

Scottish Public Services Ombudsman response to the Scottish Government Consultation on repealing section 70 of the Education (Scotland) Act 1980

Background and context

The Scottish Public Services Ombudsman (SPSO) is the independent organisation that investigates complaints from members of the public about devolved public services in Scotland. This includes, amongst others, local government services. Since 2010, we are also the body tasked with improving the handling of complaints by public service providers. Over the past two years we have worked in partnership with public organisations in Scotland to develop and implement standardised model complaints handling procedures for each sector, including one for local government that was implemented by 1 April 2013. We have supported this work by e-learning and direct delivery training.

We are an independent organisation created by, and accountable to, the Scottish Parliament. We recognise the importance of our independence, and it is our normal position, when asked to comment on proposed extensions to our powers, not to express a view on a preferred option. We regularly provide information, advice and assistance to the process of developing policy proposals but the decision on whether it is appropriate to pursue one option or the other lies with the Parliament.

In line with our normal practice, I do not intend to express a preference over whether complaints under section 70 should be transferred to us. However, this response sets out some information that I hope will assist the Scottish Government in considering this decision.

Our current role in education complaints

In the run up to the creation of our office in 2002, it was decided that we would have a broader jurisdiction in relation to complaints about schools than our predecessor. As a result, alongside the council's actions as education authority, we can also consider complaints relating to the 'internal management and organisation'¹ of schools. However, paragraph 10 of schedule 4 of the Scottish Public Services Ombudsman Act 2002 excludes us from considering some specific education matters. This covers the giving of instruction (whether secular or religious) and curriculum, discipline and conduct.

Under our Act, complaints are assessed against the general standards of maladministration or service failure. The concept of maladministration includes a broad range of factors that change over time, designed to ensure that where public authorities make decisions that impact on individuals, these decisions are being properly made. Maladministration can include errors in fact, failure to give reasons, failure to follow policy or guidance, failure to consider whether there were special circumstances, failure to ensure that policies are in line with guidance or legislation, and (though this is rare) significant irrationality or illogicality in the decision itself. Customer service issues such as delay, rudeness, attitude, and failure to treat with dignity are also issues we can deal with. However, as long as the decision is made properly, we cannot comment further. We also cannot determine the law, so if the complaint is that the law was not followed, but the organisation can demonstrate that they have applied a reasonable interpretation of the law, only a court could establish which possible interpretation is correct. This extends to human rights questions. Local authorities need to be able to demonstrate that they have taken human rights into account. If they can, and the question is then about two differing but reasonable interpretations, only a court can resolve that issue. Service failure covers failure to provide a service as well as failings in the delivery of a service.

¹http://www.scottish.parliament.uk/S1_Bills/Scottish%20Public%20Services%20Ombudsman%20Bill/b43s1pm.pdf paragraph 26

I want to let you know what this looks like in terms of individual complaints. The cases we look at under the broad heading of local authority education issues are varied - I give the following recent cases as examples.² More details on all of these are on our website and I include the links below. We have investigated concerns about an informal consultation process³; about failings in a pre-school assessment of special educational needs⁴; about bullying which included both physical and social media abuse⁵; and about access to community education by home-schooled children.⁶

When we find a failing, we make recommendations. These are tailored to the individual case but we also try to make general improvements where possible. Our most common recommendations are for apologies (to recognise the impact of the failing), and to improve policies and procedures for the future. Many people choose to come to our office because they want to prevent the situation happening again. As the consultation indicates, we currently have the ability to lodge a special report before parliament if an organisation fails to follow a recommendation. We have not, to date, had to use this power.

Factors to take into account when considering the options for complaints handling

I deal below with the possible impact of a change on the SPSO. As an organisation we have a keen interest in administrative justice generally. I would like to briefly highlight factors that we think should be taken into account when ensuring that citizens have appropriate routes to challenge or question decisions made by public organisations. These factors are reflected in work undertaken by the Administrative Justice and Tribunals Council and also the Crerar and Sinclair reviews.⁷

When designing any system, the aim should be to ensure that it is:

- accessible;
- transparent;
- independent;
- helping to get it right first time;
- proportionate and
- person-centred

Accessible

Any system should be simple and straightforward to follow. Particular problems can occur when there are multiple routes or options in a sector. This can lead to people being confused about what is the best route for them, so they access multiple routes. It can even lead to such confusion that they do not access any routes. The Sinclair Review highlighted particular concerns about the education sector and the multiple routes in this area.

Transparent

It is important that any system of review can demonstrate that it is impartial and transparent. There should be a requirement to publish information publicly so that it is possible to find out what timescales are achieved and what percentage of reviews are granted. Anonymised

² In 2012/13 we received 76 complaints about education matters in relation to local authorities. Of these, a significant proportion came to us before the individual had completed the local complaints procedure (33 or 43%) and of the cases we could look at in detail, we upheld 40%. Across all local government complaints, 50% were premature and we upheld 47% of those we could look at in detail.

³ <http://www.spsso.org.uk/decision-reports/2014/january/decision-report-201301098-201301098>

⁴ <http://www.spsso.org.uk/decision-reports/2014/january/decision-report-201301098-201301098>

⁵ <http://www.spsso.org.uk/decision-reports/2014/january/decision-report-201300857-201300857>

⁶ <http://www.spsso.org.uk/decision-reports/2013/october/decision-report-201202165-201202165>

⁷ <http://www.scotland.gov.uk/Publications/2007/09/25120506/0> and

<http://www.scotland.gov.uk/Topics/Government/PublicServiceReform/IndependentReviewofReg/ActionGroups/FCSAG>

summaries of decisions should be published so that details are available not only to the individual who receives the decision but also to advisers and others who are interested or may learn from that experience.

Independent

The system should demonstrate it is independent of the first decision-maker and also that the person considering the complaint is independent of any inappropriate influence.

Helps to get it right first time

The aim of any system must be to increase the likelihood of good, high-quality decisions being made the very first time someone makes an application. This is closely linked to the need for transparency and independence.

Proportionate

The system should reflect the impact on the individual and not be overly burdensome or expensive. Ideally, a system should be flexible so it can directly reflect the individual situation in each complaint.

Person-centred

In assessing these factors, the views of those who are using or could use the current process, or those who may use a future scheme, should be given most weight. They will have the best sense of what would work for them in practice and what they would consider a reasonable use of resources for the complaints process. It is also important that any process can demonstrate that it is able to take the views of users into account in its own practice and that it has the flexibility to adapt to feedback.

The implications for SPSO of an abolition of section 70 and changes to our role

As I have said above, I do not intend to comment on whether the Scottish Government should proceed with this abolition. I consider that the final decision on this lies elsewhere. I do, however, consider it appropriate to comment on the impact the changes may have on us. I hope the following comments are of assistance.

The SPSO already deals with education complaints and there is an overlap with section 70. In some circumstances, complaints could be brought to us or to the Minister. Section 70 deals specifically with failure to implement a duty imposed upon them or any enactment relating to education. As indicated above, a failing would amount to maladministration so we could consider complaints that currently go to the Minister. It is also likely that, in some circumstances, we could consider a complaint about the way the Minister had handled a section 70 request from a member of the public. The Scottish Ministers are within our jurisdiction. It could, therefore, be argued that there may be a benefit in terms of simplifying the complaints landscape.

It is important to note that given the limited information about what Ministers consider in practice under section 70 it is not clear whether the overlap between our current jurisdiction and section 70 is a partial or a complete one. We would recommend the Scottish Government consider carefully the restrictions on SPSO in schedule 4 and whether this would mean that our current jurisdiction would need to be changed to reflect the current section 70 jurisdiction. I would also like to emphasise that our ability to assess a failing against a legislative duty can be affected by the clarity or otherwise of that legal duty. In a situation where the legislation can have more than one reasonable interpretation we are not able to adjudicate which interpretation is legally correct; that can only be done by a judge.

The consultation puts the question -as to whether SPSO should be able to make orders to compel compliance. It is not clear how often the Scottish Government has used this power

or what any failing to comply with such an order would mean or whether one has been enforced. I assume that, in practical terms, orders have been complied with but it would be good to understand more clearly how this process would work in practice and how that may differ from our current process to make recommendations and issue special reports.

On this point, it should be noted that having powers of enforcement or compulsion would change our relationship with bodies under our jurisdiction. At present, we cannot compel any organisation to carry out our recommendations. This has not so far caused significant problems, with SPSO recommendations being carried out voluntarily by organisations, almost without exception. The suggestion that we should have such powers is not new and was considered in a recent consultation about the Scottish Welfare Fund. As we said in our response to that consultation, we have never had to exercise our power to make a special report, although we have, at times had difficult discussions with organisations before suitable action was taken. However, even this has been a relatively rare occurrence. I have told Parliament that if I considered organisations' actions meant that the power to compel compliance was required, I would be prepared to ask them to change our legislation to allow for this.

While we currently already operate with some variety in our powers, I would be concerned about a provision which required us to operate very differently in connection with an area of local authority complaints without giving clear reasons for that. The benefit of a one-stop shop is that there is a simple and straightforward system for complaints. We can deal with a complaint that covers more than one local authority department as a single complaint, and for which we have a single set of powers. In the context of this consultation, I would highlight two key points about compulsion - the ability to make an order, and how that should be enforced. These may require us to deal with certain complaints, or even certain aspects of some education complaints, in a different way from our general approach. We would ask that, if this decision is made, that the government clearly explain why this area is different so that we can, in turn, clearly explain that to members of the public. Otherwise it is possible that this variation may simply generate public frustration about SPSO by people who, quite reasonably, do not understand why we cannot use these powers in their planning, housing, environment or social work complaint.

The practical impact

In 2012/13 we investigated just under 1,000 cases across all the areas under our remit. 15 of these were classified as education complaints about local authorities. The consultation does not have a projected number of complaints and we understand that the annual figures are currently low. We do know that transferring complaints to us can lead to an increase in numbers, and we would expect that the Scottish Government would discuss the potential resource impact in detail with us and with the Scottish Parliamentary Corporate Body if it is decided to transfer this to us. As it is hard to predict numbers in advance, we would also suggest that there should be a process in place to ensure that this is formally revisited after any transfer.

Conclusion

It remains for the Parliament to decide whether this is an appropriate role for us and I hope these comments are useful when the Scottish Government decides what to put before them. While this response has concentrated on the information we hold and the possible impact on us, I would finish by stressing the critical and central importance of considering all the options from the users' perspective. It is their interests and concerns that should guide the decision.

Jim Martin
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