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DRAFT SCOTTISH STATUTORY INSTRUMENTS

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**2016 No.**

**CHILDREN AND YOUNG PERSONS**

**The Children and Young People (Scotland) Act 2014 (Part 4 and Part 5 Complaints) Order 2016**

*Made* - - - - 2016

*Coming into force* - - 31st August 2016

The Scottish Ministers make the following Order in exercise of the powers conferred by sections 30, 43 and 99(1)(a) of the Children and Young People (Scotland) Act 2014(a) and all other powers enabling them to do so.

In accordance with section 99(2) of that Act, a draft of this Order has been laid before and approved by resolution of the Scottish Parliament.

**Citation, commencement and interpretation**

**1.**—(1) This Order may be cited as the Children and Young People (Scotland) Act 2014 (Part 4 and Part 5 Complaints) Order 2016 and comes into force on 31st August 2016.

(2) In this Order—

“the Act” means the Children and Young People (Scotland) Act 2014;

“the 2002 Act” means the Scottish Public Services Ombudsman Act 2002(b);

“a complaint” means a complaint concerning the exercise of functions conferred by or under Part 4 or 5 of the Act;

“investigating authority” means the person to whom a complaint is made in accordance with article 4(2);

“investigation procedure” means the procedure provided for in article 6;

“the Ombudsman” means the Scottish Public Services Ombudsman; and

“person aggrieved” means an individual who makes a complaint in accordance with article 4.

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(a) 2014 asp 8.  
(b) 2002 asp 11.

### **Matters which may be the subject of a complaint**

**2.**—(1) Subject to paragraphs (2) and (3), the matters which may be the subject of a complaint are—

- (a) any exercise of, or any failure to exercise, a function which is conferred on a service provider or relevant authority by or under Part 4 of the Act; or
- (b) any exercise of, or any failure to exercise, a function which is conferred on any of the following by or under Part 5 of the Act:—
  - (i) the responsible authority in relation to a child;
  - (ii) a relevant authority;
  - (iii) the managing authority of a child’s plan; or
  - (iv) a listed authority.

(2) Paragraph (1) is to be construed as follows—

- (a) the reference to a service provider includes a service provider in relation to a child or young person; and
- (b) references to a service provider or any authority include any person exercising a function on behalf of, or under arrangements made by, that service provider or authority in accordance with Part 4 or 5 of the Act.

(3) A matter mentioned in paragraph (1) may not be the subject of a complaint if a complaint in respect of that matter has already been determined in accordance with this Order.

### **Persons who may make a complaint**

**3.**—(1) Subject to paragraphs (2) and (3), the persons who may make a complaint are—

- (a) in relation to a complaint about a matter mentioned in article 2(1)(a)—
  - (i) the child or young person in respect of whom a function mentioned in article 2(1)(a) has been or ought to have been exercised; or
  - (ii) a parent of that child or young person;
- (b) in relation to a complaint about a matter mentioned in article 2(1)(b)—
  - (i) the child in respect of whom a function mentioned in article 2(1)(b) has been or ought to have been exercised; or
  - (ii) a parent of that child.

(2) Where an individual mentioned in paragraph (1) wishes another person to make a complaint on their behalf, that other person may do so if the individual mentioned in paragraph (1) gives their consent.

(3) Where an individual who might have made a complaint by virtue of paragraph (1) has died or is for any reason unable to act, a complaint may be made by—

- (a) any person in respect of whom consent as mentioned in paragraph (2) was given before the individual’s death or inability to act;
- (b) the individual’s personal representatives or a member of the individual’s family; or
- (c) any other person suitable to represent the individual.

### **Procedure for making a complaint**

**4.**—(1) A complaint may be made—

- (a) in person;
- (b) by telephone; or
- (c) in writing.

- (2) A complaint must be made—
- (a) in the case of a complaint about a matter mentioned in article 2(1)(a), to the service provider in relation to the child or young person; or
  - (b) in the case of a complaint about a matter mentioned in article 2(1)(b), to the authority which is or would be the managing authority of the child's plan.
- (3) A complaint must contain—
- (a) the name and address of the individual making the complaint;
  - (b) the name and address of the child or young person in respect of whom the functions have been or ought to have been exercised;
  - (c) details of the matter which is the subject of the complaint;
  - (d) where the complaint is made in accordance with article 3(2) or 3(3)(a), evidence of consent as mentioned in article 3(2); and
  - (e) where the complaint is made in accordance with article 3(3)(b) or (c), information about the relationship of the individual making the complaint to the child or young person or, as the case may be, their parent.
- (4) Subject to paragraph (5), a complaint must be made within a period of 6 months, beginning with—
- (a) in relation to a complaint about a matter mentioned in article 2(1)(a), the day on which the individual mentioned in article 3(1)(a)(i) or an individual mentioned in article 3(1)(a)(ii) first had notice of the matter which is the subject of the complaint, whichever is later; or
  - (b) in relation to a complaint about a matter mentioned in article 2(1)(b), the day on which the individual mentioned in article 3(1)(b)(i) or an individual mentioned in article 3(1)(b)(ii) first had notice of the matter which is the subject of the complaint, whichever is later.
- (5) A complaint may be considered or investigated outwith the period mentioned in paragraph (4) where the investigating authority is satisfied that there are special circumstances which make it appropriate to do so.

### **Procedure for consideration of a complaint**

- 5.**—(1) After receiving a complaint, the investigating authority must consider the complaint in accordance with this article.
- (2) The investigating authority must consider whether the complaint has been made in accordance with articles 2 to 4 of this Order and—
- (a) if it considers that the complaint has not been made in accordance with articles 2 to 4 of this Order, the authority must write to the person aggrieved—
    - (i) advising why it cannot consider the complaint; and
    - (ii) advising of any other mechanism available for addressing the complaint of which the authority is aware; or
  - (b) if it considers that the complaint has been made in accordance with articles 2 to 4 of this Order, the authority must then decide whether the complaint can be determined effectively without using the investigation procedure.
- (3) In deciding whether a complaint can be determined effectively without using the investigation procedure the investigating authority must take account of—
- (a) the functions to which the subject matter of the complaint relates; and
  - (b) the need to determine the complaint in a fair and objective manner.
- (4) If the investigating authority decides that the complaint can be determined effectively without using the investigation procedure, it must—
- (a) consider and determine the complaint; and

- (b) within 5 working days, beginning with the day on which the complaint was received, write to the person aggrieved with the determination of the complaint, setting out the matters mentioned in article 8(1) so far as they are applicable to the complaint.
- (5) If the investigating authority decides that the complaint cannot be determined effectively without using the investigation procedure, it must—
- (a) within 3 working days, beginning with the day on which the complaint was received, write to the person aggrieved stating that the complaint requires to be investigated before it can be determined; and
  - (b) investigate the complaint in accordance with the investigation procedure.
- (6) If a person aggrieved who receives a determination in accordance with paragraph (4)(b) is not satisfied with the determination, they may request that the investigating authority investigate the complaint in accordance with the investigation procedure.
- (7) A request as mentioned in paragraph (6)—
- (a) may be made by any means mentioned in article 4(1); and
  - (b) subject to paragraph (8), must be made within 20 working days beginning with the day on which the determination of the complaint was received.
- (8) A request may be made outwith the period mentioned in paragraph (7)(b) where the investigating authority is satisfied that there are special circumstances which prevented the person aggrieved from making the request within that period.
- (9) If at any time the investigating authority in respect of a complaint considers it appropriate, it may agree with the person aggrieved that the investigation procedure is required in respect of that complaint.
- (10) Where an investigating authority receives a request as mentioned in paragraph (6), or where it agrees in accordance with paragraph (9) that the investigation procedure is required, the authority must—
- (a) within 3 working days beginning with the day on which the request was received or, as the case may be, agreement was reached, write to the person aggrieved stating that it intends to investigate the complaint; and
  - (b) investigate the complaint in accordance with the investigation procedure.
- (11) In addition to complying with paragraph (2)(a), (4)(b), (5)(a), or (10)(a), the investigating authority must—
- (a) consider whether there are other means of communication which might assist the person aggrieved in understanding the information mentioned in those paragraphs; and
  - (b) if it considers that there are such means of communication, communicate the information by those means, so far as it is reasonably practicable to do so.

### **Investigation procedure**

**6.—**(1) Where the investigation procedure is required by virtue of article 5(5) or 5(10), the investigating authority must—

- (a) identify any service provider or authority which has or had responsibility for the exercise of the function or functions to which the subject matter of the complaint relates;
- (b) notify any such service provider or authority of the complaint; and
- (c) request such information or assistance from that service provider or authority as the investigating authority considers necessary to enable it to investigate and determine the complaint.

(2) A service provider or authority which receives a request for information or assistance in accordance with paragraph (1)(c) must comply with the request unless it considers that to do so would—

- (a) be incompatible with any duty of the service provider or authority; or

(b) unduly prejudice the exercise of any function of the service provider or authority.

(3) If a service provider or authority refuses to comply with a request for information or assistance as mentioned in paragraph (1)(c), it must provide the investigating authority with its reasons for refusing to do so in writing.

(4) Where paragraph (1) applies the investigating authority must, within the timescale provided for in paragraph (5), write to the person aggrieved with the determination of the complaint, setting out the matters mentioned in article 8(1) so far as they are applicable to the complaint.

(5) The timescale is 20 working days, beginning with—

- (a) where the investigation procedure is required by virtue of article 5(5), the day on which the complaint was received; or
- (b) where the investigation procedure is required by virtue of article 5(10), the day on which a request as mentioned in article 5(6) was received or, as the case may be, agreement was reached under article 5(9).

(6) In addition to complying with paragraph (4), the investigating authority must—

- (a) consider whether there are other means of communication which might assist the person aggrieved in understanding the information mentioned in that paragraph; and
- (b) if it considers that there are such means of communication, communicate the information by those means, so far as it is reasonably practicable to do so.

#### **Extension of timescales in special circumstances**

7.—(1) Any timescale with which an investigating authority must comply by virtue of article 5 or 6 may be extended where the investigating authority considers that there are special circumstances which make it appropriate to do so.

(2) Where an investigating authority decides to extend a timescale in accordance with paragraph (1), the authority must write to the person aggrieved—

- (a) giving reasons for the extension of the timescale; and
- (b) advising of the date to which the timescale has been extended.

#### **Determination of complaints**

8.—(1) The matters which must be included in any determination of a complaint are—

- (a) the function or functions which the investigating authority has identified as relating to the subject matter of the complaint;
- (b) the names of any service provider or authority which is or was responsible for exercising those functions;
- (c) the names of any service provider or authority which has provided information or assistance in relation to the investigation of the complaint in accordance with article 6;
- (d) the reasons for any refusal to provide agreement as mentioned in article 6(3);
- (e) the investigating authority's findings in relation to the complaint;
- (f) the reasons for those findings;
- (g) details of—
  - (i) any action which the investigating authority has taken or which it intends to take as a result of the complaint; and
  - (ii) any action which the investigating authority recommends should be taken by any other service provider or authority as a result of the complaint; and
- (h) the ability of the person aggrieved to complain to the Ombudsman in accordance with the 2002 Act.

(2) Where another service provider or authority has provided information or assistance in relation to the investigation of a complaint in accordance with article 6, the investigating authority must—

(a) seek to agree the proposed terms of any determination of the complaint with each such service provider or authority before sending it to the person aggrieved; and

(b) provide each such service provider or authority with a copy of the final determination as it has been sent to the person aggrieved.

(3) A service provider or authority which declines to give agreement as mentioned in paragraph (2)(a) must provide the investigating authority with its reasons for doing so in writing.

(4) Any determination of a complaint must not—

(a) mention the name of any individual; or

(b) contain any particulars which, in the investigating authority's opinion, are likely to identify any individual,

unless the investigating authority determines that it is necessary to do so.

### **Ombudsman's remit in relation to Part 4 and Part 5 complaints**

9.—(1) The 2002 Act is amended as follows.

(2) After section 7(2) (matters which may be investigated: restrictions) insert—

“(2A) Subsection (1) does not apply to the merits of a decision taken by or on behalf of a listed authority to the extent that the decision was taken in exercise of a function conferred by or under Part 4 or 5 of the 2014 Act.

(2B) The Ombudsman is not entitled to investigate action taken in the exercise of a function conferred by or under Part 4 or 5 of the 2014 Act if the exercise of the function was not a matter which could have been the subject of a complaint under an order under section 30 or 43 of that Act in force at the time of the action.”.

(3) In section 23(1) (interpretation), before the entry for “the 2015 Act”(a) insert—

““the 2014 Act” means the Children and Young People (Scotland) Act 2014.”.

*Name*

Authorised to sign by the Scottish Ministers

St Andrew's House,  
Edinburgh

Date

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(a) The entry for “the 2015 Act” in section 23(1) of the Scottish Public Services Ombudsman Act 2002 was inserted by section 13(7)(a) of the Welfare Funds (Scotland) Act 2015 (asp 5), and will come into force on 1st April 2016 (by virtue of S.S.I. 2015/428).

## **EXPLANATORY NOTE**

*(This note is not part of the Order)*

This Order makes provision for the making, consideration and determination of complaints concerning the exercise of functions conferred by or under Parts 4 and 5 of the Children and Young People (Scotland) Act 2014 (“the Act”).

Article 2 makes provision about the matters which may be the subject of a complaint.

Article 3 sets out the persons who may make a complaint.

Article 4 provides for how and when a complaint may be made.

Article 5 provides for the procedure which must be followed when a complaint is received, and requires the authority to which the complaint has been made to consider and determine the complaint within 5 working days if it is appropriate to do so. This article also specifies the circumstances in which the investigation procedure (as provided for in article 6) is required.

Article 6 provides for an investigation procedure, which must be followed in cases where the authority to which a complaint has been made considers that this is required, where the person making the complaint (“the person aggrieved”) requests this procedure following receipt of a determination under article 5, or where the authority and the person aggrieved otherwise agree that the investigation procedure should be followed. The investigation procedure gives the authority investigating the complaint 20 working days to investigate and determine the complaint, and requires that authority to request such information or assistance from other service providers or authorities as it considers necessary to help it to investigate and determine the complaint.

Article 7 provides for the extension of certain timescales in special circumstances.

Article 8 provides for the matters which must be included in any determination of a complaint.

Article 9 amends the Scottish Public Services Ombudsman Act 2002 (“the 2002 Act”) so as to ensure the Ombudsman can investigate the merits of a decision taken in exercise of a function conferred by or under Part 4 or 5 of the Act. It also amends the 2002 Act so that the Ombudsman may only investigate action taken in the exercise of a Part 4 or 5 function where the exercise of that function could be the subject of a complaint under this Order at the time the action took place.

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