

# SCOTTISH PUBLIC SERVICES OMBUDSMAN ACT 2002

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Investigations by the Ombudsman*

##### *Section 7 – Matters which may be investigated: restrictions*

32. *Subsection (1) of section 7* prevents the Ombudsman from questioning the merits of a decision taken without maladministration by a listed authority in the exercise of a discretion vested in that authority (i.e. discretionary decisions).
33. *Subsection (2)* disapplies subsection (1) in respect of decisions taken by or on behalf of a health service body, a family health service provider or an independent provider to the extent that the decision was taken in consequence of the exercise of clinical judgement. The effect of this is that decisions requiring clinical judgement are within the remit of the Ombudsman.
34. *Subsection (3)* prevents the Ombudsman from investigating action taken by or on behalf of a member of the Scottish Executive unless the action was taken in the exercise of *functions conferred on the Scottish Ministers* or of functions conferred on the First Minister alone. The effect of this subsection is that complaints cannot be considered in respect of the functions of the Lord Advocate and Solicitor General in respect of the *retained functions of the Lord Advocate*, although they could be subject to complaints in respect of any functions of the Scottish Ministers that are allocated to them.
  - *Functions conferred on the Scottish Ministers* include functions conferred on them by or under Acts of the United Kingdom Parliament, functions conferred on them by executive devolution orders under section 63 of the Scotland Act 1998 and functions exercised by them on behalf of a Minister of the Crown or government department by virtue of section 93 (agency agreements) of that Act.
  - *The retained functions of the Lord Advocate* are defined in section 52(6) of the Scotland Act 1998 as any functions exercisable by him immediately before he ceased to be a Minister of the Crown and other statutory functions conferred on him alone after he ceased to be a Minister of the Crown. These functions relate mainly to his role as head of the systems of criminal prosecution and investigation of deaths in Scotland.
35. The effect of *subsection (5)* is to ensure that the Ombudsman's remit in relation to any listed authority which is cross-border public authority extends only to devolved issues undertaken by the authority. Cross-border public authorities are those specified in the [Scotland Act 1998 \(Cross-Border Public Authorities\) \(Specification\) Order 1999 \(S.I. 1999/1319\)](#).
36. *Subsection (6)* restricts the Ombudsman to investigating the actions of independent providers only in respect of the services that they are providing under arrangements

*These notes relate to the Scottish Public Services Ombudsman  
Act 2002 (asp 11) which received Royal Assent on 23 April 2002*

with a health service body or a family health service provider. Without this provision section 5(1)(b) would have extended the Ombudsman's remit across all the services provided by independent providers.

37. *Subsection (7)* ensures that, in relation to an authority which has been added to schedule 2 by an Order in Council under section 3(3)(c) (ie an authority which is neither a Scottish public authority nor a publicly-owned company but which appears to have functions of a public nature), the Ombudsman can only investigate action taken by or behalf of the authority in the exercise of its public functions.
38. The effect of *subsection (8)* is that the Ombudsman cannot investigate matters which can be considered by other means, unless in his/her view such other means could not be reasonably taken by the aggrieved person.
39. *Subsections (9) and (10)* ensure that, so far as reasonable, complaints are addressed locally before being considered by the Ombudsman.