
DRAFT SCOTTISH STATUTORY INSTRUMENTS

2020 No.

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

Amendment of the Scottish Public Services Ombudsman Act 2002

3.—(1) The Scottish Public Services Ombudsman Act 2002(1) 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)(2) 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,

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

(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)”.

(7) In schedule 5(3), after the entry relating to an auditor within the meaning of section 97(6) of the Local Government (Scotland) Act 1973(4), 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(5))
Healthcare Scotland	Improvement	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(6))
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(7)
		2. Circumstances of a kind mentioned in paragraph (a) or (d) to (f) of section 11(2) of that Act”.

(3) Schedule 5 is amended by the Freedom of Information (Scotland) Act 2002 (asp 13), schedule 4, paragraph 2.

(4) 1973 c.65.

(5) 1978 c.29.

(6) Section 10A is inserted by the Public Services Reform (Scotland) Act 2010, section 108.

(7) 2003 asp 13. Sections 11 and 12 are amended by the Public Services Reform (Scotland) Act 2010, section 111(8) and (9).