Report of investigation under section 4 (2) of the Ombudsman Act 1980 of complaints made by ten complaints about nursing home subvention payments against the Health Service Executive

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about Nursing Home Subvention Payments

against

The Health Service Executive

Office of the Ombudsman
September 2010

Contents

Chapter 1 Statement of Complaint*

A number of complaints were made to the Ombudsman on behalf of elderly residents in private nursing home care. The complaints, which concern the rate of nursing home subvention being paid by the Health Service Executive (HSE), arise from the failure of the HSE to implement the appeal decisions of the statutory Appeals Officer.

In each case the nursing home resident is an old-age pensioner categorised as requiring high-dependency care who was in receipt of the standard rate of nursing home subvention. Following appeal, the appeals officer in each case decided that the resident should be awarded a higher rate of subvention, known as the "alternative subvention". The amount awarded in each case was, .." the balance of nursing home fees not covered by [the applicant's] assessable income and current nursing home subvention subject to a combined limit of €650 per week." However, in each case, up to the time this investigation was notified, the HSE had not implemented the decision of the Appeals Officer.

The complainants contend that the failure of the HSE to implement the decision of the Appeals Officer has adversely affected the elderly nursing home residents and that this failure is wrong and unfair.

The cases under investigation here were listed in Appendix 1 of the original Report. In order to protect the anonymity of the persons involved, their names are omitted from this Report, which has been anonymised for publication.

* as notified to HSE on 28 May 2009

Chapter 2 Factual Background to Complaints

(Complainants names have been omitted in this Report to protect their identities. Where names are recorded on documents in the Appendices, they have been obscured)

1. The ten cases listed in Appendix 1 of this report were dealt with in the Carlow/Kilkenny Local Health Office of the Health Service Executive. Each centres around an elderly person who requires a high level of care. In each case, the person is receiving care in a private nursing home and a subvention is being paid by the HSE under the Health (Nursing Homes) Act 1990 (as amended). The amount of the subvention payment originally awarded by the HSE was the subject of an appeal. In each case the Appeals Officer made a decision to grant a higher subvention payment. The decision to grant a higher payment was notified in writing both to the appellant and the HSE by the Appeals Office.

2. The subsequent events in each case vary only marginally. The events in the case of one man and his son are illustrative of the HSE's action in all of the cases. The son had appealed the level of nursing home subvention being paid for his father. The HSE Appeals Officer notified the son by letter, on 28 October 2008, that his appeal was allowed and that his father was being granted "a discretionary payment to be made payable .. to meet the balance of the current nursing home fees not covered by his assessable income and the current nursing home subvention up to a maximum of €650 per week." He was told that this payment was to be backdated to the date of his appeal in January 2008.

3. The Nursing Home Subvention Office for Carlow/Kilkenny then added the case to a list of cases in which alternative subvention had been awarded by the Appeals Officer. However, the HSE did not notify the family of its action until contact was made by one of the family with the Subvention Office, some two months later, to enquire about the delay in making the payment.

4. Having carried out a preliminary examination of the ten complaints, it seemed to this Office that there was *prima facie* evidence of maladministration in the actions of the Executive. In particular, the Ombudsman's Office noted that the Appeals Officer derives his powers and functions from statute and, having regard to the wording of the legislation, it appeared that the decision taken by the HSE not to implement the Appeals Officer's decisions may have been taken on the basis of one or more of the grounds identified at section 4(2)(b) of the Ombudsman Act 1980. Accordingly, this Office decided to carry out an investigation of the complaints under the provisions of that Act.

Chapter 3 Background on Nursing Home Subvention Payments

1. There has been much discussion and controversy in recent years about health service entitlements and how they are funded. However, it is not necessary here to outline the complex background which has brought about the situation which exists in the cases now under investigation.* All of the applicants involved have been assessed by the HSE as requiring a high level of care and as being entitled to nursing home subventions towards the costs of private nursing home care.

2. Since this investigation began, the Nursing Homes Support Scheme Act 2009 has come into operation and it is this new legislation which currently governs the provision of State support for people in need of long-stay care; people already receiving nursing home subvention when the 2009 Act came into operation may opt to continue with the old arrangements. However, at the relevant time, the legal basis for the payment of nursing home subventions for people resident in private nursing homes was contained in the Health (Nursing Homes) Act 1990 (as amended). In fact, the then relevant legal provisions governing subventions were based on substantial 2007 amendments to the original 1990 Act provisions. These provisions are detailed and complex. A key feature of these provisions is that, provided certain requirements are met, they created a right to be paid a subvention by the HSE towards the costs of private nursing home care. The main requirements to be met are that the applicant is assessed as being a "dependent person" who needs nursing home care and that he or she also satisfies a means assessment. The legislation establishes two distinct categories of subvention: the first is the standard subvention, referred to in the Act as a "prescribed subvention", and the

second is a subvention payable at a higher rate than the standard one and which is referred to in the Act as an "alternative subvention". The alternative subvention is designed for situations in which the standard subvention, taken together with the applicant's assessed means, is not sufficient to meet actual nursing home costs without the applicant suffering undue hardship. Payment of this higher, alternative subvention is governed by section 7C(1)(b) of the 1990 Act (as amended) which provides that the HSE shall...."subject to subsection(6), if it is satisfied that the applicant qualifies for a prescribed subvention but is also further satisfied that the applicant still cannot, without undue hardship, pay all or any of the costs of the applicant's care and maintenance in a nursing home, [arrange] for a higher alternative subvention to be paid in lieu of the prescribed subvention...." Section 7C(6) of the 1990 Act (as amended) contains the proviso that, "the Executive shall only determine the amounts of alternative subventions after taking into account the resources available to pay the alternative subventions."

3. In each of the cases involved here the Appeals Officer considered the applicant's financial circumstances, the details of which were available both from the HSE and from the appellant, and determined that he/she could not pay all the nursing home costs without undue hardship. The Appeals Officer then went on to award an alternative subvention in each case; this was instead of the prescribed subvention which is the standard payment and the basic entitlement under the Nursing Home Subvention scheme.

4. The Appeals Officer derives his functions and powers from section 7E of the 1990 Act (as amended) which deals with the right of an applicant to appeal against the HSE

decision. Section 7E obliges the HSE to appoint a person (who may be an employee of the Executive) to consider appeals. Section 7E(4) provides that "the person appointed...to consider an appeal...shall- (a) comply with guidelines issued by the Executive"; consider any written or oral objections made by the appellant; and make a decision in writing determining the appeal. Section 7E(4) also requires the Appeals Officer to send a copy of the appeal decision, together with the reasons for the decision, to the HSE and to the appellant. A further feature of the appeal system is contained at section 7E(5) which says that " [a]n appeal shall lie to the High Court by the relevant person in respect of the relevant decision and the Executive may cross-appeal the appeal."

5. As mentioned above, section 7C(6) of the 1990 Act (as amended) contains the proviso that, "the Executive shall only determine the amounts of alternative subventions after taking into account the resources available to pay the alternative subventions." The word "after" may be of particular significance here. The Appeals Officer who decided that alternative subventions should be paid in these cases has informed this Office that he was not informed by the HSE of any financial constraints prior to his making the relevant decisions. {Neither had he been given any guidelines by the HSE regarding the procedure for conducting appeals; section 7E(4) of the 1990 Act (as amended) allows the HSE to issue such appeal guidelines and the Appeals Officer must comply with them, where issued.}

*For a detailed discussion of this issue, see the Ombudsman's report on **Nursing Home Subventions** (January 2001) on www.ombudsman.gov.ie

Chapter 4 Response of the HSE to the Statement of Complaint

1. In response to the notification of this investigation, the HSE made a written submission, the text of which is given at Appendix 2. The main points in the HSE submission (with which the Ombudsman does not necessarily agree) are summarised in the paragraphs below.

2. An alternative subvention is a discretionary top-up payment which may be approved where the applicant's means and the level of subvention already approved are insufficient to meet the costs of nursing home care. The means assessment for basic subvention is applicable. The alternative subvention is discretionary which means there is no entitlement to it but it may be paid in individual cases taking all relevant factors into account. The availability of the alternative subvention is limited by the amount of the resources allocated for this scheme. Applicants may need to be placed on a waiting list for payment.

3. The HSE introduced standardised guidelines in January 2007 for the Nursing Home Subvention Scheme (**Ombudsman Note**: This was at a time when the original subvention scheme, based on the unamended 1990 Act, was still in operation. The original subvention scheme contained some provision for the payment of so-called "enhanced" subventions but the precise basis for such subventions was confused and uncertain. The HSE appears to regard the “new” arrangements for alternative subvention as no more than a continuation of the arrangements previously in place. The subvention scheme described in Chapter 3, and analysed in Chapters 5 and 6, did not come into effect until 8

June 2007.) Prior to 2007, according to the HSE, the calculation of enhanced subvention was operated on a case by case basis. The changes implemented in 2007 commenced the move towards a consistent approach across the 32 Local Health Office (LHO) areas. It was decided that the national guideline for payment of enhanced (alternative) subvention would be on the basis of the average weekly nursing home fee for the LHO area less €100. Where resources are available, enhanced (alternative) subvention is considered on that basis or on the actual fee of the particular nursing home, if less. If resources are not available under the scheme, qualified applicants receive the appropriate basic subvention and are told that they have been placed on a waiting list for additional support should resources become available. It is a matter for each LHO area to operate such waiting lists, subject to available resources.

(**Ombudsman Note:**the following example, taken from a HSE file on a Subvention Application, shows the way in which the calculation for both the prescribed subvention and the alternative subvention was done in the case of an applicant in late 2007 who was over 80 at the time and who had no assets but for the State pension).

Basic subvention

Social Welfare pension:	€210	
less (allowance for over-80s)	42	
Assessable Means	168	(to be paid to Nursing Home)
Basic Subvention rate payable	300	(+ 42 from pension)

Enhanced Subvention

Average Weekly fee in LHO area	€763
Assessed Means	168
Total additional subvention required	595
Basic subvention approved	342
Enhancement payable	253
Total subvention payable	595 Basic + Enhanced

4. It is important to note that the available resources within each area are applied in the first instance to ensure the continued provision of basic (prescribed) subvention to all qualifying applicants. This approach ensures that all qualifying applicants will, at a minimum, receive basic/prescribed subvention of up to €300 per week depending on means.

5. With regard to the appeals process, "the Appeals Officers can make recommendations with regards to enhanced (alternative) subvention. Section 7C(6) of the Health (Nursing Homes)(Amendment) Act 2007 states 'The Executive shall only determine the amounts of alternative subventions after taking into account the resources available to pay the alternative subventions.' While every effort is made to address the concerns/recommendations of the Appeals Officers, the subvention offices may only do so where the availability of resources permit so." (sic) It appears the HSE takes the view that, in accordance with section 7C(6), it is free not to implement the decision of the Appeals Officer, or to implement it in part only, or to delay its implementation.

6. The HSE reported changes in the circumstances of some of the cases involved in this investigation since the investigation was notified. In four of the ten cases, the Appeals Officer's decision to award an alternative subvention was implemented at the rate specified by him but not from the date he specified. Payment of the alternative subvention in these cases has now been made from 1 July 2009. In another case, the applicant had been transferred to a public bed in April 2009. (**Ombudsman Note**: The Appeals Officer's decisions required payment from dates earlier than 1 July 2009. In all five of these cases, therefore, the Appeals Officer's decision remains unimplemented for a period of time while in the remaining five under investigation here the Appeals Officer's decision had not been implemented at all by the time this report was written.)

Chapter 5 Analysis - General

1. The Ombudsman's investigation in this case concerns the actions of the HSE in deciding not to implement decisions made by the Appeals Officer appointed by it under the Health (Nursing Homes) Act 1990 (as amended). The Appeals Officer who made these decisions has told this Office that, prior to his consideration of these appeals, he was not informed by the HSE that decisions to grant alternative subventions would not be implemented due to financial constraints. He described the process used in the Appeals Office when an appeal is made: a copy of the appeal form is sent to the local Nursing Home Subvention office with a request for a report and for a copy of the relevant file. However, in his experience, a report is rarely received while a copy of the file is always provided. He then considers the appeal on the basis that all the relevant information has been provided to him by the Executive. He has also stated that no formal notification in relation to lack of resources was either placed on the file or communicated to him in writing in respect of the cases which are the subject of the investigation.

2. The HSE put these cases on a waiting list with a view, presumably, to paying the alternative subventions awarded by the Appeals Officer at some unidentified point in the future. However, many have been on the list for a considerable period of time. Thus, the families involved have been subject to a degree of financial hardship and distress which would have been avoided had the Appeals Officer's decisions been implemented when they were made.

3. It is clear from an examination of these cases and of the Appeals Officer's correspondence with the HSE on the issue that, having placed the applicants on a waiting list after the appeal decision had been made in their favour, the HSE failed to notify either the Appeals Officer or the appellants that it was not implementing the appeal decisions. The fact that the HSE was placing the successful appellants on a waiting list rather than implementing the decisions without delay caused confusion for the appellants who naturally expected that the decisions, communicated to them in writing, would be implemented. The Appeals Office was also allowed to operate for a considerable period of time without notice of the fact that these appeal decisions had not been implemented. For example, in one of the cases under investigation here the Appeals Officer's decision to grant an alternative subvention was notified to the parties concerned on 25 August 2008. Following representations from a TD, the Appeals Office wrote to the appellant a full month later on 24 September confirming his decision to pay the alternative subvention. It is clear that at that point the Appeals Office was as unaware as the applicant that a decision had been made by the HSE not to make the payment and that the case had been put instead on a waiting list. The Appeals Officer's decisions in the cases under investigation here were made between April 2008 and January 2009 so, at the time of writing this report, a number of people have been waiting over a year for the implementation of the Appeals Officer's decision.

4. In January 2009, following correspondence from this Office, the Appeals Officer wrote to the HSE asking for details of how the waiting list was being operated, the criteria being used to prioritise cases (if a prioritisation system was in place), and if people were being

notified of the situation concerning the operation of the list. He also asked to be informed of the place on the list on which certain appellants stood. This Office understands that, to date, the HSE has not replied to these enquiries from the Appeals Officer.

Chapter 6 Analysis - Specific

1. The Ombudsman considers that the delay in implementing the decisions of the Appeals Officer in these cases, notwithstanding that the applicants were placed on a "waiting list", is tantamount to a refusal to implement them. A considerable period of time has elapsed since the decisions were made and it is also relevant that the affected parties were not notified of its actions until contact was made by them with the Executive.

2. The HSE, in its response to the Statement of Complaint, has cited the Health (Nursing Homes) Act 1990, (as amended) as supporting its actions in this matter. Both the payment of the alternative subvention and the appointment and functions of the Appeals Officers are governed by that Act, so it is to this legislation we must turn in considering whether the HSE is correct in the stance it has adopted.

3. The alternative subvention is provided for at Section 7C of the 1990 Act, which states;

(1) ...the Executive shall determine an application, after having regard to the reports provided to it.....in respect of the applicant, by-

(a) if it is satisfied that the applicant qualifies for a prescribed subvention,

arranging for the prescribed subvention for which the applicant is qualified to be paid-

(i) subject to subsection (2), to the applicant and

(ii) for so long as the Executive remains so satisfied,

(b) subject to subsection (6), if it is satisfied that the applicant qualifies for a prescribed subvention but is also further satisfied that the applicant still cannot, without undue

hardship, pay all or any of the costs of the applicant's care and maintenance in a nursing home, arranging for a higher alternative subvention to be paid in lieu of the prescribed subvention-

[.....]

(c) if the applicant does not fall within paragraph (a) or (b), refusing the application.

(2) The Executive may, at its discretion, effect the payment of a relevant subvention to an applicant by paying the subvention to the proprietor of the nursing home in which the applicant is or is to be maintained.

(3) Where the Executive determines an application under subsection (1), it shall, as soon as is practicable after the determination, give notice in writing to the applicant of the decision and the reason for the decision.

[....]

(6) The Executive shall only determine the amounts of alternative subventions after taking into account the resources available to pay the alternative subventions.

4. The HSE distinguishes between the prescribed subvention and the alternative subvention saying that the latter is"discretionary". This distinction is not borne out by the legislation. In the case of the basic prescribed subvention, title to payment is established when the HSE, having gathered the relevant information, is "satisfied" that the applicant qualifies for it. In the case of the alternative subvention, title to payment is established when the HSE (a) is "satisfied" that the applicant qualifies for a prescribed subvention and (b) is "*further satisfied that the applicant still cannot, without undue hardship, pay all or any of the costs of ... care... in a nursing home"*. In both cases, having established the facts to its

satisfaction, the HSE is obliged by the terms of the Act to make a determination which follows the facts. In the case of the alternative subvention once there is a finding of fact that, even with the advantage of the prescribed subvention, the applicant still cannot, without undue hardship, pay all or any of the costs of the nursing home then the determination must be that an alternative subvention will be paid in lieu of the prescribed subvention. While an assessment of what constitutes "undue hardship" may be less objective than, for example, an assessment of income, a finding in relation to "undue hardship" is not an exercise in discretion; rather, it is a fact finding exercise.

5. It is notable that while the phrase "at its discretion" is used in reference to the HSE at a number of points in the 1990 Act, [for example, at Section 7C(2) quoted above], it does not use this phrase in relation to the alternative subvention. Rather, the statutory formula followed is that the HSE "shall determine an application" and that determination must be in favour of the applicant where the HSE is "satisfied" that the conditions for award of subvention are met. In the case of the prescribed subvention, the conditions for award relate to the assessed need to be maintained in a nursing home as well as to an assessment of means. In the case of the alternative subvention, the conditions for award (as stated above) are that the applicant qualifies for a prescribed subvention and that, even with that subvention, the applicant cannot meet the nursing home costs without "undue hardship".

6. The HSE contends that the "availability of enhanced (alternative) subvention is limited by the amount of the resources allocated for this scheme". It is true that the Act provides that the amounts of alternative subvention shall be determined by the HSE "after taking into account the resources available to pay the alternative subventions". Thus, while there may be a determination that an applicant is entitled to an alternative subvention, the

amount of that alternative subvention is conditioned by the resources available to pay such subventions. As there is no such restriction in determining the amount of the prescribed subvention, and as the alternative subvention is separate from the prescribed subvention, it seems logical that the amount of the alternative subvention must, as a minimum, equal that of the prescribed subvention. Given the wording of the legislation, one can envisage a situation in which the HSE would "determine" the amount of the alternative subvention as equal to that of the prescribed subvention; though this would not confer any additional benefit on the applicant. However, it would be reasonable to expect that any such determination would be based on a standardised approach to be applied consistently across the country.

7. In dealing with an appeal from an applicant seeking an alternative subvention, the Appeals Officer is in broadly the same position as is the HSE in making the initial decision. This means that the Appeals Officer, having decided that an alternative subvention should be paid, “shall only determine the amounts of alternative subventions after taking into account the resources available to pay the alternative subventions”. There is one important difference, however. This is that the HSE, in its decision making, is presumably already aware of any issue regarding the “resources available to pay the alternative subventions”; whereas the Appeals Officer is not so aware unless such an issue is raised with him by the Executive. Though this is not to say that the Appeals Officer's decision is actually determined by any view expressed by the HSE regarding the availability of resources; rather, it is a factor which he (like the HSE in the initial decision) must take “into account”. It is not entirely clear from the legislation how either deciding party (HSE or Appeals Officer) is intended to implement the requirement to take

" account" of the availability of resources; it is reasonable, though, to expect that the provision is intended to be applied equitably across all subvention applicants or appellants.

8. In its response to the notice of this investigation, the HSE outlined a process (see Chapter 4, paragraph 3 above) whereby the formula for calculating alternative subventions was standardised nationally in 2007. While the formula is a standard one, because it takes account of variations in average levels of nursing homes costs in different LHO areas, the maximum rates of award vary from one LHO to another. In 2008, with some additional funding being allocated, the HSE says that it amended the formula to provide some increase in the rates of alternative subvention. This would seem to represent a reasonable approach to the implementation of the provision at Section 7C(6) of the Act. However, the present situation (as exemplified in the complaints being investigated here) appears to be that in the case of new applicants alternative subventions are not being paid in some LHO areas on the basis that resources to make such payments are lacking. The Ombudsman does not have information on the extent to which, generally, Appeals Officers are or are not upholding such decisions.

9. The HSE's own statistics establish that there is considerable variation across the country regarding the extent to which alternative subventions are paid. And if there is variation, the question arises as to whether such variation is equitable. This is not an issue which the Ombudsman has investigated in any detail and she does not purport to do so in this investigation.

10. The HSE has published figures for each LHO area giving (a) the number of subventions in payment as at 31 May 2009 and (b) the number of alternative subventions in payment

on the same date. The full details are published at Appendix 3; however, some of these figures are published immediately below. (NOTE: the figure for alternative subvention in each case is a subset of the figure for those being paid the prescribed, basic subvention.) It is striking that in the case of the Dublin North East region, in three of its LHO areas subventions are paid at the alternative rate in 100% of cases; while in Dublin Mid-Leinster less than 50% of the total are paid at the alternative rate. And in the HSE West region, only 25% of all subventions are paid at the alternative rate with the Roscommon LHO having no subventions paid at the alternative rate.

	Basic Subvention	Alternative Subvention	Percentage of total receiving alternative subvention
Dublin Mid -Leinster (total)	1,823	862	47%
Dublin North East (total)	1,421	1,370	96%
[3 areas in Dublin North East]	581	581	100%
West (total)	3,306	817	25%
[Roscommon]	323	nil	0%

(Figures, as at 31 May 2009, supplied by HSE in answer to a PQ: the full table is given at Appendix 3)

11. Even allowing that nursing home costs vary around the country, these figures may suggest that the extent of payment of alternative subvention is not simply a function of the variation in nursing home costs. For example, based on figures provided by the HSE itself, average nursing home costs in Roscommon and in Laois/Offaly are broadly similar yet Roscommon currently (31 May 2009) pays no alternative subvention while Laois/Offaly pays 81 alternative subventions (based on roughly the same number of subventions being paid overall in each area). And in the Carlow/Kilkenny LHO area – where the complainants in this investigation are based - 70% of all subvention recipients are currently getting the alternative, higher rate subvention.

12. In any event, the failure to pay the alternative subvention in the cases under investigation here is based on the availability of funds to the HSE generally and on how those funds are allocated across HSE regions.

13. It is not acceptable that the availability of an alternative subvention depends on where one lives rather than on one's assessed need for a higher level of nursing home subvention. It is reasonable to expect that the HSE would arrange its affairs in a manner that the provision in particular of cash payments (whatever about other services) would be standardised across the country. One cannot, for example, imagine that the Department of Social and Family Affairs would pay an old age pension to people from Donegal but refuse such a pension to people from Mayo; or that the Revenue Commissioners would allow medical expenses income tax relief to people from Dublin but refuse such relief to people from Cork. One of the motivations for the creation of the HSE in January 2005 was to establish consistency of

service provision across the entire country. In the case of subsidising the costs of private nursing home care, such consistency of approach may become the norm under the Nursing Homes Support Scheme Act 2009 which has now come into operation. However, this Scheme does not apply retrospectively and its implementation will not resolve the issues raised in this investigation.

14. The key question for decision in this investigation in relation to the specific cases at issue is whether the decisions of the Appeals Officer to award alternative subventions are binding on the HSE or whether, as the HSE it appears to believe, it may set such decisions aside on the basis of section 7C(6) of the Act. The HSE appears to regard the outcome of the appeal as no more than a recommendation which is not legally binding on it. Its response to the notification of this investigation includes the following:

"the Appeals Officers can make recommendations with regards to enhanced (alternative) subvention. Section 7C(6) of the...Act states 'The Executive shall only determine the amounts of alternative subventions after taking into account the resources available to pay the alternative subventions.'. While every effort is made to address the concerns/recommendations of the Appeals Officers, the subvention offices may only do so where the availability of resources permit so" [sic]

To resolve this matter, it is necessary to look in some detail at the provisions in the Health (Nursing Homes) Act 1990 (as amended) which govern the appeal function.

15. Section 7E of the Health (Nursing Homes) Act 1990 (as amended) provides for the appeal system governing subvention applications:

Appeals against decisions of Executive, etc.

(1) Subject to subsection (2), a person ('relevant person') may appeal against a decision of the Executive under section ...7C(1) ... by giving notice in writing to the Executive not later than 60 days after notice of the decision was given to the relevant person under section...7C(3) or (5), as the case may be.

(2) An appeal under subsection (1) shall-

(a) be in a form approved by the Executive, and

(b) state the reasons for the appeal.

(3) Where the Executive receives an appeal under subsection (1), it shall appoint a person (who may be an employee of the Executive) to consider the appeal.

(4) The person appointed pursuant to subsection (2) to consider an appeal under subsection (1) shall-

(a) comply with guidelines issued by the Executive in respect of the procedure to be followed with respect to the consideration of any appeal,

(b) consider any written or oral objections made by the appellant in support of the appeal,

(c) make a decision ('relevant decision') in writing determining the appeal as soon as is practicable in all the circumstances of the case, and

(d) send a copy of the relevant decision to the relevant person and the Executive together with the person's reason for the decision.

(5) An appeal shall lie to the High Court by the relevant person in respect of the relevant decision and the Executive may cross-appeal the appeal.

(6) An appeal under subsection (5) shall be heard otherwise than in public at the request of the relevant person.

(7) A decision of the High Court on an appeal under subsection (5) shall be final except that, by leave of the Court, an appeal from the decision shall lie to the Supreme Court on a specified question of law.

16. In many cases, the decision to award an alternative subvention is a decision taken at the appeal stage where an applicant (or his or her representative) argues that even with the prescribed subvention it is not possible to meet the costs of private nursing home care. A sub-text in many of these cases is that the applicant has had to avail of private care because of the failure of the HSE to provide a place in a public nursing home. It is clear that the jurisdiction of the Appeals Officer extends to a consideration of whether or not an alternative subvention should be paid. The right of appeal includes the right to appeal a decision of the HSE taken under Section 7C(1) of the 1990 Act (as amended); this is the provision under which, in the first instance, an alternative subvention is awarded or refused. The appeals in the cases under investigation were from applicants who, though awarded a prescribed subvention on first application, had not been awarded the alternative, higher rate subvention; in their appeals these applicants sought the alternative subvention.

17. In considering the question of whether an Appeals Officer's decisions are binding on the HSE, the following points seem relevant:

The Appeals Officer may or may not be a HSE employee. This suggests that the legislature envisaged the Appeals Officer as being independent in the performance of the appeal function.

The Appeals Officer's consideration of an appeal is to result in a decision which is to be conveyed in writing both to the HSE and to the appellant. It is significant that the Act requires the making of a decision by the Appeals Officer; clearly, a decision is a definitive outcome and cannot reasonably be equated (as the HSE has sought to do) with a recommendation or an expression of concern. The requirement that the appeal decision be conveyed in writing to the HSE further supports the view that the Appeals Officer, even where he or she is an employee of the HSE, is independent in the performance of the appeal function.

The relevant person (the subvention applicant) may appeal the decision to the High Court and the HSE may cross-appeal the appeal. Again, it is significant to note that the word 'decision' is used in the legislation and that the status accorded to that decision is that any appeal in relation to it is to the High Court. Such an appeal to the High Court is not simply an appeal on a point of law but would appear to involve a full reconsideration of all of the issues resulting in a decision being taken by that Court. It is simply not plausible to argue that a "decision", which is capable of being set aside following a full reconsideration by the High Court, can be set aside in any manner other than by the High Court. There is nothing in the legislation to support the view that the HSE may alter, or reject, or postpone implementation of an Appeals Officer's decision. It follows therefore that the decisions of the Appeals Officer are binding on the Executive. It follows also that the HSE cannot seek to invoke section 7C(6) of the Act after receiving the decision of the Appeals Officer.

18. In the course of these appeals, the HSE was given the opportunity to provide the Appeals Officer with its views and relevant information. This was the point at which, if deemed relevant, it would have been appropriate to raise the issue of financial constraints. However,

the HSE did not raise the issue at that stage and merely supplied details of the appellants' financial, medical and other circumstances. In a number of other subvention appeal cases seen by this Office, Appeals Officers have not awarded alternative subventions notwithstanding the fact of their being satisfied that the applicant could not meet the nursing home costs without "undue hardship". In these cases the Appeals Officers had been put on notice by the HSE that the availability of resources was an issue. Instead of making a decision awarding the alternative subvention, the Appeals Officers have in some instances referred the cases back to the HSE saying that, while they are satisfied that the circumstances of the case are such that an alternative subvention would be appropriate, they have refrained from making a decision to that effect. Whether or not this is a valid exercise of the appeals function, is a separate question; but it does establish that in some cases Appeals Officers have been made aware of an issue regarding the availability of resources and that this should be taken “into account” by them in determining the amount of alternative subvention to be awarded. Given the binding nature of the decisions of Appeals Officers it is clear, where the HSE believes there is an issue regarding the availability of resources, that the time for the HSE to raise this issue is before, rather than after, the Appeals Officer makes his decision.

19. Had the Appeals Officer in these cases been informed by the HSE that the availability of resources was an issue this, undoubtedly, would have been taken “into account” by him in making his appeal decisions. In the event, he was not so informed. But had he been so informed, he would have been entitled to assume that, in taking account of the resources issue, his decisions should be ones which treated all subvention applicants and appellants, across the country generally, in a consistent and equitable manner.

Chapter 7 Response of HSE to Draft Report

1. The draft report of this investigation was sent to the HSE on 28 October 2009. The Ombudsman, in accordance with section 6(6) of the Ombudsman Act 1980, offered the HSE an opportunity to make representations to her in relation to the report. The response of the HSE, received on 1 December 2009, is summarised in the following points, with some comments by the Ombudsman. The full text of the response is given at Appendix 4.

It is the HSE view that it has not failed to implement the decisions of the Appeals Officer but has, of necessity, delayed implementation in some cases while partially implementing others.

(**Ombudsman note:** This represents a change from the earlier response to the Statement of Complaint, contained in Appendix 2, in which the HSE suggested that the Appeals Officer's decisions were to be considered as "recommendations" only and were not binding on the HSE).

The HSE believes that it must treat equitably decisions on enhanced subventions which may not have gone through the appeal process versus those which have done so.

(**Ombudsman note:** The appeal system under discussion here has a statutory basis. There appears to be a failure on the part of the HSE to appreciate how an independent statutory appeal system works in practise. While an Appeals Officer's decision may have consequences in terms of precedents which would be taken into account by the administration in its decision-making process, it should never be the case that an Appeals Officer's decision is discounted or not implemented because it does not accord with decisions made by the administration).

The HSE acknowledge that in the ten cases covered in this investigation the basic subvention, together with the patient's contribution, was insufficient to meet the cost of care in the

nursing homes. The HSE say that it will implement, without further delay, the Appeals Officer's decision in the ten cases from the date specified by him.

The HSE says that there were problems with the subvention scheme, which have been publicly acknowledged by the Department of Health and Children, and that the policy decision to replace it with the Nursing Homes Support Scheme was taken with the intention of addressing the weaknesses that had emerged with the earlier scheme.

The HSE acknowledges the weaknesses in internal HSE processes identified in this report and says that it will take steps to address:

- the operation of the appeals process in an equitable manner across the system,

- the issue of critical financial information on the subvention scheme being made available to Appeals Officers in advance of consideration of appeals,

- the standard approach to the status, and implementation of, decisions made by an Appeals Officer and

- the communication of the position to the appellants.

The HSE is taking steps to ensure that the appeals process is operated in a consistent way in future appeal cases.

The HSE says that while the Appeals Officer involved in these cases may not have been given the specific details of resource constraints, there is an onus on all senior officials of the HSE to take account of the resource implications of any decisions he may make. These internal matters require to be, and will be, addressed internally. The HSE goes on to say that while an Appeals Officer, being independent, might not always be an employee of the HSE the fact is

that, in this case, the Appeals Officer is a senior employee and, as with all senior decision makers, was required to take account of the resources available.

(**Ombudsman note:** These comments indicate a serious misunderstanding on the part of the HSE of how an independent appeal system functions. Whether the Appeals Officer is a HSE employee or an external person should be irrelevant to the conduct of the appeal; an "internal" Appeals Officer should conduct business in precisely the same manner as would an "external" Appeals Officer. To suggest that an Appeals Officer would in his decision-making draw on information which is not available to the appellant (for example, the internal budgetary restrictions of the HSE in particular areas) indicates a lack of understanding of the quasi-judicial process of a statutory appeal system. The Appeals Officer involved also commented on this misapprehension in his comments on the HSE response to the Ombudsman's draft report. (See Chapter 8 and Appendix 5). While it may not be ideal, it is not unheard of that an employee of a public body will act as a statutory appeals officer in relation to decisions of his employer and do so in a manner which respects the obligation to be fair, impartial and independent as between the parties. The Appeals Officers of the Department of Social and Family Affairs operate in these circumstances.)

The HSE comments on the Ombudman's statement in Chapter 6, paragraph 13 that it is not acceptable that the availability of an alternative subvention depends on where one lives rather than on one's assessed need for a higher level of nursing home subvention. It is the HSE view that as average nursing home fees vary across the 32 LHO areas, to set the enhanced subvention rate at one level only for the entire country would have meant that applicants in different parts of the country with the same income would have varying levels of shortfall to meet. The approach adopted by the HSE was considered to be more equitable as it meant that

in addition to their contribution based on assessed income no applicant for enhanced subvention would have to meet a shortfall greater than €100 a week. The HSE notes that since 2007, however, its capacity to increase levels of subvention was limited and accordingly the gap between subvention payable and nursing home fees increased with people having to pay more than €100 a week.

(**Ombudsman note:** The fact that the scheme envisaged a shortfall of €100 a week to be met by the family does not accord with the view of the Ombudsman that, under section 52 of the Health Act 1970 the HSE is required to provide in-patient services (which includes long-stay nursing home type care) to persons with full eligibility and those with limited eligibility. The Ombudsman is currently undertaking an investigation under section 4 of the Ombudsman Act 1980 into issues relating to the provision of in-patient services under section 52 of the Health Act 1970; the report on this investigation will be published later this year.)

The HSE expects that the introduction of the Nursing Homes Support Scheme in October 2009 will address the inconsistencies that arose in the Subvention Scheme.

Chapter 8 Response of Appeals Officer to HSE Comments on Draft Report

The Ombudsman sent a copy of her draft report to the Appeals Officer involved and, subsequently, sent him a copy of the HSE response to her draft report on the basis that he is mentioned in that response and is the subject of some comments by the Executive. The Appeals Officer's response, which is reproduced in full at Appendix 5, is concerned primarily with the HSE's response to the draft report. The Appeals Officer made the following points:

He was never notified by the HSE of the existence of a waiting list for applicants in the South East area who had been awarded the alternative subvention. If he had been aware of such a list he would have sought sight of it and taken it into consideration in his deliberation on appeals.

The Appeals Officer agrees that it must be the objective of the HSE to treat equitably decisions regarding alternative subventions but his experience is that the policy on alternative subventions was implemented across and within each individual area differently.

He defends the independence of the function of Appeals Officer and asserts that an Appeals Officer who is a HSE employee is required to be just as independent as one who is not an HSE employee. It is his role to hear both sides and then to take a decision in keeping with the legislation. In relation to the contention that he did not take account of resource implications, he points out that in every case where an appeal was made he sought a report from the Executive. In most cases no report was made and there was never mention of lack of resources on any file.

The HSE says that the approach of the Appeals Officer in the South East is at variance with the approach in other offices. From his discussions with other Appeals Officers, he notes that

some were of the opinion that they had no role as the payments were discretionary (despite the statutory position) while others, unlike him, had been advised of the resource issues by the managers in Nursing Home Sections. He was never informed by the HSE that his decisions were not being implemented.

Chapter 9 Findings

1. The subvention applicants involved (identified in the notification of this investigation) have been adversely affected by the actions of the HSE in that the HSE has failed to implement the decisions of the Appeals Officer either at all or, in some cases, has not implemented those decisions fully. The adverse affect is in terms both of financial loss as well as pressure and stress arising from the HSE's actions.

2. The HSE is incorrect in its view that the Appeals Officer decisions are no more than recommendations. Such decisions are binding on the Executive. In the absence of a decision on the matter by the High Court, the HSE is not entitled to alter, defer or reject a decision of an Appeals Officer in relation to a nursing home subvention application. The actions of the HSE in the cases investigated above, insofar as they involved a failure to implement the decisions of the Appeals Officer, were taken without proper authority within the meaning of section 4(2)(b)(i) of the Ombudsman Act 1980.

3. In the case of appeals in relation to nursing home subventions, the HSE is not entitled to invoke section 7C(6) of the Health (Nursing Homes) Act 1990 (as amended) after the giving of a decision by an Appeals Officer. In purporting to invoke section 7C(6) in these cases, after the giving of the decisions of the Appeals Officer, the HSE acted without proper authority within the meaning of section 4(2)(b)(i) of the Ombudsman Act 1980.

4. The HSE should ensure that an Appeals Officer dealing with nursing home subvention cases is given all necessary information – including information about the availability of

resources, where this is relevant – in the course of the appeal process. Failure to do so, as happened in the cases under investigation here, impedes the proper functioning of the appeals process.

5. The actions of the HSE in these cases undermined the proper functioning of the independent statutory appeals process and, in that regard, were based on an undesirable administrative practice as well as being contrary to fair or sound administration within the meaning of section 4(2)(b)(vi) and (vii) of the Ombudsman Act 1980.

Chapter 10 Recommendation

The Ombudsman notes that the HSE has undertaken to implement the decision of the Appeals Officer in each case covered by this investigation without further delay. In those cases where the decision was implemented from a later date than that specified by the Appeals Officer, that payment is to be made from the effective date given in the decision. Following on from the findings above, the Ombudsman makes the following recommendation to the HSE:

> that the HSE identify all other cases in which a decision of the Appeals Officer (HSE South) on a Nursing Home subvention application remains unimplemented and ensure that these too are implemented without delay in accordance with the terms of the decision.

Emily O'Reilly
Ombudsman
September 2010