
EXPLANATORY NOTE

(This note is not part of the Order)

Overview

The Order:

- creates a new route for whistleblowers in the healthcare sector to bring complaints to the Scottish Public Services Ombudsman (“the Ombudsman”), and
- extends the list of bodies to whom the Ombudsman can disclose information obtained in the course of an investigation to include certain bodies that have a role in improving healthcare in Scotland.

Healthcare whistleblowing

Section 16B of the Scottish Public Services Ombudsman Act 2002 (“the 2002 Act”) allows the Ombudsman to publish model complaints handling procedures. Article 3(5) of the Order amends the 2002 Act to place the Ombudsman under a duty to exercise the power under section 16B to publish a model complaints handling procedure for the handling of whistleblowers’ complaints by healthcare bodies (specifically: health service bodies, family health service providers and independent providers, all as defined by schedule 2 of the 2002 Act).

Section 16C of the 2002 Act enables the Ombudsman to require that certain bodies have in place complaints handling procedures that comply with a model procedure published under section 16B.

Article 3(2) of the Order inserts new sections 6A and 6B into the 2002 Act. New section 6A provides that a healthcare body’s handling of a complaint through the procedure for handling whistleblowers’ complaints which the body has adopted in accordance with the requirement under section 16C is a matter the Ombudsman is entitled to investigate. The Ombudsman may initiate such an investigation following a complaint from an individual (as mentioned in section 2(1) of the 2002 Act) or a request from the healthcare body itself (as mentioned in section 2(2) of the 2002 Act).

New section 6B contains clarifications on a few technical points connected to new section 6A. Subsection (1) makes clear that, although the descriptions of matters in section 5(1) may be wide enough to encompass matters mentioned in new section 6A(1), provisions of the 2002 Act that bear to apply to investigations (or potential investigations) into matters mentioned in section 5(1) (see for example sections 5(3) and (5) and 10(2)) do not apply to investigations that proceed under the auspices of new section 6A.

If dealing with a whistleblowing complaint made in the context of providing services for the NHS were not treated as part of providing services for the NHS, new section 6A(6) and existing section 7(6) (which is applied by new section 6A(7)) would prevent the Ombudsman from investigating the handling of whistleblowers’ complaints by family health service providers and independent providers. New section 6B(2) clarifies that dealing with whistleblowers’ complaints made in the context of providing services for the NHS is to be regarded as part of providing those services, which means the providers’ handling of such complaints does fall within the Ombudsman’s jurisdiction.

New section 6B(3) removes scope for argument that because there can only be investigations under new section 6A once the Ombudsman has required at least some healthcare bodies to have a model complaints handling procedure for whistleblowers’ complaints, there is an implied duty for the

Ombudsman to exercise her discretionary power under sections 16AB and 16C to impose such requirements.

Article 3(3) of the Order amends section 7 of the 2002 Act so that, in the context of an investigation into a complaint under new section 6A, the Ombudsman is able to question the merits of any decision taken by a healthcare body, even if the decision was taken without maladministration and is not connected to an exercise of clinical judgement. The Ombudsman continues to be precluded from questioning the merits of such decisions in the context of investigations that proceed under section 5 of the 2002 Act.

Article 3(4) of the Order adds two new subsections to section 15 of the 2002 Act, which concerns the reports that the Ombudsman is to produce at the end of an investigation. New subsection (9) highlights particular matters the Ombudsman may wish to mention in a report prepared at the end of an investigation into a complaint under new section 6A. New subsection (10) ensures that nobody infers from the particularity of new subsection (9) any restriction on the Ombudsman's discretion about what to mention in a report.

Article 3(6) is a minor consequential adjustment.

Disclosure of information

Section 20 of the 2002 Act allows the Ombudsman to disclose information gathered in the course of an investigation to bodies listed in schedule 5 of the Act. Article 3(7) adds the following bodies to that list:

- the Common Services Agency for the Scottish Health Service (which is established by section 10 of the National Health Service (Scotland) Act 1978 (“the 1978 Act”)),
- Healthcare Improvement Scotland (which is established by section 10A of the 1978 Act),
- NHS Education for Scotland (which is a Special Health Board established by the NHS Education for Scotland Order 2002(1)),
- the Mental Welfare Commission for Scotland (the present statutory foundation for which is section 4 of the Mental Health (Care and Treatment) (Scotland) Act 2003).

(1) S.S.I. 2002/103.