

30 January 2012

Richard M Henderson
Chair
Scottish Committee of the Administrative Justice and Tribunals Committee
George House
126 George Street
Edinburgh
EH2 4HH

Dear Richard Henderson

I am writing in response to the Scottish Committee of the Administrative and Justice Tribunal Committee's consultation on Administrative Decisions made by Public Bodies in Scotland where there is no Right of Appeal against the Decision or where the Right of Appeal is Inaccessible or Inappropriate.

The consultation contains a number of specific questions about possible routes forward. While I support the Committee's decision to raise these important issues, for the reasons set out in my response, I do not consider we are yet at the point where it would be appropriate to answer those questions. I have, therefore, responded to the broader points raised by the consultation and discussion paper in the attached document. I enclose a completed response form and am happy for this response to be made available in the usual way.

I hope that you find this response helpful. Please let me know if you require any further information.

Yours sincerely

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Ombudsman

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The Scottish Public Services Ombudsman response to the Scottish Committee of the Administrative and Justice Tribunal Committee's (SCAJTC) consultation on Administrative Decisions made by Public Bodies in Scotland where there is no Right of Appeal against the Decision or where the Right of Appeal is Inaccessible or Inappropriate (the consultation).

The consultation contains a number of specific questions about possible routes forward. While I support the SCAJTC's decision to raise these important issues, for the reasons set out in my response, I do not consider we are yet at the point where it would be appropriate to answer those questions. I have, therefore, responded to the broader points raised by the consultation and discussion paper.

Background

The Scottish Public Services Ombudsman (SPSO) is the independent body that investigates complaints from members of the public about devolved public services in Scotland.

This includes, amongst others, local government, housing associations; the National Health Service; higher and further education and a range of public bodies including the Scottish Legal Aid Board. We look at complaints about the quality of administration and service provided by such bodies.

The SPSO has recently taken on a new statutory function, empowered by the Public Services Reform (Scotland) Act 2010, to improve complaints handling in bodies under our jurisdiction. To deliver this function we have created the Complaints Standards Authority (CSA), an internal unit within the SPSO. The CSA has now taken the lead in the development of simplified and standardised complaints procedures across the Scottish public sector.

The Discussion Paper and Consultation

The decisions of public bodies significantly impact on the lives of individuals. It is important that there are structures in place to ensure the quality of decision-making. This will include the ways in which an individual may challenge those decisions. I was fully supportive of the need to understand more fully the current landscape when I was approached for assistance in the research which underlies the consultation process.

This research has been carried out with impressive speed and contains much which is of use. I am glad to be involved in the debate. However, there are points in the Discussion Paper which I am compelled to correct as they give an unfair or inaccurate view of the SPSO. I do this first and then turn to each of the five areas highlighted by SCAJTC for specific comment.

Clarifying points relating to the SPSO

Paragraph 3.3 says that complaining to this office is an important remedy but goes on to say that it is neither an accessible or an appropriate way to challenge the majority of administrative decisions where those who were directly affected think that a mistake has been made. Very little evidence is given for either of these statements. The paper goes on to say that the issue with accessibility in terms of the SPSO relates to the need for people to go through a number of stages before they reach this office.

Unfortunately, this does not take into account new and significant work that is being undertaken by the CSA. As a result of our new legislative powers, we are working with bodies throughout Scotland to reduce the number of stages which individuals need to go through. The guidance on a model complaints handling procedure published in February

2010 outlines a streamlined 2-stage model with an opportunity for only one investigation stage and no stages of formal review as is currently the case in most organisations. A standardised complaints handling procedure has been developed for the local government sector with one due shortly for housing associations. The local authority procedure is already in place in some councils and will be implemented in all over the course of this year. Procedures for other sectors will be developed over the course of this year. If the concern on accessibility rests on the number of stages, this is a matter which is currently being resolved by the CSA.

The next question is of inappropriateness. It is said that most wrong outcomes are not caused by maladministration or service failure. Unfortunately it is difficult to comment on this statement given that no specific evidence is given for this. However, it is later pointed out that Tribunals can consider (a) errors of law, (b) errors of fact; and (c) the incorrect or inappropriate exercise of discretion. The paragraph continues that most administrative grievances are about (b) and (c). We would regard founding a decision on an error of fact to amount to maladministration and would therefore fall clearly within the remit of the SPSO with a likely recommendation that such a decision be changed or reviewed. Therefore, the argument being made appears to be that we are unable to consider (c). That is the case, apart from questions of clinical judgement.

The decisions made by Parliament to allow discretion to bodies does raise questions of how the use of that discretion can or should be challenged. This should be dealt with on a case by case basis taking into account the goals of the decisions and I would be uncomfortable with a blanket right of appeal against all discretionary decisions which may impact on an individual. I note that is not, in practice, the approach taken through the rest of the paper which presents a more nuanced approach. Given this, it is unfortunate that such a blanket statement of inappropriateness is aligned to both this office and the Court of Session.

The Discussion Paper contains a brief study of our decision-making processes. This was not a matter we were aware was under research. We were assisting by helping to identify areas where there was no right of appeal. Some background information about our processes will have been given as part of broader discussions. Paragraphs 3.8 to 3.10 represent a fairly simplistic understanding of our process which we undertake in line with obligations in the Scottish Public Services Ombudsman Act 2002 and we do not regard this as a definitive or authoritative statement of our process. For example, the process of 'full investigation' does involve some additional work that is required in any case which is deemed to be in the public interest. It is also not clear why these paragraphs have been included as they does not seem to have any bearing on the rest of the paper.

In paragraph 4.3, the Discussion Paper says that "Apart from clinical judgements, most of the decisions that patients might wish to challenge can, quite appropriately be dealt with under the complaints procedure." That is not the case, clinical judgement can and is questioned under the complaints procedure. The SPSO Act 2002 explicitly allows this office to question the merits of clinical judgement.

Community Care

It is notable that the same week the SCAJTC produced this consultation that a second consultation on the same point appeared on the Scottish Government website¹. This coincidence clearly demonstrates the significance of decisions in this area which often impact the most vulnerable members of our society. I am very pleased that this important area is being highlighted as one requiring discussion. As we have documented (for example

¹ Available here: : <http://www.scotland.gov.uk/Publications/2011/12/21143818/0>

in my commentaries and annual report 2010/2011²), the experience we have of reviewing Complaints Review Committees (CRCs) has caused us concern.

The consultation goes on to ask what would be the best way to take this forward. The Scottish Government consultation is based on specific research around the current experience of CRCs and I intend to respond in detail to the Scottish Government consultation in due course. I will not rehearse those arguments here as that would be premature.

In response to the SCAJTC consultation, I would say that it is important to consider the views of users and the impact of any of the suggested routes on their ability to access the process. There is also a need for any system to have the ability to look at issues holistically from the point of view of the person and not the system – to be person-centred. Complaints may not only be about the decision about the assessment of care, for example, but also touch on how that care was assessed and is being delivered and these may raise important issue of dignity and respect. It would be wrong to have to ask people to access more than one system to have all their concerns dealt with unless there were extremely strong arguments for this. On this point, possible changes in the delivery of health and social care may also be significant. As we move to shared services and joint delivery, individuals should be able to raise issues about the whole of their experience easily and without having to access different systems.

At this stage, I think it is too early to say how or which decisions may be appropriately referred for an appeal. I would though like to mention that, in my experience, purely financial decisions, such as those relating to the possible sale of a family home for care funding, do not sit easily alongside issues about care and delivery and it may be both possible and desirable to deal with these separately through an appropriate appeal route.

Higher Education

I am noted to be in support of an independent appeals body on tuition fee status. The discussion paper points out that we receive very few such complaints. That is also the case with decisions on financial support.

Most of the concerns raised with us by students relate to their dissatisfaction with academic judgement. There is no right of appeal against this and, as it is not mentioned in the report, it is clear that this is an area where the SCAJTC do not consider that the lack of an appeal should be remedied but that professional discretionary judgement should not be formally challenged. Matters ancillary to the exercise of academic judgement, how it is communicated, the correct following of processes are dealt with through the complaints process.

Like issues relating to the financial funding of care, issues around tuition fees and financial support are significant and are also issues which can be easily separated from the delivery of the service. This is another area where there is arguably less need to ensure that a holistic approach is taken and an appeal route on an individual decision may be appropriate.

Housing

This is an interesting section of the Discussion Paper and the SCAJTC has identified a number of different decisions where there is no current right of appeal. These range from the decision not to include an applicant on the waiting list of a registered social landlord (RSL) to the Edinburgh City Council statutory notice scheme.

The Discussion Paper suggests a single housing tribunal may be appropriate. This may be a suitable outcome for one or many of the decisions mentioned. There are though a wide range of these and it may be different routes may be appropriate. As I have said above

² Available on www.spsa.org.uk

some areas benefit from a holistic approach which may be difficult in a formal appeal route, while others may be more appropriate for an appeal route because they relate to decisions which can clearly stand on their own. Some discussion should also be had as to whether all these discretionary decisions are suitable for a formal appeal process. I suggest below that in creating this report the SCAJTC have implicit criteria around this which it would be good to make more explicit to emphasise what is meant when they suggest that all administrative decisions should be appealable.

Again, the views of users of the services who may range from the very vulnerable (homeless people) to the relatively sophisticated (owners of historic properties) should be taken into account.

Legal Aid

While this office can consider some matters relating to the administration of legal aid, we receive extremely few of these and I have no recent experience of this system, I do not, therefore, comment further.

Planning

The discussion paper raises concerns about Local Review Boards and whether they are appropriate. This system is new and my office has had little experience of complaints about these. I am unable to provide useful comment.

As background, it should be noted that the bulk of complaints received by me about planning come from people who are affected by a decision but have no right of appeal. These are from people who have objected to planning decisions. There has been much political debate over the years as to whether or not a third party right of appeal should or should not exist. As this area is not commented on by SCAJTC, it may be assumed this is another area where they do not consider everyone affected by discretionary decisions should be open to formal challenge.

Conclusion

In summary, I support the approach of the SCAJTC in highlighting possible anomalies in the system and bringing them to wider attention. Too often individual solutions are put in place without thought given to the wider and existing structures.

At this stage, I think there would be benefit in creating a clearer set of criteria around when discretionary decisions are appropriate for a formal appeal. In their paper, the SCAJTC is already using some implicit criteria around how they define 'direct' which is limited to the person about whom the decision is made rather than those who may be affected and also that some professional decision-making should not be included (academic judgement although not planning or social work judgement). Making this criteria more explicit would be useful in future policy decisions about how much of public body discretion should be open to individual appeal.

Given the time available to them, I also appreciate it was not possible to include the views of users at this stage. The responses to this consultation may provide a useful starting point to taking that process forward.

Finally, it is worth noting that there are areas, perhaps because of the vulnerability of users or particular complexity in interactions because of the nature of the service being provided or the interaction of service providers, that a person-centred rather than decision-centred approach should be taken. This may mean that it may not be appropriate to separate decisions (decisions about the assessment from decisions about delivery for example) or the decision from other aspects of the service.

Decisions about the routes for making an appeal need to be considered in the context of the journey of the person receiving the service. I have seen little discussion in this paper about how introducing any of the new routes would interact with other appeal or complaints routes in the same area and how, in the new landscape, an individual would be able to navigate through them. Introducing formal appeal routes for some decisions should not lead, unintentionally, to making it more difficult for people who may wish to raise other aspects of their experience. I appreciate again, the timescales involved, and do think this Discussion Paper and consultation present a valuable starting point for such debates.