REPORT TO GOVERNMENT

Subject: **Nursing Home Charges & Disabled Persons Maintenance Allowance**

From: **An tArd-Aighne**

To: **Rialtas na hÉireann**

Date: **7 Feabhra 2023**

A. INTRODUCTION

1. At a meeting of Government on Tuesday, 31 January 2023, I was requested to review the files in the Office of the Attorney General (the "**Office**") regarding (a) charges levied for the provision of nursing home care and (b) the non-payment of the Disabled Persons Maintenance Allowance to persons in residential care and to provide an account of the litigation management strategy adopted by the State insofar as it was based upon the legal advices provided by my predecessors and by the Office.

2. The matters addressed in this Report are of some considerable antiquity and span the tenure of several Governments and office holders. This account has accordingly had to be prepared on the basis of documentation readily available, and within a very compressed period of time. The Minister for Health will, I understand, be separately accounting to Government for the actions of his Department in these matters.

B. LITIGATION CHALLENGING GOVERNMENT EXPENDITURE POLICY

3. It is important at the very outset that I say something about the nature of civil litigation[1], as at its heart, this Report seeks to address recent criticisms of the manner in which the State has defended civil litigation brought against it.

4. It is all but impossible to understand the approach adopted by the State to such litigation, without a contextual understanding of the relationship between the powers of Government in relation to expenditure and the entitlement of citizens to initiate civil litigation challenging those powers.

5. In the ordinary course, expenditure on social protection and health is a matter for Government. It involves the allocation of enormous financial resources. For instance, Budget 2023 commits the Government to expenditure of €23.4 billion on social protection for the current year. As it happens, the Department of Health was also allocated €23.4

[1] *Civil* litigation is to be distinguished from *criminal* litigation. This Report has nothing to do with criminal litigation. Most serious criminal matters are prosecuted by the Director of Public Prosecutions, an independent statutory officer, whose functions are derived from the Prosecution of Offences Act, 1974.

billion, so the collective allocation for those two Departments alone is some €46.8 billion for 2023. Those sums were provided for in the Budget announced in Dáil Éireann on 27 September 2022.

6. In legal terms, the revenue elements of the Budget were contained in the Finance Act 2022, which was initiated on 18 October 2022, and after it passed through the Oireachtas, was signed into law by the President on 15 December 2022. The expenditure side is contained in the Revised Estimates and underpinned by each year's Appropriation Act. The Appropriation Act 2022 was signed into law by the President on 16 December 2022.

7. In practical terms, a Government cannot function without a majority in the Dáil to ensure the passage of legislation that it introduces. The requirement to pass the Finance Bill and Appropriation Bill every year is perhaps the most fundamental example of this basic requirement for any Government.

8. Thus, determining how to deploy scarce resources is a fundamental task of Government. It involves difficult decisions. Government has no money other than that which it collects from current taxpayers or which it borrows, for the account of a future generation of taxpayers.

9. The period of time covered by the issues of controversy addressed in this Report includes an era in which the Government's finances were very strained, but in good times or bad, any Government is always obligated to make difficult decisions in respect of the allocation of scarce resources.

10. In the context of determining what social protection or health benefits to provide, and which category of persons to provide them to, Government is of necessity required to draw up rules of eligibility. Some people will fall inside the line and will be entitled to a benefit. Others will fall outside the line and will have no such entitlement. Inherent in the process of drawing the lines is a policy choice that a democratically elected Government must make. There must be clear rules on eligibility.

11. It is in the nature of these things that some people will be disappointed if they are refused a benefit to which they believe they are entitled. In our democratic system, with an independent judiciary that has comparatively extensive powers of judicial review, such persons are entitled to sue. They may do this in different ways. The two most obvious methods of legal challenge are what are known as "*plenary*" proceedings or "*judicial review*" proceedings. These are the two principal strands of High Court civil litigation that is brought against the State.

12. When it is sued, like any other litigant, the State always has choices. The State can concede the case or it can defend the case. If the case involves a legal challenge to the deprivation of a benefit that would impose a financial obligation upon the State then, unless the State is willing or able to change its policy (which it will sometimes do if an anomaly or unfairness is highlighted), the State will ordinarily seek to defend that litigation.

13. As we shall see in due course, legal cases challenging the imposition of charges for occupancy of private nursing homes falls into this category of cases. Paying for the choice

by citizens to take up beds in private nursing homes was, put simply, a benefit that the State never agreed to provide for its citizens, and legislation passed by the Oireachtas in 2006 and 2009 reflected this policy choice.

14. It is sometimes tempting to resort to generic stereotypes about the State being in some way cruel or unfair to its citizens where they are deprived of a benefit and bring legal proceedings challenging this deprivation. But the irresistible logic of such a perspective is that the State has unlimited resources, must concede every Court case that is brought against it, and must fund every claim for compensation or redress that is demanded of it.

15. The fact that citizens have a legal entitlement to challenge decisions of the State before an independent judiciary does not imply that all of those challenges are well-founded or that the State is not entitled to defend itself against legal challenge. Governments must make hard choices all the time, with finite resources, and the requirement to defend litigation that seeks to challenge those choices ineluctably follows.

16. When electing to defend litigation, it must be emphasised that the State always does so in the "*public interest*". There is, literally, no other interest that the State can have regard to. But the "*public interest*" must of course always extend to considering the position of the taxpayer who is called upon to fund every new benefit agitated for.

17. It is fundamentally incorrect to suggest that Governments are unwilling to provide benefits to their citizens and only do so when they are legally compelled to. On the contrary, the source of any legal obligation upon Governments to provide benefits to their citizens is the very laws that they themselves enact. The €46.8 billion that this Government expects to spend on social protection and Health in 2023 is underpinned by the Government's own legislation that it introduced into the Oireachtas last autumn following the announcement of Budget 2023.

18. Moreover, Government frequently decides to spend very significant amounts of money on a completely *ex gratia* basis – in other words, in circumstances where it has no statutory or legal obligation to do anything of the kind but where it is, in the interests of society as a whole, the right thing to do.

19. To give but two recent examples in the sphere of defective property, in January 2023 the Cabinet approved a scheme whereby Government will contribute up to €2.5 billion to address defects in up to 100,000 apartments. Legislation to give effect to this scheme will follow. This decision thematically followed the Remediation of Dwellings Damaged By the Use of Defective Concrete Blocks Act, 2022, which was signed into law by the President on 23 July 2022. This is the legislation that commits Government to a projected €2.7 billion of expenditure to remediate houses with structural difficulties caused by Mica.

20. These are two instances of Government expenditure decisions that are, in historic terms, completely unprecedented in quantum and scale. They are particularly stark examples of a voluntary assumption by Government of enormous financial liability when Government has no legal liability to remediate structural difficulties in properties purchased by private citizens from private developers or builders.

21. Government does these things all the time having regard to the justice of the situation and the resources available. But at all stages it has to be understood that Governments do not have a blank cheque and cannot meet every financial demand made of them.

22. In considering the issues that are addressed in this Report, it is I believe necessary, to take a step back and consider the issues that arise from a broader perspective.

23. There is no comparison between the benefits that Government provides today, and those that were provided a century ago at the time of the foundation of the State. Social protection is constantly being refined and improved and it remains an evolving concept. Over time, benefits are modified and new benefits are introduced. When an economy prospers, and tax revenues swell, as has occurred in Ireland over an extended period of time, there is perhaps greater scope for generosity both in terms of the range and quantum of benefits provided.

24. But these decisions, at their heart, are fundamentally policy decisions for Government, and when Government is sued for failing to provide a particular benefit or for imposing a particular charge, it simply does not have unlimited resources to concede litigation on every occasion. On Friday last, 3 February, the Minister for Finance published the Annual Report on public debt in Ireland[2] which confirmed that Ireland's debt has increased to €226 billion at the end of 2022 – up from €203 billion just prior to the pandemic. This is an estimated 86% of national income, or around €44,000 for every person in the country, one of the highest per capita debt burdens in the world.

25. Real questions of inter-generational fairness also arise in circumstances where any redress must be funded from the taxes of a younger generation of workers. Resources applied to redress historic matters cannot be made available to fund services for the present needs of today's citizens.

26. These points must be understood as part of the relevant backdrop to any consideration of why the State frequently defends litigation brought by its citizens against it.

27. Portraying the State as callous or insensitive when electing to defend, rather than concede, litigation has no regard for the true context in which difficult decisions must be made.

28. At the end of the day, if a Court case seeks to obtain a benefit or advantage that is contrary to Government policy or contrary to how the State interprets the law, then the State frequently has little alternative other than to defend the litigation.

29. It must do so in the interests of its own financial solvency, and in the interests of the public who would foot the bill if the case was conceded or lost. Any suggestion that the State should have fewer rights to defend itself in litigation than private individuals or companies is misplaced.

[2] See: *https://www.gov.ie/en/press-release/58c7b-minister-mcgrath-publishes-annual-report-on-public-debt-in-ireland/*

C. THE LITIGATION PROCESS

30. Our legal system is an adversarial one. Each side is legally represented and each side has tactical or strategic choices that it may make. Each side is entitled to act, within the rules, but in its own interests. The judge is neutral and is charged with trying the case fairly and providing a just result.

31. As with many other types of Court case not involving the State (such as a personal injuries case, a defamation case or a breach of contract case), where the State is sued the parties to the litigation will have options. The parties may fight the case and await judicial determination, or the parties may engage in settlement discussions and may compromise the case. There is nothing unusual or sinister about this. It happens all the time and indeed, the Courts welcome it. There are valuable public policy benefits to the consensual resolution of legal disputes. Settlements save legal costs and they alleviate the burden of litigation on the Courts system.[3] Moreover, it is preferable that parties can reach a compromise that they can all agree to rather than having an outcome imposed upon them by a judge.

32. I am not oblivious to the context in which this Report has been sought from me. This context emanates from recent public controversy arising out of a series of newspaper articles and associated reporting in which the State has been criticised for having a "*secret litigation strategy*".

33. Any suggestion that a "*secret litigation strategy*", without more, is in some way improper betrays significant unfamiliarity with the civil litigation process. As I have said above, litigation is, by its very nature, adversarial. Each side is legally represented. Each side has a strategy. Each side keeps that strategy to itself.

34. Every single litigant therefore must, of necessity, have a "*litigation strategy*" and they have a fundamental legal right to keep that strategy confidential. There is nothing whatsoever sinister about that.

35. Of course some people may consider that the State ought not to be involved in adversarial litigation with its citizens. I can understand that reaction. But as I am endeavouring to explain, this is unavoidable in certain cases and to think otherwise does betray a fundamental lack of understanding of our legal system.

36. As it happens, the State endeavours to be far less adversarial in its approach to litigation than is characteristically the case with private litigants. For instance, the State often consents to adjournments and consents to applications to amend pleadings when private litigants might oppose such applications. These are but simple examples of a more general policy of acting with significant restraint in the conduct of litigation. Another obvious example of this approach is in relation to the State's entitlement to recover its legal costs

[3] A total of €176.5 million has been allocated to the courts in Budget 2023, up from €164 million in the previous budget. It would have to be a multiple of that if cases did not settle and all had to be individually judicially determined. See: *https://www.gov.ie/en/press-release/0d5ef-stronger-safer-communities-priorities-in-justice-budget-2023/*

from individuals who have unsuccessfully sued the State. In many cases, having regard to the circumstances of the opposing litigant, such an entitlement is waived.

37. In any event, adversarial litigation only arises in this context where a citizen elects to legally challenge Government policy. If, in 2023, a citizen is deprived of some Health or Social Protection benefit that she believes she ought to be entitled to, it is her prerogative to sue the State. But equally, it is the prerogative of the State to say that it has made policy choices as to how to deploy €46.8 billion of public money towards the Health and Social Protection Budgets and that the natural consequence of those policy choices is that the litigation that seeks to challenge them must be defended.

38. This is particularly so where the litigation is in the nature of a "*test case*" in which the significance of the issues go beyond the individual litigant. The State can, in such a scenario, elect to fight the case and await the determination of the Courts, or it can elect to try and settle the case on a compromise basis. That is an entitlement that any litigant has. It ought to borne in mind that the State cannot compel any plaintiff to settle their law-suit. On the contrary, the settling of litigation on the basis of a compromise outcome, where it occurs, is a free choice made by both parties, properly advised as to legal risk by their respective legal teams. In the case of a disputed entitlement, both sides may prefer to compromise the issue rather than risk losing in court.

39. At its heart, much of the media coverage that I have read in recent days seems to take issue with this process. The criticism appears to be founded on the proposition that the State was, in some circumstances, fearful of losing cases and elected to settle them rather than risk an adverse outcome.

40. However, this is precisely how our legal system works. Every day of the week hundreds of legal disputes are compromised in exactly this fashion. Ordinary citizens who have had an accident and sue for personal injuries will routinely have had this experience. In the cases that settle, there is always a spectrum between the cases that are very likely to succeed, and the cases that are very likely to fail. The amount of money paid (or non-monetary concessions made) to settle the case will always have regard to a series of factors including (a) the strength of the case, (b) the cost and inconvenience of defending the case and (c) the implications of an unhelpful precedent for the defendant who may be exposed to other similar claims.

41. All of these considerations are legitimately borne in mind by the State and other litigants when making choices as to how to deal with litigation. It is also important to emphasise that the strength of judicial review in Ireland whereby an independent judiciary has extensive power to review and quash Government decisions (to a much greater extent than is the case in other jurisdictions) enables citizens to litigate against the State with greater regularity and success than in many other jurisdictions.[4] Seen in this way, litigation

[4] There is a constant flow of litigation initiated against the State, whether it be well-founded or ill-founded. For the purposes of the exercise, I have interrogated publicly available information on the Courts service website (at *http://www.courts.ie*) and have identified at least 16 sets of High Court proceedings brought against the Minister for Social Protection in 2022 (15 judicial review cases and one plenary action) and 27 sets of High

brought by citizens against the State is not indicative of any failure on the part of the State at all. It is in fact an intended design feature of our system of Government that citizens should have the opportunity to legally challenge the State's actions before the Courts.

D. THE ATTORNEY GENERAL & LEGAL PROFESSIONAL PRIVILEGE

42. The State's right to receive and act on confidential legal advice, including in litigation, is a very important entitlement. That right has been significantly impaired by the sequence of events that have resulted in the commissioning of this Report.

43. Under the Constitution, the Attorney General is described in the following terms by Article 30.1

> "*There shall be an Attorney General who shall be the adviser of the Government in matters of law and legal opinion, and shall exercise and perform all such powers, functions and duties as are conferred or imposed on him by this Constitution or by law*."

44. Today, the Attorney General sits at the apex of a legal structure that includes three distinct divisions: the Office of the Attorney General in its narrow sense, which includes Advisory Counsel who advise Government Departments on many legal issues, including litigation; the Office of the Parliamentary Counsel, which is responsible for the drafting of legislation, and the Office of the Chief State Solicitor which is responsible for the provision of legal advice and the work of a solicitor on many files, including advisory, property and litigation files. In addition, independent barristers are often retained by the Attorney General to advise and act in litigation matters.

45. All of these divisions technically fall within the Office, which, fundamentally, provides legal advice to all Government Departments. Legal advice provided by the Office, as with legal advice provided by any solicitor or barrister to a private client, is subject to legal professional privilege.

46. Legal professional privilege is an important right which allows all persons, including the State, to avail of legal services and legal advice to protect their interests, including the many public interests which the State has a duty to defend. Legal professional privilege does not exist only for the person seeking legal advice, but also serves a broader public interest in the administration of justice. The role of the privilege was explained by McCracken J in ***Fyffes plc v DCC plc***[5] as follows:

> "*The principle of privilege arising in the preparation or conduct of a case is based on the proper administration of justice. This requires that a litigant must be in a position to communicate freely with his or her legal advisors, and further must be entitled to obtain expert evidence from third parties to assist, not only in the preparation of the case, but in the assessment as to whether there is any case to be made.*"

Court proceedings initiated against the Minister for Health in the same year (7 judicial review cases and 20 plenary actions).

[5] [2005] IESC 3, [2005] 1 IR 59.

47. The importance of the public interest in the proper administration of justice which is served by legal professional privilege cannot be understated. As observed by Kelly J in the High Court in ***Miley v Flood***: "*Legal Professional Privilege is more than a mere rule of evidence. It is a fundamental condition on which the administration of justice as a whole rests.*"[6] The courts have consistently emphasised the significance of the privilege and its contribution to the public interest in these terms (***Duncan v Governor of Portlaoise Prison***[7]; ***Martin v Legal Aid Board***[8]).

48. Legal professional privilege covers confidential communications between a client and their lawyer made for the purpose of giving or receiving legal advice and, where litigation is reasonably in contemplation, confidential communications or documents made for the purpose of litigation. Privileged material does not have to be disclosed under legislation or during the litigation process.[9]

49. Like any other litigant, the State is entitled to seek legal advice and prepare for litigation without publishing privileged material. The publication of such material would entail revealing its contents to the other parties to proceedings involving the State. If the State were unable to rely on legal professional privilege, its ability to defend any proceedings brought against it would be seriously compromised, with grave and damaging repercussions for the public good and public finances. This would also inevitably undermine the broader public policy objectives of securing the proper administration of justice that the privilege serves.

50. Legal professional privilege operates for the benefit of, and can ultimately only be waived by, the client, which is in this case the Government (***Gallagher v Stanley***[10]). It is also clear that the waiver cannot be inferred lightly (***Quinn v Irish Bank Resolution Corporation***[11]).

51. I understand that the Government does not seek to waive legal professional privilege in respect of the legal advice provided by the Office on the matters addressed in this Report.

52. It is entirely within the entitlement of the State that it would seek to continue to maintain privilege over this material.

53. As such, I propose to refer to the advice provided by the Office and my predecessors in general terms only, and in so doing, this Report is not to be understood as a waiver of the entitlement of the State to maintain privilege over its legal advice, in this or any other scenario.

54. It is not a question of this Government having something to hide on the issues addressed by this Report. For the reasons I will go on to explain, that is patently not the case. Rather,

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[6] [2001] IEHC 9, [2001] 2 IR 50, 65.
[7] [1997] 1 IR 558.
[8] [2007] IEHC 76, [2007] 2 IR 759.
[9] Declan McGrath and Emily Egan McGrath, ***McGrath on Evidence*** (3rd edn, Round Hall 2020) paras 10-13, 10-55.
[10] [1998] 2 IR 267, 271.
[11] [2018] IEHC 481, [46], [56].

it is a question of the ability of the State to defend itself in all present and future legal proceedings brought against it.

55. If the State's entitlement to legal professional privilege is set at nought, the State will be gravely compromised in its ability to defend itself in all future litigation and the public purse will face an untold exposure. This is a point of critical importance to all Irish Governments, past, present or future. Whilst it is a decision for Government, my own strong view is that legal professional privilege ought not to be waived in this instance, beyond what is expressly or impliedly waived by the very fact of the publication of this Report. I believe that the proper operation of Government, for generations to come, would be gravely compromised by any other outcome.

56. Before concluding this section, I should also briefly mention the constitutionally protected status of Cabinet confidentiality. Article 28.4.3° of the Constitution provides that:

> *"The confidentiality of discussions at meetings of the Government shall be respected in all circumstances save only where the High Court determines that disclosure should be made in respect of a particular matter—*
> *i. in the interests of the administration of justice by a Court, or*
> *ii. by virtue of an overriding public interest, pursuant to an application in that behalf by a tribunal appointed by the Government or a Minister of the Government on the authority of the Houses of the Oireachtas to inquire into a matter stated by them to be of public importance."*

57. This Article provides constitutional protection for the confidentiality of discussions at Cabinet which may only be displaced by determination of the High Court in accordance with the provisions of Article 28.4.3°.

58. Disclosure of Memorandums for Government, Government Decisions, appendices thereto, and the drafts of any such documents, or their contents, which would reveal the content of discussions at Cabinet violates constitutionally protected Cabinet confidentiality save where the criteria set out in Article 28.4.3° have been satisfied. I am therefore constrained in this document from describing or quoting from such documents or otherwise explaining the discussions of meetings of Government.

E. NURSING HOME CHARGES

59. In this section, I propose to trace the statutory background to the issue of controversy that has recently arisen. The history is somewhat complex and it cannot properly be understood without reference to that background.

(i) The Health Act, 1953

60. Section 54(2) of the Health Act, 1953 provides that a person who is unable to provide shelter and maintenance for themselves or their dependants is eligible for institutional assistance. For the purpose of section 54, "*institutional assistance*" means "*shelter and maintenance in a county home or similar institution*."

61. In the exercise of his powers under the Health Act, 1953 (and the earlier Health Act, 1947) the Minister for Health made the Institutional Assistance Regulations 1954 (the "***1954 Regulations***") which provided, *inter alia*, for the levying of charges on persons in receipt of institutional assistance if their income exceeded a certain threshold.

62. I understand that these charges were introduced on the basis of the (entirely rational) policy that persons in publicly funded homes should, when they could afford to do so, contribute towards their maintenance costs in the same way as persons of similar means living in the community.

63. The 1954 Regulations were the subject of a Supreme Court decision in 1976: ***In re McInerney***[12]. The judgment narrowed very significantly the grounds on which a charge could be raised for institutional assistance. It held that, where the care involved nursing supervision, activation and other para-medical services which are provided in an institutional setting, such care is beyond the range of mere "*shelter and maintenance*" and constitutes "*in-patient services*" within the meaning of section 51 of the Health Act, 1970.

64. The 1954 Regulations continued to be relied upon by Health Boards which, in some cases post-1976, raised charges for long-stay care in Health Board institutions such as County Homes and District Hospitals on the basis of these Regulations.

(ii) The Health Act, 1970

65. The Health Act, 1970 (the "***1970 Act***") introduced major reforms in the provision of healthcare in this State. In particular, it: (i) provided for the creation of Health Boards; (ii) created a system of eligibility to receive specified health services ("*in-patient services*" and "*out-patient services*", (as defined)); and (iii) empowered Health Boards to provide the said services to such persons within their functional areas. To be eligible meant that a person qualified to avail of services either without charge ("*full eligibility*") or subject to prescribed charges ("*limited eligibility*").

66. The 1970 Act and the subsequent amending legislation provided in very general terms for the services which ought to be provided and left it to the Health Boards to determine, within their budgets, the range and quality of services to be provided. The Health Boards historically made such decisions in the context of the resources available to them.

67. Over the years, the range and quality of services provided significantly increased, as did the number of persons entitled to full and limited eligibility. In 1979, the provision of health services under the 1970 Act was extended to the entire population by a widening of the definition of "*limited eligibility*". Since July 2001, persons with "*full eligibility*" has included all persons who are not less than 70 years of age and ordinarily resident in the State.[13]

[12] Unreported, Henchy J, 20 December 1976.

[13] The Health Act, 2008 introduced a means test in respect of persons over 70 years of age which was different and less restrictive to that which applied to persons under the age of 70.

68. Section 52(1) of the 1970 Act provides that Health Boards shall "*make available in-patient services for persons with full eligibility and persons with limited eligibility*." Section 51 provides that in Part IV of the 1970 Act, "*in-patient services*" means "*institutional services provided for persons while maintained in a hospital, convalescent home or home for persons suffering from physical or mental disability or in accommodation ancillary thereto*."

69. The expression "*institutional services*" is not defined in the 1970 Act but it is defined in 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*."

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

71. Pursuant to section 53(2), the Minister for Health had power, *inter alia*, to "*make regulations … providing for the imposition of charges for in-patient services in specified circumstances on persons who are not persons with full eligibility or on specified classes of such persons*". In the exercise of that power, the Minister made, *inter alia*, the Health (Charges for In-Patient Services) Regulations 1976 (the "***1976 Regulations***").

72. The 1976 Regulations provided for the levying of a charge on a person who is not a person with full eligibility in certain circumstances and conditions.

73. The decision to provide full eligibility status 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.

74. The question of long-stay charges does not seem to have been given explicit consideration at the time the decision was made.

(iii) Maintenance charges

75. Between 1976 and 9 December 2004, Health Boards imposed charges on persons with limited eligibility and persons with full eligibility pursuant to the 1976 Regulations. The imposition of such charges on persons with full eligibility ceased on 9 December 2004 on the advice of the then Attorney General that the imposition of charges on persons who had full eligibility for (long stay) in-patient services pursuant to the 1970 Act was *ultra vires* the Health Boards.

76. It is important that I explain what this legal concept means. The "*ultra vires*" doctrine is derived from a Latin phrase meaning "*beyond the powers*". Essentially, the Attorney General took the view that the imposition of such charges was beyond the legal powers of the Health Boards as the 1976 Regulations were inconsistent with the 1970 Act.

77. This simply means that the Government ought to have introduced the policy set forth in the 1976 Regulations in an Act of the Oireachtas for it to be lawful. It does not mean that

the Government *could not* have imposed such charges lawfully. Rather, it means that Government elected for the wrong legal method to achieve a permissible outcome.

78. In a line of cases considering this legal question, the Courts have occasionally taken the view that a statute is unconstitutional, on the basis that it impermissibly delegates, to a Minister, the entitlement to determine principles and policies in a manner which contravenes the constitutional order.[14]

79. In this regard, Article 15.2.1° states that "*The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State*." This provision gives rise to the so-called "non-delegation" line of authority that commences with ***Cityview Press Ltd. v. An Chomhairle Oiliúna (AnCO)***.[15] There, the plaintiff company challenged as an unconstitutional delegation of legislative power, the Industrial Training Act, 1967 which empowered AnCO to make a levy order, and impose the levy on businesses in a particular industry and use the levy for the training of persons in that industry. The Supreme Court rejected the challenge here, noting that the provision of powers by legislation to a Minister or other subordinate body was a commonplace feature of legislation, and was obviously attractive, given the "*complex, intricate and ever-changing situations which confront both the Legislature and the Executive in a modern State*." Nonetheless, the Supreme Court stated that the Courts retained ultimate authority to ensure "*that the exclusive authority of the National Parliament in the field of law-making is not eroded by a delegation of power neither contemplated nor permitted by the Constitution*." The test to be applied in establishing whether the line had been crossed was "*whether what is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself*."

80. However, more frequently, the Courts have regarded the exercise of powers by a Minister to promulgate Regulations that are contrary to the "*principles and policies*" specified by statute as *ultra vires* (or "beyond the powers") of the Minister.

81. Thus, to give a different, but relevant example, In ***Cooke v. Walsh***[16], the infant plaintiff was seriously injured in a road traffic accident, and would ordinarily have been entitled, as a "*fully eligible*" person, to free medical care under section 45 of the 1970 Act. However, the Minister for Health had, by way of Regulation 6(3) of the Health Services Regulations 1971, excluded persons from such services, who had suffered personal injuries as a result of a road accident unless it was established that the person involved was not entitled to recover damages or compensation in respect of his injuries.

82. The Regulations were made pursuant to section 72(2) of the Act, which stated that "*Regulations made under this section may provide for any service under this Act being made available only to a particular class of the persons who have eligibility for that service*."

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[14] ***Laurentiu v. Minister for Justice*** [1999] 4 IR 26; [2000] 1 ILRM 1 is a good example of such a finding.
[15] [1980] IR 381.
[16] [1984] IR 710.

83. The Supreme Court felt that if section 72 permitted the Minister to remove the obligation placed on Health Boards under section 45, then it would constitute an unlawful delegation of statutory powers. However, given the presumption of constitutionality which operates when legislation is being reviewed, the Supreme Court decided that section 72(2) was to be interpreted in a fashion that suggested that the Oireachtas did *not* intend to unconstitutionally delegate its law-making function to the Minister, and that accordingly, section 72 only authorised the exclusions that the Act itself contemplated, in respect of persons with limited eligibility only.

84. Accordingly, on this interpretation, Regulation 6(3) of the 1971 Regulations was itself void and *ultra vires* the true meaning and purpose of the Act.

85. The essential point in the case of nursing home charges, therefore, is that it would of course have been lawful for the substance of the 1976 Regulations to have been contained in primary legislation.

86. It appears that the 1976 Regulations were relied upon by the Health Boards to raise charges for long-stay care (*i.e.*, where the length of stay exceeded the prescribed limit of 90 days (until amended by the Health (In-Patient Charges) Regulations, 1987 to 30 days)) in Health Board institutions such as County Homes, District Hospitals as well as Acute Hospitals.

87. As the charges for long stay in-patient services were pursuant to Regulations made under section 53 of the 1970 Act, Health Boards were required to exempt persons with full eligibility (*i.e.*, medical card holders) from the charges. The majority of persons in long-stay Health Board institutions would, if living in the community, have qualified 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).

88. In order to maintain the general principle that such persons should contribute to the cost of their maintenance, it was traditionally the practice of Health Boards either: (i) to charge patients under the 1954 Regulations, or (ii) 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 were provided for them and so withdraw full eligibility status and subsequently charge the patients.

89. The latter practice was purportedly authorised in 1976 by Circular 7/76 from the Department of Health to the Chief Executive Officers of Health Boards.

(iv) Private nursing home fees

90. As noted above, the 1970 Act imposed a duty on Health Boards to make in-patient services (including nursing home care) available free of charge to persons with full eligibility. *Prima facie*, persons with full eligibility within the meaning of the 1970 Act enjoyed a corresponding right to the receipt of the said services.

91. During the period from 1990 (approximately) until their dissolution on 1 January 2005, Health Boards operated two different systems for the provision of nursing home care in

the State. The first system entailed the provision of care to persons in public hospitals and public nursing homes; the second system entailed the provision of care to person in private nursing homes.

92. When a bed in a public hospital or public nursing home was available, the question of whether a person was to be charged for obtaining in-patient services (and, if so, the amount of such charges) was determined (or, more accurately, purportedly determined) under the framework of the Health Acts 1947 – 1970, as amended, and the Regulations made thereunder.

93. In broad terms, that entailed a consideration of a person's means. In general, persons with full eligibility who received in-patient services in a public hospital or public nursing home were subjected to the unlawful maintenance charges referred to above.

94. If a bed in a public hospital or public nursing home was not available, the person was only able to apply for a subvention towards the cost of his or her care in a private nursing home and the question of his or her entitlement to a subvention (and, if so, the amount thereof) was determined under a different statutory framework, namely the Health (Nursing Homes) Act, 1990 and the Regulations made thereunder. In broad terms, that question entailed a consideration of a person's means and assets.

(v) The Health (Amendment) (No. 2) Bill, 2004

95. When the Attorney General advised that the maintenance charges were *ultra vires* the Health Boards, the State faced a very serious financial crisis. At that time, it was estimated that the total amount of payments in respect of maintenance charges which were received by the State during the previous 28 years was approximately €1.15 billion and, within the previous six years alone, the total amount was approximately €500 million. This compared with the entire 2005 capital allocation for the health services of €586 million.

96. Against that stark backdrop, the Houses of the Oireachtas passed the Health (Amendment) (No. 2) Bill 2004. That Bill, in provisions which applied retrospectively, sought to validate the maintenance charges which Health Boards had imposed, without what was by then accepted as having had any legal basis at the time that they were invoked.

97. In provisions that applied prospectively, the Bill also sought to provide for the imposition of charges in certain circumstances for in-patient services provided in the future insofar as they consisted of the maintenance of a person in a home or hospital by a Health Board subject to specified exceptions.

98. In December 2004, the President elected to refer the Health (Amendment) (No. 2) Bill 2004 to the Supreme Court pursuant to Article 26 of the Constitution for a ruling on its constitutionality. This is a rarely utilised but important power of the President. It was appropriately invoked on this occasion having regard to the significant contemporaneous debate about the legality of the legislation.

(vi) *In the matter of Article 26 of the Constitution and in the matter of the Health (Amendment) (No. 2) Bill 2004*[17]

99. In its judgment delivered on 16 February 2005, the Supreme Court held that the Bill was repugnant to the provisions of the Constitution. The Supreme Court held, *inter alia*:

(a) that the retrospective provisions of the Bill which nullified the rights of persons with full eligibility to recover monies for charges unlawfully imposed in respect of certain in-patient services were repugnant to the Constitution;

(b) that the right to recover monies for the charges thus imposed was a property right of the persons concerned which is protected by Articles 43 and 40.3.2° of the Constitution;

(c) that the prospective provisions in the Bill which required the imposition of charges for in-patient services to be provided in the future were compatible with the Constitution;

(d) that it could not be an inherent characteristic of any right to such services that they be provided free regardless of the means of those receiving them;

(e) that a requirement to pay charges of the nature provided for in the Bill could not be considered as an infringement of the rights of the person under Article 40.3 of the Constitution or, as was also asserted by counsel an infringement of "*the right to life, to bodily integrity and to the means which are necessary and suitable for the proper development of life; these are primarily food, clothing, shelter, rest, medical care, and finally the necessary social services*."

(vii) Subsequent legislative response

100. In light of the judgment of the Supreme Court on the Article 26 Reference, enactment of remedial legislation was necessary. The Oireachtas passed the Health (Amendment) Act 2005 which provided for the levying charges on all residents of public long stay facilities who were provided with in-patient services (beyond a 30 day threshold over a rolling 12 month period) irrespective of entitlement to a medical card or full eligibility.

101. It is important therefore to emphasise, that any continuing controversy in relation to nursing home charges, necessarily pre-dates 2005, and it solely concerns persons who were resident in nursing homes prior to that time.

102. Weekly charges were thereafter set by Regulation and restricted to a maximum of 80% of the non-contributory State pension with lower rates applying to those in receipt of part time nursing care or where income was less than the non-contributory state pension.

[17] [2005] 1 IR 105.

103. Those provisions have since been replaced by the introduction of Residential Support Service Maintenance and Accommodation Contributions now provided for under section 67C(2) of the Health Act, 1970 and Regulations made thereunder.

104. That section was inserted by section 19 of the Health (Amendment) Act 2013 and was further amended by section 43 of the Health (Miscellaneous Provisions) Act 2014.

105. To this end, in 2009 the Nursing Home Support Scheme, better known as the *Fair Deal* scheme[18] was introduced. Many readers will have come across it in their own lives if a relative or loved one has in recent years considered entering or has entered a nursing home. In essence, it provides a regime for the financial contribution by persons with means towards their own nursing home care, which the Supreme Court held in the Article 26 Reference was, in principle, entirely permissible.[19]

(viii) Health Repayment Scheme

106. Arising from the historically unlawful charging of residents in public nursing homes, the Health (Repayment Scheme) Act 2006 provided the legal framework to repay recoverable health charges for publicly funded long term care.

107. Section 2 of the Act defined recoverable health charges as those charges that were imposed for in-patient services under the 1976 Regulations or contributions for in-patient services under the 1954 Regulations.

108. The scheme was widely publicised and has dealt with some 35,466 claims and has made repayments in the order of some €453.354 million. 21,880 applicants received an offer whereas a further 13,586 applications were not accepted. Applicants could appeal the decision. The total number of payments made under the scheme up to the end of 2022 was 20,303. The total cost of the scheme was €485.945 million including administration costs of €32.591 million. KPMG assisted the Department of Health in the operation of the scheme having regard to its complexity and scale.

109. It is to be noted that the scheme dealt with claims by persons with full eligibility for in-patient services in public institutions. It did not accept claims from persons who were claiming for in-patient services in private institutions *i.e.*, claims for recovery of charges for private nursing home care. The State never accepted that there was a right to recovery of such charges.

(ix) Litigation relating to the charging for in-patient services

[18] See: *https://www2.hse.ie/services/schemes-allowances/fair-deal-scheme/about/*

[19] The application form is available from the HSE which explains that the Nursing Homes Support Scheme (to give the "Fair Deal" scheme its more formal title) provides financial support towards the cost of long-term nursing home care. Under the scheme, people who need nursing home care have their income and assets assessed, and then make a contribution towards the cost of their care based on their assessment. The HSE will pay the rest, if any, of the costs of their care in designated public and approved private nursing homes covered under the scheme. The application form is available for download at: *https://assets.hse.ie/media/documents/Fair_Deal_-_nursing_home_support_application_form.pdf*

110. Following the judgment of the Supreme Court in the Article 26 Reference, a significant number of Court cases arising out of the failure to provide in-patient services without charge were brought against the Health Boards[20], the Minister for Health and Children[21], Ireland and the Attorney General.

111. Most of the "*public cases*" – cases relating to the payment of maintenance charges by persons who had full eligibility under the 1970 Act and received in-patient services in public institutions – were resolved on the basis that the plaintiffs pursued their claims pursuant to the provisions of the Health (Repayment Scheme) Act 2006. In addition, a number of other public cases were settled. This was clearly in accordance with Government policy and no controversy can in truth arise out of it.

112. As regards the "*private cases*" – cases relating to the payment of nursing home fees by persons who had full eligibility under the 1970 Act and received in-patient services in private institutions – none of those cases have been resolved on the basis of the Health (Repayment Scheme) Act, 2006 since claims for repayment of private nursing home fees do not fall within the ambit of that Act.

113. Far from there being something secret about the fact that the "*public cases*" and the "*private cases*" were treated differently, it was in fact clear and transparent that the Health (Repayment Scheme) Act 2006 provided a redress scheme for the former cohort but not the latter.

114. Although a number of the private cases have been settled, most of these cases have not been settled.

115. A total of 516 long stay and related legal cases were initiated over the period 2005 to 2013. 289 were in respect of private nursing home care with a further 37 in respect of a mix of public and private care. The balance were in respect of public nursing home care but as the majority of these were instituted before the commencement of the Health Repayments Scheme they have since been resolved under the rubric of that scheme and the majority of the remainder have been settled. The remaining cases have been largely dormant.

(x) Legal advice and management strategy

116. In view of the right to legal privilege (which is not being waived) it is not proposed to furnish all of the detail as to the advices which have been provided by my predecessors (with the assistance of counsel) in respect of this litigation.

117. However in general terms, whilst there was always some degree of risk that a case involving a claim arising out of the fees incurred by a resident in a private nursing home could succeed, there is clear and unambiguous evidence on the files that I have reviewed

[20] The Health Boards were replaced by the Health Services Executive from 1 January 2005 by virtue of the provisions of the Health Act, 2004.

[21] At that time, the Minister for Health also had responsibility for Children. That position altered from 2011 when responsibility for Children was elevated to a senior Cabinet minister other than the Minister for Health.

that there was a *bona fide* and viable legal defence to those cases. In this regard, the following might be observed:

(a) At no stage did the Oireachtas ever legislate (in the 1970 Act or otherwise) to make the provision of private nursing home care free to all persons in nursing homes of their own choice.

(b) Nor has the Oireachtas ever voted to provide the very significant funding or raise the necessary taxation to support such a significant extension of existing entitlements.

(c) On the contrary, in a series of Bills starting with the Health (Amendment) (No.2) Bill 2004 the Oireachtas has (in the prospective provisions referred to above) voted to provide for charging for the provision of nursing home care including for persons with full eligibility.

(d) Moreover, the Oireachtas voted to pass the Nursing Home Support Scheme Act, 2009 specifically dealing with the provision of charging and contributing to the provision of private nursing home care.

(e) The provision of nursing home care is always subject to the necessary resources being available and the reality is that the State always has limited resources to fund health services along with all the other necessary services it has to provide for the benefit of its citizens. At certain times, 30 or 40 years ago there may simply have been no public nursing home beds available. That position would not have entitled any citizen who procured a private nursing home bed to demand that the State pay for it. In a very similar way, a citizen can, and frequently will, seek to avail of private education or private medical care but there is no obvious legal basis by which they can retrospectively compel the State to discharge the cost of it.

(f) The appropriate remedy for a person seeking to maintain a claim to the provision of gratuitous private nursing home care (even if they were to succeed with such a claim) is *Mandamus*, a traditional public law remedy issued as a command by the High Court ordering a person or body to perform a public or statutory duty.

(g) However, it is an entirely different thing to assert that damages or compensation ought to be payable. To this end, the decision of the Supreme Court in ***Glencar Exploration plc and Andaman Resources plc v Mayo County Council***[22] makes it clear that it is extremely difficult to obtain damages (as distinct from a public law remedy like *Mandamus*) against a public body.

(h) Most of the cases were probably "*statute barred*". In other words, they were brought beyond the permissible legal limitation period within which such cases could be brought. In this type of action, six years is the normal limitation period, but many of the potential claims dated back far beyond that.

[22] [2002] 1 IR 84.

(i) Certain of the Plaintiffs had no "*locus standi*" or standing to pursue their claims, in circumstances where the claim was being advanced on behalf of a person long since deceased, whose estate was fully administered. At law, personal representatives of a deceased (executors, executrixes or administrators) may institute proceedings on behalf of the estate of the deceased, but it is legally much more complicated for the estate to sue beyond the point in time by which the estate is fully administered.

118. As against the fact that the State had multiple grounds of viable legal defence, the State also had to bear in mind that the potential number of claims and claimants for private nursing home cases was very large. It is understood that the Department of Health calculated (in 2010 figures) that, if the State Defendants did not succeed in defeating claims in the private cases, there would be a very substantial potential maximum exposure on the part of the State, in excess of €7 billion.

119. Against that backdrop, the legal strategy was, understandably, one of caution. The consequences of the State losing a "test case" would have been very serious.

120. The initial strategy was to find a suitable "test case" to contest and that is still referred to on the file as late as 2014. But when a large volume of cases involving private care did not materialise, matters evolved to a point where a significant number of "*private care*" cases were ultimately settled where it was possible to reach agreement with the plaintiff and it was deemed appropriate to do so. Some cases were simply not progressed by the plaintiffs. In a number of cases, Notices of Discontinuance were served (a formal notice under the Rules of the Superior Courts whereby the plaintiff elects to discontinue litigation). The practical reasons why this occurred in many cases will be obvious.

121. The litigation strategy recommended by my predecessors and the Office, informed in part by the opinion of external counsel, reflected a justifiable and reasonable approach to the claims brought against the State in relation to private nursing home charges. In summary, the risks to the State of contesting the litigation were such that it was prudent to settle with the plaintiffs. Despite these risks, it was never clear or obvious that the plaintiffs would be successful in their claims.

122. In effect, the argument made by the plaintiffs was that they were entitled to avail of care in a private nursing home of their choice free of charge and at the expense of the State. It was claimed that this entitlement was not subject to any qualification or exception, irrespective of the means of the plaintiffs.

123. This always had the appearance of an ambitious argument given that there had never been any deliberate policy on the part of any Government to grant access to care in private nursing homes on that basis.

124. On the contrary, prior to the enactment of the Nursing Homes Support Scheme Act, 2009, there was never any legislation passed by the Oireachtas to provide state-funded care in private nursing homes of a person's choice or to make any adjustments to entitlements to other healthcare services to free up resources to pay for such care. When the Oireachtas did eventually legislate for such care, the supports were means tested and required a financial contribution from the patient.

125. The enactment of the Health (Amendment) Act 2014 which provided for long stay residential services for those with physical and mental difficulties who required such care similarly reinforces the conclusion that no such entitlement existed prior to its enactment.

126. In those circumstances, it is by no means clear that these claims would have been successful and the litigation strategy proposed in the advice of the Office and my predecessors reflected that.

127. In summary, I am satisfied that the legal advice furnished by the Office in respect of the litigation concerning charges levied for private nursing home care was sound, accurate and appropriate.

128. The implementation of that advice, and policy choices arising therefrom are not matters within the control of the Office and were ultimately matters for the Department of Health.

129. Yet, this notwithstanding, it is clear to me that the Department acted prudently in settling a small number of claims involving care in private nursing homes rather than risking an adverse outcome in a test case, which could have provoked many more historic cases, all for the account of the taxpayer.

F. DISABLED PERSONS MAINTENANCE ALLOWANCE

130. Disabled Persons Maintenance Allowance ("**DPMA**") constituted a weekly allowance paid by Health Boards (from 1 January 2005, the HSE) to persons who were unable to work by reason of a disability. Responsibility for the payment and administration of this allowance shifted to the Department of Social Protection (then the Department of Social Welfare) in 1996, on the commencement of the Social Welfare Act, 1996.

131. The DPMA allowance was discontinued and replaced by Disability Allowance on foot of amendment to the Social Welfare (Consolidation) Act, 1993, effected by the Social Welfare Act, 1996.

132. The issue broached in recent media coverage and the subject of settlement in two sets of legal proceedings referred to in that coverage[23] was whether the Minister (initially the Minister for Health, subsequently the Minister for Social Welfare) had the *vires* (legal entitlement or power) to withhold payment of DPMA or Disability Allowance, or pay a reduced rate of same where persons, otherwise eligible for the payment, were in full time residential care in an institution with the costs of such care being met in whole or in part by the HSE (or its predecessor, the Health Boards).

[23] I do not see how it is in any way appropriate to name individual plaintiffs in this Report, in circumstances where their litigation was compromised, in a manner to their satisfaction, on a confidential basis. The fact that their names may have been referred to or published by others is wholly insufficient to justify me in emulating that approach.

133. It is important to emphasise that this issue, insofar as it now arises at all, is purely historic in nature. In this regard, I summarise the position that is set out in more detail below as follows:

(a) The withholding of payment or the payment of reduced rate was phased out over a period of time. Persons with existing entitlement to payment of Disability Allowance who went into hospital or institutional care after 1 August 1999 retained their entitlement to payment of Disability Allowance and same was paid in full to them.

(b) Persons who spent two or three consecutive days a week outside institutional care, from June 1997, had been paid at half rate Disability Allowance from June 1997. That increased to full rate from May 2000.

(c) Persons resident in institutions and not in receipt of Disability Allowance, because their maintenance was being met in whole or part by the HSE were paid a Disability Allowance personal expenses rate of €35 per week, from June 2005. This personal expenses rate was increased to full rate Disability Allowance from 3 January 2007.

(d) By 3 January 2007, all persons in full time residential care entitled to Disability Allowance were paid at full rate, regardless of whether they were maintained by the HSE or not.

134. Therefore, the absolute height of the issue that has recently emerged is the question of whether, the very historic deprivation of full (or any) DPMA / Disability Allowance from a small cohort of claimants was *intra vires* the Minister, and if so, what redress that cohort are entitled to.

135. Again, it is important to understand that it would at all times have been open to the Minister to make the rational policy choice that persons living in residential care (provided at the expense of the State) did not also require financial support in the same way that persons with disability living in the community did.

(i) Legislative History

136. The legislative history of the statutes and regulations underpinning the manner in which DPMA and Disability Allowance was paid, to include non-payment to those in residential care is necessarily complex, but I set it out here.

137. Section 50 of the Health Act, 1953 (and section 5 of the Health Act, 1947), allowed the Minister for Health to make Regulations regarding DPMA. There appear to have been 7 sets of regulations made between 1954 and 1967 under this power. These Regulations provided that DPMA were only payable where the person *"is not maintained in an institution by or at the expense of a local authority*."

138. On the repeal of section 50 of the 1953 Act by the 1970 Act, the previous Regulations made under the 1953 Act were maintained in force by virtue of section 72(3) of the 1970 Act. Section 69 of the 1970 Act continued the entitlement to DPMA for disabled persons over 16 years.

139. Separate to the Regulations made under the 1953 Act and retained in force by Section 72 of the 1970 Act, Section 69(2) of the 1970 Act afforded a regulation-making power to the Minister for Health, with the consent of the Minister for Finance, to regulate the payment by the Health Boards of DPMA to those over the age of 16 years.

140. I understand that 8 sets of such DPMA Regulations were made between 1981 and 1996. These Regulations appear to have had the effect of limiting provision of DPMA only to those not maintained in a residential setting and were made pursuant to the Minister for Health's regulation-making powers under Section 72(1) (general regulation making power), and Section 72(3) of the 1970 Act (the provision 'saving' Regulations made under the 1953 Act).

141. Section 72 regulations in relation to DPMA required the consent of the Minister for Finance, pursuant to the provisions of section 69(2) of the 1970 Act.

142. Section 69 of the Health Act 1970 was repealed by Section 15(5) of the Social Welfare Act, 1996.

143. Section 13 of the Social Welfare Act, 1996 then provided for Disability Allowance to effectively replace DPMA. Section 13 of the Social Welfare Act, 1996 amended Part III of the Social Welfare (Consolidation) Act, 1993, by inserting a new Chapter 12 entitled "*Disability Allowance*";

144. Section 191B of the Social Welfare (Consolidation) Act, 1993 (as inserted by the Social Welfare Act, 1996) provided for the conditions of entitlement for Disability Allowance, including restrictions regarding those resident in institutions. A number of the provisions discussed hereunder constitute amendments to this new, primary legislative provision for Disability Allowance under Section 191B of the Social Welfare (Consolidation) Act 1993. This central provision for Disability Allowance in Section 191B of the 1993 Act has – with the changes detailed below – been provided for again in Section 210 of the current Social Welfare Consolidation Act 2005.

145. Section 191B(3) of the Social Welfare (Consolidation) Act, 1993 then provided - in primary legislation – that a person was not entitled to receive Disability Allowance for any period during which that person is resident in an institution, except for temporary medical treatment not exceeding 13 weeks.

146. Section 22(1) of the Social Welfare Act, 1997 and S.I. No. 251 of 1997 provided that Disability Allowance was to be paid at half rate to those in part-time residential care (2-3 days resident elsewhere, for a period of at least 4 weeks) and where a person comes home for an extended holiday period.

147. Section 20 of the Social Welfare Act, 1999 amended Section 191B of the Social Welfare (Consolidation) Act 1993. Section 20 provided that *existing recipients* of Disability Allowance could retain their entitlement where they subsequently enter full-time residential care on or after 1 August 1999. Importantly, this excluded those in residential care already who had lost their entitlement to Disability Allowance.

148. Section 21 of the Social Welfare Act, 2000 then provided that people in part-time residential care who had been entitled to half-rate Disability Allowance since April 1997, become entitled to payment at the full-rate.

149. As part of Budget 2005, Section 8 of the Social Welfare and Pensions Act, 2005 introduced a new "*Disability Allowance Personal Expenses Rate*" payment of €35 per week. This €35 payment was provided for those who would have otherwise been excluded from a Disability Allowance payment on account of their being in a residential institution. This €35 payment therefore applied to those who had not been in receipt of Disability Allowance before 1 August 1999, and who therefore were not captured by the above Section 20 of the Social Welfare Act 1999.

150. The question of whether some element of back-pay ought to have been paid to those who were now belatedly receiving the €35 per week was raised in the Dáil on Wednesday, 11 May 2005 in a question from Deputy Olivia Mitchell to the then Minister for Social and Family Affairs, Seamus Brennan. The Minister explained as follows:

> "*Responsibility for the disabled person's maintenance allowance, DPMA, scheme was transferred from the Department of Health and Children and the health boards to the Department of Social and Family Affairs in October 1996. On the transfer of the scheme, the existing qualifying conditions were retained and the scheme was renamed "disability allowance". This position was provided for in Part IV of the Social Welfare Act 1996.*
>
> *One of the qualifying conditions applying to the former DPMA scheme was that the payment could not be made to people who were in residential care where the cost of the person's maintenance was met in whole or in part by a health board. Since 1999, the restrictions on payment to persons in residential care have been progressively relaxed, as reflected in successive amendments to the Act. From August 1999, existing disability allowance recipients living at home can retain their entitlement where they subsequently go into hospital or residential care.*
>
> *A wide-ranging review of illness and disability payment schemes completed by my Department in September 2003 recommended the removal of the residential care disqualification for disability allowance purposes. The working group which oversaw the review recognised that the removal would have a range of implications, and that, in the absence of reliable data on the numbers involved and the actual funding arrangements currently in place, it was not possible to assess fully the likely impact or cost of such a move.*
>
> *Budget 2003 provided for the takeover by my Department of the discretionary "pocket money" allowances paid to people with disabilities in residential care who are not entitled to disability allowance and for the standardisation of the level of these allowances. My Department then undertook an information-gathering process with the health boards with a view to arranging for the transfer of responsibility for the payment of these allowances and of the funds involved.*

In budget 2005, I announced that, as an interim measure, a payment of €35 per week would be payable to the persons with disabilities who are affected by the current restriction, with effect from June 2005. This development was provided for in the Social Welfare and Pensions Act 2005.

There are a number of practical and administrative issues to be resolved with the Department of Health and Children, including the question of the appropriate contribution to be made by residents of institutions towards care and maintenance. It is my intention that the outstanding issues will be progressed as a matter of urgency. Payments of disability allowance were at all times made in accordance with the relevant legislative provisions so the issue of repayments does not arise in this instance."[24]

151. This answer provided by the Minister to Dáil Éireann is revealing as we review it almost 18 years later. It discloses that it was a departmental review back in 2003 that recommended the removal of the residential care disqualification for disability allowance purposes.

152. Whilst it took some time for that recommendation to be fully implemented, it did occur. As part of Budget 2007, Section 11 of the Social Welfare Act, 2006 repealed Sections 210(3)-(7) of the Social Welfare (Consolidation) Act, 2005, thereby repealing the restrictions that then limited the entitlement to receipt of Disability Allowance while resident in an institution. Accordingly, the repeal of Sections 210(3)-(7) of the Social Welfare (Consolidation) Act 2005 removed the restrictions on Disability Allowance for those in residential settings. These changes took effect on 3 January 2007.

(ii) Legal Challenge to non-payment of DPMA / Disability Allowance

153. The first indication of a challenge to the non-payment of DPMA to persons being maintained in an institution was the service in October 2006 of High Court plenary proceedings against the HSE, the Minister for Health, the Minister for Social Protection, Ireland and the Attorney General. By then, as we have seen, the plans to rectify the situation were already very far advanced.

154. As with the earlier section of this Report that addressed nursing home charges, in view of the entitlement of the State to legal professional privilege (which is not being waived) it is not proposed to enter into any significant detail as to the advices which have been provided by my predecessors (with the assistance of counsel) in respect of this litigation.

155. However in very general terms, it was considered that there was a frailty for the period from 1983 to 1996, on the basis that the Health Boards lacked power to elect not to pay DPMA under section 69 of the 1970, Act, and that Regulations made under the 1970 Act authorising non-payment were *ultra vires*. In this regard, I have closely reviewed an Opinion from a leading Senior Counsel dated 24 October 2007 that was pessimistic about the prospects of successfully defending the proceedings that had commenced in 2006. However, whatever about the period between 1983 and 1996, the Opinion noted that no

[24] See the Oireachtas record at: *https://www.oireachtas.ie/en/debates/question/2005-05-11/166/*

claim was even advanced on behalf of the Plaintiff for the period between 1996 and 1999, where the non-payment did have a statutory basis in Section 191B of the Social Welfare (Consolidation) Act, 1993 (as inserted by the Social Welfare Act, 1996). The Opinion also identified that there was an arguable defence to be made in respect of the period between 1999 and 2007, for which period the legal position had changed once again by virtue of Section 20 of the Social Welfare Act, 1999, which amended Section 191B of the Social Welfare (Consolidation) Act 1993.

156. Thus, it ought to be emphasised that the only temporal period that the State's legal advice was particularly gloomy about was the period between 1983 and 1996, a period which at this point, ended some 27 years ago.

157. In summary, the method of implementing policy, by regulation under the 1970 Act was regarded as being *ultra vires* the provisions of section 69 of the 1970 Act in that it contradicted the policy position contained in that section, which imposed a mandatory requirement on the Health Boards that they "*shall*" provide for "*the payment of maintenance allowances to disabled persons*". Based on the decision in ***Cooke v. Walsh*** (referred to above) and a subsequent decision of Barron J in the High Court in 1996[25], there was good reason for the State to be concerned about its prospects of successfully defending this litigation, at least insofar as the period between 1983 and 1996 was concerned.

158. It is long established that legislation, whether statute or statutory instrument, retains validity until set aside by court order. This does not mean that once an organ of the State knows it is acting *ultra vires* it can continue to do so. It cannot. But such an ongoing *ultra vires* issue did not arise in this case.

159. In the case of these proceedings the *ultra vires* issue related to a period predating the proceedings, with Disability Allowance being paid to all eligible persons, and not deducted because they were in institutional care from January 2007 onwards.

160. By the time legal advice was taken in relation to this litigation, the issue was purely historic in nature and it was deemed prudent to move to settle the case, which was ultimately compromised in November 2008.[26]

161. A second set of proceedings on this issue was instituted by another plaintiff in 2009 and served upon the State in July 2010. Arguable grounds for defence were identified and pleaded but the case was ultimately compromised in April 2014. Here, the views of counsel were more nuanced than those in the predecessor case in 2008. They considered that an argument of "*change of position*" or that it would be inequitable to require restitution, grounded on the basis of the decision in ***Murphy v Attorney General***[27], could be pursued. These were the only two cases pursued to settlement in relation to this issue.

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[25] ***O'Connell v Ireland, the Attorney General & ors*** [1996] 2 IR 522.

[26] The theoretical maximum exposure to the State of a redress scheme on this issue was difficult to calculate for many reasons, but in 2008, estimates ranged from 4,000 to 10,000 persons, giving a total potential liability for the Department of Social Protection and the HSE of between €233 million and €584 million.

[27] [1982] IR 241.

162. As indicated above, I understand that the policy intent behind the non-payment of DPMA and Disability Allowance to persons in state residential care was that there was a clear and logical distinction between the financial needs of those living in the community in their own homes and those living in a State-provided residential care environment.

163. It is important to emphasise that the policy was itself an entirely reasonable one, with a rational basis subtending it. Had it been given effect to by primary legislation, it would have been a legitimate exercise of policy making function, with no irrationality, unconstitutionality or illegitimate discrimination. Had the Government adverted to the potential legal infirmity in the Regulations, at a time when it wished to continue to exclude the benefit for those in State-run residential care, it would have been possible for it to have passed primary legislation that would have implemented precisely the same policy in a form that was legally sound. In effect, it did exactly this in 1996.

164. It is noteworthy that an analogous policy approach, as regards Domiciliary Care Allowance, to avoid the potential duplication of maintenance of an eligible child, was recently upheld by the Supreme Court (and the lower courts appealed from) in the case of ***Donnelly v Minister for Social Protection***.[28]

165. But as we have seen, the Government here went a different direction, and ultimately elected to remove the restriction on claiming Disability Allowance that previously pertained to those in residential care settings. That was a more generous approach to have taken of course, and it was of course entirely legitimate from a policy perspective for Government to, in light of the strong public finances at that time, take this approach.

166. The criticism that has recently been advanced in the public domain is that the State suppressed the entitlements of claimants by engaging in confidential settlements. The corollary to this proposition is that the State was actively required, not just to fix a problem, which it clearly did, but provide a retrospective redress scheme.

167. This is not correct, for a number of reasons:

(a) It is simply not the case that a finding that Regulations are *ultra vires* carries with it a legal obligation to compensate those who, but for the Regulations, would have obtained a benefit that the Regulations deprived them of;

(b) Had the Regulations been struck down as *ultra vires*, it does not follow that a compensation remedy would have followed;

(c) In the proceedings that were settled in 2008, compensation was sought. These were plenary proceedings rather than judicial review proceedings. By that time there was no need to seek to quash the Regulations as they had been repealed. However, there was at all times, a limitation defence open to the State in many of the cases that could theoretically have been brought. Under section 11(1)(e) of the Statute of Limitations, 1957, actions for the recovery of money due by virtue of an enactment must be

[28] [2022] IESC 31, [2022] 2 ILRM 185.

brought within six years of the date upon which the cause of action accrued. Some persons who would have been entitled to payment of DPMA or Disability Allowance would have found their claims statute-barred. In particular, in the case of any persons who have died more than six years ago and where no proceedings had been commenced, the Statute of Limitations would have barred any such actions. In the case of persons who were still living and who were not under a mental disability, claims could only be maintained in respect of the last six years.

(d) The fact that a law is found to be invalid, whether because it is secondary legislation that is *ultra vires* the parent statute or, in the case of primary legislation, repugnant to the Constitution, does not mean that everything that occurred on foot of the legal presumption that the law in question was valid is somehow capable of being unscrambled. Thus, in ***A. v The Governor of Arbour Hill Prison***[29] the Supreme Court held that the fact that it had a short time previously declared in ***C.C. v Ireland & Ors***[30] that section 1(1) of the Criminal Law (Amendment) Act 1935 was inconsistent with the Constitution did not entitle those previously convicted of offences under that section to immediate release on Article 40 applications challenging the legality of their detention. The constitutional invalidity of the section under which they were charged and convicted did not operate in a simplistic way to render their continuing detention unlawful.[31]

168. At the end of the day, it is certainly the case that the State was incentivised to settle the proceedings that were compromised in 2008 and the subsequent claim that was compromised in 2014. There was a significant legal weakness associated with the State's legal position. As against that, the State had no positive legal obligation to provide redress, and any claims that might now be brought, are very historic indeed, if they are not all statute barred.

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[29] [2006] IESC 45, [2006] 4 IR 88.

[30] [2006] IESC 33; [2006] 2 ILRM 161.

[31] Similarly, the decision of the Supreme Court in ***Wicklow County Council & Others v Wicklow County Manager*** [2010] IESC 49, [2011] 1 IR 152, in considering the position of a County Manager who considers or is advised that a motion under section 4 of the County and City Management (Amendment) Act 1955 is invalid, makes the point that pending a determination of invalidity, people are obliged to act in accordance with the presumption of legal validity. O'Donnell J said:

> *"The difficulty is that invalidity is a relative and not an absolute concept, and is furthermore dependent upon court determination - something which is by definition not available to a County Manager when he or she receives a s.4 motion. As Lord Radcliffe perceptively observed, in Smith v East Elloe Rural District Council [1956] AC 736 at 769 an Act 'bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders'. Similarly Craig, Administrative Law (1993) page 390 observes, 'It is difficult to see how, if there was no challenge … it would be possible to say that the decision was ultra vires at all'. The position has now been reached where it may be said that an invalid act is an act which a Court will declare to be invalid. As Professor Wade observed '… the truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances' and, it might be added, at the right time. Thus it has been observed by Lewis, Judicial Remedies in Public Law 3rd Edition page 187; 'nullifying is a description of what courts do when invalidity is properly established and the courts consider it appropriate to intervene'".*

G. CONCLUSION ON THE LEGAL ADVICE PROVIDED BY THE OFFICE

169. On the basis of my review over the course of the past week, there is and was nothing inappropriate in the advice provided by the Office and my predecessors to previous Governments on these matters.

170. As regards the legal cases that were initiated, there is no question of any plaintiff being deprived of their legal entitlements in their action against the State.

171. The advice provided by the Office and my predecessors at all times recommended a course of action in respect of each individual case that was lawful and consistent with the State's rights and obligations as a litigant and its role in safeguarding public monies.

172. The advice at all times accurately reflected the legal position as it then stood and had due regard for the merits of the State's defence in each individual case and the legal risks involved in litigation, which is an inherently uncertain process.

173. The final decision on how to approach proceedings ultimately lay with the Department of Health, under the supervision of various Ministers over the years.

174. Whilst I can understand that some might well have an interest in ascertaining precisely what an individual Minister knew on a particular date, in legal terms such an inquiry is redundant.

175. A Minister of the Government is legally responsible for every act of his or her Department. It has been observed that "*[t]he result of [the Ministers and Secretaries Act 1924, as amended] is that the Minister is not only the head of the Department; he or she also personifies the Department, in law; and, as a corporation sole, bears responsibility in law for its every action*".[32] This is to say that "*the Minister remains responsible, in law, even though s/he was not actually involved in the particular decision…".*[33]

176. Thus, in legal terms, whether the relevant Minister was personally involved in deciding on the litigation strategy finally adopted or whether they were even aware of it is irrelevant. The Minister is legally responsible for the acts of the Department irrespective.

177. Such an inquiry could only be of relevance if it were the case that the Department of Health acted unlawfully or unethically and there was in that context a legitimate political question as to the Minister's personal knowledge of the matter. However, this is not the situation that pertains here. The advice provided by the Office and my predecessors offered a robust justification for the Department of Health to act in the manner that it did.

178. As would be expected of any legal advice, the advice provided by the Office sought to identify and recommend an approach which would minimise the liability of the State and the consequent burden on the public purse. While this is not the only consideration that is

[32] Gerard Hogan, David Gwynn Morgan and Paul Daly, ***Administrative Law in Ireland*** (5th edn, Round Hall 2019 para 3-40.

[33] Hogan, Morgan and Daly, para 3-39.

relevant to the Government's decisions on this matter, it should be acknowledged that, in general, the Government has an entitlement and a responsibility to prudently manage public monies.

179. In that context, I reiterate that it is entirely legitimate for the Government to take steps to avoid making substantial compensation payments in circumstances where it is not legally obliged to do so. As everybody knows, this imperative was particularly acute from 2008 onwards when the State's finances became severely constrained due to the financial crisis.

180. Moreover, as is the case for any other litigant, it is entirely right that the State should be able to adopt a strategy on how best to approach litigation, and that it is able to form such a strategy under the protection of legal professional privilege. To demand otherwise would be to seriously undermine the ability of the State to defend itself and, by extension, the public purse, in court proceedings.

181. Legal advice will inevitably seek to examine an individual case or legal issue from all possible angles. This has meant that, while the Office at all times considered that the State has a strong defence to actions brought against it in respect of charges levied on patients in private nursing homes, it made great efforts to highlight the risks inherent in running any piece of litigation.

182. At times, this advice recommended that it would be desirable to settle some individual cases rather than contest them, having regard to a wide range of factors including the delay and cost of resolving the proceedings in court, the facts of the specific case and the prospects of success. In those circumstances, the Office did not advise the State to act in a manner which would have deprived individuals who initiated proceedings against the State of any legal entitlement. On the contrary, any plaintiff who settled their case did so voluntarily, and with the benefit of their own legal advice.

183. Where the Office recommends settling proceedings outside of court, this simply does not mean that the State had no arguable defence to the proceedings, as is sometimes wrongly assumed. A business will spend money to insure against its premises being destroyed by fire. That does not mean the business expects that eventuality to transpire. It just means that the cost of the insurance outweighs the risk of the adverse outcome insured against.

184. Similarly, even where the State does have reasonable prospects of defending a case, litigation is inherently uncertain and rarely without risk or considerable additional cost to the public purse. Therefore, it may often be prudent for the State to settle cases even if it has a viable legal defence and the advice furnished by the Office on these matters has reflected that.

185. In any event, it might be thought surprising that the State would be exposed to criticism for settling cases and making payments to plaintiffs. This is the very opposite of "*dragging plaintiffs through the courts*" which is what the State is sometimes criticised for when it does *not* settle cases brought against it.

186. There is no basis for suggesting that any of the cases that were compromised required judicial resolution or that there was or is anything inappropriate in settling cases outside of court. It is self-evident that there is no need to pursue costly and time-consuming litigation in court where both parties, *i.e.* the State and the plaintiff, agree to a mutually acceptable settlement. All defendants are entitled to consider the appropriateness of settlement prior to the cost and inconvenience of making discovery, and prior to the requirement to provide internal documentation to a litigation opponent. That is a calculation made in every case, and there is nothing surprising about it being considered here.

187. This is reinforced by the fundamental proposition that the management of public expenditure is the responsibility of the Government, something expressly recognised by Article 17.2 of the Constitution which provides:

> "*Dáil Éireann shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue or other public moneys unless the purpose of the appropriation shall have been recommended to Dáil Éireann by a message from the Government signed by the Taoiseach.*"

188. This overall responsibility for managing public monies has also been stated in strong terms by the Supreme Court. In ***TD v Minister for Education***[34] Keane CJ considered that the mandatory orders imposed by the High Court were "*without precedent*" in that they "*require the executive power of the State to be implemented in a specific manner by the expenditure of money on defined objects within particular time limits.*" It was further held that such orders were "*prima facie at least, the exclusive role of the executive and the legislature.*"

189. In that decision, the Supreme Court endorsed the primacy of Government, acting with the support of the legislature, in the stewardship of public monies.

190. The settlement of these cases by the Government with the agreement of the plaintiffs and without judicial intervention is therefore reflective of a fundamental aspect of the separation of powers envisaged by the Constitution.

191. In truth, it is to be welcomed that public expenditure decisions were determined by Government, having regard to the totality of the situation, rather than being dictated to by fact-specific judicial decisions on individual cases in a manner that is divorced from the state of the public finances.

192. I am at the Government's disposal should it request me to elaborate on any of the issues addressed in this Report.

ROSSA FANNING SC
ATTORNEY GENERAL

[34] [2001] IESC 101, [2001] 4 IR 259.