



# Scottish Public Services Ombudsman Act 2002

2002 asp 11

## *Investigations by the Ombudsman*

### **2 Power of investigation**

- (1) The Ombudsman may investigate any matter, whenever arising, if—
  - (a) the matter consists of action taken by or on behalf of a person liable to investigation under this Act,
  - (b) the matter is one which the Ombudsman is entitled to investigate, and
  - (c) a complaint in respect of the matter has been duly made to the Ombudsman.
- (2) The Ombudsman may investigate any matter, whenever arising, if—
  - (a) paragraphs (a) and (b) of subsection (1) are satisfied, and
  - (b) the person liable to investigation has requested the Ombudsman to investigate the matter.
- (3) Without prejudice to paragraph 2(2) of schedule 1, it is for the Ombudsman to decide whether to initiate, continue or discontinue an investigation under subsection (1) or (2).
- (4) The Ombudsman may take such action in connection with the complaint or request as the Ombudsman thinks may be of assistance in reaching any such decision.
- (5) Such action may, in particular, include action with a view to resolving the complaint or request.

### **3 Persons liable to investigation**

- (1) The persons liable to investigation under this Act are the persons specified, or of a class specified, in Parts 1 and 2 of schedule 2; and references in this Act to a listed authority are references to any such person.
- (2) Her Majesty may by Order in Council amend Part 2 of that schedule so as to—
  - (a) modify any entry in it,
  - (b) remove any entry from it, or

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- (c) subject to subsections (3) to (6) and section 4, add any entry to it.
- (3) An entry may be added to that Part of that schedule only if the entry relates to a person who, or a class of persons each of whom, is—
  - (a) a Scottish public authority with mixed functions or no reserved functions,
  - (b) a publicly-owned company, or
  - (c) a person who is neither a Scottish public authority nor a publicly-owned company but who appears to Her Majesty to exercise functions of a public nature.
- (4) An Order in Council under subsection (2) adding an entry to that Part of that schedule in pursuance of subsection (3)(c)—
  - (a) may provide for this Act to apply to any person to whom, or falling within any class of persons to which, the entry relates subject to such modifications or exceptions as may be specified in the Order in Council, and
  - (b) must, in relation to each such person or class of person, specify the functions of a public nature which appear to be exercised by that person or, as the case may be, persons of that class.
- (5) No recommendation to make an Order in Council referred to in subsection (4) is to be made to Her Majesty in Council unless every person to whom the Order relates has been consulted.
- (6) No entry is to be added to Part 2 of schedule 2 in relation to—
  - (a) a person whose sole activity is, or whose main activities are—
    - (i) the provision of education, or the provision of training otherwise than under the Industrial Training Act 1982 (c. 10),
    - (ii) the development of curricula, the conduct of examinations or the validation of educational courses,
    - (iii) the control of entry to any profession or the regulation of the conduct of members of any profession, or
    - (iv) the investigation of complaints by members of the public regarding the actions of any person or the supervision or review of such investigations or of steps taken following them, or
  - (b) a person operating in an exclusively or predominantly commercial manner or a person carrying on under national ownership an industry or undertaking or part of an industry or undertaking.

#### **4 Persons liable to investigation: supplementary**

- (1) A person is a publicly-owned company for the purposes of section 3(3) if that person is a company wholly owned by the Scottish Ministers or by any listed authority.
- (2) A company is wholly owned—
  - (a) by the Scottish Ministers if it has no members except—
    - (i) the Scottish Ministers or companies wholly owned by the Scottish Ministers, or
    - (ii) persons acting on behalf of the Scottish Ministers or of such companies,
  - (b) by a listed authority if it has no members except—
    - (i) the authority or companies wholly owned by the authority, or

(ii) persons acting on behalf of the authority or of such companies.

(3) In subsections (1) and (2), “company” includes any body corporate.

## **5 Matters which may be investigated**

- (1) The matters which the Ombudsman is entitled to investigate are—
- (a) in relation to a listed authority other than one to whom paragraph (b), (d) or (e) applies, any action taken by or behalf of the authority (other than action consisting of a service failure) in the exercise of administrative functions of the authority,
  - (b) in relation to a health service body or an independent provider, any action taken by or on behalf of the body or provider (other than action consisting of a service failure),
  - (c) in relation to a listed authority other than one to whom paragraph (d) or (e) applies, any service failure,
  - (d) in relation to a family health service provider, any action taken by or on behalf of the provider in connection with any family health services provided by that provider,
  - (e) in relation to a registered social landlord, any action taken by or on behalf of the landlord.
- (2) In subsection (1), “service failure”, in relation to a listed authority, means—
- (a) any failure in a service provided by the authority,
  - (b) any failure of the authority to provide a service which it was a function of the authority to provide.
- (3) The Ombudsman may investigate a matter falling within subsection (1) pursuant to a complaint only if a member of the public claims to have sustained injustice or hardship in consequence of—
- (a) where the matter is such action as is mentioned in paragraph (a), (b) or (e) of that subsection, maladministration in connection with the action in question,
  - (b) where the matter is such failure or other action as is mentioned in paragraph (c) or (d), the failure or other action in question.
- (4) A person making such a claim is referred to in this Act as the “person aggrieved”.
- (5) The Ombudsman may investigate a matter falling within subsection (1) pursuant to a request only if the Ombudsman is satisfied that—
- (a) it has been alleged publicly (whether or not by a person aggrieved) that one or more members of the public have sustained injustice or hardship as mentioned in subsection (3), and
  - (b) the listed authority in question has taken all reasonable steps to deal with the matter to which the allegation relates.
- (6) In this section “member of the public” means any individual or body of persons (whether incorporated or not) other than—
- (a) the Parliamentary corporation,
  - (b) a local authority or other authority or body constituted for purposes of the public service or of local government,
  - (c) an authority or body constituted for the purposes of carrying on under national ownership an industry or undertaking or part of an industry or undertaking,

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- (d) any other authority or body—
  - (i) whose members are appointed by Her Majesty or by any Minister of the Crown or government department or by a member of the Scottish Executive, or
  - (ii) whose revenues consist wholly or mainly of money provided by the Parliament of the United Kingdom or sums payable out of the Scottish Consolidated Fund (whether directly or indirectly).

(7) This section is subject to sections 6 to 8.

## **6 Application of section 5 to certain tribunals**

- (1) For the purposes of section 5, administrative functions exercisable by any person appointed as a member of the administrative staff of any tribunal specified in schedule 3—
  - (a) by a listed authority (whether alone or jointly with any other person), or
  - (b) with the consent (whether as to remuneration and other terms and conditions of service or otherwise) of a listed authority,
 are to be taken to be administrative functions of that authority.
- (2) Her Majesty may by Order in Council amend schedule 3 so as to—
  - (a) modify any entry in it,
  - (b) remove any entry from it, or
  - (c) add any entry to it.

## **7 Matters which may be investigated: restrictions**

- (1) The Ombudsman is not entitled to question the merits of a decision taken without maladministration by or on behalf of a listed authority in the exercise of a discretion vested in that authority.
- (2) Subsection (1) does not apply to the merits of a decision taken by or on behalf of a health service body, a family health service provider or an independent provider to the extent that the decision was taken in consequence of the exercise of clinical judgement.
- (3) The Ombudsman must not investigate action taken by or on behalf of a member of the Scottish Executive unless the action was taken in the exercise of functions conferred on the Scottish Ministers or of functions conferred on the First Minister alone.
- (4) For the purposes of subsection (3), functions conferred on the Scottish Ministers include functions exercised by them on behalf of a Minister of the Crown or government department by virtue of section 93 (agency arrangements) of the Scotland Act 1998 (c. 46).
- (5) The Ombudsman must not investigate action taken—
  - (a) by or on behalf of a listed authority which is a cross-border public authority, or
  - (b) by a member of the administrative staff of any tribunal specified in schedule 3 which is a cross-border public authority,
 unless the action taken concerned Scotland and did not relate to reserved matters.
- (6) The Ombudsman must not investigate action taken by or on behalf of an independent provider unless the action—

- (a) was taken in relation to, or
  - (b) consisted of a failure in, or to provide,a service which the independent provider was providing, or which it was the independent provider's function to provide, under arrangements with a health service body or a family health service provider.
- (7) The Ombudsman must not investigate action taken by or on behalf of a person who is a listed authority by virtue of an Order in Council referred to in subsection (4) of section 3 unless the action was taken in the exercise of the functions of a public nature which are specified in the Order in Council in pursuance of paragraph (b) of that subsection.
- (8) The Ombudsman must not investigate any matter in respect of which the person aggrieved has or had—
  - (a) a right of appeal to a Minister of the Crown or the Scottish Ministers,
  - (b) a right of appeal, reference or review to or before any tribunal constituted by or under any enactment or by virtue of Her Majesty's prerogative, or
  - (c) a remedy by way of proceedings in any court of law,unless the Ombudsman is satisfied that, in the particular circumstances, it is not reasonable to expect the person aggrieved to resort or have resorted to the right or remedy.
- (9) Subsection (10) applies where a matter in respect of which a complaint is made under this Act—
  - (a) is a matter in respect of which a complaint can be made, or a review can be requested, by the person aggrieved under a procedure operated by any listed authority (whether or not the listed authority in relation to whom the complaint under this Act is made), and
  - (b) is not a matter of the kind mentioned in subsection (8) or paragraph 12 of schedule 4.
- (10) In such a case, the Ombudsman must not investigate the matter unless the Ombudsman is satisfied that—
  - (a) the other procedure has been invoked and exhausted, or
  - (b) in the particular circumstances it is not reasonable to expect the procedure to be invoked or, as the case may be, exhausted.

## **8 Excluded matters**

- (1) The Ombudsman must not investigate any matter specified in schedule 4.
- (2) Her Majesty may by Order in Council amend schedule 4 so as to—
  - (a) modify any entry in it,
  - (b) remove any entry from it,
  - (c) add any entry to it.
- (3) Nothing in section 7 or schedule 4 prevents the Ombudsman conducting an investigation in respect of action taken by a listed authority in operating a procedure established to examine complaints or review decisions.

## 9 Complaints: who may complain

- (1) A complaint may be made to the Ombudsman—
  - (a) by the person aggrieved, or
  - (b) by a person authorised in writing for the purpose by the person aggrieved.
- (2) The persons who may be authorised for the purpose of subsection (1)(b) include, in particular—
  - (a) a member of the Scottish Parliament,
  - (b) a listed authority,
  - (c) a member, officer or member of staff of a listed authority.
- (3) Despite subsection (1)—
  - (a) where an individual by whom a complaint might have been made has died or is for any reason unable to act, the complaint may be made by—
    - (i) any person authorised for the purpose of subsection (1)(b) before the individual's death or inability to act,
    - (ii) the individual's personal representatives or a member of the individual's family, or
    - (iii) any other person suitable to represent the individual,
  - (b) where a body by whom a complaint might have been made is for any reason unable to act for itself, the complaint may be made by another person suitable to represent it.
- (4) Except where subsection (5) applies, the person aggrieved must be resident in the United Kingdom at the time the complaint is made (or, if the person has died, must have been so resident at the time of death).
- (5) This subsection applies where the complaint relates to action taken—
  - (a) in relation to the person while the person was present—
    - (i) in the United Kingdom, or
    - (ii) on an installation in a designated area within the meaning of the Continental Shelf Act 1964 (c. 29), a ship registered in the United Kingdom or an aircraft so registered, or
  - (b) in relation to rights or obligations which accrued or arose in the United Kingdom or on such an installation, ship or aircraft.

## 10 Complaints: time limits and procedure

- (1) The Ombudsman must not consider a complaint made more than 12 months after the day on which the person aggrieved first had notice of the matter complained of, unless the Ombudsman is satisfied that there are special circumstances which make it appropriate to consider a complaint made outwith that period.
- (2) The Ombudsman must not consider a complaint if—
  - (a) the matter complained of consists of such failure or other action as is mentioned in section 5(1)(b) to (d) taken by or on behalf of a person who was, at the time of the action, a family health service provider or an independent provider but who has since ceased to be such a provider, and
  - (b) the complaint is made more than 3 years after the last day on which the person was such a provider.

- (3) A complaint must be made in writing or electronically unless the Ombudsman is satisfied that there are special circumstances which make it appropriate to consider a complaint made orally.
- (4) It is for the Ombudsman to determine whether a complaint has been duly made.

## **11 Decisions not to investigate**

- (1) If the Ombudsman, after considering a complaint, decides not to conduct an investigation pursuant to the complaint, the Ombudsman must send a statement of the reasons for the decision to the persons specified in subsection (2).
- (2) Those persons are—
  - (a) the person aggrieved,
  - (b) the listed authority in question,
  - (c) any other person who is alleged in the complaint to have taken the action complained of,
  - (d) if the complaint was made by a person authorised for the purpose of subsection (1)(b) of section 9, that person,
  - (e) if the complaint was made by a person other than the person aggrieved by virtue of subsection (3) of that section, that other person,
  - (f) if the listed authority is a family health service provider, any health service body with whom that provider—
    - (i) is subject to an undertaking to provide family health services, or
    - (ii) has agreed to perform such services,(as the case may be), and
  - (g) if the listed authority is an independent provider, the health service body or family health service provider with whom the independent provider made the arrangement to provide the service concerned.
- (3) Where a person referred to in subsection (2)(d) was authorised for the purpose of section 9(1)(b) in a particular capacity but no longer acts in that capacity, the Ombudsman must send the statement of reasons instead to such other person acting in that or a similar capacity as the Ombudsman thinks fit.
- (4) If the Ombudsman, after considering a request, decides not to conduct an investigation pursuant to the request, the Ombudsman must send a statement of the reasons for the decision to—
  - (a) the listed authority who made the request,
  - (b) if the listed authority is a family health service provider, any health service body with whom that provider is subject to an undertaking to provide family health services, and
  - (c) if the listed authority is an independent provider, the health service body or family health service provider with whom the independent provider made the arrangement to provide the service concerned.

## **12 Investigation procedure**

- (1) An investigation under section 2 must be conducted in private.
- (2) Where the investigation is pursuant to a complaint, the Ombudsman must give—

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- (a) the listed authority in question, and
  - (b) any other person who is alleged in the complaint to have taken the action complained of,
- an opportunity to comment on any allegations contained in the complaint.
- (3) In other respects the procedure for conducting the investigation is to be such as the Ombudsman thinks fit.
- (4) The Ombudsman may, in particular—
  - (a) obtain information from such persons and in such manner, and make such inquiries, as the Ombudsman thinks fit,
  - (b) determine whether any person may be represented, by counsel or solicitor or otherwise, in the investigation.
- (5) The Ombudsman may pay to—
  - (a) the person by whom the complaint was made (where an investigation is pursuant to a complaint), and
  - (b) any other person who attends or supplies information for the purposes of an investigation (whether or not pursuant to a complaint),such allowances in respect of expenses properly incurred by the person and by way of compensation for loss of time as the Parliamentary corporation may determine.
- (6) The conduct of an investigation does not affect—
  - (a) any action taken by the listed authority in question,
  - (b) any power or duty of the listed authority to take further action with respect to any matter being investigated.

### **13 Evidence**

- (1) For the purposes of an investigation, the Ombudsman may require the listed authority in question and any of the persons mentioned in subsection (2) to supply information or produce documents relevant to the investigation.
- (2) Those persons are—
  - (a) any member, officer or member of staff of the listed authority, and
  - (b) any other person,who in the Ombudsman's opinion is able to supply such information or to produce such documents.
- (3) Where the listed authority in question is an office-holder in the Scottish Administration, the persons referred to in subsection (2)(a) include, in particular—
  - (a) any other office-holder in the Scottish Administration,
  - (b) any member of the staff of the Scottish Administration assigned to assist the office-holder under investigation in the exercise of the office-holder's functions.
- (4) For the purposes of any such investigation the Ombudsman has the same powers as the Court of Session in respect of—
  - (a) the attendance and examination of witnesses (including the administration of oaths and the examination of witnesses abroad), and
  - (b) the production of documents.



- (5) No obligation to maintain secrecy or other restriction on the disclosure of information obtained by or supplied to persons in Her Majesty's service, whether imposed by any enactment or by any rule of law, applies to the disclosure of information for the purposes of an investigation by the Ombudsman.
- (6) The Crown (whether in right of Her Majesty's Government in the United Kingdom or in right of the Scottish Administration) is not entitled in relation to any investigation by the Ombudsman to any such privilege in respect of the production of documents or the giving of evidence as is allowed by law in legal proceedings.
- (7) No person is or may be required or authorised by virtue of this Act to supply any information or answer any question relating to proceedings of the Scottish Cabinet or of any committee of the Scottish Cabinet, or to produce so much of any document as relates to such proceedings.
- (8) For the purposes of subsection (7), a certificate issued by the most senior member of the staff of the Scottish Administration, with the approval of the First Minister, and certifying that any information, question, document or part of a document so relates is conclusive.
- (9) Subject to subsections (5) and (6), no person is compelled, for the purposes of an investigation by the Ombudsman, to give any evidence or produce any document which that person could not be compelled to give or to produce in civil proceedings before the Court of Session.

## **14 Obstruction and contempt**

- (1) Where—
  - (a) a person, without lawful excuse, obstructs the Ombudsman in the performance of the Ombudsman's functions, or
  - (b) a person does any act or fails to take any action in relation to an investigation which, if the investigation were a proceeding in the Court of Session, would constitute contempt of court,the Ombudsman may apply by petition to the Court of Session for the person to be dealt with in accordance with subsection (2).
- (2) Where such a petition is presented, the Court of Session may inquire into the matter and after hearing—
  - (a) any witnesses who may be produced against or on behalf of the person in question, and
  - (b) any statement which may be offered in defence,may deal with the person as if the person had committed a contempt of court in relation to the Court of Session.
- (3) Nothing in this section is to be construed as applying to the taking of such action as is mentioned in section 12(6).

## **15 Reports on investigations**

- (1) After conducting an investigation, the Ombudsman must—
  - (a) if the investigation is pursuant to a complaint, send a report of the investigation to the persons specified in section 11(2) and to the Scottish Ministers,

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- (b) if the investigation is pursuant to a request, send a report of the investigation to the persons specified in section 11(4) and to the Scottish Ministers, and must lay a copy of the report before the Parliament.
- (2) Subsection (3) of section 11 applies for the purposes of subsection (1)(a) of this section as it does for the purposes of subsection (2)(d) of that section.
- (3) Apart from identifying the listed authority in question, the report must not—
  - (a) mention the name of any person, or
  - (b) contain any particulars which, in the Ombudsman’s opinion, are likely to identify any person and can be omitted without impairing the effectiveness of the report,
 unless the Ombudsman determines that it is necessary to do so.
- (4) The listed authority in question must, unless the Ombudsman otherwise directs—
  - (a) make arrangements, having effect for a period of at least 3 weeks, for allowing any person to—
    - (i) inspect the report at any reasonable time,
    - (ii) obtain a copy of it, or any part of it (whether or not on payment of a reasonable fee), and
  - (b) publicise those arrangements.
- (5) Subsection (4) has effect—
  - (a) where the listed authority is a family health service provider, as if the reference to the listed authority were a reference to any health service body with whom that provider—
    - (i) is subject to an undertaking to provide family health services, or
    - (ii) has agreed to perform such services,
 (as the case may be),
  - (b) where the listed authority is an independent provider, as if the reference to the listed authority were a reference to the health service body or family health service provider with whom the independent provider made the arrangement to provide the service concerned.
- (6) In considering whether to make—
  - (a) a determination under subsection (3), or
  - (b) a direction under subsection (4),
 the Ombudsman must take into account the public interest as well as the interests of the person aggrieved (if the investigation is pursuant to a complaint) and of any other persons.
- (7) Any person who obstructs another person seeking to inspect a report or obtain a copy of it or any part of it in pursuance of arrangements made under subsection (4) is guilty of an offence and liable, on summary conviction, to a fine not exceeding level 3 on the standard scale.

## 16 Special reports

- (1) This section applies where a report under section 15 finds that the person aggrieved has sustained injustice or hardship as is mentioned in section 5(3).

- (2) If, following the making of the report, it appears to the Ombudsman that the injustice or hardship has not been, or will not be, remedied, the Ombudsman may make a special report on the case.
- (3) The Ombudsman must—
  - (a) send a special report made under subsection (2) to the persons to whom the report under section 15 was sent, and
  - (b) lay a copy of the report before the Parliament.
- (4) Section 15(3) applies in relation to a special report as it applies in relation to a report under that section.
- (5) The Ombudsman may make arrangements for the special report to be available to the public in such manner (whether or not on payment of a reasonable fee) as the Ombudsman thinks fit.
- (6) The listed authority to whom the special report relates is liable to reimburse the Ombudsman in respect of any expenses incurred by the Ombudsman by virtue of subsection (5).