

These notes refer to the Public Services Ombudsman Act (Northern Ireland) 2016 (c.4) which received Royal Assent on 19 February 2016

Public Services Ombudsman Act (Northern Ireland) 2016

EXPLANATORY NOTES

COMMENTARY ON CLAUSES

Part 2: Investigations

The main power of the NIPSO is to investigate listed authorities. Part 2 sets out how this power is to be used. Part 2 is further sub-divided under several cross headings. The first cross heading deals with the power of the NIPSO to investigate. The second cross heading deals with the authorities who can be investigated. The third cross heading deals with the subject matter which can be investigated. The next three cross headings set out the different procedures involved for each different type of investigation. The final cross heading sets out the way in which investigations must be conducted.

Section 5: Power to investigate complaints made by a person aggrieved

The key investigatory power is the power to investigate a complaint made by a member of the public. Section 5 is a framework section. It sets out the key criteria for the exercise of this power and points to the other sections where the details on those criteria may be found. The key criteria are:

- The complaint is made by a member of the public
- The complaint relates to a listed authority
- The complaint must be about maladministration or injustice consequent on the exercise of professional judgement in health and social care
- The correct procedure has been followed

The person making the complaint is referred to as the person aggrieved.

Section 6: Power to investigate complaints referred by a listed authority

The NIPSO can also investigate a complaint referred by a listed authority. Section 6 is also a framework section, setting out the criteria and pointing to where the details on those criteria may be found. The key criteria are:

- The complaint made by the person aggrieved to a listed authority

- The listed authority is not able to resolve the complaint
- The complaint is about maladministration or injustice consequent on the exercise of professional judgement in health and social care
- The correct procedure has been followed

Section 7: Acting on behalf of a person aggrieved

Other people can act on behalf of the person aggrieved (for example where the person aggrieved has authorised this, or the person aggrieved cannot act). There is a broad range of people who can act on behalf of a person aggrieved:

- MLAs
- Personal representatives
- Family members
- Others

In some cases, the NIPSO will need to first confirm that the person is suitable to act on behalf of the person aggrieved.

Section 8: Power to investigate on own initiative

This is another key investigatory power – the power for the NIPSO to launch an investigation without waiting for a complaint from a person aggrieved. This is a new power which isn't possessed by the existing offices. The criteria are similar to the criteria for ordinary investigations. The key difference is that the NIPSO can only launch an own initiative investigation where there is a reasonable suspicion of systemic maladministration or systemic injustice (injustice consequent on the exercise of professional judgement in health and social care).

Section 9: Criteria for own initiative investigations

The NIPSO must establish, and have regard to, further criteria for when to launch an own initiative investigation and publish them.

Section 10: Alternative resolution of complaints

The NIPSO has the flexibility to use alternative methods of resolving complaints made about listed authorities.

Section 11: Purposes of investigation

This section summarises some of the purposes of an investigation. These are to check if the complaint was justified and how it can be resolved.

Section 12: Listed authorities

A body is a listed authority if it is listed in Schedule 3. This list can be updated by OFMDFM after consultation with the NIPSO and the body in question. A body can only be added to the list if it has some sort of public or governmental dimension.

Section 13: Meaning of action taken by a listed authority

This section provides that action is taken by a listed authority if it does the action itself, or it is done on its behalf. The NIPSO can also investigate a failure by a listed authority to act.

Section 14: Matters which may be investigated: general

The standard jurisdiction of the NIPSO is to investigate alleged maladministration through action taken in the exercise of administrative functions by listed authorities. Subsequent sections set out some specialised cases where the jurisdiction is slightly different.

Sections 15, 16 and 17: Matters which may be investigated - professional judgement

Under these three sections, the NIPSO can also investigate the merits of a decision of a body to the extent that it was taken in consequence of the exercise of professional judgement. This can only be done in the health and social care field, in relation to three specific types of bodies:

- health and social care bodies (see the definition in section 59),
- general health care providers, and
- independent providers of health and social care.

Section 18: Matters which may be investigated: universities

The NIPSO is given a new power to investigate students' complaints of alleged maladministration through action taken by universities in the exercise of administrative functions. This relates to students enrolled in courses provided or validated by the University of Ulster and Queen's University Belfast. This supersedes the existing power of the visitor of a university to investigate complaints by students. If the NIPSO doesn't have jurisdiction in a matter relating to universities, the jurisdiction of the visitor is unaffected. This section also contains a transitional provision in subsection (6) to deal with complaints made to the visitor but unresolved before this Act becomes law.

Section 19: Administrative functions of staff of tribunals

Court proceedings are not subject to the jurisdiction of the NIPSO, see paragraph 4 of Schedule 5. However, section 19 provides that the NIPSO may

investigate some of the administrative work done by staff working in courts or tribunals. Schedule 4 lists these tribunals.

Section 20: Exclusion: public sector employment

This section and the following two sections set out some areas where the NIPSO does not have jurisdiction to investigate. Under section 20, the NIPSO cannot investigate a complaint relating to public sector employment.

Section 21: Exclusion: other remedies available

The NIPSO cannot investigate a complaint if the person aggrieved has a right to take a case to court instead. However, this rule can be waived if the NIPSO thinks it is not reasonable to expect the person aggrieved to take a case to court.

Section 22: Other excluded matters

This section introduces Schedule 5. That Schedule sets out other instances where the NIPSO does not have jurisdiction.

Section 23: Decisions taken without maladministration

This section reiterates that the prime function of the NIPSO is to investigate maladministration, save in the cases where the investigation concerns professional judgement. There is no definition of maladministration in the Act. There was no definition in previous legislation in Northern Ireland, England, Scotland or Wales on the meaning of maladministration. When the Parliamentary Commissioner Act 1967 was being debated in Westminster Richard Crossman MP made this statement:

“A positive definition of maladministration is far more difficult to achieve. We might have made an attempt in this Section to define, by catalogue, all of the qualities which make up maladministration, which might count for maladministration by a civil servant. _ It would be a wonderful exercise— bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness and so on. It would be a long and interesting list.” (HC Deb 18 October 1966 vol. 734 cc42 – 172)

This has become known as the Crossman catalogue and is normally taken to be a fair summary of what comprises maladministration.

Section 24: Complaint handling procedure to be invoked and exhausted

This section and the following three sections set out the procedure which must be followed for a complaint to be made to the NIPSO under section 5. Under section 24, the person aggrieved must first make the complaint to the listed authority and give the authority a chance to resolve the complaint. The NIPSO has discretion to waive this requirement.

Section 25: Duty to inform person aggrieved about the Ombudsman

The listed authority must tell the person aggrieved when they have exhausted the complaints handling procedure, and must also tell the person aggrieved that it is possible to refer the complaint to the NIPSO.

Section 26: Form and time limit for making complaint

It is for the NIPSO to determine the way in which complaints are to be submitted. For example, the NIPSO could allow complaints to be made in writing, by email or online. This could include a special procedure for allowing oral complaints in special circumstances as long as these are subsequently reduced to writing. The ordinary time limit for making a complaint to the NIPSO is 6 months from the day that the complaints handling procedure has been exhausted. If the NIPSO has decided to accept a complaint which hasn't exhausted the internal complaints handling procedure, the time limit is 12 months from the day that the person aggrieved first became aware of the problem.

Section 27: Meaning of exhausting the complaints handling procedure

Section 24 states that the complaints handling procedure must be exhausted. Section 27 sets out how that is done. Normally a complaints handling procedure is exhausted when the listed authority makes a final decision on a complaint.

Section 28: Procedure for complaint referred to the Ombudsman

This section sets out the time limit for complaints referred to the NIPSO by a listed authority. The NIPSO may waive these time limits if there are special circumstances which make it proper to do so.

Section 29: Procedure for own initiative investigations

The procedure for own initiative investigations is quite different from that for other investigations. The NIPSO must send an investigation proposal to the listed authority. The proposal must state how the criteria for an own initiative investigation have been satisfied.

Section 30: Investigation procedure

This section sets out how the NIPSO must carry out investigations. It contains procedural rules to ensure that the investigation is fair to all parties. For example, if an allegation is made against a person, that person will have a right to hear that allegation and counter it. The NIPSO has a power to allow parties to an investigation to be legally represented in that investigation. There is also a power to pay expenses or allowances to witnesses.

Section 31: Information, documents, evidence and facilities

The NIPSO is entitled to request documents and seek assistance from the persons being investigated. The NIPSO also has the power to compel people to give evidence or provide documents.

Section 32: Privileged and confidential information

The normal rules on confidential information and legal privilege do not apply for the purposes of the NIPSO investigating a listed authority. Normally, a listed authority could refuse to disclose this sort of information. However, the NIPSO can insist on seeing it in the course of an investigation. There are safeguards for this later on in the Act. Under section 47, information subject to legal privilege cannot be included in a report. Under section 56, this information cannot be used in court proceedings.

Sections 49 and 50 contain further provision on disclosure of information obtained by the NIPSO in the course of an investigation.

Section 33: Obstruction and contempt

It is an offence to obstruct the NIPSO in course of his or her work. This is treated as the equivalent to contempt of court.