale/management issues.

6. Sale of land

- The Department was concerned that the matter of the sale of land should be done in a manner which will not compromise HSE and that, in transitional phases, it should involve the Department. Therefore there needs to be continuous communication between the Health Boards/ERHA and the Department in this regard.

7. Service Plans 2004

- Service Plans have been proposed to the Department in terms of existing activity levels. The importance of Health Boards providing the Department with information on Performance Indicators was mentioned.
- It was stated that the 2004 budget must be strictly adhered to.
- It was mentioned that the national template is being worked on at the moment and that a review of the 2004 template should be finished by May. A group in the Department have started to look at 2005 needs.

8. Capital programme

- The Department is discussing with the Department of Finance the capital investment needs for the 2004-2008 period. A priority is a clear 2004 programme with a substantial increased in ICT over that period, and a minor capital programme for 2004. The Department will revert to the Group on this issue in due course.

9. Date for next meeting

- Next meeting date to be decided.

APPENDIX 16

MAC/CEO GROUP MEETING OF 18 OCTOBER 2004
DRAFT MINUTES OF MEETING

MAC/CEO Group Meeting
Monday 18th October 2004, 2.00pm
Hawkins House

Attendance:

Department	CEO Group	Apologies
Mr. M. Kelly (Sec. General)	Ms. M. Windle (Chair)	Mr. J. Collins
Dr. J. Kiely (CMO)	Mr. D. Doherty (HeBE)	Mr. S. Hurley
Mr. F. Ahern	Mr. L. Woods (deputising for Mr M. Lyons)	Ms. F. Spillane
Mr. N. Usher	Mr. A. McLoughlin (deputising for Mr P. Robinson)	Dr. S. de Burca
Mr. D. Devitt	Mr. M. Gallagher	Mr. P. Donnelly
Mr. P. Barron	Mr. P. Gaughan	Mr. P. Robinson
Mr. B. Carey	Dr. S. Ryan	Mr. P. Harvey
Mr. T. Mooney	Mr. P. Finegan (deputising for Mr.P. McLoughlin)	Mr. P. McLoughlin
Mr. D. Smyth		
Ms. F. O'Brien (Secretary)		

1. Minutes

- The minutes of the meeting of 29th March 2004 were approved.

2. Matters Arising

- The CEO Group expressed concern about the legal advice they have received in relation to the long stay charges issue. The Department acknowledged the pressure building on this and stated that the legal options are still being reviewed. It was highlighted that particular attention should be paid to individual cases of all Health Boards.

3. Health Reform Programme

- A paper entitled 'Reform Programme Status Report' was circulated by the Department and a brief overview was given of developments in the Health Reform Programme to date.
- It was stated that the Minster hopes to bring the Bill to Government on 9th November and it will be published immediately after Easter.
- In relation to HR/IR, it was brought to the attention of the group that some difficulties have arisen between IMPACT and the iHSE last week regarding health board service management grades.
- It was stated that Chairpersons have been appointed to HIQA Reference Group but the group has not been set up yet.
- It was stated that IHCA gave the Minister a commitment that they would cooperate with the implementation of the European Working Time Directive (EWTD) as it

relates to doctors in training. However, they are refusing to nominate reps to the 8 pilot sites that have been identified. It was stressed that there is no problem locally with INO.

- The importance of appointing local Health Office Managers on 1 January 2005 was highlighted.
- It was mentioned that the iHSE are meeting the CEO Group this week. A proposal by the CEOs to set up the equivalent of a transition team in each of the boards was mentioned. The need for clarity on the governance responsibility of the CEOs up to 31 December and beyond was highlighted. It was hoped that this week's meeting with the iHSE would provide clarification on this.
- In relation to the Service Planning Process, the importance of continuity in terms of service delivery within the framework of the service plan was highlighted.
- The critical importance of CEOs taking the necessary corrective measures to ensure compliance with approved employment ceilings at year end was explained. Serious concern was expressed by the Department about the trends showing through in some boards.
- The CEOs expressed concern in relation to employment contracts and raised the question as to whether contracts expire or carryover. It was stated that the new legislation would cover this.
- HEBE stressed the need for joint sponsorship/joint working between the Department and CEOs in view of the short timeframe.

4. Health Board/Department Relationship

- The final quarter of 2004 was identified as a unique period in terms of relationship on the business side and it was suggested that an ongoing set of commitments between the boards, iHSE, Department and Minister should be maintained in order to ensure a clean handover at the end of the period.
- It was stated that line divisions within the Department are sending information as quickly as possible to the boards and the main concern being that the non-capital front is without any deficit at end of year.
- Concern was expressed in relation to the numbers in the health system at the end of June quarter and the fact that there is a trend of increasing numbers of management admin posts in 2004. This was discussed in the context of the Secretary General's letter concerning employment control that was issued to boards earlier in the year. While it was recognised that there is pressure regarding budgeting and managing services, the clear expectations of the Department is that employment levels will be within the approved ceilings by end of year. It was decided that one to one discussions will be arranged between the relevant people in the Department and Health Boards in order to try and resolve outstanding employment control issues.

5. National Service Plan 2005

- It was stated that there is a subgroup within the Department who are working on getting material to HSE.
- It was also stated that the service plan review meetings are taking place next week and this should enable us to address issues such as budgets, capital, numbers etc.
- It was suggested that governance arrangements beyond end of year be put on next meetings agenda.

- It was stressed that the boards are very committed to ensuring legacy position and want any outstanding matters resolved by end of year.
- The CEOs were thanked for their work in relation to the National Service Plan 2005.
- It was confirmed that there will be a letter of determination issued to each board for 2005 in early December, as the HSE will not exist as a legal entity before 1 January 2005.

6. Capital Programme 2004-2008

- It was explained that the Department will have to agree a 2005 Programme with Department of Finance in a few weeks. The main problem highlighted was the revenue implications of projects, which may delay the equipping of some hospitals.
- The employment control issue was mentioned in the context of the capital programme, highlighting the fact that the increasing numbers complicates the position on the Programme and Department of Finance will need to see something happening on stabilising the position.
- The priorities identified were the ICT Programme and Minor Capital (including non-acute side).
- It was stated that there will be a session with iHSE on the transitionary period and a further session at the end of this week on the financial transition.

7. Legislation

- It was mentioned that the Education for Persons with Special Educational Needs Act 2001 was enacted over the summer. It was stated that there is provision in the Act concerning Health Board liaison officers. It was explained that they must be appointed by Department and national council on special education.
- In relation to the Disability Bill, it was stated that this would impose major obligations on Health Boards and HSE in future. There are massive financial implications involved and the boards are advised to study the papers.
- It was stated that the Government have yet to decide when the legislation would be brought into force.
- It was explained that certain issues need to be addressed within six months of the Bill being published. It was mentioned that there is a commitment for end of 2005 in relation to accessibility to services and assessment of needs processes. It was agreed that this will be put on CEO's agenda for next week and they will keep in mind to be contingent if there are resource implications.

8. AOB

- The CEOs were asked if they aware that there is a persistent volume of complaints on MIFC Scheme in relation to GPs charging for the first visit – GP's are claiming from Health Boards so are effectively being paid twice. The CEOs were not aware of this but agreed to investigate the matter.
- It is the Department's intention that there will be an event organised before the end of year to conclude business and acknowledge contribution made by CEOs. It was agreed that another meeting will be scheduled if the need arises.

APPENDIX 17

DÁIL SPEECH BY AN TÁNAISTE AND MINISTER FOR HEALTH AND CHILDREN, MARY HARNEY, T.D. ON 16 DECEMBER 2004.

CHECK AGAINST DELIVERY

Health (Amendment) (No. 2) Bill 2004

Second Stage Speech by An Tánaiste and Minister for Health and Children, Mary Harney, T.D.
Dáil Éireann, 16th December, 2004

I move that the Bill be now read a second time.

Introduction

In the debate on this Bill in the House today, I believe it is important that we address important issues with clarity, purpose and fairness.

It is important that people in long term care and their families should have clarity about how care will be provided and paid for.

It is important that any charges made by the State are on a fully legal basis.

It is important that we should have confidence in our public administration operating effectively in the public interest at all times.

And it is important, too, that where mistakes are made, they are recognised, responsibility is taken, the lessons are learned and applied.

I wish to deal with three areas today: first, the provisions of the Bill; second, the scheme of repayments the government will put in place; and third, the issues arising from the handling of this question within the Department of Health and Children.

I am placing on the record of the House a number of documents as an annex to my prepared remarks. I am putting all the facts I know before the House. This is the only way each of us can form clear and fair assessments.

Health (Amendment) (No. 2) Bill 2004

I wish to introduce formally the Second Stage of the Health (Amendment) (No. 2) Bill 2004 to the House.

The purpose this Bill is to provide a legal framework for the charging of patients in long term care in health board run institutions and publicly contracted beds in private nursing homes.

The Bill will establish a sound legal basis for the long established practice of health boards in charging for the costs of maintenance in institutions providing long term care.

Most people accept that it is fair and reasonable that those who can afford to contribute to the cost of their long stay care should do so. This has been implemented by successive governments, and by Ministers for Health from all parties in government, since 1954.

The charges raised are used to support the provision of care for those in long term residential care. These charges currently generate approximately €100 million in revenue for health boards each year. The cost of long term care, even of the shelter and maintenance part, is clearly more than this amount. There is no doubt that the loss of this income would have an adverse effect on our ability to provide the health and caring services people need.

Background

I am attaching as one of the annexed document a brief background note on the history of the legislative basis on which charges have been raised up to now.

Similar information is found in the report I also include of the Secretary General of my Department, prepared at my request for the government meeting on Tuesday.

The essential point is that the basis for charges made since the McInerney Supreme Court judgement of 1976 arose from a circular issued by the Department of Health to Health Boards. This circular – included in the annexed documentation - authorised a practice by which the CEO of a health board could regard patients as not meeting the criteria for full eligibility while being maintained in long term care, on the basis that necessary general practitioner and surgical services were being provided for them.

The withdrawal of people's medical cards and full eligibility in this way was taken to enable a charge for in-patient services to be raised under the 1976 Regulations, which provided for charging for people other than those with full eligibility.

I would emphasise for the House that the extension of full eligibility to all persons over 70 years of age, irrespective of means, in 2001 was not the reason why the practice of charging in this way was found to be without a sound legal basis.

The flawed basis for charges for anyone with full eligibility goes back to the 1976 circular which continued to be implemented after the 2001 decision.

I will return later to developments since 2002 in how the legal issues around this were handled when I address management issues.

Provisions of the Health (Amendment) (No. 2) Bill 2004.

At this point, I propose to outline the scope and principal provisions of the Bill.

The Bill provides for an amendment to section 53 of the Health Act, 1970 as follows:

- To replace the existing enabling provision in sub-section (2), which provides the Minister with discretionary power to make regulations, by a provision which requires the Minister to make regulations in order to impose charges in relation to all persons, i.e. those with full and limited eligiblity.

- To insert a new sub-section (3) which specifies categories of person exempted from charges imposed under sub-section (2).

- To insert a new sub-section (4) which empowers the Chief Executive Officer of a health board to reduce or waive a charge having regard to the financial circumstances of the person and with a view to avoiding undue financial hardship in relation to that person. It is intended that the Regulations will impose a maximum weekly charge of €120, which approximates to 80% of the weekly rate of the maximum level of non-contributory old age pension. The Regulations will also make clear that individuals are to retain a minimum amount of pocket money of €35 per week.

- To insert a new sub-section (5) to provide, among other things, that charges levied under section 53 of the 1970 Health Act prior to the 14th December, 2004 are and always have been lawful. My Department is satisfied, in the light of legal advices available to it, that it is constitutional and in accordance with the European Convention on Human Rights. The Department has received advice from the Office of the Attorney General which includes advice from outside counsel including Dr. Gerard Hogan S.C., a leading expert in Irish constitutional law and a co-author of Kelly on the Constitution.

- To insert a new sub-section (6) that the retrospective regularisation provision of the new sub-section (5) does not apply in the case of a charge which is the subject of civil proceedings instituted on or before 14 December, 2004 for the recovery of the relevant charge..

- To insert a new sub-section (7) to provide that the provisions of the new sub-section (5) do not affect any other ground which may be raised in civil proceedings to debar the recovery of the relevant charge.

- To insert a new sub-section (8) to make it clear that any current regulations in force remain in force. This is to make it clear that the Bill does not interfere with other existing regulations.

- To insert a new sub-section (9) to provide that the charges shall only apply for in-patient services after a period of 30 days or periods aggregating 30 days within the previous 12 months. The new sub-section (9) also limits the weekly charge to an amount that does not exceed 80% of the maximum of the weekly rate of old age (non-contributory) pension.

- To insert a new sub-section (10) to clarify that the period of 30 days referred to in subsetion (9) begins to run immediately the person concerned is provided with in-patient services.

- To insert a new sub-section (11) to define "in-patient services" for the purpose of charges made.

These are the provisions of the Bill to implement the government's policy, in summary,

- that it is reasonable that charges should be made;

- that charges must be on a sound legal basis;

- and that clarity is brought to charges made in the past so as to avoid needless litigation and potentially large instability in health care funding.

Policy on repayments

As I said at the outset, where mistakes are made, they should be recognised and there should be redress, if at all possible.

The Government recognises that a mistake has been made for 28 years on the legal basis for charges. Notwithstanding the fact that the policy had consistent support, and that people did actually receive a benefit for their payment, the government believe that some repayment should be made because a mistake was made.

It is clearly beyond our financial and administrative ability to repay all charges since 1976. We have decided therefore by way of a goodwill gesture to make repayments to people with full eligibility who have paid charges to date.

I expect that approximately 20,000 people will benefit from this repayment. Each person will receive a repayment of up to €2,000.
These payments will be made automatically, where possible, and as soon as possible in the New Year. We will also advertise to allow people to apply for a payment. This is so as to ensure that no-one who has made payments is left out, or is unduly delayed in receiving payment. For example, there may be people who may previously have been in long term care but have since left or moved to another setting and records may, in some case, not be as readily available as normal.

The government believe this is a reasonable and fair way to recognise that a mistake was made. People who are now actually in long term care will benefit directly and

exclusively. Administrative and legal costs will not absorb any part of the repayment. And it will be done speedily and fairly.

Developments since 2002

I wish now to address how this issue was handled at various times since 2002 by my Department and in its work with health boards.

At the end of 2002, the South Eastern Health Board, in the context of a number of claims about charges by and against the board, obtained legal advice on a range of issues related to long stay care in both public institutions and private nursing homes.

An extract from the legal advice was handed to the Department at a meeting with the South Eastern Health Board on 11 March 2003. I am informed that the broad content of the advice was also made known by the South Eastern Health Board to the CEOs of the other health boards.

The relevant aspects of this advice were considered within the Department over the following months. It was not, however, brought to a particular decision point during this period.

The charges for long term stays in public institutions were discussed in some detail at the end-year review meeting between the Department's senior management the CEOs of the health boards on 16th December 2003.

I am attaching the minutes of that meeting for the House.

The meeting concluded that it would be necessary for the Department to get a definitive legal assessment as the first step in drawing up legislation on eligibility and charges.

Arising from that meeting, a small group was convened within the Department to prepare a position paper on the legal issues surrounding charges for long stay in public institutions.

This position paper was drawn up at the end of January of this year, as was a letter to the Office of the Attorney General requesting legal advice that would have been signed by the Secretary General. Unfortunately, this letter was not sent at that time.

Following questions on the issue from Deputies Kenny and Perry in the House and elsewhere last October, I immediately sought legal advice from the Office of the Attorney General.

The legal advice provided by the Attorney General on 5th November made it clear to me that new primary legislation would be required urgently to underpin a policy that persons can be required to contribute to their costs of maintenance (e.g. shelter, food, bed, clothing) in a public institution (or a contract bed in private setting).

In the light of that advice, work began immediately in the Department on the preparation of the necessary legislation.

I received further advice of 8th December from the Attorney General on legal problems arising out of continuing to make such charges.

On foot of that advice, a letter was issued on my instructions to the Chief Executive Officers of the health boards and the Eastern Regional Health Authority asking them to stop making such charges immediately, pending the introduction of amending legislation.

The health boards confirmed last Friday, 10th December, that they had taken the necessary steps to do so.

Drafting of the legislation continued between the Department and the Attorney General's office, and was completed so that I was in a position to bring a memorandum to Government this Tuesday, 14th December.

Those are all the facts I know of how we have come to today's debate on this Bill.

Management report

Clearly, serious issues arise from how this important legal issue was handled in the Department of Health and Children.

The government propose to deal with the charges by new law and by making *ex-gratia* repayments. There is also a responsibility on us to deal with public management and administration issues.

I have asked Mr John Travers, a retired head of Forfás with a distinguished career in the public service, to examine the management of this issue in the Department and the reasons why the Attorney General's advice was not sought at the earliest possible time.

I will ask him to identify lessons that can be learnt and applied from these events, in the interests of more effective public administration in the Department of Health and, indeed, elsewhere. I intend to give him the greatest latitude possible for recommendations in this regard. I expect to receive his report by 1st March next year and I will publish it also.

I am not interested in blame. I am interested only in achieving excellence in public administration, in the interests of patients, public and staff.

There is every reason for the Department of Health to strive for and to achieve excellence, particularly at this time of change when its role will be more focused on policy, legislation and evaluation. I look forward to this report helping us to achieve that.

Conclusion

The legislation before the House today will bring clarity to an area which has not been operating on a sound basis going back nearly 30 years. This is a genuine attempt to correct that flaw, so that charges for long term care will now have a sound legal basis.

This Bill will ensure that the income from charges will continue to support the provision of quality services to those in long term care.

If we do not allow this funding to be retained , the loss of resources for the health services is estimated to be approximately €8 to €10m per month.

It has been accepted that these charges, as contributions to the cost of care, are fair and reasonable.

I commend this Bill to the House.

Annexes

1. Background note on history of legal basis for charges
2. Circular of the Department of Health, 1976
3. Report of the Secretary General 13 December 2004
4. Minutes of DoHC-CEOs meeting 16 December 2003

Annex 1 to Appendix 17:
Background Note on History of Legal Basis for Charges

Department of Health and Children

Background Note on History of Legal Basis used for Charges

Charges have been raised by health boards from people with full eligibility under the Health Act for long term stays in a range of public institutions for the past 50 years. These charges were raised under either of two sets of relevant regulations:

- The Institutional Assistance Regulations 1954 (as amended in 1965); and

- The Health (Charges for In-Patient Services) Regulations 1976 (as amended in 1987).

Both sets of Regulations have been relied upon by the health boards to raise charges for long stay care in health board institutions, such as county homes and district hospitals where the length of stay exceeds 30 days. The level of charge is based on the person's income. Allowance is made for any commitments the person had such as rent, insurance premiums etc. and a reasonable amount is left to cover the person's personal needs.

Charges under the Institutional Assistance Regulations 1954 (as amended in 1965) were introduced on the principle that persons in publicly funded homes should, when they can afford to do so, contribute towards their maintenance costs in the same way as persons of similar means living in the community. "Institutional assistance" is defined in section 54 of the Health Act, 1953 as "shelter and maintenance in a county home or similar institution". In practical terms, this has been taken by the health boards to mean non-medical care in a health board, home or institution. These Regulations do not distinguish between persons with full eligibility and persons with limited eligibility. The charges are payable by both medical cardholders and non-medical card holders.

The Institutional Assistance Regulations were the subject of a Supreme Court Judgement (McInerney case) in 1976. The Judgement narrowed very significantly the grounds on which a charge could be raised for institutional assistance. It found that where the care involves nursing supervision, activation, and other para-medical services, which are given in an institutional setting, such care is beyond the range of mere "shelter and maintenance" and constitutes in-patient services.

Section 53(2) of the Health Act, 1970 provides for the making of Regulations by the Minister for Health and Children, with the consent of the Minister for Finance, in relation to 'in-patient services' which are defined in section 51 as "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". Under these Regulations, charges imposed are only payable by persons with limited eligibility. Medical cardholders are exempt as are persons with dependants.

The majority of persons in long stay health board institutions would, if living in the community, qualify for a medical card under the criterion in Section 45 of the 1970 Act, that is, inability to arrange necessary general practitioner and surgical services without undue hardship. In order to maintain the principle that such persons should contribute to the cost of their maintenance, it has therefore traditionally been the practice by health boards either

- to charge patients under the Institutional Assistance Regulations;or
- to regard patients as not meeting the criteria for full eligibility under section 45 of the 1970 Act while being maintained, since necessary general practitioner and surgical services are provided for them and so withdraw the medical card

Following receipt of legal advice on the matter especially in light of the Supreme Court Judgement in the McInerney case, a circular from the Department of Health to the health boards in 1976 authorised a practice by which the CEO of a health board could regard patients as not meeting the criteria for full eligibility while being maintained, since necessary general practitioner and surgical services were being provided for them and so withdrew their medical card. The withdrawal of full eligibility in this way was taken to enable a charge for in-patient services to be raised. While the legal basis for this practice has now been questioned, the Department and health boards have stood over this practice in the bona fide belief that it was legally defensible.

The decision to provide medical cards on grounds of age rather than means from July 2001 marked a significant change in the basis on which full eligibility was to be determined. The question of long-stay charges does not seem to have been given explicit consideration at the time the decision was made. It was however, considered by the Chief Executive Officers of the health boards, on foot of which their conclusion was that the charging arrangements as they pertained up to the introduction of the legal entitlement to a medical card for those over 70 were not necessarily changed as a result of the statutory entitlement to a medical card.

The belief in the health boards and in the Department was that the long-established policy of persons in publicly funded homes who could afford to do so, contributing towards their cost of maintenance, in the same way as persons of similar means living in the community, remained in place It was also clear that the new cohort drawn into medical card coverage on age grounds were, by definition, of greater means than those who had previously qualified on the grounds of financial means and there would have been an argument for not having a more favourable regime for the new cohort on equity grounds. The Department and health boards believed that it would continue to be legitimate for health boards to raise charges for long-stay, but that in the case of the over 70s age groups, the rationale would relate more to charging for institutional maintenance rather than charges made on foot of removal of the medical card. Among the considerations under-pinning this position was the pressure on health boards to maintain levels of income generally and similar pressure on the Department to avoid any supplementary estimate. It was also felt to be justified on the basis that all long-stay patients received care and maintenance and some received, in addition, nursing, medical and other services. The fact that the charge raised (typically about

€120 per week) represented less than 20% of the average weekly cost of a long-stay bed was seen as supporting this rationale.

Accordingly, the health boards, with the knowledge of the Department of Health and Children, continued to raise charges under both sets of regulations up to 9th December 2004.

Annex 2 to Appendix 17:
Circular of the Department of Health, 1976

CIRCULAR LETTER OF AUGUST 1976 ISSUED BY DEPARTMENT OF HEALTH IN RELATION TO HEALTH BOARD CHARGES FOR CERTAIN SERVICES

Circular letter dated 6 Lunasa 1976, re-typed for purposes of clarity

Circular 7/76

6 Lunasa 1976

Chief Executive Officer
Each Health Board

Health (Charges for In-Patient Services) Regulations, 1976

A chara

I am directed by the Minister for Health to forward herewith copies of the above regulations recently made by him which empowers health boards to impose a charge towards the cost of in-patient services provided under Section 52 of the Health Act 1970 in the case of long-stay patients without dependants.

It will be noted that in accordance with section 53(2)(a) of the Act, the regulations do not relate to 'persons with full eligibility'. However in this respect the precise definition of a person with full eligibility in section 45(1)(a) of the Act should be carefully noted. A person who, while he was providing for himself in his own home, was deemed to have full eligibility could be regarded as not coming within that definition when he is being maintained in an institution where the services being provided include medical and surgical services of a general practitioner kind, with consequential liability for charges under the regulations.

In answer to inquiries it is desired to point out that health boards remain authorised to require persons to contribute towards the cost of institutional assistance in county homes and similar institutions including welfare homes. The relevant regulations, which are still in operation, are the Institutional Assistance Regulations 1954 as amended by the Institutional Assistance Regulations 1965.

Mise le meas

D Whelan

CIRCULAR LETTER OF AUGUST 1976 ISSUED BY DEPARTMENT OF HEALTH IN RELATION TO HEALTH BOARD CHARGES FOR CERTAIN SERVICES

Department of Health
Custom House, Dublin 1

An Roinn Sláinte
Teach an Chustaim, Baile Átha Cliath 1

TEL. (01) 742961 EXTN
TELEX
REF.

Circular 7/76

6 Lunasa 1976

Chief Executive Officer
Each Health Board

Health (Charges for In-Patient Services) Regulations, 1976

A Chara

I am directed by the Minister for Health to forward herewith copies of the above regulations recently made by him which empowers health boards to impose a charge towards the cost of in-patient services provided under Section 52 of the Health Act 1970 in the case of long-stay patients without dependants

It will be noted that in accordance with section 52(2)(a) of the Act the regulations do not relate to 'persons with full eligibility'. However in this respect the precise definition of a person with full eligibility in section 45(1)(a) of the Act should be carefully noted. A person who, while he was providing for himself in his own home, was deemed to have full eligibility could be regarded as not coming within that definition when he is being maintained in an institution where the services being provided include medical and surgical services of a general practitioner kind, with consequential liability for charges under the regulations.

In answer to inquiries it is desired to point out that health boards remain authorised to require persons to contribute towards the cost of institutional assistance in county homes, and similar institutions including welfare homes. The relevant regulations, which are still in operation, are the Institutional Assistance Regulations 1954 as amended by the Institutional Assistance Regulations 1965.

Mise le meas

Annex 3 to Appendix 17:
Report of the Secretary General of 13 December 2004

--- Report of Secretary General, 13 December 2004 ---

Re: Long Stay Charges in Health Board Institutions

1. The Legal Framework

The legal position surrounding long-stay charges in health board institutions is based on a succession of provisions in the Health Acts 1947-2001, various sets of regulations made under those Acts and interpretation of those provisions arising from judgements on particular cases in the courts.

The capacity of health boards to raise charges from persons with full eligibility has been contested on numerous occasions over the past 30 years. Instances include the McInerney case (1976), the Ombudsman's Report on Nursing Home Subventions (2001), various cases pending against health boards, and the raising of the matter in the Dáil over recent months. Overall, this body of law is quite complex, and has previously been regarded as allowing for some uncertainty as to interpretation. It is quite clear that it now requires radical review and updating.

2. Current System of Eligibility

Under the current system of eligibility as set down in section 45 of the Health Act 1970, anyone ordinarily resident in the State has either full eligibility (i.e. medical card holder) or limited eligibility regardless of means or financial contribution to the exchequer. Other than for persons over the age of seventy who have full eligibility automatically regardless of means since 1 July 2001, full eligibility is granted on hardship grounds – usually on the basis of low income but sometimes for medical reasons.

The Department has long held the view, based on legal advice, that the Health Act 1970 (as amended) distinguished between 'eligibility' and 'entitlement' (although the two terms are often used interchangeably). To be eligible means that a person qualifies to avail of services, either without charge (full eligibility) or subject to prescribed charges (limited eligibility). Section 52 of the 1970 Act requires health boards to "make available" in-patient services for persons with full eligibility and persons with limited eligibility; however the manner and extent to which in-patient services are to be made available and the nature and extent of the in-patient services to be provided are not specified.

3. Charges for Long Stay Care in Health Board Institutions

Until 9th December 2004 charges for long stay care in health board institutions were raised either under the Institutional Assistance Regulations or the In-

Patient Services Regulations. Significant features of these regulations are set out in the table below:

	Institutional Assistance	In-Patient Services
Type of Care	"Shelter & Maintenance" type care provided in a county home or similar institution	"Medical" type care – persons in receipt of in-patient services
Payable from	Payable from date of admission	Payable after 30 days
Who pays	Payable by all, including medical card holders	Only payable by non-medical card holders – medical card holders are exempt
Exemptions – Dependants	Persons with dependants are not exempted	Exempts persons with dependants
Legal Basis	• S.54(1) & 54(4) of the Health Act, 1953 • Institutional Assistance Regulations, 1954 (as amended in 1965)	• S.2 of the Health Act, 1947 S.51 & 53 of the Health Act, 1970 Health (Charges for In-Patient Services) Regulations, 1976 (as amended in 1987)

3.1 Institutional Assistance Charges

The institutional assistance charges were introduced on the principle that persons in publicly funded homes should, when they can afford to do so, contribute towards their maintenance costs in the same way as persons of similar means living in the community. "Institutional assistance" is defined in section 54 of the Health Act, 1953 as "shelter and maintenance in a county home or similar institution". In practical terms, this has been taken by the health boards to mean non-medical care in a health board, home or institution. The Regulations do not distinguish between persons with full eligibility and persons with limited eligibility. The charges were payable by both medical card holders and non-medical card holders.

These Regulations were the subject of a Supreme Court Judgement (McInerney case) in 1976 which found that where the care involves nursing supervision, activation, and other para-medical services, which are given in

an institutional setting, such care is beyond the range of mere "shelter and maintenance" and constitutes in-patient services.

3.2 In-Patient Services Charges

The in-patient services charges are payable only by persons with limited eligibility. Medical card holders are exempt as are persons with dependants. Section 53(1) of the Health Act, 1970 provides for charges to be levied for 'in-patient services' which are defined in section 51 as "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".

3.3 Practical Application of Regulations –

Both sets of the above Regulations have been relied upon by the health boards to raise charges for long stay care in health board institutions, such as county homes, district hospitals as well as acute hospitals where the length of stay exceeds 30 days. The level of charge is based on the person's income. Allowance was made for any commitments the person had such as rent, insurance premiums etc. and a reasonable amount was left to cover the person's personal needs.

The distinction between "institutional assistance" and in-patient services" was clarified in the McInerney case in 1976 where the Supreme Court interpreted institutional assistance as meaning solely shelter and maintenance, excluding medical type care. The impact of this judgement was to narrow considerably the grounds on which persons with full eligibility could be charged under the Institutional Assistance Regulations. In practice, health boards seem to have admitted long stay patients under one set of regulations or the other depending on whether they were most in need of active medical and nursing care rather than principally in need of care and maintenance.

As the Charges for In-Patient Regulations are made under Section 53 of the 1970 Act, health boards are required to exempt persons with full eligibility (i.e. medical card holders) from the charge. The majority of persons in long stay health board institutions would, if living in the community, qualify for a medical card under the criterion in Section 45 of the 1970 Act i.e. inability to arrange necessary general practitioner and surgical services without undue hardship. In order to maintain the principle that such persons should contribute to the cost of their maintenance, it has therefore traditionally been the practice by health boards either

- to charge patients under the Institutional Assistance Regulations;or
- to regard patients as not meeting the criteria for full eligibility under section 45 of the 1970 Act while being maintained, since necessary

general practitioner and surgical services are provided for them and so withdraw the medical card

The latter practice was authorised in 1976 in a Circular 7/76 from the Department to the Chief Executive Officers of Health Boards. Appendix 1 While the legal basis for this practice has now been questioned, the Department and health boards have stood over this practice in the bona fide belief that it was legally defensible.

4. Ombudsman's Report on Nursing Home Subventions, 2001

The Department's interpretation of the legal position on eligibility was questioned in the Ombudsman's Report on Nursing Home Subventions published in January 2001. The Report put forward the view that everyone in the State is eligible to be provided with in-patient services, where necessary, by the relevant health board including, in the Ombudsman's view, services such as long-stay care of the elderly or people with a disability.

The Department obtained legal advice on the draft report in October 2000 from the Office of the Attorney General, which supported its long held view as set out in Paragraph 1 above.

While this opinion clarified the legal distinction between eligibility for and automatic entitlement to services, it did not explicitly consider the legal position regarding charges made for long-stay care in public institutions. It did however draw attention to the obligation on health boards under the 1996 Act to take account of the board's financial resources in determining functions to be performed.

5. Introduction of Medical Cards for People aged 70+

The decision to provide medical cards on grounds of age rather than means from July 2001 marked a significant change in the basis on which full eligibility was to be determined. The question of long-stay charges does not seem to have been given explicit consideration at the time the decision was made. It was however, considered by the CEOs of the health boards, leading to their letter to the Department of 2nd July 2001. (Appendix 2)

The belief in the health boards and in the Department was that the long-established policy of persons in publicly funded homes who could afford to do so, contributing towards their cost of maintenance, in the same way as persons of similar means living in the community, remained in place It was also clear that the new cohort drawn into medical card coverage on age grounds were, by definition, of greater means than those who had previously qualified on the grounds of financial means and there would have been an argument for not having a more favourable regime for the new cohort on equity grounds. The Department and health boards believed that it would continue to be legitimate for health boards to raise charges for long-stay, but that in the case of the over 70s age groups, the rationale would relate more to charging for institutional maintenance rather than charges made on foot of removal of the medical card.

Among the considerations under-pinning this position was the pressure on health boards to maintain levels of income generally and similar pressure on the Department to avoid any supplementary estimate. It was also felt to be justified on the basis that all long-stay patients received care and maintenance and some received, in addition, nursing, medical and other services. The fact that the charge raised (typically about €120pw) represented less than 20% of the average weekly cost of a long-stay bed was seen as supporting this rationale.

6. Review of Eligibility Legislation

The need to radically overhaul the eligibility legislation was acknowledged in the Health Strategy published in November 2001. Given the many other aspects of the Strategy which needed priority attention, work on the review of legislation and on the preparation of legislation for a formal complaints process commenced in March 2002 and has continued until recently (The original plan was to have a separate Statutory Complaints Bill but in early Summer 2004 it was decided to incorporate the complaints procedure in to the new Health Bill). Significant progress was made on both issues but it did become clear that the policy and legal complexity of the issues on eligibility would take a considerable time to work through before legislation could be drafted.

Coming into 2004 it was clear, based on the Government decision of June 2003 that the structural reforms arising from the Prospectus, Brennan and Hanley Reports would need to be given priority in the Department's Business Plan for 2004. During 2004, the Legislation Unit has been working full-time on the preparation of the Health Bill 2004 and further work required to complete the overall review of eligibility legislation was postponed to 2005 on this basis.

7. Legal Advice obtained by the South Eastern Health Board

The South Eastern Health Board, in the context of a number of claims about charges by and against the board, obtained legal advice on a range of issues related to long stay care in both public institutions and private nursing homes. An extract from this advice was handed to the Department at a meeting with the health board in March 2003.

The relevant aspects of this advice were considered within the Department over the following months. The broad content of the advice was also made known by the South Eastern Health Board to the CEOs of the other health boards.

The overall position about charges in public institutions was discussed in some detail at the end-year review meeting between the MAC and the CEOs of the health boards on 16th December 2003. As a result of that discussion the Department indicated that "it would make an assessment of the need for a stand-alone bill on this aspect of eligibility in light of overall priorities in the legislative programme and the relative urgency of this particular issue". It indicated its intention to obtain a definitive legal assessment of the present arrangements as a first step.

At the start of 2004 a decision was made that priority would need to be give to three major areas i.e. managing the service plans and budgets for 2004, the EU

Presidency and the Health Reform Programme and that other policy agenda items would, by extension, have to be postponed to a later period. These priorities were reflected in the Department's Business Plan as agreed between the Secretary General and the then Minister.

Following through on the commitment above, a small group was convened within the Department to prepare a position paper on the legal issues surrounding charges for long stay in public institutions as a prelude to submitting a request for legal advice to the Office of the Attorney General. .

The work of the Department during 2004, and time at the most senior levels, was dominated by:

- The unprecedented requirements of the Health Reform Programme which have demanded a large commitment of time particularly at senior levels of the Department and on the part of the Minister.
- The requirements of an active Presidency of the EU in relation to health issues;
- The management of on-going service pressures in areas like A & E services, disability services, services for older people;
- The management of on-going financial pressures;

In these circumstances, the follow through on the position paper prepared in the Department did not receive the priority that would otherwise have been possible.

8. Current Position

In the event, the request for legal advice from the Office of the Attorney General was not made until 27th October 2004. The matter was also raised on that date on the Order of Business in the Dáil. A copy of the briefing note prepared on that occasion is at Appendix 3.

Legal Advice was given by the Attorney General by letter of 5th November 2004 to the Tánaiste. In light of that advice, work was immediately commenced on the preparation of a short Bill to amend the Health Act 1970. This has now culminated in preparation of a draft Bill to be submitted to Government on 14th December 2004.

A further advice of 8th December 2004 was received from the Attorney General. Following discussions between the Tánaiste and Attorney General (and officials) on 9th December, a letter was issued to the Chief Executive Officers of the health boards and ERHA asking them to immediately stop making such charges, pending the introduction of amending legislation. The health boards confirmed on 10th December that they had taken the necessary steps to do so.

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Michael Kelly
Secretary General

13 December 2004

Annex 4 to Appendix 17:
Minutes of DoHC-CEOs Meeting of 16 December 2003

MAC/CEO Group meeting with the Minister and the Ministers of State

Tuesday 16th December 2003, 2.00pm – 5.00pm
The Gresham Hotel

Attendance:

Department	CEO Group
Minister M. Martin	Mr. D. Doherty (HeBE)
Minister I. Callelly	Mr. M. Lyons
Minister T. O'Malley	Mr. P. Donnelly
Mr. M. Kelly (Secretary General)	Ms. M. Windle
Dr. J. Kiely (CMO)	Mr. M. Gallagher
Mr. F. Ahern	Mr. P. Robinson
Ms. F. Spillane	Mr. P. Harvey
Mr. N. Usher	Mr. S. Hurley
Mr. D. Devitt	Dr. S. de Burca (Chair)
Mr. P. Barron	Mr. P. Gaughan
Mr. B. Carey	Mr. P. McLoughlin
Mr. T. Mooney	Dr. S. Ryan
Mr. D. Magan	
Mr. C. Hardy	Apologies
Ms. D. Gillane	Minister B. Lenihan
Mr. C. Mannion	Mr. D. Smyth
Ms. F. O'Brien	Mr. J. Collins

1. Minutes

- The minutes of the meeting of 26th February 2003 were approved.

2. Domicilary Births

- It was stated that the expert group has finished the first draft report which will be going to the steering group today. It is hoped that it will be brought to the Department of Health and Children in early January.
- It was highlighted that there is an urgent need for a standardised procedure to be in place nationally, in order to avoid different approaches being taken by each Health Board.
- The matter of Health Boards issuing grants was raised. It was stated that Health Boards still have a legal obligation if there are complications after the birth.
- The idea of a contract between the expectant mother and the Health Board was suggested. This would be in the form of a simple legal document to accompany the payment of the grant.

3. Proposed Amendments to Infectious Diseases Regulations 1981

- A brief overview was given of the proposed changes. It was explained that the language used to describe various diseases would be updated and there would be provision for clinical notification of infectious diseases through laboratories.

- It was suggested that it would not be possible for the Health Boards to take on the control aspects of the new regulations without additional resources. However, it was agreed that this issue is an internal Health Board matter.

4. Long Stay Charges – Over 70's

- It was brought to the attention of the group that the Ombudsman has challenged a health board's interpretation of how persons over 70 should be charged for long stay care in health board institutions.
- The varying views of different legal advisors were noted in the context of the legislation clarifying the existing eligibility framework.
- The Department indicated that it would make an assessment of the need for a stand-alone bill on this aspect of eligibility, in light of overall priorities in the legislative programme and the relative urgency of that particular issue. It would be necessary to get a definitive legal assessment of the present arrangement as a first step.

5. Emergency Planning

- It was suggested that a group could be set up in early January. This group would prepare for the possibility of another SARs outbreak.
- It was mentioned that HeBE have a project group already in existence to deal with emergency planning.

6. Service Plans 2004

- The CEOs were thanked for their efforts in completing Service Plans for 2003.
- It was emphasised that core funding and core service funding should be examined in order to determine if any funding can be re-prioritised.
- In relation to the recent Controller and Auditor General report on waiting lists, concern was expressed that a majority of Health Boards who had done very well with performances of up to 90% reduction in waiting lists did not receive recognition for same in media coverage.

7. Reform Programme

- The importance of informing people at an early stage about their future was discussed-people's fears and anxieties must be addressed.
- It was agreed that a sustained communication process is essential in 2004.
- The following Critical Change Events in 2004 were mentioned:
    - The announcement concerning the National Steering Committee should happen in the next week or so;
    - The announcement of the Hanley 2 Group immediately after Christmas;
    - Finalising the Boards' position – look at the project plan and identify key events.

APPENDIX 18

DRAFT STATEMENT (25 FEBRUARY 2005) BY SECRETARY GENERAL ON FOLLOW-UP TO SUBMISSION FOR ATTORNEY GENERAL OF JANUARY 2004

Statement by Secretary General on follow-up to submission of January 2004

1. The year 2004 was a period of intense and persistent pressure on the Department arising from the normal run of crises, the Health Reform Programme, the EU Presidency and numerous other pressure points. In my judgement, the staff of the Department have worked extraordinarily hard and have, overall, a record of solid achievements to show for it. I sincerely hope that the report on the particular item under examination will be generous in acknowledging the scale of this achievement.

2. On the submission of January 2004, the facts as best I can clearly recollect them are as follows:

    (1) The papers circulated for the Ministers/MAC/CEO meeting on 16th December 2003 included a summary of the legal opinion obtained by the South Eastern Health Board and an accompanying document from an official of the health board. On reading the papers in preparing for the meeting, the import and urgency of clarifying the legal situation definitively became clear to me. That view was confirmed as a result of the discussion at the meeting. My recollection is that Minister Martin was late in arriving at the meeting and the substantive discussion on this item had already concluded before his arrival. There were other very significant items on the agenda for that meeting, including the allocations/service plans 2004 and the health reforms, including dissolution of the health boards.

    However, my recollection is that on Minister Martin's arrival at the meeting venue (Gresham Hotel), there was as short break in proceedings (10 minutes or so) during which I met with him at the entrance to the hotel and briefed him on the discussion on this item (nursing home charges), as well as on the mood generally at the meeting.

    I assumed, given the participation of Ministers of State and Advisors in the earlier part of the meeting that he would also be briefed by them, given their respective roles in relation to the Minister.

    (2) Following on the meeting, I asked one of the Assistant Secretaries to take the lead in getting the relevant people together in the Department to do whatever preparatory work was

necessary to progress this. Because the most relevant MAC member (Assistant Secretary) was absent at the time, I asked another MAC Member (Assistant Secretary) to take this on and he agreed to do so. It was necessary to pull this group together because the issues arising around the nursing home charges were dealt with in a number of different areas of the Department.

(3) I recollect receiving and reading the submission at end of January/early February 2004. While conscious of the urgency in dealing with it, I was also conscious of its potential legal, financial and political consequences in the event that legal advice from the Office of the Attorney General turned out to support the opinion obtained by the South Eastern Health Board.

(4) I unfortunately do not have a clear recollection of the action I took as a result of my consideration of the submission. I can think of no reason why I would have sent it to any official in the Department. However, given its potential consequences, my instinct is that I would have wished to bring it to the attention of the Minister, in advance of issuing the letter.

My practice is not to hold folders or files in my office. Unless due to longer absence from the Office, my aim is to clear items submitted to me, if not within 24 hours, then within 48 hours. Exceptionally, I may hold an item longer to reflect on it but this item would not have required reflection, since what needed to be done was very clear.

(5) I do clearly recollect a subsequent discussion with the Minister on what the best solution might be, if it proved necessary on the basis of legal advice to introduce amending legislation, as a stand-alone item from the general overhaul of eligibility legislation. That discussion took place on 10th March 2004 in the context of the Minister signing off on the Department's Business Plan for 2004. It was a one-to-one discussion on the Business Plan, of which there is no formal record. On that occasion I suggested to the Minister that it should be possible to incorporate an amendment, if needed, into the Bill providing for new health structures later in 2004.

(6) I understand that a folder containing the January 2004 submission was observed by another official of the Department in the outer office of the Minister's Office at some point, but I have no direct information on this point myself.

(7) While normally items referred from my Office are logged on a correspondence tracking system, I have also on occasion personally delivered items/folders to another individual or office where I believed there was a particular urgency or I wanted to have a personal word with someone in particular. For that

reason, the logging system from my Office has not been watertight. I have since given up this practice.

(8) Over the following weeks and months, I was not conscious of the submission to the Office of the Attorney General being an outstanding item requiring further action on my part. This was an omission, which followed on from the absence of this folder from my Office and its non-return. Had the folder with the submission remained with me or been returned to me, it would have triggered the appropriate response on my part. I accept that my failure to recollect and follow-up on the submission is open to criticism. I put this down to the intense pressure I was working under for the duration of 2004, arising from the range of additional workloads already outlined, on the Department over that period. My view then and now is that this was a period of corporate and personal overload where the Department was attempting to do far too much in far too tight a time-frame, in accordance with politically determined time frames and expectations.

(9) The matter was next raised with me in October 2004.

APPENDIX 19

DRAFT STATEMENT (28 FEBRUARY 2005) BY SECRETARY GENERAL ON FOLLOW-UP TO SUBMISSION FOR ATTORNEY GENERAL OF JANUARY 2004

Statement by Secretary General on follow-up to submission of January 2004

1. The year 2004 was even by normal standards in the Department of Health and Children a period of intense and persistent pressure on the Department. This arose principally from the combined effect of the normal run of business pressures, the Health Reform Programme and the EU Presidency. In my judgement, the staff of the Department have worked extraordinarily hard and have, overall, a record of solid achievements to show for it. My hope is that the report on the particular item under examination will have regard to this context and that the extent of the Department's positive achievements in 2004 will also be acknowledged.

   In my experience, the culture of the Department values integrity and officials of the Department display a strong sense of personal integrity in the way they discharge their responsibilities. It is also the case that in the past and present, the need to secure an adequate level of funding to support service levels in accordance with Government policy and public commitments and to operate services strictly within budget allocations has been a significant on-going pressure on the Department and on health boards.

2. On the submission of January 2004, the facts as best I can clearly recollect them are as follows:

   (1) The papers circulated to everyone attending the Ministers/MAC/CEO meeting on 16th December 2003 included a summary of the legal opinion obtained by the South Eastern Health Board and an accompanying document from an official of the health board. On reading the papers in preparing for the meeting, the importance of clarifying the legal situation definitively became clear to me. That view was confirmed as a result of the discussion at the meeting. My recollection is that Minister Martin was late in arriving at the meeting and the substantive discussion on this item had already concluded before his arrival. There were a number of very significant items on the agenda for that meeting, including the allocations/service plans 2004 and the health reforms, including dissolution of the health boards.

   On Minister Martin's arrival at the meeting venue (Gresham Hotel), I was contacted by his Private Secretary and I left the meeting room for a short period (10 minutes or so) during which I met with him at the entrance to the hotel and briefed him on the discussion so far, including nursing home charges, as well as on the mood generally at the meeting.

Given the participation of Ministers of State Callely and O'Malley and the Advisors in the earlier part of the meeting they would also have been in possession of the information necessary to brief the Minister or to follow up any concerns they had in their own right. Notes taken by the Secretary at the meeting indicate that Minister of State Callely had indicated his intention to brief both the Taoiseach and the Minister on the problem. The minutes of the meeting circulated in draft form also made reference to the outcome of the discussion on charges.

(2) Following on the meeting, I asked one of the Assistant Secretaries to take the lead in getting the relevant people together in the Department to do whatever preparatory work was necessary to progress the question of definitive legal advice. Because the most relevant Assistant Secretary was absent at the time, I asked another Assistant Secretary to take this on and he agreed to do so. It was necessary to pull this group together because the issues arising around the nursing home charges had implications for a number of different areas of the Department.

(3) I recollect reading the submission and draft covering letter for my signature at end of January/early February 2004. While conscious of the importance of dealing with it, I was equally conscious of its potential legal, financial and political consequences in the event that legal advice from the Office of the Attorney General turned out to support the opinion obtained by the South Eastern Health Board.

(4) My practice is not to hold folders or files in my office. Unless due to longer absence from the Office, my aim is to clear items submitted to me, if not within 24 hours, then within 48 hours. Exceptionally, I may hold an item longer to reflect on it but this item would not have required reflection, since what needed to be done was clear from the submission made.

I did not retain the folder and my firm belief is that I referred it elsewhere in the Department. I can think of no reason why I would have sent it to any official in the Department. However, given its potential consequences, my belief is that I would have brought it to the attention of the Minister, in advance of issuing the letter.

(5) I have a clear recollection of a subsequent discussion with the Minister on what the best solution might be, if it proved necessary on the basis of legal advice to introduce amending legislation, as a stand-alone item from the general overhaul of eligibility legislation. That discussion took place on 10th March 2004 in the context of the Minister signing off on the Department's Business Plan for 2004 which makes reference to this item. It was a one-to-one discussion on the Business Plan, of which there is no formal record other than that the meeting was diaried and that the Business Plan was agreed at it. On that occasion I suggested to the Minister that it should be possible to incorporate an amendment, if needed, into the Bill providing for new health structures later in 2004.

The content of the Business Plan, and particularly priority items identified for 2004 would have been the subject of discussion at MAC meetings in early 2004. The Minister and/or his advisors usually attended MAC meetings.

(6) A folder containing the January 2004 submission was observed by another official of the Department (who would have recognised it and was aware of its significance) in the outer office of the Minister's Office at some point in early 2004. As a trusted and experienced member of the Department's staff I have no reason to doubt the validity of the very clear and explicit recollection described by this official.

(7) While normally items referred from my Office are logged on a correspondence tracking system, I have also on occasion personally delivered items/folders to another individual or office where I believed there was a particular urgency or I wanted to have a personal word with someone in particular. For that reason, the logging system, other than for Oireachtas business items, captures most but not all items that issue from my Office.

(8) Over the following weeks and months, had the folder with the submission been returned to me, I believe it would have triggered the appropriate response on my part. I accept that the failure to keep track of and follow-up on the submission is open to criticism. My view then and now is that this was a period of corporate and personal overload where the Department attempted to get through too much in too little time. This followed from the very ambitious timetable set down for the Health Reform Programme in particular. Combined with normal business requirements and the EU Presidency, the time pressures on the Department were very intense over the course of the year.

The fact that output expectations were otherwise largely realised should also form part of the judgement made in relation to the Department's performance in 2004. I set a high standard for my own performance and for those reporting to me. I regret that on this occasion that standard has not been met but believe that any objective evaluation must have regard to the overall business context in which this occurred.

(9) The matter of nursing home charges was next raised with me in October 2004.

APPENDIX 20

DRAFT STATEMENT (10.06AM ON 1 MARCH 2005) BY SECRETARY GENERAL ON FOLLOW-UP TO SUBMISSION FOR ATTORNEY GENERAL OF JANUARY 2004

Statement by Secretary General on follow-up to submission of January 2004

1. The year 2004 was even by normal standards in the Department of Health and Children a period of intense and persistent pressure on the Department. This arose principally from the combined effect of the normal run of business pressures, the Health Reform Programme and the EU Presidency. In my judgement, the staff of the Department have worked extraordinarily hard and have, overall, a record of solid achievements to show for it. My hope is that the report on the particular item under examination will have regard to this context and that the extent of the Department's positive achievements in 2004 will also be acknowledged.

   In my experience, the culture of the Department values integrity and officials of the Department display a strong sense of personal integrity in the way they discharge their responsibilities. It is also the case that in the past and present, the need to secure an adequate level of funding to support service levels in accordance with Government policy and public commitments and to operate services strictly within budget allocations has been a significant on-going pressure on the Department and on health boards.

2. On the submission of January 2004, the facts as best I can clearly recollect them are as follows:

   (1) The papers circulated to everyone attending the Ministers/MAC/CEO meeting on 16th December 2003 included a summary of the legal opinion obtained by the South Eastern Health Board and an accompanying document from an official of the health board. On reading the papers in preparing for the meeting, the importance of clarifying the legal situation definitively became clear to me. That view was confirmed as a result of the discussion at the meeting. My recollection is that Minister Martin was late in arriving at the meeting and the substantive discussion on this item had already concluded before his arrival. There were a number of very significant items on the agenda for that meeting, including the allocations/service plans 2004 and the health reforms, including dissolution of the health boards.

   On Minister Martin's arrival at the meeting venue (Gresham Hotel), I was contacted by his Private Secretary and I left the meeting room for a short period (10 minutes or so) during which I met with him at the entrance to the hotel and briefed him on the discussion so far, including nursing home charges, as well as on the mood generally at the meeting.

Given the participation of Ministers of State Callely and O'Malley and Advisors in the earlier part of the meeting they would also have been in possession of the information necessary to brief the Minister or to follow up any concerns they had in their own right. Notes taken by the Secretary at the meeting indicate that Minister of State Callely had indicated his intention to brief both the Taoiseach and the Minister on the problem. The minutes of the meeting circulated in draft form also made reference to the outcome of the discussion on charges.

(2) Following on the meeting, I asked one of the Assistant Secretaries to take the lead in getting the relevant people together in the Department to do whatever preparatory work was necessary to progress the question of definitive legal advice. Because the most relevant Assistant Secretary was absent at the time, I asked another Assistant Secretary to take this on and he agreed to do so. It was necessary to pull this group together because the issues arising around the nursing home charges had implications for a number of different areas of the Department.

(3) I recollect reading the submission and draft covering letter for my signature at end of January/early February 2004. While conscious of the importance of dealing with it, I was equally conscious of its potential legal, financial and political consequences in the event that legal advice from the Office of the Attorney General turned out to support the opinion obtained by the South Eastern Health Board.

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I did not retain the folder and my firm belief is that I referred it elsewhere in the Department. I can think of no reason why I would have sent it to any official in the Department. However, given its potential consequences, my belief is that I would have brought it to the attention of the Minister, in advance of issuing the letter.

(5) I have a clear recollection of a subsequent discussion with the Minister on what the best solution might be, if it proved necessary on the basis of legal advice to introduce amending legislation, as a stand-alone item from the general overhaul of eligibility legislation. That discussion took place on 10th March 2004 in the context of the Minister signing off on the Department's Business Plan for 2004 which makes reference to this item. It was a one-to-one discussion on the Business Plan, of which there is no formal record other than that the meeting was diaried and that the Business Plan was agreed at it. On that occasion I suggested to the Minister that it should be possible to incorporate an amendment, if needed, into the Bill providing for new health structures later in 2004.

The content of the Business Plan, and particularly priority items identified for 2004 would have been the subject of discussion at MAC meetings in early 2004. The Minister and/or his advisors usually attended MAC meetings.

(6) A folder containing the January 2004 submission was observed by another official of the Department (who would have recognised it and was aware of its significance) in the outer office of the Minister's Office at some point in early 2004. As a trusted and experienced member of the Department's staff I have no reason to doubt the validity of the very clear and explicit recollection described by this member of staff.

(7) While normally items referred from my Office are logged on a correspondence tracking system, I have also on occasion personally delivered items/folders to another individual or office where I believed there was a particular urgency or I wanted to have a personal word with someone in particular. For that reason, the logging system, other than for Oireachtas business items, captures most but not all items that issue from my Office.

(8) Over the following weeks and months, had the folder with the submission been returned to me, I believe it would have triggered the appropriate response on my part. I accept that my failure to keep track of and follow-up on the submission is open to criticism. My view then and now is that this was a period of corporate and personal overload where the Department attempted to get through too much in too little time. This followed from the very ambitious timetable set down for the Health Reform Programme in particular. Combined with normal business requirements and the EU Presidency, the time pressures on the Department were intense over the course of the year.

The fact that output expectations were otherwise fully realised should also form part of the judgement made in relation to the Department's performance in 2004. I set a high standard for my own performance and for those reporting to me. I regret that on this occasion that standard has not been met but believe that any objective evaluation must have regard to the overall business context in which this occurred.

(9) The matter of nursing home charges was next raised with me in October 2004.

APPENDIX 3

Orders of Reference

Dáil Éireann on 16 October 2002 *ordered*:

"(1) (*a*) That a Select Committee, which shall be called the Select Committee on Health and Children consisting of 11 members of Dáil Éireann (of whom 4 shall constitute a quorum), be appointed to consider -

(i) such Bills the statute law in respect of which is dealt with by the Department of Health and Children;

(ii) such Estimates for Public Services within the aegis of the Department of Health and Children; and

(iii) such proposals contained in any motion, including any motion within the meaning of Standing Order 157 concerning the approval by the Dáil of international agreements involving a charge on public funds,

as shall be referred to it by Dáil Éireann from time to time.

(*b*) For the purpose of its consideration of Bills and proposals under paragraphs (1)(*a*)(i) and (1)(*a*)(iii), the Select Committee shall have the powers defined in Standing Order 81(1), (2) and (3).

(*c*) For the avoidance of doubt, by virtue of his or her *ex officio* membership of the Select Committee in accordance with Standing Order 90(1), the Minister for Health and Children (or a Minister or Minister of State nominated in his or her stead) shall be entitled to vote.

(2) (*a*) The Select Committee shall be joined with a Select Committee to be appointed by Seanad Éireann to form the Joint Committee on Health and Children to consider -

(i) such public affairs administered by the Department of Health and Children as it may select, including, in respect of Government policy, bodies under the aegis of that Department;

(ii) such matters of policy for which the Minister for Health and Children is officially responsible as it may select;

(iii) such related policy issues as it may select concerning bodies which are partly or wholly funded by the State or which are established or appointed by Members of the Government or by the Oireachtas;

(iv) such Statutory Instruments made by the Minister for Health and Children and laid before both Houses of the Oireachtas as it may select;

(v) such proposals for EU legislation and related policy issues as may be referred to it from time to time, in accordance with Standing Order 81(4);

(vi) the strategy statement laid before each House of the Oireachtas by the Minister for Health and Children pursuant to section 5(2) of the Public Service Management Act, 1997, and the Joint Committee shall be so authorised for the purposes of section 10 of that Act;

(vii) such annual reports or annual reports and accounts, required by law and laid before either or both Houses of the Oireachtas, of bodies specified in paragraphs 2(a)(i) and (iii), and the overall operational results, statements of strategy and corporate plans of these bodies, as it may select;

Provided that the Joint Committee shall not, at any time, consider any matter relating to such a body which is, which has been, or which is, at that time, proposed to be considered by the Committee of Public Accounts pursuant to the Orders of Reference of that Committee and/or the Comptroller and Auditor General (Amendment) Act, 1993;

Provided further that the Joint Committee shall refrain from inquiring into in public session, or publishing confidential information regarding, any such matter if so requested either by the body or by the Minister for Health and Children; and

(viii) such other matters as may be jointly referred to it from time to time by both Houses of the Oireachtas,

and shall report thereon to both Houses of the Oireachtas.

(*b*) The quorum of the Joint Committee shall be five, of whom at least one shall be a member of Dáil Éireann and one a member of Seanad Éireann.

(*c*) The Joint Committee shall have the powers defined in Standing Order 81(1) to (9) inclusive.

(3) The Chairman of the Joint Committee, who shall be a member of Dáil Éireann, shall also be Chairman of the Select Committee.".

Seanad Éireann on 17 October 2002 *ordered*:

"(1) (*a*) That a Select Committee consisting of 4 members of Seanad Éireann shall be appointed to be joined with a Select Committee of Dáil Éireann to form the Joint Committee on Health and Children to consider –

(i) such public affairs administered by the Department of Health and Children as it may select, including, in respect of Government policy, bodies under the aegis of that Department;

(ii) such matters of policy for which the Minister for Health and Children is officially responsible as it may select;

(iii) such related policy issues as it may select concerning bodies which are partly or wholly funded by the State or which are established or appointed by Members of the Government or by the Oireachtas;

(iv) such Statutory Instruments made by the Minister for Health and Children and laid before both Houses of the Oireachtas as it may select;

(v) such proposals for EU legislation and related policy issues as may be referred to it from time to time, in accordance with Standing Order 65(4);

(vi) the strategy statement laid before each House of the Oireachtas by the Minister for Health and Children pursuant to section 5(2) of the Public Service Management Act, 1997, and the Joint Committee shall be so authorised for the purposes of section 10 of that Act;

(vi) such annual reports or annual reports and accounts, required by law and laid before both Houses of the Oireachtas, of bodies specified in paragraphs 1(a)(i) and (iii), and the overall operational results, statements of strategy and corporate plans of these bodies as it may select;

provided that the Joint Committee shall not, at any time, consider any matter relating to such a body which is, which has been, or which is, at that time, proposed to be considered by the Committee of Public Accounts pursuant to the Orders of Reference of that Committee and/or the Comptroller and Auditor General (Amendment) Act, 1993;

Provided further that the Joint Committee shall refrain from inquiring into in public session, or publishing confidential

information regarding, any such matter if so requested either by the body or by the Minister for Health and Children;

and

(viii) such other matters as may be jointly referred to it from time to time by both Houses of the Oireachtas,

and shall report thereon to both Houses of the Oireachtas.

(*b*) The quorum of the Joint Committee shall be five, of whom at least one shall be a member of Dáil Éireann and one a member of Seanad Éireann.

(*c*) The Joint Committee shall have the powers defined in Standing Order 65(1) to (9) inclusive.

(2) The Chairman of the Joint Committee shall be a member of Dáil Éireann.".

APPENDIX 4

Members of the
Joint Committee on Health and Children

Deputies:

Jerry Cowley (Ind)
Beverly Flynn (Ind)
Jimmy Devins (FF) (Vice-Chair)*****
Dermot Fitzpatrick (FF)
John Gormley (GP)
Liz McManus (Lab)
John Moloney (FF) (Chair)****
Dan Neville (FG)
Charlie O'Connor (FF) (Government Convenor)***
Fiona O'Malley (PD)
Liam Twomey (FG)*

Senators:

Fergal Browne (FG) (Opposition Convenor) **
Geraldine Feeney (FF)
Camillus Glynn (FF)
Mary Henry (Ind)

Chairman: Mr John Moloney (FF)

Clerk: Ms. Tara Wharton

* Liam Twomey (FG) replaced Olivia Mitchell (FG) on 20th October, 2004
** Senator Fergal Browne (FG) replaced Senator Frank Feighan (FG) on 20th October, 2004
*** Charlie 0'Connor (FF) replaced Batt 0'Keeffe (FF) on 17th November, 2004
**** John Moloney elected chairman 17th November, 2004
***** Jimmy Devins elected vice-chairman 17th November, 2004