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SCOTTISH STATUTORY INSTRUMENTS

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**2020 No. 5**

**PUBLIC SERVICES REFORM  
SCOTTISH PUBLIC SERVICES OMBUDSMAN  
PUBLIC HEALTH  
NATIONAL HEALTH SERVICE**

The Public Services Reform (The Scottish Public Services Ombudsman) (Healthcare Whistleblowing) Order 2020

*Made - - - - 7th January 2020*

*Coming into force in accordance with article 2*

The Scottish Ministers make the following Order in exercise of the powers conferred by section 14 of the Public Services Reform (Scotland) Act 2010(1) and all other powers enabling them to do so.

They consider the conditions in section 16(2) of that Act to be satisfied.

They have complied with the requirements of section 25(2)(a) and (b) of that Act.

In accordance with section 19(2) of that Act, the Scottish Parliamentary Corporate Body has consented to a draft of this Order being laid before the Scottish Parliament.

In accordance with section 25(2)(c) of that Act(2), a draft of this Order has been laid before and approved by resolution of the Scottish Parliament.

**Citation**

1. This Order may be cited as the Public Services Reform (The Scottish Public Services Ombudsman) (Healthcare Whistleblowing) Order 2020.

**Commencement**

2. This Order comes into force on the day after the day on which it is made.

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(1) 2010 asp 8. The period for which section 14 (and the other provisions mentioned in the preamble to this Order) have effect is relevantly extended by S.S.I. 2015/234.  
(2) Section 25(2)(c) is modified by the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10), schedule 3, paragraph 5.

## **Amendment of the Scottish Public Services Ombudsman Act 2002**

3.—(1) The Scottish Public Services Ombudsman Act 2002(3) is amended as follows.

(2) After section 6 insert—

### **“6A Matters which may be investigated: healthcare whistleblowing**

(1) The Ombudsman is entitled to investigate the following matters—

- (a) whether a body or provider mentioned in subsection (2) has handled a complaint by a whistleblower properly in accordance with the complaints handling procedure described in subsection (3),
- (b) any action taken by or on behalf of the body or (as the case may be) the provider in respect of that complaint.

(2) The bodies and providers referred to in subsection (1) are—

- (a) any health service body, other than the Scottish Dental Practice Board,
- (b) any independent provider,
- (c) any family health service provider.

(3) The complaints handling procedure referred to in subsection (1) is the procedure that the body or (as the case may be) the provider is required, by section 16C(2), to ensure complies with a model complaints handling procedure for whistleblowers' complaints.

(4) In subsection (1)(a), “whistleblower” means a person who, according to the terms of the complaints handling procedure described in subsection (3), is entitled to have a complaint handled in accordance with that procedure.

(5) In connection with any investigation into a matter mentioned in subsection (1), references in this Act to the “person aggrieved” are to the person who made the complaint.

(6) The Ombudsman must not investigate, in an investigation into a matter mentioned in subsection (1), action taken by or on behalf of a family health service provider that was not taken in connection with any family health services provided by that provider.

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

(8) For the avoidance of doubt, the action referred to in subsection (1)(b) includes the treatment of any person.

### **6B Further provision in relation to healthcare whistleblowing**

(1) In a case where a complaint or request is made in relation to a matter mentioned in section 6A(1), the complaint or request is not to be regarded as relating to a matter mentioned in section 5(1).

(2) For the avoidance of doubt, the reference—

- (a) in section 6A(6) to action taken in connection with family health services, and
- (b) in section 7(6) to action taken in relation to services that—
  - (i) an independent provider provided, or
  - (ii) it was an independent provider's function to provide,

includes action taken in handling, or in light of, a complaint made in connection with those services.

(3) Nothing in section 6A requires the Ombudsman to make a model complaints handling procedure for whistleblowers' complaints relevant to a body or provider by virtue of a specification under section 16C(1).”

(3) In section 7, for subsection (2) substitute—

“(2) Subsection (1)—

- (a) does not apply in the case of an investigation into a matter mentioned in section 6A(1), and
- (b) in the case of any other investigation in relation to a health service body, a family health service provider or an independent provider, does not preclude the Ombudsman from questioning the merits of any decision taken by or on behalf of the body or provider to the extent that it was taken in consequence of the exercise of clinical judgement.”

(4) In section 15, after subsection (8)(4) insert—

“(9) A report prepared after conducting an investigation into a matter mentioned in section 6A(1) may include any observations the Ombudsman wishes to make about—

- (a) the general culture in relation to the handling of complaints in accordance with a complaints handling procedure of the kind described in section 6A(3) by—
  - (i) the health service body, independent provider or (as the case may be) family health service provider in question, or
  - (ii) any other listed authority investigated by the Ombudsman in connection with the investigation, and
- (b) the treatment, by any person mentioned in paragraph (a), of the person aggrieved.

(10) Subsection (9) is without prejudice to the Ombudsman’s discretion about what to include in any report.”

(5) After section 16B insert—

**“16BA Model complaints handling procedure: healthcare whistleblowing**

(1) The Ombudsman must publish, under section 16B, a model CHP for whistleblowers’ complaints to—

- (a) a health service body, other than the Scottish Dental Practice Board,
- (b) an independent provider,
- (c) a family health service provider.

(2) The Ombudsman may publish different model CHPs in accordance with this section for different purposes.

(3) Any model CHP published in accordance with this section must include the following definition of whistleblowing—

“Whistleblowing is when a person who delivers services or used to deliver services on behalf of a health service body, family health service provider or independent provider (as defined in section 23 of the Scottish Public Services Ombudsman Act 2002) raises a concern that relates to speaking up, in the public interest, about an NHS service, where an act or omission has created, or may create, a risk of harm or wrong doing.””

(6) In section 23(1), at the end of the definition of “person aggrieved” insert “or (as the case may be) section 6A(5)”.

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(4) Section 15(8) is inserted by the Scottish Parliamentary Commissions and Commissioners etc. Act 2010 ([asp 11](#)), schedule 3, paragraph 5(d).

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(7) In schedule 5(5), after the entry relating to an auditor within the meaning of section 97(6) of the Local Government (Scotland) Act 1973(6), insert—

“The Common Services Agency for the Scottish Health Service	1. The Agency’s function of providing information, advice and management services in support of the functions of the Scottish Ministers, Health Boards and Special Health Boards
	2. Fraud or another irregularity in relation to the health service (as defined in section 108(1) of the National Health Service (Scotland) Act 1978(7))
Healthcare Improvement Scotland	A matter of relevance to furthering improvement in the quality of health care (as defined in section 10A(2) of the National Health Service (Scotland) Act 1978(8))
NHS Education for Scotland	The education or training of persons providing, or intending to provide, services under the National Health Service (Scotland) Act 1978
The Mental Welfare Commission for Scotland	1. An investigation under section 11 or 12 of the Mental Health (Care and Treatment) (Scotland) Act 2003(9)
	2. Circumstances of a kind mentioned in paragraph (a) or (d) to (f) of section 11(2) of that Act”.

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St Andrew’s House,  
Edinburgh  
7th January 2020

*JEANE FREEMAN*  
A member of the Scottish Government

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(5) Schedule 5 is amended by the Freedom of Information (Scotland) Act 2002 (asp 13), schedule 4, paragraph 2.  
(6) 1973 c.65.  
(7) 1978 c.29.  
(8) Section 10A is inserted by the Public Services Reform (Scotland) Act 2010, section 108.  
(9) 2003 asp 13. Sections 11 and 12 are amended by the Public Services Reform (Scotland) Act 2010, section 111(8) and (9).

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## 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

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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(10)),
- 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).

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