



2011 CHAPTER 1

Formal investigations

Formal investigations

13.—(1) Subject to section 14, the Commissioner may determine to conduct an investigation under this section (“a formal investigation”)—

- (a) for the purposes of the Commissioner’s functions under section 5;
- (b) for the purposes of the Commissioner’s functions under section 6; or
- (c) into a complaint under section 8(1).

(2) In determining whether to conduct or discontinue a formal investigation, the Commissioner may act in accordance with the Commissioner’s own discretion.

(3) Where the Commissioner determines to conduct a formal investigation for the purposes of the Commissioner’s functions under section 5 or 6 the Commissioner must—

- (a) produce terms of reference for the investigation;
- (b) send notice of the proposed investigation and a copy of the terms of reference to—
 - (i) the relevant authority concerned; and
 - (ii) in the case of an investigation for the purposes of the Commissioner’s functions under section 6, the particular older person mentioned in that section;
- (c) afford to the relevant authority concerned an opportunity to comment on the matters being investigated and to give oral or other evidence respecting those matters.

(4) Where the Commissioner determines to conduct a formal investigation into a complaint under section 8(1) the Commissioner must—

(a) give to—

(i) the relevant authority concerned; and

(ii) any other person who is alleged in the complaint to have taken or authorised the action complained of or who is otherwise involved in allegations made in the complaint,

information as to the substance of the allegations made in the complaint so far as they relate to that authority or (as the case may be) to that person; and

(b) afford to every such authority or person an opportunity to comment on any allegations made in the complaint and to give oral or other evidence respecting those matters.

(5) Every formal investigation must be conducted in private.

(6) Except as otherwise provided by this Act, the procedure for conducting a formal investigation must be such as the Commissioner considers appropriate in the circumstances of the case; and, in particular, it is for the Commissioner to determine whether any person may be represented by counsel or solicitor or otherwise in the investigation.

(7) The Commissioner may for the purposes of a formal investigation obtain information from such persons and in such manner, and make such enquiries, as the Commissioner thinks fit.

(8) Subject to subsections (9) and (10), in conducting a formal investigation the Commissioner is not obliged to hold any hearing, and no person is entitled as of right to be heard by the Commissioner.

(9) If at any time during the course of a formal investigation it appears to the Commissioner that there may be grounds for making any report or recommendation that may adversely affect any relevant authority or other person, the Commissioner must afford to that authority or person—

(a) an opportunity to give oral or other evidence; and

(b) an opportunity of testing by cross-examination any evidence which may affect that authority or person.

(10) Where the opportunities mentioned in subsection (9) are given to a relevant authority or other person, then—

(a) in any formal investigation for the purposes of the Commissioner's functions under section 6, the same opportunities must be given to the older person mentioned in that section; and

(b) in any formal investigation into a complaint under section 8(1), the same opportunities must be given to the complainant.

Status: This is the original version (as it was originally enacted).

(11) The Commissioner may, if the Commissioner thinks fit, pay to any person (including a complainant) who attends or supplies information for the purposes of a formal investigation—

(a) sums in respect of expenses properly incurred by that person;

(b) allowances by way of compensation for the loss of that person's time, in accordance with such scales and subject to such conditions as the Office may determine.

(12) A formal investigation does not affect—

(a) any action taken by a relevant authority or by any department or Minister with respect to that authority; or

(b) any power or duty of that authority, department or Minister to take further action with respect to any matters subject to the investigation.

Formal investigations: exclusions

14.—(1) The Commissioner may not conduct a formal investigation for the purposes of the Commissioner's functions under section 6 in relation to the operation of the advocacy, complaint, inspection or whistle-blowing arrangements of a relevant authority in the case of any older person if the Commissioner has under section 10 or 11 brought or intervened in, or provided assistance in relation to, any proceedings—

(a) against the relevant authority which relate to the operation of the arrangements in question in the case of that older person; or

(b) in which the correctness in law of any action of the relevant authority in relation to the operation of any such arrangements in the case of that older person is called into question.

(2) The Commissioner may not conduct a formal investigation into a complaint under section 8(1) in respect of any action of a relevant authority if the Commissioner has under section 10 or 11 brought, intervened in or provided assistance in relation to any proceedings—

(a) against the relevant authority in respect of that action; or

(b) in which the correctness in law of that action is called into question.

Report on formal investigation

15.—(1) Where the Commissioner conducts a formal investigation for the purposes of the Commissioner's functions under section 5 or 6, the Commissioner must prepare a report on the outcome of that investigation and send it to—

(a) the relevant authority concerned and, where the report contains recommendations as to action to be taken by any other relevant authority, that relevant authority; and

(b) such other bodies or persons as the Commissioner thinks appropriate.

(2) Where the Commissioner conducts a formal investigation into a complaint under section 8(1), the Commissioner must prepare a report on the outcome of that investigation and send it to—

(a) the complainant;

(b) the relevant authority concerned and, where the report contains recommendations as to action to be taken by any other relevant authority, that relevant authority;

(c) any person who is alleged in the complaint to have taken or authorised the action complained of or otherwise to be involved in the allegation made in the complaint; and

(d) such other bodies or persons as the Commissioner thinks appropriate.

(3) Apart from identifying any relevant authority concerned, a report under this section must not—

(a) mention the name of any person; or

(b) contain any particulars which, in the Commissioner's opinion, are likely to identify any person and can be omitted without impairing the effectiveness of the report,

unless the Commissioner determines that it is necessary to do so (whether for the purposes of subsection (4) or otherwise).

(4) A report under this section may include recommendations as to action to be taken by a relevant authority mentioned in the report; and any such recommendations must be accompanied by the Commissioner's reasons for making them.

(5) In particular, the report on a formal investigation conducted for the purposes of the Commissioner's functions under section 6 in relation to any complaint arrangements may recommend that the relevant authority concerned reconsider afresh the complaint in question.

(6) Where a report contains a recommendation as to action to be taken by a relevant authority, the authority must—

(a) consider the recommendation; and

(b) determine what action (if any) to take in response to the recommendation.

Further action following report on formal investigation

16.—(1) Where the Commissioner has made a report under section 15 which contains a recommendation as to action to be taken by a relevant authority, the

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Commissioner may by notice require that authority to provide the Commissioner within 3 months of the date of the notice with—

- (a) such information as will enable the Commissioner to determine whether the authority has complied with the recommendation or will be complying with it; or
- (b) a statement of the authority's reason for not complying with the recommendation.

(2) A notice under subsection (1) must include a statement that a failure by the authority to respond within the period mentioned in that subsection may be published in such manner as the Commissioner considers appropriate.

(3) If, on receipt of a response from the authority, the Commissioner considers that—

- (a) the action taken or proposed to be taken by the authority to comply with the recommendation is inadequate; or
- (b) the authority's reason for not complying with the recommendation is inadequate,

the Commissioner may send to the authority concerned a further notice setting out the inadequacy and requiring the authority to reconsider the matter and respond within one month of the date of the notice.

(4) A notice under subsection (3) must include a statement that a failure by the authority—

- (a) to provide what the Commissioner considers to be a satisfactory response; or
- (b) to provide any response within the period mentioned in that subsection,

may be published in such manner as the Commissioner considers appropriate.

(5) The Commissioner must maintain a register containing details of—

- (a) recommendations (together with the reasons for them) contained in reports made under section 15;
- (b) action taken by the Commissioner under subsections (1) and (3); and
- (c) the results of any such action.

(6) Any register maintained under subsection (5) must be open to inspection by any person at all reasonable times at the offices of the Commissioner and the Commissioner may make arrangements for copies of the register to be available for inspection in such other place or places or by such other means as the Commissioner considers appropriate.

(7) The Commissioner must publish those arrangements in such a way as to bring them to the attention of persons likely to be interested.

Evidence in formal investigations

17.—(1) For the purposes of a formal investigation the Commissioner may require any person who in the Commissioner's opinion is able to supply information or produce documents relevant to the investigation to supply any such information or produce any such documents.

(2) For the purposes of such an investigation the Commissioner has the same powers as the High Court in respect of—

- (a) the attendance and examination of witnesses, including the administration of oaths or affirmations and the examination of witnesses abroad; and
- (b) the production of documents.

(3) A person may not be compelled for the purposes of a formal investigation to give any evidence or produce any document which that person could not be compelled to give or produce in civil proceedings in the High Court.

(4) Where any information required to be supplied under this section consists of, or includes, information held by means of a computer or in any other form, the Commissioner may require any person having charge of, or otherwise connected with the operation of, the computer or other device holding that information to make the information available, or produce the information, in legible form.

Powers of entry and inspection for purposes of formal investigation

18.—(1) Where the Commissioner considers it necessary to do so for the proper conduct of a formal investigation, the Commissioner may, at any reasonable time, enter any premises managed by a relevant authority in which—

- (a) an older person is living or being looked after;
- (b) an older person is being detained whether under any statutory provision or otherwise; or
- (c) health, welfare or any other services are provided for older persons.

(2) On entering any premises under this section, the Commissioner may—

- (a) make any examination into the state and management of the premises and the treatment of older persons there which the Commissioner thinks appropriate;
- (b) subject to subsection (3), inspect and take copies of any documents or records which are required by any statutory provision to be kept there;
- (c) subject to subsection (4), interview any older person present on the premises who consents to be interviewed;
- (d) interview in private any other person present on the premises who is employed there (whether the employment is paid or unpaid or under a contract or otherwise).

(3) The Commissioner may not exercise the Commissioner's power under subsection (2)(b) unless the Commissioner considers it necessary to do so for the proper conduct of the investigation.

(4) An interview under subsection (2)(c) must be conducted—

- (a) if the older person requires another person to be present, in that other person's presence; and
- (b) otherwise in the presence of others only to the extent that the older person and the Commissioner have consented to their being present.

(5) Where the Commissioner proposes to exercise the power of entry conferred by this section the Commissioner must, if so required, produce some duly authenticated document showing the Commissioner's authority to exercise the power.

(6) Nothing in this section authorises the Commissioner to enter any premises (or any part of any premises) used wholly or mainly as a private dwelling.

Obstruction and contempt in relation to formal investigation

19.—(1) If any person without lawful excuse—

- (a) obstructs the Commissioner or any officer of the Commissioner in the conduct of a formal investigation; or
- (b) is guilty of any act in relation to such an investigation which, if that investigation were a proceeding in the High Court, would constitute contempt of court,

the Commissioner may certify the offence to the High Court.

(2) Where an offence is certified under this section, the High Court may inquire into the matter and, after hearing—

- (a) any witnesses who may be produced against or on behalf of the person charged with the offence; and
- (b) any statement that may be offered in defence,

may deal with the person charged with the offence in any manner in which the court could deal with that person if the person had committed the same offence in relation to the court.

(3) This section does not apply to the taking in good faith of any action mentioned in section 13(12).

Disclosure of information by Commissioner

20.—(1) Information obtained by the Commissioner or the Commissioner's officers in the course of, or for the purposes of, a formal investigation must not be disclosed except as permitted by subsection (2) or for the purposes of—

- (a) the investigation and any report to be made thereon under this Act;

- (b) any civil proceedings or proceedings for a criminal offence;
- (c) an inquiry with a view to the taking of proceedings for a criminal offence;
or
- (d) any proceedings under section 19.

(2) Where information is to the effect that any person (“the subject”) is likely to constitute a threat to the health or safety of any other person (“the person at risk”), the Commissioner may disclose that information to any person to whom the Commissioner thinks it should be disclosed in the interests of the health or safety of the person at risk.

(3) If the Commissioner discloses information as permitted by subsection (2), the Commissioner must—

- (a) where the Commissioner knows the identity of the subject, inform the subject—
 - (i) that the Commissioner has disclosed the information; and
 - (ii) of the identity of any person to whom the Commissioner has disclosed it; and
- (b) inform the person from whom the information was obtained that the Commissioner has disclosed it.