

# SCOTTISH PUBLIC SERVICES OMBUDSMAN ACT 2002

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Investigations by the Ombudsman*

##### *Section 2 – Power of investigation*

16. This section sets out the investigatory powers of the Ombudsman.
17. *Subsections (1) and (2)* provide for the Ombudsman to investigate any matter that consists of action taken by or on behalf of a person liable to investigation by the Ombudsman (as defined in section 3). The matter must be one the Ombudsman is entitled to investigate (see sections 5 to 8) and a matter in respect of which a complaint has been made to the Ombudsman or a request for an investigation has been made by the person liable to investigation.
18. *Subsection (3)* empowers the Ombudsman to determine whether to initiate, continue or discontinue an investigation under section 2.
19. *Subsections (4) and (5)* enable the Ombudsman to take whatever action he or she thinks may be helpful in deciding whether to initiate, continue or discontinue an investigation, including action with a view to achieving informal resolution of a complaint or request.

##### *Section 3 and schedule 2 – Persons liable to investigation*

20. This section and *schedule 2* set out which persons, or classes of persons, are liable to investigation by the Ombudsman (throughout the Act referred to as *listed authorities*) and provide for amendments to be made to Part 2 of that list of persons.
21. *Subsection (1)* provides that the persons, or classes of persons, listed in Parts 1 and 2 of schedule 2 are liable to investigation by the Ombudsman.
22. *Subsections (2) to (6)* provide for Her Majesty, by Order in Council, to amend Part 2 of the schedule by adding, removing or modifying entries, subject to certain restrictions. Additions to the schedule may only be made if the entry relates to a Scottish public authority with mixed functions or no reserved functions; a publicly-owned company; or 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. A person who is neither a Scottish public authority nor a publicly-owned company must be consulted before being added to Part 2 of the schedule.

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

23. This section defines a “publicly-owned company” for the purposes of section 3(3).

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

24. **Section 5** makes provision for the matters covered by the Ombudsman’s power to investigate. **Subsection (1)** sets out what matters the Ombudsman may investigate. For listed authorities other than health service bodies, independent providers, family health service providers and registered social landlords, the Ombudsman can investigate any service failure and action taken in the exercise of administrative functions of that authority. For health service bodies and independent providers the Ombudsman can investigate any service failure and any action taken by or on behalf of the body or authority. For family health service providers the Ombudsman is able to investigate any action taken by or on behalf of the provider in connection with the provision of family health services. For registered social landlords the Ombudsman is entitled to investigate any action taken by or on behalf of the landlord.
25. **Subsection (2)** defines the term “service failure” for the purposes of subsection (1) as any failure in a service provided by the authority, or any failure of the authority to provide a service which it was a function of the authority to provide.
26. **Subsection (3)** provides that the Ombudsman may investigate a complaint about the matters specified in subsection (1) only where a member of the public claims to have sustained injustice or hardship in consequence of:
- maladministration in connection with:
- any action taken by or on behalf of a listed authority (other than a health service body, independent provider, family health service provider or registered social landlord) in the exercise of administrative functions of that authority;
  - any action taken by or on behalf of a health service body, an independent provider or a registered social landlord;
  - any service failure by a listed authority (apart from a family health service provider or a registered social landlord);
  - any action taken by or on behalf of a family health service provider in connection with any family health services provided by that provider.
27. **Subsection (4)** defines a person making a claim of injustice or hardship under subsection (3) as the *person aggrieved*.
28. **Subsection (5)** provides that the Ombudsman may investigate a request (under section 2(2)(b)) relating to the matters specified in subsection (1) only if he or she is satisfied that:
- it has been alleged publicly that one or more members of the public have sustained injustice or hardship as mentioned in subsection (2); and,
  - the listed authority in question has taken all reasonable steps to deal with the matter to which the allegation relates.
29. **Subsection (6)** defines the term “member of the public” for the purposes of this section as any individual or body of persons (whether incorporated or not) other than the various bodies and authorities listed.
30. **Subsection (7)** provides that all provisions in section 5 are subject to sections 6 to 8 which provide for the application of section 5 to certain tribunals and set out restrictions and exclusions in relation to matters which the Ombudsman may investigate.

### **Section 6 and schedule 3 – Application of section 5 to certain tribunals**

31. **Subsection (1) of section 6** provides that where any member of the administrative staff of a tribunal listed in **schedule 3** is appointed by or with the consent of a listed authority, administrative functions exercisable by such a member of staff are to be taken to

be administrative functions of that listed authority. This brings such actions within section 5(1)(a). *Subsection (2)* provides for Her Majesty, by Order in Council, to amend schedule 3 by adding, removing or modifying entries.

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

32. *Subsection (1) of section 7* prevents the Ombudsman from questioning the merits of a decision taken without maladministration by a listed authority in the exercise of a discretion vested in that authority (i.e. discretionary decisions).
33. *Subsection (2)* disapplies subsection (1) in respect of decisions 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. The effect of this is that decisions requiring clinical judgement are within the remit of the Ombudsman.
34. *Subsection (3)* prevents the Ombudsman from investigating 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. The effect of this subsection is that complaints cannot be considered in respect of the functions of the Lord Advocate and Solicitor General in respect of the *retained functions of the Lord Advocate*, although they could be subject to complaints in respect of any functions of the Scottish Ministers that are allocated to them.
  - *Functions conferred on the Scottish Ministers* include functions conferred on them by or under Acts of the United Kingdom Parliament, functions conferred on them by executive devolution orders under section 63 of the Scotland Act 1998 and functions exercised by them on behalf of a Minister of the Crown or government department by virtue of section 93 (agency agreements) of that Act.
  - *The retained functions of the Lord Advocate* are defined in section 52(6) of the Scotland Act 1998 as any functions exercisable by him immediately before he ceased to be a Minister of the Crown and other statutory functions conferred on him alone after he ceased to be a Minister of the Crown. These functions relate mainly to his role as head of the systems of criminal prosecution and investigation of deaths in Scotland.
35. The effect of *subsection (5)* is to ensure that the Ombudsman's remit in relation to any listed authority which is cross-border public authority extends only to devolved issues undertaken by the authority. Cross-border public authorities are those specified in the [Scotland Act 1998 \(Cross-Border Public Authorities\) \(Specification\) Order 1999 \(S.I. 1999/1319\)](#).
36. *Subsection (6)* restricts the Ombudsman to investigating the actions of independent providers only in respect of the services that they are providing under arrangements with a health service body or a family health service provider. Without this provision section 5(1)(b) would have extended the Ombudsman's remit across all the services provided by independent providers.
37. *Subsection (7)* ensures that, in relation to an authority which has been added to schedule 2 by an Order in Council under section 3(3)(c) (ie an authority which is neither a Scottish public authority nor a publicly-owned company but which appears to have functions of a public nature), the Ombudsman can only investigate action taken by or behalf of the authority in the exercise of its public functions.
38. The effect of *subsection (8)* is that the Ombudsman cannot investigate matters which can be considered by other means, unless in his/her view such other means could not be reasonably taken by the aggrieved person.
39. *Subsections (9) and (10)* ensure that, so far as reasonable, complaints are addressed locally before being considered by the Ombudsman.

### **Section 8 and schedule 4 – Excluded matters**

40. *Subsection (1) of section 8* provides that the Ombudsman must not investigate any matter specified in *schedule 4*. Schedule 4 contains absolute exclusions as opposed to the restrictions on investigations and conditions that have to be satisfied which are set out in the body of section 7. *Subsection (2)* provides for Her Majesty, by Order in Council, to modify, add or remove matters specified in schedule 4.

### **Section 9 – Complaints: who may complain**

41. Under *subsections (1) and (2) of section 9* a complaint may be made to the Ombudsman by the *person aggrieved* (see definition in subsection 5(4)), or by a person authorised in writing by the person aggrieved. The persons who may be authorised by the person aggrieved include an MSP, a listed authority or a member, officer or member of staff of a listed authority (e.g. a local councillor).
42. The effect of *subsection (3)* is to enable complaints to be considered by the Ombudsman where a person aggrieved for whatever reason is unable to pursue the complaint themselves.
43. By virtue of *subsection (4)*, the person aggrieved must be (or have been) a resident in the United Kingdom at the time a complaint is made, except in the limited circumstances set out in *subsection (5)*.

### **Section 10 – Complaints: time limits and procedure**

44. This section provides time limits for making complaints to the Ombudsman, and the required format for making complaints.
45. Generally, complaints must be made within 12 months of the day on which the person aggrieved first had notice of the matter to which the complaint relates. However, the Ombudsman has discretion to accept late complaints if he/she considers there are special circumstances which make it appropriate to do so.
46. *Subsection (2)* makes special provision in relation to complaints relating to action by a family health service provider or an independent provider, who has since ceased to be such a provider. The effect of subsections (1) and (2) when taken together is that, even where a complaint is made less than 12 months from when it came to the notice of the person aggrieved, it will not be considered if it relates to a family health service provider or independent provider who ceased to be such a provider more than 3 years before.

### **Section 11 – Decisions not to investigate**

47. This section specifies to whom the Ombudsman must send a statement of reasons when he/she has decided not to conduct an investigation following a complaint by a person aggrieved or a request by a listed authority.

### **Section 12 – Investigation procedure**

48. This section sets out certain requirements in relation to the conduct of investigations. In particular, investigations must be conducted in private and where the investigation arises out of a complaint (as opposed to a request from a listed authority) the Ombudsman must give the listed authority in question, and any other person involved in the action which is the subject of the complaint, the opportunity to comment on any allegations contained in the complaint. Otherwise, it is for the Ombudsman to determine the procedure for conducting an investigation.
49. *Subsection (5)* provides for the Ombudsman to pay the person making the complaint (but not a listed authority who has made a request), or any other person who is involved in an investigation, allowances in respect of expenses and compensation for loss of time. The amount of such payments will be determined by the Parliamentary corporation.

### **Section 13 – Evidence**

50. This section gives the Ombudsman a wide range of powers to require information to be supplied or documents to be produced, which are relevant to an investigation. Under *subsections (1) and (2)*, the persons who may be required to supply information or documents are:
- the listed authority; and
  - any member, officer or member of staff of the listed authority and any other person, who the Ombudsman considers is able to supply the information or document.
51. To reflect the special circumstances of the Scottish Administration, *subsection (3)* provides that where the listed authority in question is an office-holder in the Scottish Administration, the persons who may be required to supply information or documents also include other office-holders in the Scottish Administration and members of staff of the Scottish Administration assigned to work for the office-holder under investigation.
52. *Subsection (4)* provides that for the purposes of investigations the Ombudsman has the same powers as the Court of Session in respect of:
- the attendance and examination of witnesses (including the administration of oaths and the examination of witnesses abroad), and
  - the production of documents.
53. *Subsection (5)* prevents any obligation to maintain secrecy or other restriction on the disclosure of information in relation to persons in Her Majesty's service from applying to the disclosure of information for the purposes of an investigation by the Ombudsman.
54. *Subsection (6)* precludes the Crown from enjoying any privilege in respect of the production of documents or the giving of evidence (as is allowed by law in legal proceedings) in relation to any investigation by the Ombudsman.
55. *Subsection (7)* exempts any person, in consequence of the Act, from being required or authorised to supply any information or answer any question relating to Scottish Cabinet proceedings, or to proceedings of any committee of the Scottish Cabinet. *Subsection (8)* provides for certification that any information, question, document or part of document is a Scottish Cabinet document for the purposes of subsection (7).
56. *Subsection (9)* provides that subject to subsections (5) and (6) no person can be compelled, in respect of an investigation by the Ombudsman, to give evidence or produce documents that they could not be compelled to give or produce in civil proceedings before the Court of Session.

### **Section 14 – Obstruction and contempt**

57. This section enables the Ombudsman to petition the Court of Session for a person to be dealt with as if they had committed a contempt of court, where that person has:
- obstructed the Ombudsman in the performance of his/her functions, or
  - done any act or failed to take any action in relation to an investigation which would constitute a contempt of court in the Court of Session.

### **Section 15 – Reports on investigations**

58. This section sets out how the Ombudsman must report on investigations. In particular, it specifies who should receive copies of an investigation report, requires a copy to be laid before the Parliament, provides that a report must not normally identify any person (other than the listed authority) and sets out requirements for publicising an investigation report.

59. *Subsection (2)* provides that section 11(3) of the Act applies in respect of reports subsequent to complaints, so that when a person is no longer authorised to act for the purposes of section 9(1)(b), the Ombudsman is to send a copy of the report to whomever he/she considers is acting in a similar capacity. *Subsection (7)* provides that any person who obstructs another person from inspecting or obtaining a copy of an investigation report shall be guilty of an offence. On conviction a person would be liable to a fine not exceeding level 3 (currently £1,000) on the standard scale.

### ***Section 16 – Special reports***

60. This section makes provision for a special report where the Ombudsman considers that injustice or hardship has been sustained by an individual and that the injustice or hardship has not been, or will not be, remedied. In particular it specifies who should receive copies of a special report, requires a copy to be laid before the Parliament, provides that a report must not identify any person (other than the listed authority) and sets out requirements for publicising a special report.