

# **Too Old to be Equal? – A Follow-up**

## **A Follow-up Investigation by the Ombudsman into the Illegal Refusal by the Department of Health of Mobility Allowance to People over 66 Years of Age**

*A Report to the Dáil and Seanad under section 6(5) and (7) of the  
Ombudsman Act 1980*

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

**October 2012**

## **Introduction and Summary**

The Department of Health has, for the past twelve years, been operating the Mobility Allowance scheme on the basis of a condition which is illegal and which the Department has known to be illegal since at least 2008. The illegal condition is the inclusion within the scheme of an upper age limit of 66 years which is contrary to the Equal Status Act 2000. Furthermore, despite having agreed to do so in April 2011, the Department of Health has failed to implement a recommendation from the Ombudsman to remove this illegal upper age limit. As a consequence, the Department has knowingly allowed the scheme to continue in operation on the basis of an illegality.

The Department of Health has now (October 2012) rejected a further similar recommendation from the Ombudsman. This recent Ombudsman recommendation was made following the investigation of five new complaints from people refused Mobility Allowance because of the illegal upper age limit. These complaints were made after the expiry of the period within which the Department of Health had agreed to remove the illegal upper age limit. The Ombudsman's recommendation was that the upper age limit should be removed from the scheme generally and that the complainants' applications should be re-considered without reference to the upper age limit.

The Mobility Allowance is a monthly payment made by the Health Service Executive (HSE) to people with a severe disability "who are unable to walk and who would benefit from occasional trips away from home". The Allowance has been in existence since 1979 and is currently worth a maximum of €208.50 per month. The Allowance is non-statutory and is administered by the HSE on the basis of a circular issued by the Department of Health.

### ***Main Issue***

In April 2011 the Ombudsman published an investigation report called *Too Old to be Equal?* which dealt specifically with the fact that the Mobility Allowance excludes applicants over the age of 66 years. The Ombudsman made a finding that the inclusion by the Department of Health of this upper age limit was a breach of the Equal Status Act 2000. The Ombudsman found that the upper age limit was illegal and had been illegal since the enactment of the Equal Status Act 2000. The Ombudsman recommended to the Department that it complete a review of the Allowance, which was already underway, and that it then revise the Mobility Allowance so as to render its terms compliant with the Equal Status Act 2000. The Ombudsman further recommended that the process of review and revision should be completed within six months.

It is important to note that the Department of Health accepted the Ombudsman's finding regarding the breach of the Equal Status Act. It also accepted the Ombudsman's recommendation. In accepting the recommendation, the Department committed itself (a) to review the Mobility Allowance scheme; (b) to revise the scheme so as to make it compliant with the Equal Status Act and (c) to have the review and revision completed within six months, that is, by end October 2011. Thus, the Ombudsman's expectation was that,

whatever the terms of the revised Allowance, from end October 2011 it would not contain an upper age limit contrary to the Equal Status Act 2000.

The Department has not revised the scheme and it has not removed the upper age limit. The scheme continues to be administered by the HSE on the basis of an age limit which the Department itself accepts is illegal.

### ***Second Issue***

In the period since late October 2011, by which time the Allowance should have been rendered compliant with the Equal Status Act 2000, the Ombudsman has received a further five complaints from, or on behalf of, people whose applications for the Allowance were rejected because they were over 66 years of age.

The Ombudsman decided to investigate these five complaints. The actions being investigated are, **firstly**, the failure of the Department of Health to remove the upper age limit in the scheme and, **secondly**, the related fact that the Department has allowed the scheme to continue in operation in the full knowledge that a key eligibility condition is illegal.

### ***This Report***

This report is by way of a special report to the Dáil and Seanad under the provisions of section 6(5) and (7) of the Ombudsman Act 1980. These provisions enable the Ombudsman to lay a “special report” before the Dáil and Seanad:

*(5) Where it appears to the Ombudsman that the measures taken or proposed to be taken in response to a recommendation under subsection (3) of this section are not satisfactory, he may, if he so thinks fit, cause a special report on the case to be included in a report under subsection (7) of this section.*

It appears to the Ombudsman that the measures taken by the Department of Health, since April 2011, in response to her recommendation in the *Too Old to be Equal?* report are not satisfactory and that this should be brought to the attention of the Dáil and Seanad.

This report deals also with the Ombudsman’s investigation of the five complaints from people whose applications for the Allowance were rejected because they were over 66 years of age. This report should be read in conjunction with the April 2011 report *Too Old to be Equal?* which is available on the Ombudsman website.<sup>1</sup> However, for convenience, the key issues of relevance from the earlier report are set out below.

As the Department of Health has now rejected the recommendations of the Ombudsman following this investigation of five recent complaints, the Ombudsman believes that this failure also should be reported to the Dáil and Seanad.

The Department’s position is that it cannot act on the Ombudsman’s recommendations because to do so “would create liabilities the State could not afford”. In other words, abiding by the law of the land is not something we as a State can afford. The Ombudsman’s position

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<sup>1</sup> <http://www.ombudsman.gov.ie/en/Publications/Investigation-Reports/Too-Old-to-be-Equal/>

– set out in some detail at the conclusion of this report – is that the continued disregard of the law by a key State body is not something we can afford. The Ombudsman rejects absolutely the attempt of the Department to represent its position as a commonsense response to an unfortunate situation in which, in order to target limit resources effectively, it is necessary to infringe on the law. There are options to be considered on how best to use scarce resources. Breaking the law is not one of those options.

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In referring throughout this report to “the Department” it is relevant to recall that, for the purposes of the Ombudsman Act 1980, *references in this Act to any Department of State include references to the Minister of the Government having charge of that Department of State ...*<sup>2</sup>. The Ombudsman understands that the position being put forward by the Department is a position agreed with the Minister for Health.

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<sup>2</sup> Ombudsman Act 1980, section 1(2)

## **Key Issues from *Too Old to be Equal?***

The overriding issue identified in *Too Old to be Equal?* was that the inclusion of an upper age limit for applicants is illegal as it constitutes a breach of the Equal Status Act 2000. The report documents that in the course of that investigation the Department was slow to accept this fact. While the Ombudsman's Office first put it to the Department in February 2009, before starting its investigation, that the age limit appeared to be "improperly discriminatory"<sup>3</sup> and contrary to the Equal Status Act 2000, the Department in its various replies avoided addressing the issue. Two years later, in February 2011, the Department for the first time addressed this issue of improper discrimination and of non-compliance with the Equal Status Act 2000.

In commenting on a draft of the *Too Old to be Equal?* report, the Department appeared to accept that the upper age limit was illegal. The Department said it accepted that it should have "reviewed and updated the mobility allowance scheme following the enactment of the Equal Status Act" in 2000. Further, it said that "following a more recent review of the terms of the scheme, particularly the upper age limit and the definition of disability, the Department [had] concluded that it could not continue to operate on the current basis". At that point also, the Department told the Ombudsman that the then Minister had "agreed that the mobility allowance should be paid, on an exceptional basis, to Ms. Browne [complainant]" from the date of application in June 2008.

In her *Too Old to be Equal?* report the Ombudsman commented that the failure of the Department, over an eleven year period (up to April 2011), to comply with the Equal Status Act 2000 reflected very poorly on the Department. She noted that there is a particular onus on the Department of Health in the area of disability and that one might reasonably expect that Department, even more than public bodies generally, to be cognisant of the legal rights of people with disabilities. The Ombudsman referred to the fact that the Department is the lead Department in terms of promoting the welfare and life chances of people with disabilities; that it has a Minister of State with special responsibility for equality, disability issues and mental health and that it has, within the overall Departmental structure, a dedicated Office for Disability and Mental Health with its own Director.

In her earlier report also the Ombudsman pointed out that there were several reasons why, prior to the point being made by her Office (in February 2009), the Department should have been aware that the upper age limit for Mobility Allowance was illegal. In June 2008 the Department was effectively forced to remove an upper age limit from the Motorised Transport Grant scheme. This decision came about following a process begun in May 2007 by the Equality Authority which was acting on foot of a particular complaint. When the Department failed to engage with the Equality Authority the complaint was referred on to the Equality Tribunal for adjudication. Only following this referral to the Equality Tribunal, and in the light of an impending adjudication by the Tribunal, did the Department engage with the age limit issue. At that point, June 2008, the Department accepted that the upper age limit

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<sup>3</sup> This is one of the seven categories of maladministration identified at section 4 of the Ombudsman Act 1980.

breached the Equal Status Act and removed this condition from the terms of the Motorised Transport Grant scheme.

In June 2008 therefore the Department should have been aware that the continued imposition of an upper age limit for the Mobility Allowance was also a breach of the Equal Status Act 2000. However, in its dealings with the Ombudsman over two years (February 2009 – February 2011) the Department failed to respond to specific queries on the matter and in effect evaded this issue. Eventually in February 2011, and very similar to how it had dealt with the Equality Authority and the Equality Tribunal in the case of the Motorised Transport Grant, the Department acknowledged that the upper age limit for the Mobility Allowance was not tenable.

In her *Too Old to be Equal?* report the Ombudsman referred to a reluctance on the part of the Department to face up to the fact that its Mobility Allowance scheme has a significant legal defect. It is evident from the report that the Department faced up to this fact only when it was clear that the Ombudsman would find against the Department on the matter of the upper age limit. This was a repeat of its performance in the case of the Motorised Transport Grant; only when it was clear that the Equality Tribunal would find against it, did the Department deal with the fact that the upper age limit in that scheme was not tenable.

In the case of the Motorised Transport Grant, the Department removed the upper age limit for all applicants. In the case of the Mobility Allowance, while the Department agreed that the particular complainant should be paid the Allowance, it did not remove the age limit generally. The Department said that it wished to deal with the age limit issue along with other issues of concern. In particular, it said it wished to deal with an issue relating to the definition of disability which was raised also in the Ombudsman's report.<sup>4</sup>

### *Reviews of Scheme*

During the course of the Ombudsman's investigation which led to the *Too Old to be Equal?* report, the Department sought to explain the delay in bringing the Mobility Allowance into line with the Equal Status Act on the basis that it was reviewing the operation of the Allowance. In letters to the Ombudsman dated 30 April 2009, 2 November 2009, 29 January 2010 and 11 February 2011 the Department said it was undertaking a review of the scheme. In the case of the letter of 11 February 2011, the Department said that certain "options in relation to the future of the mobility allowance scheme have been submitted to, and considered by, the Minister and the Government but final policy decisions in this regard have yet to be taken". The Department then commented that, as a General Election was then underway, the issue would "have to be dealt with by the new Minister/Government".

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<sup>4</sup> The Ombudsman drew attention in her report to two decisions of an Equality Officer who found that the definition of mobility, as used for the Mobility Allowance scheme, is unduly restrictive. The Equality Officer commented: *The concept of mobility in the [Mobility Allowance] circular is construed in such a narrow manner that it fails to recognise that in severe cases a person's intellectual and/or psychological health may restrict their mobility as effectively as some physical disabilities do. I find that this is a clear omission and it is obvious that the mobility allowance has not been updated to comply with the requirements set out in the Equal Status Acts (enacted in October 2000). ... (DEC-S2009-012)*

The *Too Old to be Equal?* report refers to the fact that in the period since 2000 there had been a number of previous references by the Department to the fact that it was reviewing the Mobility Allowance.<sup>5</sup> Nevertheless, in framing her recommendation in April 2011, the Ombudsman accepted in good faith that the Department would act quickly to correct the defect in the Mobility Allowance scheme. On this basis, the Ombudsman recommended as follows:

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

In the context of a scheme operating on the basis of a requirement known to be illegal, seeking to have this defect remedied within six months was more than generous. For the Department, knowing that any other complaint to the Ombudsman based on the upper age limit would necessarily have the same outcome as in the case of Ms. Browne, there should have been an urgency to revise the scheme at the earliest possible moment.

On 21 April 2011 the Department accepted this recommendation and its Secretary General noted explicitly that the Department “intends to act on it within six months, as recommended”.

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<sup>5</sup> For example, in a PQ reply of 7 November 2007, Minister of State, Jimmy Devins, said: ... [my] Department is aware of the issue of age related criteria for health allowances and grants. Having regard to equality legislation, my Department is considering the question of removing the upper age limit for this scheme. (PQ27807/07)

## **Failure to Implement Ombudsman’s Recommendation**

On **21 October 2011**, by which time the Ombudsman’s recommendation should have been implemented, the Ombudsman’s Office wrote to the Department seeking details of the outcome of the review and the “manner in which the Mobility Allowance scheme has been revised.” In the event that the review had not then been completed, the Ombudsman asked for a “detailed update and a date when the Ombudsman’s recommendation will be fully implemented”.

The Department replied to this letter on **28 November 2011**<sup>6</sup>. The reply was that the future of the scheme had been “considered by Government and is due to be considered again soon. When the Government has made a decision in relation to mobility allowance, the Department will be back in touch with the Ombudsman”. The Department made no mention of the six month timescale for meeting the Ombudsman’s recommendation; nor did it contain any apology for failing to implement the recommendation.

In the absence of further communication, the Ombudsman’s Office wrote again to the Department on **29 December 2011**. This letter pointed out that the Department had failed to implement the Ombudsman’s recommendation and that it was continuing to stand over a scheme with “an eligibility criterion which, on the Department’s own admission, is in breach of the law”. Because there was an inference in the Department’s letter of 28 November 2011 that the Department required a decision from Government in order to comply with the Ombudsman’s recommendation, the Ombudsman’s Office pointed out that the Department “should have anticipated this difficulty when it committed to meeting the Ombudsman’s recommendation”.

On **20 January 2012** the Ombudsman’s Office wrote to the Department to say that it had received two new complaints from people refused Mobility Allowance because of the upper age limit. The Ombudsman asked the Department to set out the then current position on the matter. Following a number of reminders, the Ombudsman received the Department’s reply on **7 March 2012**. It said that the overall position was the same as that set out in its letter of 28 November 2011, that is, no decision yet taken on the upper age limit. As regards the two recent complaints received by the Ombudsman, the Department said that, because the eligibility criteria had not been changed, the HSE was not “authorised to pay the allowance outside of the eligibility criteria”.

The matter of making the Mobility Allowance compliant with the Equal Status Act was raised in a Parliamentary Question on **31 January 2012**<sup>7</sup>. In her written reply, the Minister for State (Ms. Kathleen Lynch) referred to the Ombudsman’s recommendation and said: “The Department has pointed out to the Ombudsman that there are a range of policy options that need to be considered. Final policy decisions in this regard have yet to be taken”. There was no mention of the Department’s commitment to have implemented the Ombudsman recommendation by 21 October 2011.

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<sup>6</sup> The key items of correspondence to and from the Department are published as an Appendix to this report.

<sup>7</sup> Question No. 573 <http://debates.oireachtas.ie/dail/2012/01/31/00390.asp>



On **18 June 2012** the Ombudsman's Office wrote again to the Department to say that it had received further complaints regarding the upper age limit for Mobility Allowance and to seek an update on when a decision on the matter might be expected. On **13 July 2012** the Ombudsman received the Department's reply which was that "the position, at present, remains as in previous correspondence".

In the meantime, the Ombudsman, laid her Annual Report for 2011 before the Dáil and Seanad on **26 June 2012**. In her Report, the Ombudsman drew attention to the fact that the Department had failed to comply with the recommendation made in the *Too Old to be Equal?* report. She commented in her Annual Report:

*In my original Investigation Report I observed that the apparent inability of the department to deal with issues, such as the inclusion of an illegal condition in the Mobility Allowance Scheme, leaves it open "to the perception that it is unconcerned with the fact that it is operating a scheme which is at odds both with the law of the land and with human rights law more generally." More than a year later, the department has not shown that this perception is unwarranted.*

*I also find it totally unsatisfactory that the department failed to contact me to say that it had not complied, or was unable to comply, with the recommendation.<sup>8</sup>*

On **20 July 2012** the Ombudsman's Office wrote to the Secretary General of the Department to say, in view of the Department's failure to implement the Ombudsman's recommendation, and in the absence of any definite date from which the recommendation would be implemented, that the Ombudsman intended to make a special report to the Oireachtas on the matter.

On **27 July 2012** the Department replied. For the first time since the passing of the six month deadline for the implementation of the Ombudsman's recommendation, the Department apologised for "the delay in relation to this matter". The Department continued:

*It is now our firm intention to have this matter resolved by the end of September. Because of the nature and sensitivity of the decisions that have to be taken in relation to this allowance, and other issues, the matter does have to go to Government and we are preparing for this at the moment.*

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<sup>8</sup> <http://www.ombudsman.gov.ie/en/Publications/Annual-Reports/2011-Annual-Report/AnnualReport2011/chapter4.html>

## Recent Complaints - Upper Age Limits for Mobility Allowance

Since completing the *Too Old to be Equal?* report, the Ombudsman has received five complaints from or on behalf of people whose Mobility Allowance applications have been refused by the HSE because the applicant was over 66 years at the point of application. For the purposes of this present report, it is not necessary to identify these complainants or to assess the general merits of their applications. The Ombudsman has already been in contact with the HSE regarding these complaints. Its position is that, in the absence of an instruction from the Department allowing the upper age limit to be set aside, it must deal with these applications by reference to the current eligibility criteria.<sup>9</sup> It may be helpful for present purposes, however, to give a brief account of the circumstances of these five cases.

### Case 1

This man was 67 years old when he first applied for Mobility Allowance in April 2011. He suffered a stroke in 1996 which, he says, left him with severe mobility problems. The HSE refused his application on age grounds. There was no medical assessment of his mobility made by the HSE nor was there any financial assessment done. The complaint was made to the Ombudsman in April 2012. A further issue raised in this case is that the complainant and his family say they heard of the Mobility Allowance only in 2011 and applied immediately; they say that they should have been advised by the HSE of the existence of the Allowance when the man was first disabled. Had this man been already receiving the Allowance before 66 years of age, he would have continued to be paid it after 66 years of age. The upper age limit applies only to those first applying for the Allowance after 66 years of age.

### Case 2

This woman was 81 years old when she first applied for the Mobility Allowance in September 2011. The application was refused by the HSE on the grounds that “[u]nfortunately, under the criteria laid down by the Department of Health & Children, you are not eligible ... The criteria state “**Applicants must be 16 years or older and under 66 years**”. The HSE did not undertake either a medical assessment of the woman’s mobility or a financial assessment. A medical report provided by the woman’s GP indicated that she has serious mobility problems. Her appeal of the decision to refuse was unsuccessful on the same grounds. The complaint was made to the Ombudsman in December 2011. Regrettably, this complainant died in late March 2012.

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<sup>9</sup> In fact the HSE has been seeking clarification on the matter from the Department for some time.

### Case 3

This man was 91 years old when he first applied for the Mobility Allowance in April 2012. In fact, this man is the husband of the complainant at Case 2 above and his application was refused by the HSE in terms identical to those used in the case of his late wife. The HSE did not undertake either a medical assessment of the man's mobility or a financial assessment. This man's appeal was refused because of the upper age limit with the appeals officer remarking that he was "governed by the legislation (sic) and current guidelines relative to the scheme". The complaint was made to the Ombudsman in July 2012.

### Case 4

This woman was 73 years old when she first applied for the Mobility Allowance in August 2011. The application was refused by the HSE "as guidelines state that you must be under 65 years". [In fact, the upper age limit is 66 years.] The HSE did not undertake either a medical assessment of the woman's mobility or a financial assessment. The woman appealed the refusal decision but the relevant HSE appeals office has not dealt with this appeal. This, apparently, is because the appeals office understands the HSE local office is reviewing the original decision. However, there is no evidence that the case is under active review. The complaint was made to the Ombudsman in December 2011.

### Case 5

This man was 77 years old when he first applied for the Mobility Allowance in September 2011. The application was refused "as applicants must be 16 years or older and under 65 years" (sic). The man notified the HSE of a possible legal claim under the Equal Status Acts 2000 – 2004 using a standard form (Form ES.1) provided by the Equality Authority. The HSE treated this as an appeal and in November 2011 the local HSE General Manager gave an "appeal decision" to uphold the refusal. In December 2011 the man complained to the Ombudsman. At the same time, he wrote to the HSE with a further appeal which was referred to the HSE appeals office. That office requested a medical assessment of the applicant – no previous such assessment having been done. This medical assessment was carried out by a HSE medical officer in April 2012. The outcome of that assessment was that the man was regarded as not being medically eligible for the Mobility Allowance. In fact, the man accepted this assessment and accepts that he will not qualify for the Mobility Allowance. However, he has told the Ombudsman's Office that he remains very aggrieved at having been excluded from consideration solely on grounds of age.

## **Ombudsman Analysis**

The Ombudsman made it very clear in the *Too Old to be Equal?* report that she was expressing no view as to what the outcome might be following the Department's review of the Mobility Allowance scheme. The Ombudsman has no role in relation to whatever matters might be put to Government regarding the future of the scheme or of related schemes. The sole concern of the Ombudsman is that a scheme, devised on an administrative basis by the Department, should not be operated on the basis of an eligibility criterion which is illegal.

It is very important to be absolutely clear that action to render the Mobility Allowance scheme compliant with the Equal Status Act does not require a decision from Government. It is perfectly understandable that proposals relating to income supports for people with disabilities should be brought to Government and that whatever decisions Government thinks appropriate will be made by it. However, it would be absurd to think that the Department could not remove an illegal requirement from its own administrative scheme and then discuss at Government level whatever further changes might be necessary..

When a similar issue came to a head in 2008, the Department simply deleted the upper age limit from the Motorised Transport Grant scheme and issued a revised circular to the HSE to this effect. It could have made the same change to the Mobility Allowance scheme at any stage since June 2008 when it changed the Motorised Transport Grant scheme.

Clearly, a decision to remove the upper age limit would have financial implications. The Department made this point in the course of the *Too Old to be Equal?* investigation. In a letter to the Ombudsman, dated 30 August 2009, the Department said: "*it is not feasible to amend the scheme to remove the upper age limit in the current economic circumstances*". The Ombudsman acknowledged then, and continues to acknowledge, that the financing of the scheme is a problem. However, financial constraints cannot justify a scheme condition which is illegal. The Ombudsman wrote in that report:

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

In its contact with the Ombudsman in the course of the *Too Old to be Equal?* investigation, the Department sought to link the removal of the illegal upper age limit to a wider review of the Mobility Allowance scheme. While removing the illegal upper age limit did not require a wider review, the Ombudsman nevertheless accepted the Department's position in good faith. In the light of subsequent events, it is clear that this acceptance of the good faith of the

Department may not have been justified. It might have been wiser had the Ombudsman recommended the removal of the illegal upper age limit with immediate effect. Agreeing to a six month period in which to correct the problem has, it would appear, simply allowed the Department to postpone further the action which it must take.

Whatever the financial pressures, whatever the constraints of getting Government attention during the current economic crisis, it remains the case that a Government Department simply cannot allow one of its schemes to continue in operation where it is known – and long known – that one of its key conditions is illegal.

## **Department's Response**

The Department was given an opportunity to comment on a draft of this report. The Secretary General of the Department responded in a letter dated 3 October 2012 (the full text of his letter is available in the Appendix to this report).

The main points made by the Secretary General were:

- The potential impact of a decision on the scheme, in terms of increased exchequer costs or loss of income to a vulnerable group of people, indicates that this was an appropriate matter to bring to the attention of the Government. The Minister reserves the right and discretion to decide on what is appropriate to bring to Cabinet.
- The Motorised Transport Grant is not comparable to the Mobility Allowance in terms of its purpose or the level of expenditure involved. Therefore the contention that the age limit could be removed for the Mobility Allowance is not accepted.
- Options have been put to the Government which have given rise to significant policy and legal issues which the Department intends to resolve expeditiously.
- The Department has serious regard for the legal rights of people with disabilities.
- The Department has to have regard to the best use of available resources and ensure that those resources are targeted at those most in need of assistance.

## **Ombudsman's Comments on Response**

The Ombudsman has already clarified that she does not claim any right to suggest what the outcome might be following the Department's review of the Mobility Allowance scheme. Clearly, it is also the case that the Ombudsman has no role in relation to whatever matters might be put to Government regarding the future of the scheme or of related schemes. The sole concern of the Ombudsman is that a scheme, devised on an administrative basis by the Department, should not be operated on the basis of an eligibility criterion which is illegal.

The Ombudsman welcomes the Department's assurances concerning the legal rights of people with disabilities and also recognises the Department's need to make the best use of available resources.

Those rights and needs cannot, however, absolve the Department from its overriding duty to act lawfully. Regardless of the explanations offered by the Department it remains the case, very simply, that the Department continues to operate an administrative scheme on the basis of an eligibility criterion which is illegal.

## **Findings**

Following her investigation under section 4 of the Ombudsman Act 1980, the Ombudsman made the following findings:

1. That her finding, first made in the *Too Old to be Equal?* report, continues to apply: “that the Mobility Allowance scheme, as currently constituted, is in breach of the Equal Status Act 2000 in as much as it includes an upper age limit which cannot be justified on any basis which would render that age limit in compliance with the Equal Status Act”. The Ombudsman finds that this breach of the Equal Status Act is improperly discriminatory, based on an undesirable administrative practice as well as being contrary to fair or sound administration.
2. That the failure of the Department to honour its commitment to implement the Ombudsman’s recommendation in the *Too Old to be Equal?* report is based on an undesirable administrative practice as well as being contrary to fair or sound administration.
3. That the five complainants in question have been adversely affected by the refusal of their applications for Mobility Allowance and that these refusals arose from reliance by the HSE on a condition of the scheme (the upper age limit) which is improperly discriminatory, imposed without proper authority and is otherwise contrary to fair or sound administration.

## **Recommendations**

Following her investigation under section 4 of the Ombudsman Act 1980, and arising from the findings set out above, the Ombudsman made the following recommendations to the Department of Health:

1. That the Department, without prejudice to whatever decisions may be made regarding the future of the scheme more generally, remove the upper age limit as a condition of the Mobility Allowance scheme with immediate effect.
2. That the Department authorise the HSE to reconsider the Mobility Allowance applications of four<sup>10</sup> of the complainants whose cases are described earlier in this report and that this reconsideration should not take account of the upper age limit.
3. That the Department require the HSE (i) to identify all applications for Mobility Allowance received since 1 April 2011 which have been refused solely on the basis of the upper age limit, or where a decision has been postponed pending clarification on the upper age limit, and (ii) to reconsider these applications without regard to the upper age limit.

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<sup>10</sup> The Ombudsman accepts that the complainant in Case 5 does not expect to have his application reconsidered by the Health Service Executive.



## **Recommendations Rejected – Ombudsman Comment**

The Department rejected the Ombudsman’s recommendations. In its response<sup>11</sup>, the Department says that it is “not in a position to amend the circular relating to the Mobility Allowance”. Furthermore, it says that the “recommendations, if implemented would ignore the very serious financial constraints on the Department, the HSE and the State generally.” It says: “Implementation of the recommendations would create liabilities that the State cannot afford”. Finally, the Department says that, nevertheless, it “will be seeking to resolve the outstanding issues as expeditiously as possible”.

The Department represents the present situation as an unfortunate conflict between the requirements of the law and the constraints on public spending. One might have some sympathy with this view if the difficulty was one of recent origin. One might accept that the Department should be given some reasonable time in which to resolve this conflict. However, the fact is that the Department has been given more than adequate time in which to resolve the conflict. The illegality has been occurring since 2000, for twelve years. The Department has, or ought to have, known of this illegality almost from the outset. The Department has been on specific notice of the need to resolve the problem since April 2011. It agreed to resolve the problem in April 2011.

In any event the Ombudsman rejects the proposition that, in the light of the present crisis in State finances, it is not possible to implement her recommendations. This is not a case in which abiding by the law necessarily involves a substantial increase in public spending. The Ombudsman made this clear in her original report of April 2011 when she referred specifically to the need to match the terms of eligibility under the scheme with the level of resources available. While it was not, and is not, an area in which the Ombudsman should express a preference, it is clear that the options available to the Department range from abolition of the scheme in its entirety, to a reduction in the monetary value of the scheme, to the introduction of some other limiting (but legal) eligibility condition.

There is a significant issue of trust raised in the response of the Department to the Ombudsman. At present, in a time of very serious national crisis, the provision of health and welfare services is of critical importance to people generally. People need to have confidence that they can trust the Department of Health, and indeed all organs of the State, to act responsibly, fairly and legally. In the very complex area of health and welfare services, it is often very difficult to follow the twists and turns necessary to ensure services are provided to the fullest extent possible within the available resources. While these developments are the subject of debate within the Oireachtas and in the media, people to a large extent must take it on trust that the State, through its agencies, is acting with integrity.

Furthermore, there is a need for openness on the part of State agencies and people need to feel that all of the issues of relevance are being put before them. People need to be clear that whatever difficult decisions must be made will be made following an open and honest assessment of all relevant considerations. The possibility of abolishing the Mobility

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<sup>11</sup> Letter from Secretary General dated 22 October 2012 – published in the Appendix to this report.

Allowance scheme, or otherwise curtailing its scope, is something about which people should be informed. Inevitably, any decision to abolish or curtail a service or payment will have political implications; but this is not a reason to refuse or defer action necessitated by the law.

Finally, the Department's rejection of the Ombudsman's recommendations raises a fundamental question about the strength of our commitment nationally to international human rights norms. The Equal Status Act 2000 has to be seen as a recognition in our law of the international human rights principle of equality. The failure over the last twelve years to remove the upper age limit from the Mobility Allowance scheme is a direct rejection of the human rights principle enshrined in the Equal Status Act 2000. The continued failure of the Department to tackle this issue suggests that it has a very weak sense of the importance of supporting human rights principles and, indeed, a very weak sense of the rule of law and of its obligation to act in accordance with the law.

The Ombudsman takes the view that it is now a matter for the Dáil and Seanad to consider this report. She will be very happy to accept an invitation, if made, to discuss this report with the Joint Oireachtas Committee on Public Service Oversight and Petitions.

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Emily O'Reilly

Ombudsman

October 2012



# **Too Old to be Equal? – A Follow-up**

**Items of key correspondence  
Between Department of Health and the Office of the  
Ombudsman**

**April 2011-October 2012**



21 April 2011

Ms. Emily O'Reilly  
Ombudsman  
Office of the Ombudsman  
18 Lower Leeson St.  
Dublin 2

Dear Ms. O'Reilly

**Ombudsman Investigation – Mobility Allowance – Final Report**

I refer to your letter of 15<sup>th</sup> April enclosing the above Report, the contents of which have been noted.

I have noted your recommendation at paragraph 7.2 of the Report and I have discussed it with the Minister. I can confirm that this Department accepts your recommendation and intends to act on it within six months, as recommended.

I trust this resolves the matter to your satisfaction.

Yours sincerely



**Michael Scanlan**  
Secretary General

**From: Office of the Ombudsman**

Our Reference : HC8/08/2204

21 October 2011

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

Dear Ms Nic Aonghusa

I refer to the Ombudsman's investigation into the illegal refusal of **Mobility Allowance** to people over 66 years of age, and her subsequent published report, "Too Old to be Equal ?".

Following her investigation the Ombudsman recommended that :

" the Department of Health and Children completes its review of the Mobility Allowance scheme and, arising from that review, revises the scheme so as to render it compliant with the Equal Status Act 2000. The Ombudsman further recommends that this process of review and revision should be completed within six months of the date of this report."

On 21 April 2011 Mr Michael Scanlan, on behalf of the Department of Health and Children, accepted the recommendation and agreed to act on it within six months.

As six months have now passed I would be grateful if you would let me know the outcome of the review and the manner in which the Mobility Allowance scheme has been revised. If the review has not been completed or the scheme not revised, I would be grateful if you would provide me with a detailed update and a date when the Ombudsman's recommendation will be fully implemented.

Yours sincerely

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David Nutley

Investigator

## From Office of the Ombudsman

Our Reference : HC8/08/2204

29 December 2011

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

Dear Ms Nic Aongusa,

### **Ombudsman Investigation - Mobility Allowance**

I refer again to the matter of your Department's acceptance of the Ombudsman's recommendation following her investigation of a complaint regarding mobility allowance. The Ombudsman's recommendation was that the Department "*completes its review of the Mobility Allowance scheme and, arising from that review, revises the scheme so as to render it compliant with the Equal Status Act 2000. The Ombudsman further recommends that this process of review and revision should be completed within six months of the date of this report.*" In accepting the recommendation, the Department committed itself (a) to review the mobility allowance scheme; (b) to revise the scheme so as to make it compliant with the Equal Status Act and (c) to have the review and revision completed within six months, that is, by end October 2011.

It is clear that the Department has not, in fact, implemented the Ombudsman's recommendation and we have had an exchange of correspondence since early November 2011 arising from this situation. The Department's present position, as set out in your letter of 28 November 2011, is that the future of the mobility allowance scheme "*has already been considered by Government and is due to be considered again soon. When the Government has made a decision in relation to the mobility allowance, the Department will be back in touch with the Ombudsman*". The inference here is that the Department requires a decision from Government in order to comply with the Ombudsman's recommendation. If this is in fact the case, it seems reasonable to expect that the Department would have anticipated this difficulty when it committed to meeting the Ombudsman's recommendation.

It is clear from the Ombudsman's investigation report that the future of the mobility allowance scheme has been under review within the Department for several years now. In the absence of a decision on its future, the mobility allowance continues to operate on the basis of an eligibility criterion which, on the Department's own admission, is in breach of the law. As the Ombudsman commented in her investigation report:

*"While the Department may well be acutely aware of the difficulties facing people with disabilities, its apparent inability to respond to specific situations (the Mobility Allowance issue, for example) leaves it open to the charge that it lacks a sense of urgency in tackling such issues. It leaves it open also, in this particular case, to the perception that it is unconcerned with the fact that it is operating a scheme which is at odds both with the law of the land and with human rights law more generally. The Ombudsman is not stating that this is her conclusion; nevertheless, she recognises that others may feel compelled to reach this conclusion."*

As you are aware the Ombudsman reports to the Oireachtas on matters relating to her Office. You will appreciate that the Ombudsman is required to keep the Oireachtas informed of developments in relation to implementation of recommendations in her reports. While the Ombudsman has noted the Department's commitment to keep her informed, she will be obliged to notify the Oireachtas of developments in this case when the opportunity arises.

Yours sincerely

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Fintan Butler  
Senior Investigator





Your ref:- HA6/11/3608

27 July 2012

Ms. Bernie McNally  
Director General  
Office of the Ombudsman  
18 Lower Leeson Street  
Dublin 2



Dear Ms. McNally

The Secretary General has asked me to respond to your letter of 20 July concerning the implementation of the recommendations from your investigation into the refusal of the Mobility Allowance on the grounds of age.

I can only apologise again for the delay in relation to this matter. As you are aware there are considerable pressures on the Department at the present time and we have been endeavouring to make progress on this issue since your original recommendations.

It is now our firm intention to have this matter resolved by the end of September. Because of the nature and sensitivity of the decisions that have to be taken in relation to this allowance, and other issues, the matter does have to go to Government and we are preparing for this at the moment.

I appreciate that your Office is concerned at the delays so far, and should there be any change in relation to the above timescale I will let you know.

Yours sincerely

Geraldine Fitzpatrick  
Assistant Secretary  
Social Care

Patient Safety

Other

Cuirfear fáilte roimh dhéanfhlíonagrais i nGeallge

**An Roinn Sláinte / Department of Health**

Teach Haicín Baile Átha Cliath 2  
Hawkins House Dublin 2

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3<sup>rd</sup> October 2012

Your ref: HC8/08/2204

Mr Fintan Butler  
Senior Investigator  
Office of the Ombudsman  
18 Lower Leeson Street  
Dublin 2

Dear Mr Butler

**Re: Ombudsman's Investigation Report of September 2012 into the Mobility Allowance**

I refer to your letter of 14<sup>th</sup> September with enclosed draft investigation report "Too Old to be Equal? – A Follow-up", regarding a recommendation by the Ombudsman in regard to the Mobility Allowance Scheme, along with five additional complaints in regard to the scheme. I apologise for the delay in replying to you.

I would point out that one of the complainants covered in the report has been assessed and does not qualify for the allowance on medical grounds, and that the complainant has accepted this.

This Department originally signalled its intention to review the Mobility Allowance Scheme in late-2009. In February 2011, my predecessor wrote to your office and explained the potential policy options available. In April 2011, this Department accepted the Ombudsman's findings, and recommendation to review and revise the Mobility Allowance Scheme so as to render it compliant with the Equal Status Acts. The Department also noted that the Ombudsman, in a footnote to her recommendation, expressed no view as to the terms of the revision of the scheme other than that the revised scheme should be compliant with the Acts. I note that this is restated in the draft investigation report.

The Department continues to accept that the Mobility Allowance Scheme cannot continue to operate on its present basis. The Department commenced its examination of the issues raised by the Ombudsman, as soon as it signalled its intention to review the scheme in late-2009. At that stage, there were two Equality Tribunal decisions under appeal by the HSE, whose outcome was not known at that time. A decision was also taken to inform the Government that the scheme was under examination. Due to the implications of the Ombudsman's recommendation in her report "Too Old to be Equal" (April 2011), it was felt necessary to obtain Government approval for changes to the scheme. Subsequently, the Department notified the Ombudsman's office that

the future of the Mobility Allowance scheme had already been considered by Government by November 2011, and was due for further early consideration.

In regard to the content of the draft report, I would refer the Ombudsman to previous correspondence from this Department and add the following two additional comments.

(i) In regard to your comment on page 11, (end of paragraph 2), on the need to go to Government on this issue, I would point out that the potential impact of a decision on a scheme such as this, taken at administrative level, in terms of potential increased exchequer costs or loss of income to a vulnerable group of people, would indicate that this was, in fact, an appropriate matter to bring to the attention of the Government.

(ii) In regard to the decision to remove the age limit on the Motorised Transport Grant by an administrative decision, as a precedent upon which the same could be done with the Mobility Allowance, I would point out that the Motorised Transport Grant is not comparable to the Mobility Allowance in terms of its purpose or the level of expenditure involved. Therefore, your contention that the age limit could be removed for the allowance by administrative procedure is not accepted.

I must point out that the Minister reserves the right and discretion to decide on what is appropriate to bring to Cabinet bearing many factors, including those already referred to above, in mind.

Notwithstanding the commitment to meet the six month timescale, it has since proved extremely difficult to resolve this matter. A number of policy options have been put to Government in the intervening period. These have raised significant issues, including:

- (i) the feasibility of extending eligibility under the scheme, due to the potentially significant cost implications;
- (ii) legislating for the scheme;
- (iii) the inappropriateness of extending or formalising schemes which no longer accord with the Government's mainstreaming policy on disability, and where alternative transport options are increasingly available for people with mobility difficulties under the relevant State agencies.

Arising from recent approaches to Government in the matter, a number of legal issues have been raised which require further consideration. The Department will be seeking to resolve the outstanding issues as expeditiously as possible.

I wish to assure you that this Department has serious regard for the legal rights of people with disabilities and, informed by the National Disability Strategy and the Disability Act 2005, consistently seeks to put these rights at the forefront of its policies and their implementation by the HSE. The recently published Value for Money and Policy Review of Disability Services puts the implementation of new person-centred approaches to service delivery at its centre. Unfortunately, the evolution of specific aspects of policy and their implementation has not always been

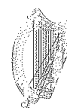
consistent with wider legal developments and legacy issues can arise from time to time. In that regard, the points made in the document, "Too Old to be Equal? – A follow Up" as regards the addressing of the upper age limit for the Motorised Transport Grant in 2008, and its implications for the age limit on the Mobility Allowance Scheme, are also noted. However, in addressing these issues, this Department has to have regard to the best use of available resources and ensure that those resources are targeted at those most in need of assistance, including those people with disabilities who have mobility and transport access issues.

Finally, I note that the draft report enclosed with your letter is also by way of a "special report" to the Dáil and Seanad under the provisions of sections 6(5) and (7) of the Ombudsman Act 1980, and I will advise the Minister for Health and Minister of State for Disability, Mental Health and Older People, respectively of the Ombudsman's intentions in this regard.

Yours sincerely



Dr. Ambrose McLoughlin  
Secretary General



22 October 2012

Your ref: HC8/08/2204

Bernie McNally  
Director General  
Office of the Ombudsman  
18 Lower Leeson Street  
Dublin 2

**Mobility Allowance - Ombudsman's Investigation Report**

Dear Director General

I refer to your letter of 12th October and enclosed investigation report "Too Old to be Equal? – A Follow-up".

You request that the Department informs you whether it accepts and intends to act on the recommendations in the report.

The Ombudsman is asking the Department to

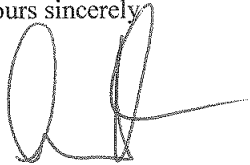
- remove the upper age limit as a condition of the Mobility Allowance scheme with immediate effect
- authorise the HSE to reconsider the applications of the four complainants in the report without taking account of the upper age limit
- instruct the HSE to reconsider applications received since 1 April 2011 which were refused solely on the basis of the upper age limit without regard to the upper age limit.

The Department is not in a position to amend the circular relating to the Mobility Allowance as recommended in the report. The recommendations, if implemented would ignore the very serious financial constraints on the Department, the HSE and the State generally. Implementation of the recommendations would create liabilities that the State could not afford.

However, I would refer to my letter of 3<sup>rd</sup> October where the Department again accepts that the Mobility Allowance scheme cannot continue to operate on its present basis. As stated in my previous letter the Department is obliged to consider further a number of issues which have arisen from recent approaches to Government in this matter.

The Department will be seeking to resolve the outstanding issues as expeditiously as possible.

Yours sincerely

A handwritten signature in black ink, appearing to be 'AM', with a long horizontal stroke extending to the right.

Dr. Ambrose McLoughlin  
Secretary General

# ***Too Old to be Equal? – Imscrúdú Leantach***

**Imscrúdú Leantach de chuid an Ombudsman  
ar Dhiúltú Mídhleathach na Roinne Sláinte  
Liúntas Soghluaisteachta a íoc  
le Daoine os cionn 66 Bliain d’Aois**

***Tuarascáil don Dáil agus don Seanad faoi ailt 6(5) agus (7)  
den Acht Ombudsman 1980***

***Imscrúdú faoi alt 4 den Acht Ombudsman 1980***

**Deireadh Fómhair 2012**

## **Réamhrá & Achoimriú**

Le dhá bhliain déag anuas tá an scéim Liúntais Soghluaisteachta i bhfeidhm ag an Roinn Sláinte agus an scéim i bhfeidhm ar bhonn coinníll atá neamhdhleathach agus ar thuig an Roinn é a bheith neamhdhleathach ar a laghad ón mbliain 2008. An coinníoll neamhdhleathach sin ná go bhfuil uasteorainn de 66 bliain d'aois ag gabháil leis an scéim agus tá sin ag sárú an Achta um Stádas Comhionann 2000. De bhreis air sin, d'ainneoin gur aontaigh an Roinn Sláinte i mí Aibreáin 2011 moladh ón Ombudsman a chur i bhfeidhm maidir le baint na huasteorann aoise neamhdhleathaí sin, ní dhearna an Roinn amhlaidh. Dá bharr sin, cheadaigh an Roinn don scéim leanúint ag feidhmiú ar an mbonn neamhdhleathach sin cé go raibh a fhios ag an Roinn go raibh an bonn neamhdhleathach.

Tá an Roinn Sláinte anois (Deireadh Fómhair 2012) tar éis diúltú do mholadh comhchosúil ón Ombudsman. Rinneadh an moladh is déanaí seo ón Ombudsman tar éis imscrúdú a dhéanamh ar chúig cinn de ghearáin ó dhaoine ar diúltaíodh an Liúntas Soghluaisteachta dóibh bunaithe ar an uasteorainn aoise neamhdhleathach. Rinneadh na gearáin tar éis dhul in éag na tréimhse inar aontaigh an Roinn Sláinte go mbainfí an uasteorainn neamhdhleathach. An moladh a rinne an tOmbudsman ná go mbainfí an uasteorainn aoise ón scéim i gcoitinne agus gur chóir iarratais na ngearánach a mheas arís gan aon tagairt don uasteorainn aoise.

Is íocaíocht mhíosúil í an Liúntas Soghluaisteachta a íocann Feidhmeannacht na Seirbhíse Sláinte (FSS) le daoine atá faoi mhíchumas trom “nach bhfuil de chumas acu siúl agus a mbeadh turais ócáideacha as baile tairbheach dóibh”. Tá an liúntas seo ann ón mbliain 1979 i leith agus faoi láthair tá uasluch €208.50 in aghaidh na míosa i gceist leis. Tá an Liúntas neamhrechtúil agus déanann FSS é a riar ar bhonn ciorcláin a d'eisigh an Roinn Sláinte.

### ***Príomhcheist***

I mí Aibreáin 2011, d'fhoilsigh an tOmbudsman tuarascáil imscrúdaithe dar teideal *Too Old to be Equal?* agus an príomhábhar plé ann ná go ndéantar iarratasóirí os cionn aois 66 a eisiamh ón Liúntas. Chinn an tOmbudsman go raibh an Roinn Sláinte ag sárú an Achta um Stádas Comhionann 2000 sa mhéid go raibh an Roinn ag áireamh uasteorainn aoise. Go bunúsach, chinn an tOmbudsman go raibh an uasteorainn aoise neamhdhleathach agus go raibh sí neamhdhleathach ó achtaíodh an tAcht um Stádas Comhionann 2000. Mhol an tOmbudsman don Roinn athbhreithniú ar an Liúntas a chur i gcrích, a bhí ar bun cheana féin, agus athmheas a dhéanamh ansin ar an Liúntas Soghluaisteachta chun go mbeadh sé ag comhlíonadh an Achta um Stádas Comhionann 2000. Mhol an tOmbudsman chomh maith go ndéanfaí an próiseas athbhreithnithe agus athmheasa a chur i gcrích laistigh de thréimhse sé mhí.

Ghlac an Roinn Sláinte le cinneadh an Ombudsman maidir le sárú an Achta um Stádas Comhionann. Ghlac an Roinn freisin le moladh an Ombudsman. Trí ghlacadh leis an moladh sin, chuir an Roinn de cheangal uirthi féin (a) athbhreithniú a dhéanamh ar an scéim Liúntais Soghluaisteachta; (b) athmheas a dhéanamh ar an scéim chun go mbeadh sí ag comhlíonadh an Achta um Stádas Comhionann agus (c) an t-athbhreithniú agus an t-athmheas a chur i gcrích laistigh de thréimhse sé mhí, is é sin, faoi dheireadh mhí Dheireadh Fómhair 2011. Dá



bharr sin, bhí an tOmbudsman ag coinne, is cuma pé téarmaí a bheadh i gceist leis an Liúntas leasaithe, nach mbeadh uasteorainn aoise ann ó dheireadh mhí Dheireadh Fómhair 2011 amach, mar go mbeadh seo ag teacht salach ar an Acht um Stádas Comhionann 2000.

Níl athbheithniú déanta ag an Roinn ar an scéim agus níl an uasteorainn aoise bainte aici. Tá an scéim fós á riar ag FSS ar bhonn teorann aoise a cheapann an Roinn féin a bheith neamhdhleathach.

### *Dara Cheist*

Sa tréimhse idir seo agus dheireadh mhí Dheireadh Fómhair 2011, tráth ar chóir don Liúntas a bheith leasaithe chun go mbeadh sé ag comhlíonadh an Achta um Stádas Comhionann 2000, tá cúig ghearán breise faighte ag an Ombudsman ó dhaoine, nó thar ceann daoine, ar diúltaíodh dá n-iarratais toisc go raibh siad os cionn 66 bliain d’aois.

Bheartaigh an tOmbudsman imscrúdú a dhéanamh ar na cúig ghearán seo. Na nithe atá á n-imscrúdú ná, **ar an gcéad dul síos**, an tslí ar theip ar an Roinn Sláine an uasteorainn aoise a bhaint ón scéim agus, **ar an dara dul síos**, an tslí ar lig an Roinn don scéim dul ar aghaidh agus iad ar an eolas go hiomlán go raibh príomhchoinníoll cáilitheachta ina choinníoll neamhdhleathach.

### *An Tuarascáil Seo*

Tá an tuarascáil seo ina tuarascáil speisialta don Dáil agus don Seanad faoi fhorálacha na n-alt 6(5) agus (7) den Acht Ombudsman 1980. Cuireann na forálacha seo ar chumas an Ombudsman “tuarascáil speisialta” a chur os comhair na Dála agus an tSeanad:

*“(5) I gcás ar dealraitheach don Ombudsman nach bhfuil na bearta a rinneadh nó a beartaíodh a dhéanamh de bharr moladh faoi fho-alt (3) den alt seo sásúil, féadfaidh sé, más cú leis é, a chur faoi deara go ndéanfar tuarascáil speisialta ar an gcás a chur i dtuarascáil faoi fho-alt (7) den alt seo.”*

Sa chás faoi láthair, tá an tOmbudsman den tuairim nach bhfuil na bearta atá glactha ag an Roinn Sláinte, ó mhí Aibreán 2011, mar fhreagra ar a moltaí sa tuarascáil *Too Old to be Equal?* sásúil.

Baineann an tuarascáil seo chomh maith le himscrúdú an Ombudsman ar na cúig ghearán faighte ag an Ombudsman ó dhaoine, nó thar ceann daoine, ar diúltaíodh dá n-iarratais toisc go raibh siad os cionn 66 bliain d’aois. Ní mór é a léamh i bpáirt leis an tuarascáil ó Aibreán 2011, *Too Old to be Equal?* atá ar fáil ar shuíomh gréasáin an Ombudsman.<sup>1</sup> Tá na mórcheisteanna iomchuí ón gcéad tuarascáil leagtha amach thíos.

Sa mhéid go bhfuil diúltaithe ag an Roinn Sláinte anois do mholtaí an Ombudsman tar éis imscrúdú a dhéanamh ar chúig ghearán le déanaí, tá an tOmbudsman den tuairim gur chóir an teip seo a thuairisciú don Dáil agus don Seanad.

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<sup>1</sup> <http://www.ombudsman.gov.ie/en/Publications/Investigation-Reports/Too-Old-to-be-Equal/>

An seasamh atá ag an Roinn maidir leis seo ná nach féidir leis an Roinn feidhmiú ar mholtaí an Ombudsman sa mhéid go “gcruthódh sé dliteanais don Stát nach bhfuil d’acmhainn airgid ag an Stát iad a sheasamh faoi láthair”. Is é sin, níl sé d’acmhainn airgid ag an Stát cloí le dlí na tíre. An seasamh atá ag an Ombudsman ina leith – mar atá sonraithe i gconclúid na tuarascála seo – ná nach bhfuil sé chun ár leasa go dtabharfadh comhlacht tábhachtach Stáit neamhaird ar an dlí. Diúltaíonn an tOmbudsman go huile is go hiomlán don iarracht a rinne an Roinn a seasamh a thacú le hargóint gur freagra ciallmhar é ar shuíomh mí-ámharach, suíomh ina gcaithfear an dlí a shárú d’fhonn acmhainní a theorannú go héifeachtach. Tá roghanna éagsúla ann maidir le conas is fearr acmhainní tearca a úsáid. Ach níl sárú an dlí ar cheann de na roghanna sin.

\*\*\*

Ag tagairt tríd síos sa tuarascáil seo don “Roinn”, is fiú a mheabhrú, chun críocha an Achta Ombudsman 1980, *folaíonn tagairtí san Acht seo d’aon Roinn Stáit tagairtí don Aire Rialtais atá i bhfeighil na Roinne Stáit sin.....*<sup>2</sup> An tuiscint atá ag an Ombudsman ar an seasamh atá á chur chun tosaigh ag an Roinn ná gur seasamh é a n-aontaíonn an tAire Sláinte leis.

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<sup>2</sup> An tAcht Ombudsman 1980, alt 1(2)

## **Mórcheisteanna ó *Too Old to be Equal?***

An mhórcheist is mó ar cuireadh síos uirthi sa tuarascáil *Too Old to be Equal?* ná go bhfuil an uasteorainn aoise d'iarratasóirí neamhdhleathach agus go bhfuil sé sin ina shárú ar an Acht um Stádas Comhionann 2000. Sonraítear sa tuarascáil go raibh an Roinn mall le glacadh leis an bhfíric seo le linn an imscrúdaithe. Cé gur luaigh Oifig an Ombudsman leis an Roinn i mí Feabhra 2009, sular thosaigh an t-imscrúdú, go raibh an uasteorainn aoise “idirdhealaitheach go míchuí”<sup>3</sup> agus go raibh sé ag sárú an Achta um Stádas Comhionann 2000, rinne an Roinn ina cuid freagraí éagsúla iarracht an t-ábhar a sheachaint. Dhá bhliain níos déanaí, i mí Feabhra 2011, thug an Roinn aird ar an idirdhealú míchuí agus neamhchomhlíonadh an Achta um Stádas Comhionann 2000.

Agus iad ag trácht ar dhréacht den tuarascáil *Too Old to be Equal?*, bhí an chuma air gur admhaigh an Roinn go raibh an aoisteorainn neamhdhleathach. Dúirt an Roinn gur ghlac sí gur chóir go ndearnadh “athbhreithniú agus nuashonrú ar an scéim liúntais soghluaisteachta i ndiaidh achtú an Achta um Stádas Comhionann” sa bhliain 2000. De bhreis air sin, luaigh an Roinn “i ndiaidh athbhreithnithe le déanaí ar théarmaí na scéime, ar an uasteorainn aoise agus sainmhíniú ar cad is míchumas ann go háirithe, tá an Roinn den tuairim nach bhféadann sí leanúint ar aghaidh á feidhmiú ar an mbonn reatha”. Ag an bpointe sin chomh maith, dúirt an Roinn leis an Ombudsman go raibh an tAire tar éis “aontú gur chóir go raibh an liúntas soghluaisteachta á íoc, ar bhonn eisceachtúil, le In. Browne [gearánach]” ó dháta an iarratais i mí Meithimh 2008.

Ina tuarascáil *Too Old to be Equal?* rinne an tOmbudsman trácht ar an tslí nár éirigh leis an Roinn, thar tréimhse aon bhliain déag (suas go dtí Aibreán 2011), téarmaí an Achta um Stádas Comhionann a chomhlíonadh agus go raibh seo ina dhrochléiriúchán don Roinn. Luaigh sí go raibh sainchúram ar leith ar an Roinn Sláinte i réimse an mhíchumais agus nach mbeadh sé míréasúnta do dhuine bheith ag súil go mbeadh an Roinn, thar aon chomhlacht poiblí eile i gcoitinne, in iúl ar chearta dlíthiúla daoine atá faoi mhíchumas. Rinne an tOmbudsman trácht ar an tslí a bhfuil an Roinn ina Roinn cheannasach ó thaobh chur chun cinn agus leas agus deiseanna saoil na ndaoine atá faoi mhíchumas; go bhfuil Aire inti a bhfuil freagracht ar leith air/uirthi as comhionannas, mórcheisteanna míchumais agus meabhairshláinte agus go bhfuil Oifig thiomnaithe aici, laistigh de bhonneagar iomlán na Rann, don Mhíchumas agus don Mheabhairshláinte lena Stiúirthóir féin.

Ina tuarascáil a tháinig roimhe, shonraigh an tOmbudsman chomh maith go raibh cúiseanna éagsúla ann, sular luaigh a hOifig an pointe (i mí Feabhra 2009), le gur chóir go mbeadh an Roinn ar an eolas cheana féin maidir le neamhdhleathacht na huasteorann aoise don Liúntas Soghluaisteachta. I mí an Mheithimh 2008, cuireadh iallach, go bunúsach, ar an Roinn an uasteorainn aoise a bhaint ón Scéim Deontas Mótariompair. Rinneadh an cinneadh seo de bharr próisis a thosaigh an tÚdarás Comhionannais i mí Bealtaine 2007 a bhí ag gníomhú de bharr gearáin ar leith. Nuair nach ndearna an Roinn dul i gcomhar leis an Údarás Comhionannais, cuireadh an gearán ar aghaidh chuig an mBinse Comhionannais lena mheas.

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<sup>3</sup> Tá sé seo ar cheann de sheacht gcatagóir míriaracháin aitheanta in alt 4 d'Acht an Ombudsman 1980.

Is de bharr an atreoraithe seo chuig an mBinse Comhionannais amháin, agus mar thoradh ar an mbreithniú a bheadh á dhéanamh ag an mBinse, a thug an Roinn aghaidh ar mhórchéist na huasteorann aoise. Ag an bpointe sin, Meitheamh 2008, ghlac an Roinn leis gur sháraigh an uasteorainn aoise an tAcht um Stádas Comhionann agus bhain an Roinn an coinníoll seo ó théarmaí na Scéime Deontais Mótariompair.

Dá bharr seo, i mí an Mheithimh 2008 ba chóir go dtuigeadh an Roinn ag an bpointe sin go raibh an uasteorainn aoise don Liúntas Soghluaisteachta ag sárú an Achta um Stádas Comhionann 2000 chomh maith. Ina plé leis an Ombudsman, áfach, thar thréimhse dhá bhliain (Feabhra 2009 – Feabhra 2011) theip ar an Roinn freagra a thabhairt ar iarratais ar leith a bhí bainteach leis an ábhar agus, go bunúsach, sheachain an t-ábhar. Faoi dheireadh, i mí Feabhra 2011, agus ar shlí a bhí an-chosúil leis an mbealach ar dhéileáil sí leis an Údarás Comhionannais agus leis an mBinse Comhionannais i gcás an Deontais Mhótariompair, d’admhaigh an Roinn nach raibh an uasteorainn aoise don Liúntas Soghluaisteachta inchosanta.

Ina tuarascáil *Too Old to be Equal?* thagair an tOmbudsman don leisce a bhí ar an Roinn aghaidh a thabhairt ar go raibh locht suntasach ó thaobh an dlí de ar an scéim Liúntais Soghluaisteachta. Is léir ón tuarascáil nár thug an Roinn aghaidh ar an gceist seo go dtí go raibh sé soiléir go gcinneadh an tOmbudsman i gcoinne na Roinne i gcás na huasteorann aoise. Bhí sé seo ina mhacasamhail den chás maidir leis an Deontas Mótariompair; is é sin nach dtabharfadh an Roinn aghaidh ar an gcás go raibh an uasteorainn aoise sa scéim dochosanta go dtí go raibh sé soiléir go gcinneadh an Binse Comhionannais i gcoinne na Roinne.

I gcás an Deontais Mótariompair, bhain an Roinn an uasteorainn aoise do gach iarratasóir. I gcás an Liúntais Soghluaisteachta, cé gur aontaigh an Roinn gur chóir an Liúntas a íoc leis an ngearánach áirithe sin, níor bhain sí an uasteorainn aoise i gcoitinne. Dúirt an Roinn gur theastaigh uaithi aghaidh a thabhairt ar mhórchéist na huasteorann aoise i gcomhar le cúiseanna inní eile. Luaigh sí gur theastaigh uaithi, go háirithe, déileáil le mórchéist an tsainmhíneithe ar cad is míchumas ann, a ardaíodh i dtuarascáil an Ombudsman chomh maith.<sup>4</sup>

#### *Athbhreithnithe ar an Scéim*

I rith imscrúdú an Ombudsman ónar eascair *Too Old to be Equal?*, rinne an Roinn iarracht míniú a thabhairt ar an moill a bhí ann an Liúntas Soghluaisteachta a bheith ag comhlíonadh an Achta um Stádas Comhionann, ar an mbonn go raibh athbhreithniú á dhéanamh ag an Roinn ar fheidhmiú an Liúntais. I gcomhfhreagras leis an Ombudsman dar dáta 30 Aibreán 2009, 2 Samhain 2009, 29 Eanáir 2010 agus 11 Feabhra 2011, luaigh an Roinn go raibh

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<sup>4</sup> Tharraing an tOmbudsman aird ina tuarascáil ar dhá chinneadh de chuid Oifigigh Comhionannais a chinn go raibh an sainmhíniú ar shoghluaisteacht, faoi mar a bhí in úsáid sa scéim Liúntais Soghluaisteachta, sriantach ar bhealach míchuí. Luaigh an tOifigeach Comhionannais: "*The concept of mobility in the [Liúntas Soghluaisteachta] circular is construed in such a narrow manner that it fails to recognise that in severe cases a person's intellectual and/or psychological health may restrict their mobility as effectively as some physical disabilities do. I find that this is a clear omission and it is obvious that the mobility allowance has not been updated to comply with the requirements set out in the Equal Status Acts (achtaithe i mí Deireadh Fómhair 2000). ...*" (DEC-S2009-012)

athbhreithniú á dhéanamh aici ar an scéim. I gcás na litreach ón 11 Feabhra 2011, dúirt an Roinn go raibh “roghanna áirithe maidir leis an scéim liúntais soghluaisteachta curtha faoi bhráid an Aire agus an Rialtais agus go raibh breithniú á dhéanamh acu orthu ach nach bhfuil cinntí polasaí deiridh déanta faoin gcás go fóill”. Luaigh an Roinn ansin, ós rud é go raibh Olltoghchán ar siúl ag an uair, go mbeadh ar “Aire/Rialtas nua déileáil leis” an ábhar.

Tagraíonn an tuarascáil *Too Old to be Equal?* chomh maith don bhealach a raibh roinnt tagairtí eile ón mbliain 2000 amach déanta ag an Roinn a luaigh go raibh athbhreithniú á dhéanamh aici ar an Liúntas Soghluaisteachta.<sup>5</sup> D’ainneoin sin, agus a moladh á ceapadh aici i mí Aibreáin 2011, ghlac an tOmbudsman, de mheon macánta, go ndéanfadh an Roinn gníomhú go tapa leis an mbotún sa scéim Deontais Soghluaisteachta a chur ina cheart. Ar an mbonn sin, mhol an tOmbudsman seo a leanas:

*“Chun déileáil le bunchúis na droch-éifeachta ar an In. Browne, molann an tOmbudsman go ndéanfadh an Roinn Sláine agus Leanaí a hathbhreithniú ar an scéim Deontas Soghluaisteachta a chomhlánú agus, mar thoradh ar an athbhreithniú sin, an scéim a athmheas le go mbeidh sí ag comhlíonadh an Achta um Stádas Comhionann 2000. Molann an tOmbudsman chomh maith gur chóir go mbeadh an próiseas athbhreithnithe agus athmheasa curtha i gcrích laistigh de sé mhí ó dháta na tuarascála.”*

Sa chomhthéacs go raibh scéim i bhfeidhm ar bhonn ina raibh ceanglas neamhdhleathach inti, bhí an teorainn ama de sé mhí an locht seo a chur ina cheart thar a bheith flaithiúil. Don Roinn, agus a fhios aici go mbeadh an toradh céanna ar aon ghearán eile déanta leis an Ombudsman mar gheall ar an uasteorainn aoise is a bhí i gcás an In. Browne, ba chóir gurbh ábhar práinne é athbhreithniú a dhéanamh ar an scéim.

Ar 21 Aibreán 2011, ghlac an Roinn leis an moladh seo agus luaigh Ard-Rúnaí na Roinne go sonrach go raibh sé i gceist ag an Roinn “gníomhú ina thaobh laistigh de sé mhí, faoi mar a moladh”.

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<sup>5</sup> Mar shampla, i bhfreagra CP ar 7 Samhain 2007, dúirt an tAire Stáit, Jimmy Devins “.... tá an [mo] Roinn ar an eolas maidir leis an mórcheist bainteach leis an gcritéar d’uasteorainn aoise i liúntais agus deontais sláine. Le haird tugtha ar reachtaíocht chomhionannais, tá mo Roinn ag plé na ceiste an uasteorainn aoise don scéim seo a bhaint”. (PQ27807/07)

## **Teip Moladh an Ombudsman a chur i bhFeidhm**

Ar **21 Deireadh Fómhair 2011**, tráth ar chóir go mbeadh moladh an Ombudsman curtha i bhfeidhm, scríobh Oifig an Ombudsman chuig an Roinn ag lorg sonraí maidir le toradh an athbhreithnithe agus maidir leis an “mbealach inar athbhreithníodh an scéim Liúntais Soghluaisteachta”. Sa chás nach raibh an t-athbhreithniú curtha i gcrích, d’iarr an tOmbudsman ar an Roinn “tuairisc chun dáta a sholáthar in éineacht le dáta ar a mbeadh moladh an Ombudsman curtha i bhfeidhm go hiomlán”.

Chuir an Roinn freagra ar a litir seo ar **28 Samhain 2011**<sup>6</sup>. An freagra a fuarthas ná go raibh “breithniú déanta ag an Rialtas air agus tá sé i gceist aige breithniú breise a dhéanamh air. Nuair atá cinneadh déanta ag an Rialtas maidir leis an liúntas soghluaisteachta, rachaidh an Roinn i dteagmháil arís leis an Ombudsman”. Ní dhearna an Roinn trácht ar bith ar an amscála sé mhí a bhí ann moltaí an Ombudsman a chur i bhfeidhm; agus níor gabhadh aon leithscéal ann nár cuireadh an moladh céanna i bhfeidhm.

Sa mhéid nach raibh aon chumarsáid eile ann, scríobh Oifig an Ombudsman arís chuig an Roinn ar **29 Nollaig 2011**. Shonraigh an litir sin gur theip ar an Roinn moladh an Ombudsman a chur i bhfeidhm agus go raibh an Roinn fós ag seasamh le scéim ina raibh “critéar cáilitheachta atá, dar leis Roinn féin, ag sárú an dlí”. Ós rud é go bhféadfaí baint de thátal as litir na Roinne ar 28 Samhain 2011 go raibh cinneadh Rialtais ag teastáil ón Roinn chun moladh an Ombudsman a chomhlíonadh, luaigh Oifig an Ombudsman gur chóir go raibh an Roinn “ag coinne leis an deacracht sin nuair a thug sí tiomantas maidir le moladh an Ombudsman a chur i bhfeidhm”.

Ar **20 Eanáir 2012** scríobh Oifig an Ombudsman chuig an Roinn ag rá go raibh dhá ghearán nua faighte aici ó dhaoine ar diúltaíodh Liúntas Soghluaisteachta dóibh de bharr na huasteorann aoise. D’iarr an tOmbudsman ar an Roinn a seasamh reatha ag an uair maidir leis an ábhar a shonrú. Tar éis roinnt meabhrúchán a chur, fuair an tOmbudsman freagra na Roinne ar **7 Márta 2012**. Luaigh sé go raibh cúrsaí díreach mar a bhí sonraithe ina litir ar 28 Samhain 2011, is é sin, nach raibh cinneadh ar bith déanta maidir leis an uasteorainn aoise. Maidir leis an dá ghearán is déanaí a tháinig isteach chuig an Ombudsman, luaigh an Roinn nach raibh, toisc nach raibh an critéar cáilitheachta athraithe, sé d’údarás ag FSS “an liúntas a íoc lasmuigh de na critéir cháilitheachta”.

Ardaíodh an cheist an Liúntas Soghluaisteachta a bheith ag comhlíonadh an Achta um Stádas Comhionann mar Cheist Parlaiminte ar **31 Eanáir 2012**<sup>7</sup>. Ina freagra scríofa, rinne an tAire Stáit (Kathleen Lunch) tagairt do mholadh an Ombudsman agus dúirt sí “Tá sé luaite ag an Roinn leis an Ombudsman go bhfuil raon roghanna beartas ar ghá machnamh a dhéanamh orthu. Níl cinntí deiridh beartas déanta againn maidir leis seo go fóill”. Ní raibh aon trácht ar ghealltanais na Roinne moladh an Ombudsman a chur i bhfeidhm roimh 21 Deireadh Fómhair 2011.

<sup>6</sup> Tá na príomh-mhíreanna comhfhreagrais ón Roinn agus chuig an Roinn á bhfoilsíú mar Aguisín ar shuíomh gréasáin an Ombudsman.

<sup>7</sup> Ceist Uimhir. 573 <http://debates.oireachtas.ie/dail/2012/01/31/00390.asp>

Ar **18 Meitheamh 2012** scríobh Oifig an Ombudsman chuig an Roinn arís ag rá go raibh tuilleadh gearán faighte aici maidir leis an uasteorainn aoise don Liúntas Soghluaisteachta agus le sonraí a fháil maidir le cathain a mheas an Roinn a bheadh cinneadh aici ar an ábhar. Ar **13 Iúil 2012** fuair an tOmbudsman freagra na Roinne a luaigh go raibh “seasamh na Roinne faoi láthair, díreach mar a bhí i gcomhfhreagras go dtí seo”.

Idir an dá linn, chuir an tOmbudsman a Tuarascáil Bhliantúil do 2011 os comhair na Dála agus an tSeanaid ar **26 Meitheamh 2012**. Ina Tuarascáil, tharraing an tOmbudsman aird ar nach raibh an Roinn tar éis an moladh a chomhlíonadh a luadh sa tuarascáil *Too Old to be Equal?* Luaigh sí seo ina Tuarascáil Bhliantúil :

*Thug mé le fios i mo Thuarascáil Imscrúdaithe bhunaidh gurb é an toradh atá ag neamhábaltacht dealraitheach na roinne déileáil le saincheisteanna, mar choinníoll neamhdhleathach a bheith sa Scéim Liúntas Soghluaisteachta, “go bhféadfadh daoine a mheas gur cuma leo go bhfuil scéim á réachtáil acu atá ag teacht salach ar dhlí na tíre agus ar an dlí um chearta an duine go ginearálta.” Tá sé breis agus bliain níos déanaí anois agus níor chruthaigh an roinn fós nach bhfuil údar ag daoine an dearcadh sin a bheith acu.*

*Lena chois sin measaim nach bhfuil sé sásúil ar chor ar bith gur theip ar an roinn teagmháil a dhéanamh liom le rá nár chomhlíon sí an moladh, nó nach raibh sí in ann é a chomhlíonadh.<sup>8</sup>*

Ar **20 Iúil 2012** scríobh Oifig an Ombudsman chuig Ard-Rúnaí na Roinne chun a rá, de bharr theip na Roinne moladh an Ombudsman a chur i bhfeidhm, agus ós rud é nár tugadh aon dáta ar leith faoina gcuirfí an moladh i bhfeidhm, go raibh sé i gceist ag an Ombudsman tuarascáil speisialta a scríobh agus a chur faoi bhráid an Oireachtais.

Ar **27 Iúil 2012** d’fhreagair an Roinn. Den chéad uair ó d’imigh an sprioc sé mhí in éag do chur i bhfeidhm mholadh an Ombudsman, ghabh an Roinn leithscéal mar gheall ar an “moill maidir leis an ábhar seo”. Mar leanúint leis sin, luaigh an Roinn:

*Tá sé anois ina rún docht againn an cheist seo a réiteach faoi dheireadh mhí Mheán Fómhair. De bharr chineáil agus íogaire na gcinntí is gá a ghlacadh i leith an liúntais seo, agus de bharr ceisteanna eile, is gá an cheist a chur faoi bhráid an Rialtais agus táimid ag ullmhú chuige seo faoi láthair.*

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<sup>8</sup> <http://www.ombudsman.gov.ie/en/Publications/Annual-Reports/2011-Annual-Report/AnnualReport2011/chapter4.html>

## Gearáin le Déanaí - Uasteorainn Aoise don Liúntas Soghluaisteachta

Ó cuireadh an tuarascáil *Too Old to be Equal?* i gcrích, tá an tOmbudsman tar éis cúig ghearán a fháil ó dhaoine, nó thar ceann daoine ar dhiúltaigh FSS dá n-iarratais ar Liúntais Soghluaisteachta toisc go raibh an t-iarratasóir 66 bliain d’aois tráth ar seoladh an t-iarratas isteach. Chun críche na tuarascála seo, ní gá na gearánaigh seo a shainaithint ná fiúntais ghinearálta a n-iarratas a mheas. Tá an tOmbudsman tar éis bheith i dteagmháil cheana féin le FSS mar gheall ar na gearáin seo. Glacann sí leis gur gá do FSS, nuair nach bhfuil aon treoir faighte acu ón Roinn a chuirfeadh ar a cumas neamhaird a dhéanamh den uasteorainn aoise, déileáil leis na hiarratais seo trí thagairt a dhéanamh don chritéar cáilitheachta reatha.<sup>9</sup> D’fhéadfadh go mbeadh sé úsáideach, áfach, cuntas gairid a thabhairt ar chúinsí na gcúig chás seo.

### Cás 1

Bhí an fear seo 67 bliain d’aois nuair a chuir sé iarratas isteach ar dtús do Liúntas Soghluaisteachta i mí Aibreáin 2011. Bhuail stróc é sa bhliain 1996 rud a d’fhág é, dar leis féin, le fadhbanna soghluaisteachta tromchúiseacha. Dhiúltaigh FSS dá iarratas ar fhoras aoise. Níor eagraigh FSS aon tástáil ar a chumas soghluaisteachta ná aon tástáil ar a chúinsí airgeadais ach an oiread. Cuireadh an gearán faoi bhráid an Ombudsman i mí Aibreáin 2012. Mórcheist eile a ardaíodh sa chás seo ná gur luaigh an gearánach agus a theaghlach nár chuala siad trácht ar an Liúntas Soghluaisteachta go dtí 2011 agus gur chuir siad iarratas isteach air láithreach; dúirt siad gur chóir go raibh FSS tar éis a chur in iúl dóibh gurbh ann don Liúntas Soghluaisteachta nuair a buaileadh an fear le míchumas ar an gcéad dul síos. Dá mbeadh an fear seo tar éis a bheith ag fáil an Liúntais sular shroich sé 66 bliain d’aois, bheifí fós á íoc leis i ndiaidh dó dul os cionn 66 bliain d’aois. Níl an uasteorainn aoise i bhfeidhm ach dóibhsean atá ag cur iarratais isteach den chéad uair agus iad os cionn 66 bliain d’aois.

### Cás 2

Bhí an bhean seo 81 bliain d’aois nuair a chuir sí iarratas isteach ar Liúntas Soghluaisteachta i mí Mheán Fómhair 2011. Dhiúltaigh FSS don iarratas seo ag lua “ar an drochuair, faoi na critéir leagtha amach ag an Roinn Sláinte & Leanaí, níl tú cáilithe....Luann na critéir gur ghá do **“Iarratasóirí bheith 16 bliain d’aois agus níos sine, agus faoi bhun 66 bliain d’aois”**”. Ní dharna FSS measúnú leighis ar shoghluaisteacht na mná, ná measúnú ar a cúinsí airgid. Léirigh tuairisc leighis curtha isteach ag dochtúir teaghlaigh na mná go raibh fadhbanna tromchúiseacha soghluaisteachta aici. Níor éirigh lena hachomharc an cinneadh a athrú ar na fáthanna céanna. Rinneadh an gearán leis an Ombudsman i mí na Nollag 2011. Is oth linn a rá go bhfuair an gearánach seo bás go déanach i mí Márta 2012.

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<sup>9</sup> Tá FSS tar éis bheith ag lorg soiléirithe ar an ábhar seo ón Roinn le tamall fada anuas, mar a tharlaíonn.



### Cás 3

Bhí an fear seo 91 bliain d’aois nuair a chuir sé iarratas isteach ar dtús ar Liúntas Soghluaisteachta i mí Aibreáin 2012. Mar a tharlaíonn, is é an fear seo fear céile an ghearánaigh i gCás 2 thuas agus dhiúltaigh FSS dá iarratas siúd ar na fáthanna céanna ar diúltaíodh do chás a mhná a d’éag. Ní dhearna FSS measúnú leighis ar shoghluaisteacht an fhir ná ar a chúinsí airgid féin. Diúltaíodh d’achomharc an fhir seo de bharr na huasteorann aoise agus luaigh an t-oifigeach achomhairc “go raibh sé stiúrtha ag reachtaíocht (sic) agus ag treoirlínte reatha bainteach leis an scéim”. Rinneadh an gearán leis an Ombudsman i mí Iúil 2012.

### Cás 4

Bhí an bhean seo 73 bliain d’aois nuair a chuir sí iarratas isteach ar dtús ar Liúntas Soghluaisteachta i mí Lúnasa 2011. Dhiúltaigh FSS don iarratas seo “toisc go luann na treoirlíne gur gá bheith faoi bhun 65 bliain d’aois”. [An uasteorainn aoise atá ann ná 66 bliain dáiríre]. Ní dhearna FSS measúnú leighis ar shoghluaisteacht na mná agus ní dhearna a cúinsí airgid a mheas. Rinne an bhean achomharc in aghaidh an chinnidh ach níl an oifig achomhairc FSS tar éis déileáil leis an achomharc seo go fóill. Is amhlaidh an cás, de réir dealraimh, toisc go gceapann an oifig achomhairc go bhfuil an oifig FSS áitiúil ag déanamh athbhreithnithe ar an gcinneadh tosaigh. Níl aon fhianaise go bhfuil athbhreithniú gníomhach ar siúl sa chás seo, áfach. Rinneadh an gearán leis an Ombudsman i mí na Nollag 2011.

### Cás 5

Bhí an fear seo 77 bliain d’aois nuair a chuir sé isteach ar Liúntas Soghluaisteachta ar dtús i mí Mheán Fómhair 2011. Diúltaíodh don iarratas “toisc gur gá d’iarratasóirí bheith os cionn 16 agus faoi bhun 65 bliain d’aois” (sic). Chuir an fear FSS ar an eolas maidir le héileamh dlí féideartha faoi na hAchtanna um Stádas Comhionann 2000-2004 ag baint úsáide as gnáth-fhoirm (Foirm ES.1) curtha ar fáil ag an Údarás Comhionannais. Ghlac FSS leis seo mar achomharc agus i mí na Samhna 2011 rinne Bainisteoir Ginearálta FSS áitiúil “cinneadh achomhairc” seasamh leis an diúltú. I mí na Nollag 2011, rinne an fear gearán leis an Ombudsman. I gcomhthráth leis seo, scríobh sé chuig FSS le hachomharc eile a atreoraíodh chuig oifig achomhairc FSS. D’iarr an oifig go ndéanfaí measúnú leighis ar an iarratasóir – ós rud é nach raibh measúnú dá leithéid déanta air cheana féin. Rinne oifigeach leighis an measúnú leighis i mí Aibreáin 2012. Toradh an mheasúnaithe sin ná gur cinneadh nach raibh an fear incháilithe ó thaobh sláinte de don Liúntas Soghluaisteachta. Mar a tharlaíonn, ghlac an fear leis an measúnú seo agus glacann sé leis an gcinneadh nach mbeidh sé incháilithe riamh do Liúntas Soghluaisteachta. Tá sé ráite aige le hOifig an Ombudsman, áfach, go ngoileann sé go mór air fós gur diúltaíodh dá iarratas i dtosach díreach de bharr a aoise amháin.

## **Barúlacha an Ombudsman**

Rinne an tOmbudsman soiléir go maith é sa tuarascáil *Too Old to be Equal?* nach raibh aon dearcadh á léiriú aici maidir leis an toradh a thiocfadh as athbhreithniú na Roinne ar an scéim Liúntais Soghluaisteachta. Thairis sin, níl aon ról ag an Ombudsman maidir le pé gnóthaí a d'fhéadfaí a bheith faoi bhráid an Rialtais maidir le todhchaí na scéime nó na scéimeanna gaolmhara. An t-aon ábhar inní don Ombudsman ná nár chóir do scéim, cruthaithe ar bhonn riaracháin ag an Roinn, feidhmiú ar bhonn critéir atá neamhdhleathach.

Tá sé an-tábhachtach bheith ríshoiléir nach bhfuil cinneadh ón Rialtas riachtanach chun go mbeadh gníomh ann leis an scéim Liúntais Soghluaisteachta a bheith ag comhlíonadh an Achta um Stádas Comhionann. Is féidir a thuiscint go maith gur chóir tograí maidir le tacaíochtaí ioncaim do dhaoine atá faoi mhíchumas a chur faoi bhráid an Rialtais agus go ndéanfadh an Rialtas féin pé cinneadh a cheapann sé atá cuí. Bheadh sé áiféiseach, áfach, bheith ag smaoineamh nach féidir leis an Roinn riachtanas neamhdhleathach a bhaint óna scéim riaracháin féin gan reámfhaomhadh ar leith ón Rialtas.

Nuair a tháinig mórcheist eile dá leithéid chun solais sa bhliain 2008, ní raibh ar an Roinn ach an uasteorainn a scrios ón scéim Deontas Mótariompair agus ciorclán a eisiúint don FSS á lua sin. D'fhéadfadh sé bheith tar éis an t-athrú céanna a dhéanamh i gcás na scéime Liúntais Soghluaisteachta ag aon staid ó mhí an Mheithimh amach, nuair a athraíodh an scéim Deontais Mótariompair.

Tá sé soiléir, gan amhras, go mbeadh impleachtaí airgeadais i gceist le baint na huasteorann aoise seo. Rinne an Roinn an pointe seo le linn an imscrúdaithe do *Too Old to be Equal?*. I litir chuig an Ombudsman, dar dáta 30 Lúnasa 2009, dúirt an Roinn “*nach raibh sé indéanta an scéim a leasú leis an uasteorainn aoise a bhaint sna cúinsí eacnamaíochta reatha*”. Ghlac an tOmbudsman leis ag an uair, agus glacann sí fos leis, go mbeadh cistiú na scéime ina fhadhb. Ach ní féidir srianta airgeadais, áfach, a úsáid mar bhonn cirt do choinníoll scéime atá neamhdhleathach. Scríobh an tOmbudsman sa tuarascáil sin:

*I gcás an Liúntais Soghluaisteachta, féadtar an scéim a leasú chun an uasteorainn aoise a bhaint ar bhonn riaracháin sa mhéid nach scéim reachtúil í. I gcás go mbeadh impleachtaí costais ann dá ndéanfaí an scéim a leathnú le go gcuimseofaí daoine os cionn 66 bliain d'aois, ar costais iad nach bhféadfaí a sheasamh sna cúinsí eacnamaíochta reatha, féadfaidh gá a bheith ann athruithe eile a dhéanamh ar an scéim ionas go mbeadh sí ag comhlíonadh an Achta um Stádas Comhionann agus ceanglas eile, a chumasóidh feidhmiú na scéime de réir na n-acmhainní atá ar fáil. Ní féidir glacadh leis go mbeadh comhlachtaí poiblí i sochaí atá faoi rialú an dlí ag gníomhú chun moill a chur leis seo, nó gan gníomhú ina leith in aon chor. Tá sé fíor ach go háirithe sa mhéid gur grúpa leochaileach a bheidh thíos leis i gcás nach ngníomhaítear ina leith – grúpa daoine nach féidir leo stocaireacht a dhéanamh ar a son féin ag féachaint lena gcearta a chosaint.*

Ina teagmháil leis an Ombudsman le linn an imscrúdaithe *Too Old to be Equal?*, rinne an Roinn iarracht nasc a chruthú idir baint na huasteorann aoise agus athbhreithniú níos leithne

ar an scéim Liúntais Soghluaisteachta. Cé nach raibh gá athbhreithniú níos leithne a dhéanamh de bharr bhaint na huasteorann aoise, ghlac an tOmbudsman, de mheon macánta, le seasamh na Roinne. De bharr na n-imeachtaí a tharla ina dhiaidh, áfach, d'fhéadfadh gur chóir don Ombudsman a mholadh go mbainfí an uasteorainn aoise láithreach. I ndiaidh aontú tréimhse sé mhí a chaitheamh chun an fhadhb a chur ina ceart, is léir, nach bhfuil déanta anseo ach cead a thabhairt don Roinn gníomhaíochtaí a chur ar atráth, gníomhaíochtaí ar chóir di a dhéanamh láithreach.

Pé brúnna airgeadais, pé srianta atá ann aird an Rialtais a fháil i rith na géarchéime eacnamaíochta reatha, is fíor go fóill nach bhfuil sé de chead ag Roinn Rialtais ligean do scéim dá cuid bheith i bhfeidhm nuair a thuigtear – le tamall fada – go bhfuil ceann de na príomhchoinníollacha ann neamhdhleathach.

## **Freagra na Roinne**

Tugadh an deis don Roinn barúil a chur in iúl maidir le dréacht den tuarascáil seo. D'fhreagair Ard-Rúnaí na Roinne i litir dar dáta 3 Deireadh Fómhair 2012 (tá téacs iomlán na litreach sin ina aguisín den tuarascáil seo agus tá sé le fáil ag [www.ombudsman.gov.ie](http://www.ombudsman.gov.ie))

Seo a leanas na príomhphointí a rinne an tArd-Rúnaí:

- I bhfianaise an tionchair a d'fhéadfadh a bheith ag cinneadh maidir leis an scéim, ó thaobh costais bhreise ar an státchiste nó cailteanas ioncaim do ghrúpa leochaileach daoine, is léir gur iomchuí é an cás a chur faoi bhráid an Rialtais. Forchoimeádan an tAire an ceart agus an lánrogha cinneadh a dhéanamh maidir le céard is iomchuí a chur faoi bhráid na Comh-aireachta.
- Níl an Deontas Mótariompair inchomparáide leis an Liúntas Soghluaisteachta ó thaobh a chuspóra de agus ó thaobh leibhéal an chaiteachais i gceist. Mar sin ní ghlactar leis an maíomh gur chóir an aoisteorainn a bhaint sa Liúntas Soghluaisteachta.
- Cuireadh roghanna faoi bhráid an Rialtais agus d'eascair saincheistanna suntasacha polasaí agus dlí astusan a bhfuil sé beartaithe ag an Roinn iad a réiteach go gasta.
- Tá meas an-mhór ag an Roinn ar chearta daoine faoi mhíchumas.
- Is gá don Roinn aird a bheith aici ar an úsáid is fearr a bhaint as na hacmhainní atá ar fáil chun a chinntiú go ndéantar na hacmhainní sin a spriocdhírú ar na daoine is mó a bhfuil cúnamh de dhíth orthu.

## **Barúlacha an Ombudsman maidir leis an bhFreagra**

Shoiléirigh an tOmbudsman cheana féin nach raibh sí ag maímh go raibh aon cheart aici a mholadh cén toradh deiridh a bheadh ann tar éis athbhreithniú na Roinne ar an scéim le haghaidh Liúntas Soghluaisteachta. Anuas air sin níl aon ról in aon chor aici i ndáil le cúrsaí a d'fhéadfaí a chur faoi bhráid an Rialtais faoi thodhchaí na scéime nó scéimeanna bainteacha. An t-aon chúis inní ag an Ombudsman ná nár chóir go ndéanfaí scéim, a bhunaigh an Roinn ar bhonn riaracháin, a fheidhmiú ar bhonn critéir incháilitheachta atá neamhdhleathach.

Fáiltíonn an tOmbudsman roimh dhearbhuith na Roinne i ndáil le cearta dlíthiúla na ndaoine faoi mhíchumas agus aithníonn freisin go gcaithfidh an Roinn an úsáid is fearr agus is féidir a bhaint as na hacmhainní atá ar fáil di.

Ní féidir leis na cearta agus na riachtanais sin, ámh, an Roinn a scaoileadh óna dualgas foriomlán feidhmiú de réir an dlí. D'ainneoin na mínithe atá tugtha ag an Roinn tá an cás fanta mar a bhí, is é sin go simplí, go bhfuil an Roinn fós ag feidhmiú scéime riaracháin ar bhonn critéir incháilitheachta atá neamhdhleathach.

## Cinntí

Tar éis di imscrúdú a dhéanamh faoi alt 4 den Acht Ombudsman 1980, iad seo a leanas cinntí an Ombudsman:

1. Go bhfuil a cinneadh, a rinne sí ar dtús in *Too Old to be Equal?*, fós i bhfeidhm : “go bhfuil an scéim Liúntais Soghluaisteachta, ina comhdhéanamh reatha, ag sárú an Achta um Stádas Comhionann 2000 sa mhéid go n-áiríonn an scéim uasteorainn aoise, agus ní féidir seasamh leis an uasteorainn aoise sin ar aon bhonn a chuirfeadh an scéim ag comhlíonadh an Achta um Stádas Comhionann”. Tá an tOmbudsman den tuairim go bhfuil an sárú seo ar na hAchtanna um Stádas Comhionann idirdhealaitheach go míchuí, bunaithe ar chleachtas míshásúil agus contrártha le riarachán cothrom nó iontaofa.
2. Go bhfuil teip na Roinne a tiomantas a chomhlíonadh, ó thaobh moladh an Ombudsman ina tuarascáil *Too Old to be Equal?* a chur i bhfeidhm de, bunaithe ar chleachtas míshásúil chomh maith le bheith contrártha le riarachán cothrom nó iontaofa.
3. Go ndearnadh dochar don chúigear gearánach atá i gceist trí dhiúltú dá n-iarratais Liúntas Soghluaisteachta a fháil agus go bhfuil na diúltuithe céanna tar éis teacht ó iontaoibh FSS ar choinníoll scéime (an uasteorainn aoise) atá idirdhealaitheach go míchuí, curtha i bhfeidhm gan údarás ceart agus contrártha le riarachán cothrom agus iontaofa.

## **Moltaí**

Tar éis di imscrúdú a dhéanamh faoi alt 4 den Acht Ombudsman 1980, agus ag eascairt ó na cinní leagtha amach thuas, iad seo a leanas moltaí an Ombudsman don Roinn Sláinte:

1. Go mbainfeadh an Roinn láithreach bonn, gan réamhchlaontacht mar gheall ar aon chinneadh a d'fhéadfaí a dhéanamh mar gheall ar thodhchaí na scéime i gcoitinne, an uasteorainn aoise mar choinníoll sa scéim Liúntais Soghluaisteachta.
2. Go dtabharfadh an Roinn údarás do FSS athbhreithniú a dhéanamh ar iarratais na gceathrar<sup>10</sup> gearánach a bhfuil a gcásanna luaite thuas sa tuarascáil seo agus nach mbeadh an uasteorainn aoise san áireamh san athbhreithniú sin.
3. Go gcuirfeadh an Roinn de cheangal ar FSS (i) gach iarratas a aithint ar Liúntas Soghluaisteachta a fuarthas ó 1 Aibreán 2011 agus ar diúltaíodh dóibh de bharr na huasteorann aoise amháin, nó inar cuireadh cinneadh ar atráth toisc go rabhthas ag feitheamh ar shoiléiriú maidir leis an uasteorainn aoise, agus (ii) go ndéanfadh an Roinn athbhreithniú ar na hiarratais seo gan an uasteorainn aoise san áireamh.

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<sup>10</sup> Glacann an tOmbudsman leis nach bhfuil an gearánach i gCás 5 ag súil go ndéanfadh Feidhmeannacht na Seirbhíse Sláinte athbhreithniú ar a iarratas.

## **Moltaí Diúltaithe – Barúil an Ombudsman**

Dhiúltaigh an Roinn do mholtaí an Ombudsman. Ina litir ón Ard-Rúnaí dar dáta 22 Deireadh Fómhair 2012 – foilsithe in Aguisín na tuarascála seo - dúirt an Roinn nach raibh sé “in ann an ciorclán a leasú a bhain leis an Liúntas Soghluaisteachta”. De bhreis air sin, deir an Roinn go dtabharfadh na “moltaí, dá gcuirfí i bhfeidhm iad, neamhaird ar shrianta tromchúiseacha airgeadais atá ar an Roinn, an FSS agus ar an Stát i gcoitinne.” Deir an Roinn go ndéanfadh: “cur i bhfeidhm na moltaí dliteanais a chruthú nach bhfuil sé d’acmhainn airgid ag an Stát iad a sheasamh”. Mar chríoch, deir an Roinn, cibé scéal é go mbeidh sí “ag féachaint le réiteach a fháil ar na saincheisteanna atá fós idir lámha chomh gasta agus is féidir é”.

Cuireann an Roinn an cás seo i láthair mar choinbhleacht mhí-ámharach idir ceanglais an dlí agus srianta ar chaiteachas poiblí. D’fhéadfaí bheith tuisceanach ina leith seo dá mba rud é gur deacracht seo a tháinig chun solais le déanaí. D’fhéadfaí glacadh leis go bhféadfaí tréimhse réasúnta ama a thabhairt don Roinn chun an choinbhleacht a réiteach. Déanta na fírinne, ámh, tugadh tréimhse imleor don Roinn réiteach a fháil air seo. Bhí an bonn neamhdhleathach i bhfeidhm ó bhí 2000 ann, sin le dhá bhliain déag anuas. Bhí an Roinn ar an eolas faoin neamhdhleathacht sin ón tús, nó ba chóir go raibh. Bhí an Roinn ar fógra sonrach réiteach a fháil ar an scéal ó mhí Aibreáin 2011. D’aontaigh an Roinn an fhadhb a réiteach i mí Aibreáin 2011.

Cibé scéal é diúltaíonn an tOmbudsman don seasamh, i bhfianaise na géarchéime airgeadais sa Stát faoi láthair, nach féidir a moltaí a chur i bhfeidhm. Ní cás é seo a mbeadh méadú substaintiúil ann ar chaiteachas poiblí dá gcoifí leis an dlí. Bhí an tOmbudsman thar a bheith soiléir maidir leis seo ina tuarascáil bunaidh i mí Aibreáin 2011 mar ar thagair sí go sonrach don ghá a bhí ann meaitseáil a dhéanamh ar théarmaí incháilitheachta faoin scéim le leibhéal na n-acmhainní ar fáil. Cé nach réimse é seo inar chóir don Ombudsman a túsrogha a chur in iúl, is léir go bhfuil roghanna ann don Roinn, idir dheireadh a chur leis an scéim ina hiomláine, laghdú ar luach airgeadais na scéime, nó thabhairt isteach coinníll theorannaithe incháilitheachta eile (ach é bheith dleathach).

Tá saincheist shuntasach muiníne léirithe i bhfreagra na Roinne ar an Ombudsman. Faoi láthair, tréimhse ina bhfuil géarchéim thromchúiseach náisiúnta, tá soláthar seirbhísí sláinte agus leasa ríthábhachtach do dhaoine i gcoitinne. Is gá go mbeadh daoine muiníneach go ndéanfadh an Roinn Sláinte, agus go deimhin as gach gníomhaireacht Stáit, feidhmiú go freagrach, go cóir cothrom agus go dlíthiúil. Is réimse thar a bheith casta é réimse na seirbhísí sláinte agus leasa, agus go minic bíonn sé deacair cloí le gach mionsonra is gá chun a chinntiú go ndéantar na seirbhísí a sholáthar ar an mbonn ina iomláine agus is féidir laistigh de na hacmhainní atá ar fáil. Cé go bhfuil na forbairtí seo faoi réir díospóireachta san Oireachtas agus sna meáin, bíonn ar dhaoine glacadh leis ar bhonn muiníne, go bhfuil an Stát agus a ghníomhaireachtaí ag feidhmiú go hionraic.

De bhreis air sin, tá gá le hoscailteacht ó ghníomhaireachtaí Stáit agus ní mór go mbraithfeadh daoine go bhfuil gach saincheist atá ábhartha dóibhsean á chur faoina mbráid. Ní foláir do dhaoine a bheith soiléir faoi go ndéanfar measúnú oscailte, macánta ar gach breithniúchán cuí is cuma cibé cinneadh deacair is gá a dhéanamh. Ba chóir go gcuirfí daoine ar an eolas faoin bhféidearthacht go gcuirfí deireadh leis an scéim Liúntais Soghluaisteachta, nó go ndéanfaí teorannú ar raon na scéime. Mar sin, níl aon dul as ach go gcruthóidh aon chinneadh deireadh nó srian a chur leis an tseirbhís nó íocaíocht impleachtaí polaitiúla; ach ní cúis é seo bearta riachtanacha de réir dlí a dhiúltú nó a chur siar.

Mar chríoch, ardaíonn diúltú na Roinne do mholtaí an Ombudsman ceist bhunúsach faoi láidreacht ár dtiomantais náisiúnta do noirm idirnáisiúnta chearta an duine. Feictear an tAcht um Stádas Comhionann 2000 mar aitheantas inár ndlí ar phrionsabal an chomhionannais ó chearta idirnáisiúnta an duine. An teip le dhá bhliain déag anuas an uasteorainn aoise a bhaint ón scéim Liúntais Soghluaisteachta – is diúltú díreach é do phrionsabal chearta an duine atá cumhdaithe san Acht um Stádas Comhionann 2000. Tugann teip leanúnach na Roinne dul i ngleic leis an tsaincheist seo le fios nach samhlaíonn an Roinn mórán tábhachta le tacú le prionsabail chearta an duine agus, go deimhin féin, nach samhlaíonn an Roinn mórán tábhachta le riail an dlí agus lena dualgais feidhmiú de réir an dlí.

Is é barúil an Ombudsman ná gur cás é seo anois ina chóir an tuarascáil a chur faoi bhráid na Dála agus an tSeanaid. Cuirfidh sí fáilte roimh aon chuireadh, i gcás go ndéanfar é, an tuarascáil a phlé le Comhchoiste Oireachtais maidir le Maoirseacht na Seirbhíse Poiblí agus Achainíochas.

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Emily O'Reilly

Ombudsman

Deireadh Fómhair 2012