



A modern complaints system

The new Scottish Public Services Ombudsman

investigate



om-boodz-man, n

(also without cap.) (orig. *n* Sweden and Denmark) a 'grievance person', an official who is appointed to investigate complaints against the Administration: any official with a similar function:- *pl.* -men.

The Scottish Public Services Ombudsman Act 2002 (asp 11)



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Introduction

1. This Circular draws attention to, and provides guidance on, the Scottish Public Services Ombudsman Act 2002 (the 2002 Act) which establishes the new Scottish Public Services Ombudsman. The 2002 Act received Royal Assent on 23 April 2002 and will be commenced on 23 October 2002. It should be noted that this Circular provides advice and guidance only – it does not seek to provide an authoritative interpretation of the 2002 Act.

2. With effect from 23 October 2002, the 2002 Act repeals and replaces the legislation under which the existing public sector ombudsmen in Scotland are established, i.e.:

Legislation	Ombudsman
The Scotland Act 1998 (Transitory and Transitional Provisions) (Complaints of Maladministration) Order 1999 (S.I. 1999 No. 1351)	Scottish Parliamentary Commissioner for Administration (known as the Scottish Parliamentary Ombudsman)
The Health Service Commissioners Act 1993 (c.46)	Health Service Commissioner for Scotland (known as the Scottish Health Service Ombudsman)
The Local Government (Scotland) Act 1975 (c.30)	Commissioner for Local Administration in Scotland (known as the Scottish Local Government Ombudsman)

The non-statutory arrangements for the Housing Association Ombudsman for Scotland and the External Complaints Adjudicators for Scottish Enterprise and Highlands & Islands Enterprise are also discontinued from the commencement date.

3. The new Scottish Public Services Ombudsman, Professor Alice Brown, will be appointed on 30 September 2002 and take up all her functions and powers from 23 October 2002.

4. The Executive wishes to draw particular attention to paragraphs 11 to 18 of this Circular which summarise new requirements which the 2002 Act places on all authorities within the jurisdiction of the new Ombudsman.

5. Section and schedule references in this Circular are references to sections and schedules of the 2002 Act unless otherwise stated.

Background to the 2002 Act

6. Section 91(1) of the Scotland Act 1998 (the 1998 Act) required the Scottish Parliament to make provision for the investigation of certain complaints of maladministration made to its members and which relate to action taken by or on behalf of a member of the Scottish Executive or other office-holders in the Scottish Administration (e.g. junior Scottish Ministers, Registrar General of Births, Deaths and Marriages, Keeper of the Registers of Scotland and Keeper of the Records of Scotland). The 2002 Act meets that requirement.

7. Section 91 of the 1998 Act did not require any action to be taken in respect of the Scottish Local Government Ombudsman, the Scottish Health Service Ombudsman or the Housing Association Ombudsman for Scotland. However, in line with the Executive's commitments to modern and effective public services, we took the opportunity to consider the arrangements for the other main public sector ombudsmen in Scotland, instead of looking at the Ombudsman arrangements for the Scottish Administration in isolation.

General effect of the 2002 Act

8. The key effect of the 2002 Act is to establish a one-stop shop ombudsman service, headed by the Scottish Public Services Ombudsman (supported by up to 3 deputies), to deal with complaints formerly dealt with by the Scottish Parliamentary Ombudsman, the Scottish Health Service Ombudsman, the Scottish Local Government Ombudsman and the Housing Association Ombudsman for Scotland. The new Ombudsman will also take over:

- the Mental Welfare Commission's function of investigating complaints relating to mental health; and
- complaints against Scottish Enterprise and Highlands and Islands Enterprise whose External Complaints Adjudicators will be abolished.

9. The 2002 Act aims to establish Ombudsman arrangements for the Scottish public sector which are more open, accountable and accessible to the public. This is achieved through new provisions which:

- provide a simpler and more effective means for members of the public to make complaints;
- reinforce the Ombudsman's independence from the authorities within his or her jurisdiction; and
- improve publicity and transparency of the Ombudsman's functions.

These provisions are explained in more detail later in this Circular.

Commencement and transitional arrangements

10. When the remainder of the 2002 Act is commenced on 23 October 2002, the new Scottish Public Services Ombudsman will take up all of her powers and functions and the existing Ombudsmen (listed in paragraph 8 above) will cease to operate. All of the former Ombudsmen's undetermined complaints will transfer to the new Ombudsman, except for complaints about Scottish Enterprise and Highlands & Islands Enterprise whose External Complaints Adjudicators will complete any complaints which they are working on at that date. It will be for the new Ombudsman to decide whether to continue any investigation which a former Ombudsman has begun. All new complaints will go to the new Ombudsman from the commencement date.

Summary of new requirements on listed authorities

Publicising the Ombudsman service

11. A key theme arising from the Executive's review of the former Scottish public sector ombudsmen arrangements was that for an ombudsman service to be effective, it is necessary to ensure that members of the public are made fully aware of its existence. Section 22 of the 2002 Act therefore introduces a new requirement for listed authorities (in terms of schedule 2 to the Act – see Annex A to this Circular) to publicise the Ombudsman service. Listed authorities will wish to note and ensure their compliance with the requirements of section 22, which are summarised below:

- a) a listed authority must take reasonable steps to publicise the application and effect of the Act including, in particular, providing information about:
 - the right conferred by the Act to make a complaint to the Ombudsman;
 - the time limit for doing so; and
 - how to contact the Ombudsman;
- b) this information must be included in, or provided with:
 - any document published by the listed authority which contains information about services they provide to members of the public or about their procedures for dealing with complaints; and
 - any document issued by the listed authority responding to a complaint made to it by any person who might be entitled to make a complaint to the Ombudsman.

12. The Executive recognised that many listed authorities would be likely to have significant stocks of publicity material already printed at the time of the 2002 Act coming into force. Accordingly, section 22(2) allows this information to be inserted into existing documents (any references to the former ombudsman arrangements will, of course, have to be superseded by the insertion). Listed authorities should ensure that any leaflets, etc. printed after 23 October 2002 include the information required by section 22.

13. Section 22(3) provides for the Ombudsman to issue guidance to listed authorities to assist them in the performance of their duties under section 22. No such guidance has yet been produced – any listed authority which requires advice in the meantime should contact the Ombudsman’s office. However, the Ombudsman’s office will be very busy in its first few months, so listed authorities should only seek their advice if absolutely necessary.

Publicity of investigation reports (see also paragraphs 66 and 67 below)

14. Section 15 makes provision for publicising the Ombudsman’s investigation reports, which is broadly similar to the arrangements that were in place for the former Local Government Ombudsman’s investigation reports.

15. Section 15(1) requires the Ombudsman to lay each report before the Parliament and to copy it to (amongst others) the listed authority who is the subject of the report. Under section 15(4) the listed authority must then:

- a) make arrangements, having effect for a period of at least 3 weeks, for allowing any person to:
 - inspect the investigation report at any reasonable time;
 - obtain a copy of the report, or any part of it (whether or not on payment of a reasonable fee); and
- b) publicise those arrangements.

These provisions are explained in more detail in paragraphs 66 and 67 below.

Publicity of special reports (see also paragraphs 70 and 71 below)

16. Section 16 provides for the Ombudsman to make a special report where an investigation report finds that the aggrieved person has sustained injustice or hardship and it appears to the Ombudsman that the injustice or hardship has not been, or will not be, remedied. This provision is similar to the arrangements that were in place for the former Parliamentary and Health Service Ombudsmen.

17. Section 16(5) enables the Ombudsman to determine how to make special reports available to the public. Section 16(6) is a new provision making the listed authority to whom the special report relates liable to reimburse the Ombudsman for any expenses incurred in publishing the report.

18. These provisions are explained in more detail in paragraphs 70 and 71 below.

Remit of the Ombudsman

Listed authorities

19. The full list of the authorities and bodies covered by the new Ombudsman is set out in schedule 2 to the Act (a copy is at Annex A to this Circular). These 'listed authorities' all fall into one of the following categories:

- Scottish public authorities with mixed functions or no reserved functions;
- cross-border public authorities;
- publicly-owned companies, i.e. companies wholly owned by the Scottish Ministers or by a listed authority; and
- other persons exercising functions of a public nature, e.g. family health service providers and independent providers and registered social landlords, but only as respects those functions.

20. The entries in Part 2 of schedule 2 can be amended by an Order in Council under section 3(2) – this ensures that the list can be kept up to date without the need for primary legislation. However, the power to amend is limited to:

- Scottish public authorities with both reserved and devolved functions or with devolved functions only; and
- publicly-owned companies.

A person who falls into neither of these categories but who appears to exercise functions of a public nature can be added to Part 2 of schedule 2. No new cross-border public authorities can be designated under the Scotland Act, so the amending power in respect of these authorities is in effect limited to reflecting any change to the name of such a body, or to deleting a body from the schedule should it be wound up.

Tribunals

21. The Ombudsman is also able to investigate administrative functions exercisable by any person appointed, by or with the consent of a listed authority, as a member of the administrative staff of a tribunal specified in schedule 3 to the Act. For this purpose, these functions are taken to be administrative functions of the authority by whom, or with whose consent, the person was appointed. The tribunals specified are:

The Dairy Produce Quota Tribunal for Scotland
Independent Schools Tribunals
The Lands Tribunal for Scotland
Meat Hygiene Appeals Tribunals
Rent Assessment Committees
The Plant Varieties and Seeds Tribunal
The Scottish Land Court.

Entries in schedule 3 may be added, removed or modified by an Order in Council under section 6(2).

Power to investigate

22. Section 2 empowers the Ombudsman to conduct an investigation following:

- a complaint from a member of the public (see paragraph 29 below); or
- a request from a listed authority (see paragraph 33 below).

The matters which the Ombudsman is entitled to investigate are explained in paragraphs 24 to 28 below. Under section 2(3), the Ombudsman has complete discretion to decide whether to initiate, continue or discontinue an investigation.

Informal resolution

23. It should be particularly noted that section 2(4) and (5) introduce a new provision to enable the Ombudsman to take action to resolve a complaint informally. A formal investigation is a costly and time-consuming process but an informal resolution can achieve the result which the complainant is seeking much more quickly and easily. So, where the Ombudsman is seeking an informal resolution, the Executive recommends that listed authorities should be as co-operative as possible.

Matters which may be investigated

24. Section 5 entitles the Ombudsman to investigate the following matters :

- maladministration (see Annex B of this Circular for examples of maladministration) in connection with:
 - any action taken by or on behalf of an authority listed in schedule 2 (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 (see paragraph 25 below for definition) by an authority listed in schedule 2 (apart from a family health service provider or a registered social landlord); and
- any action taken by or on behalf of a family health service provider in connection with any family health services provided by that provider.

The Ombudsman may investigate these matters only where there is a claim that a member of the public has sustained injustice or hardship in consequence of the maladministration, service failure or other action as appropriate.

25. Section 5(2) defines 'service failure' (see 4th bullet in paragraph 24 above) as:
- a) any failure in a service provided by the authority; or
 - b) any failure of the authority to provide a service which it was a function of the authority to provide.

This does not entitle the Ombudsman to question discretionary decisions taken without maladministration (see first 'restriction' in paragraph 26 below), such as whether to provide a service which an authority is not statutorily required to provide, or how to provide a service.

Restrictions and exclusions

26. The Act retains broadly the same list of matters which the former statutory Ombudsmen were specifically prevented from dealing with. These restrictions and exclusions are set out in sections 7 and 8, and schedule 4. Section 7 sets out restrictions on investigations and conditions that have to be satisfied, while schedule 4 contains absolute exclusions. Section 8(2) provides for matters specified in schedule 4 to be modified, added or removed by Order in Council. For ease of reference, the restrictions and exclusions are summarised below:

Restrictions (section 7)

- discretionary decisions taken without maladministration (the processes leading up to the making of such decisions continue to be open to investigation). This restriction does not apply to a decision taken in the exercise of clinical judgement by or on behalf of a health service body, a family health service provider or an independent provider;
- action taken by or on behalf of a member of the Scottish Executive not undertaken in the exercise of functions conferred on the Scottish Ministers or on the First Minister alone. This prevents the Ombudsman from investigating certain functions of the Lord Advocate, mainly relating to his role as head of the systems of criminal prosecution and investigation of deaths in Scotland;
- action taken by or on behalf of a cross-border public authority which does not concern Scotland and does not relate to devolved matters;
- action taken by an independent provider which does not relate to a service being provided under arrangements with a health service body or family health service provider. Without this provision the Ombudsman's remit would have extended across all the services provided by independent providers, e.g. private health care;
- the private functions of a listed authority (added to schedule 2 by an Order in Council under section 3(3)(c)) which undertakes both private and public functions;

- matters for which the complainant has, or had, a right of appeal to a Minister or a statutory tribunal, or a remedy by way of proceedings in a court of law. The Ombudsman does, however, have discretion to conduct an investigation if she is satisfied that in the circumstances it is not reasonable to expect the person to use, or to have used, those courses of action; and
- any case where the relevant local complaints procedure has not been invoked and exhausted, unless the Ombudsman is satisfied that in the circumstances it is not reasonable to expect the procedure to be invoked or exhausted.

Exclusions (section 8 and schedule 4)

- action taken by the Scottish Executive, a police authority or any joint police board for the purposes of, or in connection with, the investigation or prevention of crime or the protection of the security of the State;
- the commencement or conduct of civil or criminal proceedings before any court of law, or proceedings before any international court or tribunal. However, the Ombudsman will continue to be able to investigate the administration of courts, e.g. arrangements for calling witnesses, payment of expenses, etc.;
- action taken by anyone from the Scottish Administration who is appointed to the administrative staff of any court or tribunal, so far as that action is taken at the direction, or on the authority, of any person acting in a judicial capacity or in the capacity of a member of the tribunal;
- action taken by a member of the administrative staff of any tribunal specified in schedule 3 so far as that action is taken at the direction, or on the authority, of any person acting in the capacity of a member of the tribunal;
- action taken by a person, appointed under section 5(3)(c) of the Criminal Injuries Compensation Act 1995, which is taken at the direction, or on the authority, of an adjudicator appointed under that section to determine appeals;
- any exercise of the prerogative of mercy or of the power of a member of the Scottish Executive to make reference in respect of any person to the High Court of Justiciary;
- contractual or other commercial transactions of a listed authority, except matters relating to certain NHS contracts and arrangements, and the compulsory purchase or disposal of land. However, the Ombudsman will continue to be able to investigate maladministration in the process leading up to contracts or commercial transactions, e.g. failure to invite a particular company to tender;

- appointments or removals, pay, discipline, superannuation or other personnel matters;
- the grant of honours, awards or privileges within the gift of the Crown, including the grant of Royal Charters;
- professional education matters, i.e. the giving of instruction, conduct, curriculum or discipline in any educational establishment under the management of an education authority;
- action taken by the Mental Welfare Commission relating to:
 - discharge of hospital patients under section 33 of the Mental Health (Scotland) Act 1984;
 - revocation of community care orders under section 35I of the 1984 Act;
 - discharging patients from guardianship under section 50 of the 1984 Act (*before the repeal of that section by the Adults with Incapacity (Scotland) Act 2000*); or
 - recall of powers of guardian under section 73 of the 2000 Act;
- action which has been, or is, the subject of an inquiry under section 76 of the National Health Service (Scotland) Act 1978;
- action taken by a Health Board in the exercise of its functions under:
 - the National Health Service (Service Committees and Tribunal) (Scotland) Regulations 1992 (S.I. 1992/434);
 - regulations made under section 19, 25(2), 26(2), or 27(2) of the National Health Service (Scotland) Act 1978 by virtue of section 17 of the Health and Medicines Act 1988; and
- determination of the amount of any rent or service charge.

Extensions to remit

Internal organisation and management of schools

27. Paragraph 5 of schedule 5 to the Local Government (Scotland) Act 1975 prevented the former Local Government Ombudsman from investigating maladministration in the internal organisation and management of schools. Paragraph 10 of schedule 4 to the 2002 Act removes this restriction but continues to prevent the Ombudsman from investigating matters directly relating to education (see 10th 'exclusion' in paragraph 26 above).

Retired Family Health Service (FHS) Practitioners or Independent Providers

28. Section 10(2) ensures that the Ombudsman is able to investigate complaints about FHS practitioners or independent providers who have retired or otherwise ceased to provide a service. Such a complaint must be made within 3 years of the date on which the practitioner or provider ceased service. In all other respects, these complaints are subject to exactly the same rules as any other complaint to the Ombudsman.

Complaints and requests

Who can complain

29. Under section 9(1), a complaint to the Ombudsman may be made by the person aggrieved. In addition, section 9(1) introduces a new provision enabling complaints to be made by a representative authorised in writing by the aggrieved person to complain on their behalf. This may be an MSP, local councillor or any person whom the aggrieved person considers suitable to represent their interests. This is one of the provisions designed to improve the accessibility of the Ombudsman. Section 9(3) continues the provision for complaints to be made by an aggrieved person's personal representatives, where that person has died or is for any reason unable to act for themselves.

30. Previously, all complaints to the Scottish Parliamentary Ombudsman had to be submitted via an MSP. The provisions described above remove this requirement but still allow a person to submit their complaint via an MSP, should they so wish.

Time limits

31. Section 10(1) provides that a complaint must be submitted within 12 months after the day on which the person aggrieved first had notice of the matter complained of, unless the Ombudsman is satisfied that there are special circumstances which make it appropriate to consider a complaint made outwith that period. This is the same time limit as applied under the former public sector ombudsman arrangements which are replaced by the 2002 Act.

Procedures

32. Under the previous statutory ombudsman arrangements, all complaints had to be submitted in writing. Section 10(3) provides that, while there will be a presumption that complaints be submitted in writing or by electronic communications, the Ombudsman will have discretion to accept oral complaints in special circumstances, e.g. where the complainant has difficulty reading or writing or there is exceptional urgency.

Requests by listed authorities

33. Section 2(2) allows a listed authority to request an investigation by the Ombudsman. This provides a means to address cases where there has been public criticism of an authority but, as no complaint has been made to the Ombudsman, she cannot investigate. The intention is that this option should be used very much as a last resort and so that it does not divert the Ombudsman from her main function of

dealing with complaints from members of the public. Section 5(4)(b) therefore provides that, before requesting an investigation, an authority should have taken all reasonable steps to resolve the problem. The Ombudsman has complete discretion to decide whether or not to conduct an investigation. Where the Ombudsman does decide to investigate, the process will be the same as for an investigation following a complaint.

Investigations

General

34. The Scottish Parliament agreed with the Executive that the 2002 Act should not include detailed provisions for investigation procedure, as this would result in inflexible procedures which are difficult to update in the light of experience or as circumstances change. Therefore, section 12 enables the Ombudsman to conduct investigations as she sees fit, provided that investigations are conducted in private and the authority in question (or any individual named in the complaint) is given an opportunity to comment on the allegations contained in the complaint. The Ombudsman should ensure that investigation procedures are made clear to complainants and listed authorities.

35. Section 12(5) makes provision for the Ombudsman to pay allowances to complainants or any other person involved in an investigation in respect of expenses incurred by the person and by way of compensation for loss of time. The level of such allowances will be determined by the Scottish Parliamentary Corporate Body.

36. Section 12(6) ensures that the conduct of an investigation does not affect any action taken by the listed authority, or any power or duty of the authority to take further action in relation to any matter under investigation. This provision is intended to enable a listed authority to carry on its normal business while an investigation is under way.

Evidence-gathering

37. Section 13 gives the Ombudsman comprehensive powers to gather evidence for the purposes of an investigation. These powers are consistent with those available to the previous statutory ombudsmen.

38. Under section 13(1) and (2), the Ombudsman may require:

- any member, officer or member of staff of the listed authority, and
- any other person,

to supply information or produce documents relevant to the investigation. To reflect the special circumstances of the Scottish Administration, section 13(3) provides that where the listed authority in question is an office-holder in the Scottish Administration (see paragraph 6 above for examples), 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.

39. Section 13(4) provides the Ombudsman, for the purposes of an investigation, with the same powers as the Court of Session in respect of:

- the attendance and examination of witnesses; and
- the production of documents.

40. Section 13(5) makes clear that no obligation to maintain secrecy or other restriction on disclosure of information obtained by or supplied to persons in Her Majesty's service, prevents disclosure of information to the Ombudsman under this section. Section 13(6) prevents the Scottish Administration and the UK Government, in relation to an investigation by the Ombudsman, from withholding documents or other evidence on grounds of public interest immunity.

41. Section 13(7) and (8) ensures that the Ombudsman cannot require any person to supply information or papers, or answer questions, relating to proceedings of the Scottish Cabinet or any committee of the Scottish Cabinet. Arrangements are in hand to extend the application of this section by way of an Order under section 104 of the Scotland Act, to ensure that information and papers relating to the UK Cabinet and its committees are similarly protected.

42. Section 13(9) provides that no person may be compelled, for the purposes of an investigation by the Ombudsman, to give any evidence or produce any document which that person could not be compelled to give or to produce in civil proceedings before the Court of Session.

43. Paragraph 9 of schedule 6 amends section 34(2) of the Legal Aid (Scotland) Act 1986 (the 1986 Act) to disapply section 34(1) of that Act in relation to disclosure of information to the Ombudsman for the purposes of an investigation. Prior to this amendment, section 34(1) of the 1986 Act prevented the Scottish Legal Aid Board (SLAB) from disclosing information furnished for the purposes of that Act without the consent of the applicant or the person who furnished it. Neither the new Ombudsman's evidence-gathering powers set out in section 13 of the 2002 Act, nor those of the former Scottish Parliamentary Ombudsman, would have overridden section 34(1) of the 1986 Act. So, if a person withheld their consent, this could prevent the Ombudsman from obtaining all of the evidence she needs to complete an investigation. This was out of line with the otherwise comprehensive powers available to the Ombudsman – the amendment made by paragraph 9 of schedule 6 corrects that anomaly.

Obstruction and contempt

44. Where a person:

- without lawful excuse, obstructs the Ombudsman in the performance of her functions, or
- does any act or fails to take any action in relation to an investigation which, if the investigation were a proceeding in the Court of Session, would constitute contempt of court,

the Ombudsman may under section 14 apply by petition to the Court of Session for the person to be dealt with as if they had committed a contempt of court. The same option was available to the former statutory ombudsmen.

45. Section 14(3) clarifies that section 14 does not apply in respect of action taken by a listed authority relating to an investigation, or any power or duty of the authority to take further action with respect to any matter being investigated.

Confidentiality

46. Section 19(1) provides that information obtained by the Ombudsman in connection with any matter in respect of which a complaint or request for investigation has been made, must not be disclosed.

47. However, there are circumstances where the Ombudsman needs to be able to disclose information; e.g. when pursuing enquiries she will need to give the authority affected some details of what the complaint is about. Section 19(2) therefore allows the Ombudsman to disclose information for the purposes of:

- any consideration of a complaint or request;
- an investigation and any report on it;
- any inquiry or proceedings for an offence under the Official Secrets Act or for an offence of perjury, relating to an investigation;
- any proceedings for obstruction or contempt relating to an investigation.

48. The confidentiality provisions which applied to the former statutory ombudsmen covered only information obtained in the course of an investigation. Section 19 extends this protection to any information relating to a complaint or a request for an investigation. However, this tighter confidentiality provision could have put unnecessary obstacles in the way of the Ombudsman pursuing his or her inquiries in relation to a complaint. Accordingly, the disclosure provisions in section 19(2) have been extended to allow the Ombudsman to disclose information for the purposes of the consideration of a complaint or request, for example so that she can give the authority affected some details of what the complaint is about. These changes ensure proper protection for the privacy of anyone giving information or evidence to the Ombudsman, while not obstructing her ability to consider complaints or requests. They also reflect the increasing practice of Ombudsmen to seek to resolve complaints informally without resorting to full investigation.

49. Section 19(3) replicates the former Health Service Ombudsman provision that, where the Ombudsman obtains information to the effect that a person is likely to constitute a risk to the health or safety of patients, she may disclose that information to any appropriate person in the interests of the health and safety of patients. Under section 19(4), where the Ombudsman decides upon such a disclosure, she must inform the person to whom the information relates (if their identity is known) of:

- the disclosure; and
- the identity of the person to whom the information has been disclosed.

In addition, the Ombudsman must also inform the person from whom the information was obtained.

50. Under section 19(5), it is not competent for the Ombudsman or the Ombudsman's advisers to give evidence in any proceedings not covered by section 19(2) of matters relating to a complaint or request.

51. Section 19(6) makes provision for a member of the Scottish Executive to give notice in writing to the Ombudsman that the Executive considers that disclosure of any document or information (or any class of document or information) specified in the notice is contrary to the public interest. Under section 19(7), when such a notification is given, nothing in the 2002 Act allows the Ombudsman or any of the Ombudsman's advisers to communicate the material specified to any person or for any purpose.

52. Section 19(8) and (9) provides that information obtained by the Ombudsman from either the UK Information Commissioner or the Scottish Information Commissioner is, for the purposes of section 19(1), to be treated as if it were information obtained by the Ombudsman in connection with a complaint or request. This ensures that the Ombudsman treats such information as confidential and is able to disclose it only for the purposes specified in section 19(2) or (3).

Defamation

53. Under section 18(1), the following statements (within the meaning of the Defamation Act 1996) are absolutely privileged for the purposes of the law of defamation:

- any statement made by the Ombudsman in respect of a decision not to investigate, an investigation report, a special report or an annual report (see paragraphs 60 to 73 below);
- any statement made:
 - by the person aggrieved, or their representative or the authority against whom the complaint was made, in communicating with the Ombudsman, or
 - by the Ombudsman in communicating with any such person,

for the purposes of the 2002 Act; and

- any statement made in relation to arrangements for the publication of an investigation report or a special report.

This effectively places a bar on a person's right to pursue an action for defamation in respect of the above statements.

Consultation, co-operation and information-sharing with other ombudsmen etc

54. Section 20 enables the Ombudsman to disclose information obtained under the Act to the UK Information Commissioner, Scottish Information Commissioner, auditors and examiners, if the information appears to the Ombudsman to relate to a matter for which the particular office-holder is responsible as set out in the second column of schedule 5.

55. Where the Scottish Public Services Ombudsman forms the opinion that a complaint or request which she is considering relates partly to a matter which could be the subject of an investigation by:

- the UK Parliamentary Commissioner for Administration;
- the Health Service Commissioner for England or Wales;
- the Welsh Administration Ombudsman;
- a Local Government Ombudsman for England or Wales; or
- the Independent Housing Ombudsman for England,

section 21 requires her to consult that Commissioner or Ombudsman.

56. In addition, section 21(4) requires the Ombudsman to co-operate with the UK Parliamentary Commissioner for Administration where a complaint relates to an authority which is also within the jurisdiction of that Commissioner. This will generally apply to the cross-border public authorities listed in Part 2 of schedule 2.

57. Reciprocal provisions for the Ombudsman and Commissioners covered by sections 20 and 21 to consult and co-operate with the Scottish Public Services Ombudsman are to be contained in an Order under section 104 of the Scotland Act 1998. This is because the Scottish Parliament does not have powers to legislate to confer functions on UK office-holders.

58. These provisions remove the inconsistencies in the previous arrangements for consultation and co-operation between the existing Scottish public sector ombudsmen and their counterparts in England and Wales. They also introduce new provision for the Ombudsman to share information with auditors, examiners and the UK and Scottish Information Commissioners. The overall aim is to provide a clear and consistent framework for co-operation, consultation and information-sharing between office-holders within the public sector, and thereby promote joined-up working. The sharing of experience, expertise and knowledge should also be improved.

Reporting arrangements

General

59. The reporting arrangements set out in the 2002 Act are intended to ensure that the activities of the Ombudsman are seen to be open and fair, while not imposing excessive burdens on her. They are broadly based on those of the former Scottish Parliamentary Ombudsman and Health Service Ombudsman but are extended to include provisions, similar to those of the former Local Government Ombudsman, for publishing investigation reports.

Decisions not to investigate

60. Where after considering a complaint or a request for an investigation, the Ombudsman decides not to undertake an investigation, she must send a statement of reasons for that decision to everyone with an interest in the complaint or request.

61. Where the Ombudsman decides not to investigate a complaint, section 11(2) requires the statement of reasons to be sent to:

- the person aggrieved;
- the listed authority in question;
- any other person who is alleged in the complaint to have taken the action complained of;
- if applicable, the person authorised in writing to act on behalf of the person aggrieved;
- if applicable, the complainant's personal representative;
- if the listed authority is a family health service provider, any health service body with whom that provider:
 - is subject to an undertaking to provide family health services, or
 - has agreed to perform such services;
- if the listed authority is an independent provider, the health service body or family health service provider with whom the independent provider made the arrangement to provide the service concerned.

62. Where the Ombudsman decides not to investigate a request for investigation, section 11(4) requires the statement of reasons to be sent to:

- the listed authority who made the request;
- if the listed authority is a family health service provider, any health service body with whom that provider is subject to an undertaking to provide family health services; and

- if the listed authority is an independent provider, the health service body or family health service provider with whom the independent provider made the arrangement to provide the service concerned.

Investigation reports

63. The arrangements for the Ombudsman to make reports on investigations are set out in section 15.

64. Section 15(1) provides that a report of an investigation must be sent to the same persons to whom a statement of reasons must be sent under section 11 (see paragraphs 61 and 62 above) and to the Scottish Ministers. A copy of the report must also be laid before the Parliament.

65. An investigation report must not identify any person unless, after taking into account the public interest and the interests of the person in question, the Ombudsman decides it necessary to do so.

66. After the listed authority receives the investigation report, it is required under section 15(4) to make copies available for inspection or purchase and to publicise those arrangements. The Ombudsman may direct that a report shall not be made available, if she thinks fit after taking account of the public interest and the interests of the complainant and other persons.

67. Section 15(5) modifies the effect of section 15(4) in respect of family health service providers and independent providers as follows:

- where the listed authority is a family health service provider, any health service body with whom that provider is subject to an undertaking to provide family health services, or has agreed to perform such services, will be responsible for publicising the investigation report;
- where the listed authority is an independent provider, the health service body or family health service provider with whom the independent provider made the arrangement to provide the service concerned, will be responsible for publicising the investigation report.

Special reports

68. Section 16 enables the Ombudsman to make a special report on any case where she considers that the complainant has suffered an injustice or hardship which has not been, or will not be, remedied. The Ombudsman must lay any special report before the Parliament and copy it to those who were sent the relevant investigation report.

69. Like an investigation report, a special report must not identify any person unless, after taking into account the public interest and the interests of the person in question, the Ombudsman decides it necessary to do so.

70. Section 16(5) enables the Ombudsman to determine how to make special reports available to the public. Section 16(6) requires the listed authority to whom the special report relates to reimburse the Ombudsman for any expenses incurred in publishing the report.

71. These provisions in section 16 are more detailed than those for the former Scottish Parliamentary and Health Service Ombudsmen but are less prescriptive than those for the former Local Government Ombudsman. They enable the Ombudsman to publicise cases of unremedied injustice or hardship and to draw them to the attention of the Parliament. The Act does not make it mandatory for the Ombudsman to report on and publicise cases of unremedied injustice. Sometimes only a minor part of the injustice will not be remedied or the matter will be addressed in a different way to that recommended by the Ombudsman and, in such cases, follow up action may not be justified. These arrangements allow a reasonable degree of flexibility, while being sufficiently rigorous to encourage compliance with the Ombudsman's recommendations.

Annual reports

72. Section 17 provides that the Ombudsman must lay before the Parliament each year a general report on the performance of her functions. That annual report may also include any general recommendations which the Ombudsman may have, arising from her consideration of complaints and requests during the year covered by the report. Section 17(3) enables the Parliament to give the Ombudsman directions as to the form and content of the annual report.

73. Under section 17(4), the Ombudsman may from time to time lay before the Parliament such other reports on her functions as she thinks fit. The Ombudsman could, for example, use this power if an important matter requiring to be publicised urgently comes to her attention shortly after the publication of an annual report.

Appointment

General

74. The Act maintains and reinforces the Ombudsman's independence from the bodies which she investigates, while making the appointment process more modern and democratic. Accordingly, section 1(1) and (2) provides for the Ombudsman and deputy Ombudsmen to be appointed by Her Majesty on the nomination of the Parliament. Section 1(3) stipulates that there may be no more than 3 deputy Ombudsmen at any one time.

75. Provision is made in paragraph 1 of schedule 1 to prevent the Ombudsman or deputies from holding certain public appointments or paid offices, during their period of appointment. They are also disqualified from certain public appointments or paid offices for 3 years after appointment. These disqualification provisions are designed to avoid conflicts of interest or allegations of corruption. There is nothing to prevent a former Ombudsman or deputy Ombudsman from resuming employment as a family health service provider or as an independent provider. Provision disqualifying the Ombudsman and deputy Ombudsmen from election as an MP or MSP is to be made by way of an Order under section 104 of the Scotland Act 1998, as the Scottish Parliament has no powers to legislate on such constitutional matters.

Status

76. To further reinforce the independence of the office-holders and staff of the Ombudsman office, paragraph 2(1) of schedule 1 provides that the Ombudsman, deputy Ombudsmen, and Ombudsman's staff are not to be regarded as having any status, immunity or privilege of the Crown. Paragraph 2(2) states that the Ombudsman, in the exercise of her functions, is not subject to the direction or control of any MSP, any member of the Scottish Executive or the Scottish Parliamentary Corporate Body (except with regard to the form and content of annual reports or the maintenance of accounts).

Term of office and tenure

77. Paragraph 4 of schedule 1 provides that the new Ombudsman and deputy Ombudsmen shall be appointed for a period to be determined by the Scottish Parliamentary Corporate Body, which must not exceed 5 years. They will be eligible for re-appointment for a second term but re-appointment for a third term is allowed only if it is desirable in the public interest due to special circumstances. The Ombudsman and deputies will retire compulsorily on 31st December in the year in which they reach the age of 65. They may be relieved of office by Her Majesty on request, or may be removed from office by resolution of the Parliament, which if passed on a division must be supported by at least two thirds of the total number of MSPs. Other terms and conditions may be determined by the Scottish Parliamentary Corporate Body. Where the office of the Ombudsman or a deputy Ombudsman is vacant, paragraphs 5 and 6 of schedule 1 provide for the Scottish Parliamentary Corporate Body to appoint an acting Ombudsman or acting deputy Ombudsman.

Enquiries

78. Any **enquiries about matters contained in this Circular** should be directed to Al Gibson, Scottish Executive, Constitutional Policy Unit, Area 4-SW, St Andrew's House, Edinburgh EH1 3DG. Telephone: 0131 244 5560. E-mail: al.gibson@scotland.gsi.gov.uk.

79. **Additional copies of this Circular** may be obtained from Susan Brady, Scottish Executive, Constitutional Policy Unit, Area 4-SW, St Andrew's House, Edinburgh EH1 3DG. Telephone: 0131 244 5205. E-mail: susan.brady@scotland.gsi.gov.uk.

Scottish Executive
September 2002

Annex A

Listed authorities under schedule 2 to the 2002 Act

Scottish Parliament and Scottish Administration

The Parliamentary corporation;
Any member of the Scottish Executive (and its Departments and Agencies);
Any other office-holder in the Scottish Administration (i.e. the Registrar General of Births, Deaths and Marriages for Scotland, the Keeper of the Registers of Scotland, the Keeper of the Records of Scotland and those specified in the Scottish Administration (Offices) Order 1999 (S.I. 1999/1127)).

Health service

Health Boards;
Special Health Boards;
NHS Trusts;
Common Services Agency for the Scottish Health Service;
Scottish Dental Practice Board;
Mental Welfare Commission for Scotland;
Family health service providers (i.e. individuals or bodies undertaking to provide general medical services, general dental services, general ophthalmic services or pharmaceutical services under the National Health Service (Scotland) Act 1978);
Independent providers, (i.e. individuals or bodies providing services under arrangements with health service bodies or family health service providers and who are not themselves health service bodies or family health service providers).

Local government, etc.

Any local authority;
Any committee, joint committee or joint board appointed by local authorities;
Any person or body which by virtue of section 56(1) of the Local Government (Scotland) Act 1973 discharges any of the functions of a local authority;
Any licensing board within the meaning of the Licensing (Scotland) Act 1976;
Strathclyde Passenger Transport Authority;
A National Park authority;
Any joint board constituted by an administration scheme under section 36 of the Fire Services Act 1947 or the Local Government (Scotland) Act 1973;
Any joint police board constituted by an amalgamation scheme under the Police (Scotland) Act 1967;
Any Children's Panel Advisory Committee or joint committee formed under paragraph 3 or 8 of schedule 1 to the Children (Scotland) Act 1995;
Any joint committee for the administration of superannuation schemes for local government employees or teachers, established by regulations under section 7 or 9 of the Superannuation Act 1972.

Housing

Any person who is, or was at the time of the matter complained of, a registered social landlord.

Scottish public authorities

Accounts Commission for Scotland

Audit Scotland

The Auditor General for Scotland

The Chief Investigating Officer established by section 9(1) of the Ethical Standards in Public Life etc. (Scotland) Act 2000 (asp 7).

Crofters Commission

Deer Commission for Scotland

General Teaching Council for Scotland

Highlands and Islands Enterprise

Learning and Teaching Scotland

Any local enterprise company

Local Government Boundary Commission for Scotland

Board of Trustees for the National Galleries of Scotland

The Trustees of the National Library of Scotland

The Board of Trustees of the National Museums of Scotland

Parole Board for Scotland

The Board of Trustees of the Royal Botanic Garden, Edinburgh

Royal Commission on the Ancient and Historical Monuments of Scotland

Scottish Agricultural Wages Board

Scottish Arts Council

Scottish Children's Reporter Administration

Scottish Commission for the Regulation of Care

Scottish Enterprise

Scottish Environment Protection Agency

Scottish Further Education Funding Council

Scottish Further Education Unit

Scottish Higher Education Funding Council

Scottish Homes

Scottish Legal Aid Board

Scottish Medical Practices Committee

Scottish Natural Heritage

Scottish Qualifications Authority

Scottish Screen

Scottish Social Services Council

Scottish Sports Council (now known as sportscotland)

Scottish Tourist Board

Standards Commission for Scotland

Water Industry Commissioner

Any holder of an office –

a) established by or under any enactment, and

b) appointments to, or designations of, which are made by a local authority or committee, joint committee or joint board.

Cross-border public authorities

British Library Board
British Potato Council
British Tourist Authority
British Wool Marketing Board
Central Bureau for Educational Visits and Exchanges
Committee of Investigation for Great Britain
Community Development Foundation
Construction Industry Training Board
Consumers' Committee for Great Britain
The Criminal Injuries Compensation Appeals Panel
Criminal Injuries Compensation Authority
Design Council
Engineering Construction Industry Training Board
Food from Britain
Forestry Commissioners
Home-Grown Cereals Authority
Horticultural Development Council
Intervention Board for Agricultural Produce
Joint Nature Conservation Committee
The licensing authority designated under section 1(1) of the Activity Centres (Young
Person's Safety) Act 1995 (c.15)
Meat and Livestock Commission
Milk Development Council
National Consumer Council
National Radiological Protection Board
Police Information Technology Organisation
Rail Passengers' Committee for Scotland
Scottish Consumer Council
Sea Fish Industry Authority
Theatres Trust
The Trustees of the National Heritage Memorial Fund
United Kingdom Sports Council
Unrelated Live Transplant Regulatory Authority

Annex B

Examples of maladministration

The term ‘maladministration’ is not defined in the Scottish Public Services Ombudsman Act 2002. Nor was it defined in previous Ombudsman legislation, e.g. the Parliamentary Commissioner Act 1967. When the 1967 Act was being taken through the UK Parliament, Mr Crossman, as Leader of the House of Commons, gave the following examples of maladministration:

‘bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude and arbitrariness and so on’.

This is known as the ‘Crossman catalogue’.

Additional examples of maladministration were quoted in the UK Parliamentary Ombudsman’s annual report for 1993:

- rudeness (although that is a matter of degree);
- unwillingness to treat the complainant as a person with rights;
- refusal to answer reasonable questions;
- neglecting to inform a complainant on request of his or her rights or entitlements;
- knowingly giving advice which is misleading or inadequate;
- ignoring valid advice or overruling considerations which would produce an uncomfortable result for the ‘overruler’;
- offering no redress or manifestly disproportionate redress;
- showing bias because of colour, sex, or any other grounds;
- omission to notify those who thereby lost a right of appeal;
- refusal to inform adequately of the right of appeal;
- faulty procedures;
- failure by management to monitor compliance with adequate procedures;
- cavalier disregard of guidance which is intended to be followed in the interest of equitable treatment of those who use a service;
- partiality; and
- failure to mitigate the effects of rigid adherence to the letter of the law where this produces manifestly inequitable treatment.

This annex is not intended to be a comprehensive definition of maladministration – it is simply a list of examples which have been used in the past. Further definitive guidance on matters which may be covered by the term maladministration may be produced by the Ombudsman in due course.

investigate

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