



The Scottish Parliament
Pàrlamaid na h-Alba

Published 14 May 2019
SP Paper 525
24th Report, 2019 (Session 5)

Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Subordinate legislation considered by the Delegated Powers and Law Reform Committee on 14 May 2019



Published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:
<http://www.parliament.scot/abouttheparliament/91279.aspx>

For information on the Scottish Parliament contact Public Information on:
Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

Contents

Introduction	1
Points raised: instruments/documents laid for consultation	2
The Public Services Reform (The Scottish Public Services Ombudsman) (Healthcare Whistleblowing) Order 2019 (Proposed draft/SG 2019/66), and proposed draft Explanatory Document (SG 2019/67) (Health and Sport)	2
No points raised	4
Annex A	5

Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



dplr.committee@parliament.scot



0131 348 5212

Committee Membership



Convener
Graham Simpson
Scottish Conservative
and Unionist Party



Deputy Convener
Stuart McMillan
Scottish National Party



Tom Arthur
Scottish National Party



Mary Fee
Scottish Labour



Alison Harris
Scottish Conservative
and Unionist Party

Introduction

1. At its meeting on 14 May 2019, the Committee agreed to draw the following proposed draft instrument to the attention of the Parliament-

The Public Services Reform (The Scottish Public Services Ombudsman) (Healthcare Whistleblowing) Order 2019 (proposed draft/SG 2019/66).
2. The Committee's recommendations and conclusions in relation to this proposed draft Order are set out in the following section of this report.
3. The Committee determined that it did not need to draw the Parliament's attention to the instruments set out by the relevant lead committee at the end of this report.

Points raised: instruments/documents laid for consultation

The Public Services Reform (The Scottish Public Services Ombudsman) (Healthcare Whistleblowing) Order 2019 (Proposed draft/SG 2019/66), and proposed draft Explanatory Document (SG 2019/67) (Health and Sport)

Purpose

4. The general purposes of this proposed draft Order are to:
 - create a new route for whistleblowers in the healthcare sector to bring complaints to the Scottish Public Services Ombudsman, and
 - extend 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. Those bodies are the Common Services Agency, Healthcare Improvement Scotland, NHS Education for Scotland, and the Mental Welfare Commission for Scotland.
5. The draft Order amends relevant sections of the Scottish Public Services Ombudsman Act 2002 to enable the Ombudsman (the “SPSO”) to investigate whether a relevant body or provider has handled a whistleblower’s complaint properly, in accordance with the SPSO’s model complaint handling procedure for whistleblowing complaints. The SPSO can also investigate any action taken by or on behalf of the body or provider in respect of the complaint, including the treatment of any person including the whistleblower. This will confer the role and functions of an “Independent National Whistleblowing Officer for NHS Scotland” upon the Ombudsman.
6. The draft Order is proposed for consultation. A finalised Order would be laid after the consultation stage and considered again by the Committee.
7. The proposed draft Order has been initially laid under a “super-affirmative” procedure. At this stage, the draft Order is laid for consultation purposes. It requires to be laid before the Parliament for at least 60 days, along with a proposed draft Explanatory Document which complies with the requirements of section 27 of the Public Services Reform (Scotland) Act 2010. The Order will be laid in draft for approval by the Parliament, after the 60 day period has elapsed, and after Ministers have had regard to representations.
8. A commencement date should be stated in the draft Order when finally laid.

Committee consideration

9. The Committee identified a patent error in the proposed draft Order relating to the misspelling of "whistleblower" in article 3(2) so far as inserting section 6A(4) of the Scottish Public Services Ombudsman Act 2002. The proposed provision includes a definition of "whistleblower".
10. The issue was raised with the Scottish Government and this correspondence is reproduced in Annex A. The Government has undertaken to correct the error.
11. The Committee also noted that there are some clarifications needed in the proposed explanatory document to be laid with the draft Order as set out in the correspondence reproduced at Annex A (paragraphs 16, 17 and 19).

Recommendations

12. **The Committee draws the instrument to the attention of the Parliament under the general reporting ground as there is an error in article 3(2) as set out in paragraph 9 above.**
13. **The Committee noted that the Scottish Government has undertaken to correct this error in the draft Order to be laid under section 25(2)(b) of the Public Services Reform (Scotland) Act 2010, following the current consultation stage.**
14. **The Committee also noted that the Government has undertaken to clarify some aspects in the explanatory document to be laid with the draft Order, as set out in its written response to the Committee (Annex A).**

No points raised

Education and Skills

Children and Young People (Scotland) Act 2014 (Modification) (No. 1) Order 2019 [draft]

Children and Young People (Scotland) Act 2014 (Modification) (No. 2) Order 2019 [draft]

Head Teachers Education and Training Standards (Scotland) Regulations 2019 [draft]

St Mary's Music School (Aided Places) (Scotland) Amendment Regulations 2019 (SSI 2019/144)

Local Government and Communities

Private Housing (Tenancies) (Scotland) Act 2016 (Modification of Schedule 1) Regulations 2019 [draft]

Private Landlord Registration (Fees) (Scotland) Regulations 2019 (SSI 2019/160)

Rural Economy and Connectivity

Welfare of Farmed Animals (Scotland) Amendment Regulations 2019 [draft]

Code for the Welfare of Meat Chickens and Breeding Chickens (Revocation) (Scotland) Notice 2019 (SG/2019/65)

Road Works (Qualifications of Operatives and Supervisors) (Scotland) Amendment Regulations 2019 (SSI 2019/159)

Annex A

Proposed draft Order – The Public Services Reform (The Scottish Public Services Ombudsman) (Healthcare Whistleblowing) Order 2019 (SG/2019/66)

On 3 May the Scottish Government was asked:

15. 1. There is an error in draft article 3(2), so far as inserting section 6A(4) of the Scottish Public Services Ombudsman Act 2002 (“the 2002 Act”), as that subsection (4) includes a definition of “whistleblower”. Will this be corrected in the draft Order to be laid under section 25(2)(b) of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”) following consultation?

16. 2. Section 20 of the 2002 Act enables the Scottish Public Services Ombudsman (‘SPSO’) to disclose information gathered in the course of an investigation under or for the purposes of the 2002 Act or the Welfare Funds (Scotland) Act 2015 to bodies listed in schedule 5 of the 2002 Act. Draft article 3(6) adds to those listed bodies, the Common Services Agency, Healthcare Improvement Scotland, NHS Education for Scotland, and the Mental Welfare Commission for Scotland, in respect of functions listed in the second column in article 3(6).

17. Paragraph 9.1.9 of the draft Explanatory Document states that the provisions in draft article 3(6) allow the SPSO to disclose information “gathered in the course of the SPSO’s “INWO” (independent national whistleblowing officer) investigation with relevant bodies”.

(a) Is there any intention therefore that draft article 3(6) should be adjusted to restrict the disclosure of information to the four bodies as above for the purposes of the whistleblowing investigation functions which are the subject of draft article 3(2) of the instrument? Otherwise, please explain?

(b) Please explain why draft article 3(6) complies with the requirements of section 16(2)(a) and (c) of the 2010 Act – that the effect of the provision must be proportionate to the policy objective, and broadly consistent with the general objects or purpose of the body concerned?

(c) Is it agreed that paragraphs 8.2 and 8.4 of the draft Explanatory Document omit an explanation of why draft article 3(6) complies with section 16(2)(a) and (c) as above? If so, is it proposed to correct this when the explanatory document is laid before the Parliament with the draft Order, after consultation?

On 8 May, the Scottish Government responded as follows –

18. 1. The Scottish Government thanks the committee’s advisers for drawing this spelling error to our attention. We will correct this when the draft Order is prepared for laying under section 25(2)(b) of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”) following consultation.

19. 2.(a) The Scottish Government notes that paragraph 9.1.9 of the Explanatory Document could be read as suggesting that information is only to be shared bodies added to schedule 5 of the 2002 Act by Article 3(6) of the Order under consideration. This is not the intention, and we will monitor responses to the

consultation and adjust the Explanatory Document following consultation in order to ensure clarity in this regard.

(b) The Scottish Government notes that Article 3(6) of the Order enables the Ombudsman to disclose relevant information to a person or body specified in the first column of that Article if the information appears to relate to a matter specified in relation to that person or body in the second column of that Article. In addition, as the Order (in particular, Article 3(2)) confers new functions on the Ombudsman in relation to the handling of whistleblowing complaints, section 20 and schedule 5 of the 2002 Act apply to those new functions as to the Ombudsman's existing functions. The Scottish Government considers that draft Article 3(6) complies with the requirement to be proportionate to the policy objective as Article 3(6) enables the Ombudsman to share information with health service bodies who have a role in supporting health boards, for example by investigating fraud and irregularities, seeking to improve quality or providing education and training. The overarching policy objective of the Order is stated as being to improve performance on whistleblowing matters by the relevant healthcare bodies by promoting an open and honest reporting culture within the NHS. The Explanatory Document also notes that this could lead to improved patient care and safety, as well as efficiency savings through reports of financial malpractice or maladministration – and this is part of the policy objective. Article 3(6) is considered to be broadly consistent with the general objects or purpose of the Ombudsman for the same reasons as the remainder of the Order is considered to be broadly consistent.

(c) The Scottish Government accepts that these aspects could be more clearly addressed in relation to Article 3(6) and we will adjust the Explanatory Document following consultation in order to bring this out.

