

B1. Delegated Authority

Casework and Assessment and Guidance staff act on the delegated authority of the Ombudsman. In practical terms this requires the Ombudsman and staff member to sign a personal mandate giving the Ombudsman's authority to act on their behalf. In legal terms, this means the actions of a member of staff acting with such delegated authority are the actions of the Ombudsman. This is both practical, as the Ombudsman would not have the time available to physically review every complaint received, and legally essential. Only the Ombudsman is given statutory authority to act by the Scottish Public Services Ombudsman Act 2002 (the Act). Only with delegated authority can individual staff invoke the powers of investigation granted to the Ombudsman by the Act. Similarly, staff decisions will carry the status of an Ombudsman decision which impose obligations on authorities, for example, publication of reports on BUJ websites. All other references in this section to the actions of the Ombudsman also refer to the actions of staff acting under delegated authority.

B2. Statute and Common Law

Statute

The Ombudsman takes his authority from the Act. The legal entity that is the Ombudsman only exists within the scope of this legislation. Actions are only the actions of the Ombudsman when they draw their legitimacy from some part of the Act. The Act both enables the actions of the Ombudsman and limits his powers. Any action of the Ombudsman which does not draw on the Act would be 'ultra vires' or beyond his powers. Such an action is open to challenge by judicial review and could be set aside by the courts.

The Act gives us the discretion to investigate or not – section 2 states 'the Ombudsman may investigate'. This is the starting point for any investigation.

The Act gives the Ombudsman authority to investigate actions by or on behalf of persons listed in the Act (these public authorities are those 'listed' in Schedule 2 to the Act or who have opted in under the provision in the Public Services Reform (Scotland) Act 2010 relating to non-domestic water companies). The Ombudsman generally cannot investigate the actions of any authority not listed. However, he may be able to investigate actions taken on behalf of a listed organisation by non-listed organisations.

The Ombudsman can only investigate those matters that the Act expressly permits him to investigate. These are set out in section 5 and includes any action or service failure by BUJs. There are though a number of restrictions on this broad power. The Ombudsman can only investigate if there is a claim that an injustice or hardship has occurred as a result of: i) a failure in a service provided and/or ii) a failure to provide a service which it is the

authority's function to provide; and/or iii) maladministration in relation to an action taken by the authority. The terminology of service failure is broadly self-explanatory and well understood. Maladministration is a more complex concept which eludes a neat or complete definition. The most quoted definition is that of Richard Crossman in 1967: 'bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude and so on' but as Lord Denning noted in 1979 the 'and so on would be a long and interesting list, clearly open-ended, covering the manner in which a decision is reached or discretion is exercised ...'. The Act does not give a definition.

The Act also lists a number of other restrictions on the matters that may be investigated. These introduce variations in the three categories of 'matters to be investigated' listed above which can have significant consequences. For example, a principal restriction under section 7(1) stops the Ombudsman questioning the merits of a properly made decision, if it was a decision the authority was entitled to use its discretion to make. The next subsection 7(2) lifts this restriction if the decision being considered was a matter of clinical judgement rather than simply an exercise of discretion. This gives the Ombudsman his mandate to question the decisions of clinicians.

One overriding permission given by the Act is authority to consider any complaint about a BUJ's complaints procedure or any procedure set up by the body to review decisions even when the underlying issue could not be considered.

Beyond the authorities and matters that the Act specifically prescribes there are a significant number of areas where the Act gives the Ombudsman discretion to decide whether to act or not to act. In these circumstances a decision to act or not to act must still fall within the general authority given to the Ombudsman by the Act to be lawful. One further important consideration here is that the Ombudsman cannot 'fetter' his discretion. This means he cannot commit himself to always exercise his discretion in a particular way but must instead consider the circumstances of each case before deciding whether or not to exercise discretion. This is a rule set out in Common Law (see below) rather than statute.

Whether or not any complaint concerns a body or a matter that the Act gives the Ombudsman authority to consider will usually require individual consideration based on all the circumstances of a case.

Freedom of Information (Scotland) Act 2002 (FOISA) and Data Protection Act 1998 (DPA)

As a public body we are also subject to both FOISA and DPA. Both these acts may reinforce an existing provision in the Act not to disclose information and to act in confidence, or may give rise to an overriding obligation to disclose information. This will depend on the exact circumstances of the information concerned.

FOISA requires that we make information available to a member of the public on request unless there is an absolute or qualified exemption that means we cannot release the information. One of the absolute exemptions prohibits the release of information covered by the DPA. The DPA covers personal information relating to a living individual while FOISA generally covers any non-personal information.

Both acts require us to record and store information in a particular way and to respond to any request for information. More details of our responsibilities under these acts can be found in the [Information Governance](#) handbook.

Human Rights

Human Rights in the UK derive from the European Convention on Human Rights (ECHR), which form part of the law of Scotland through the Human Rights Act (HRA) 1998 and the Scotland Act 1998. The HRA makes it unlawful for a public authority to act, or fail to act, in a way that is incompatible with the ECHR. This is doubly significant for the Ombudsman as he must consider both whether a public authority has properly considered human rights implications in reaching a decision and also ensure SPSO duly consider human rights in reaching any decision. It is important to remember though that the Act does not give the Ombudsman authority to determine what is and is not a human right – only a court, and ultimately only the European Court of Human Rights, can do this.

Common Law and Natural Justice

Beyond any statutory duties and limits placed on the Ombudsman, he must also fulfil any duties imposed on him by Common Law. Common Law is made up of previous decisions by judges in courts or other tribunals. The main common law duty imposed on the Ombudsman (and all public bodies) is to act with Natural Justice. This means he must act fairly and it must be clear to others that he is acting fairly. In practice this means we must have a fair procedure for dealing with complaints, must be impartial and must give reasons for our decisions.

Judicial Review

In general the Ombudsman's actions are not open to review and his decisions cannot be 'appealed'. However if there is doubt about whether a decision of the Ombudsman is lawful it may be challenged in the courts by a request for judicial review. Judicial Review can only be requested for three reasons; illegality (the Ombudsman did not have the authority to make the decision), irrationality (the decision cannot be logically supported) or unfairness (the decision was biased or otherwise against natural justice).