

**Scottish Public Services Ombudsman
response to the Scottish Government's consultation
on the Scottish Welfare Fund**

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 or not it is appropriate to pursue one option or the other lies with the Parliament.

This consultation presents three options. In line with our normal practice I do not intend to express a preference. However, this response sets out some information which I hope will assist the Scottish Government in considering this decision.

I have only responded to the parts of the consultation where I consider we have useful information. This is around the issues a second tier review scheme may face; factors we think the Scottish Government should take into account when deciding between the options, and the proposals about the role of this office.

Our experience of the Interim Scheme

As the organisation responsible for complaints about local authorities, we receive complaints about the interim Scottish Welfare Fund (SWF). As the consultation sets out, this occurs after the review process has ended or after the complaint process has ended. To date all the complaints we have considered have come to us after the review process, including complaints where the person has been unhappy about both the review and the service provided. In those cases, we would not normally require the individual to access two procedures to complain about what is, for them, the same experience.

We have had very few contacts from the public about the scheme. Our data has not yet been finalised for 2013/2014 but since April 2013 we have only had 16 detailed contacts about the fund. I understand that the Scottish Government anticipated about 100 second tier reviews across Scotland. This is significantly fewer than the previous second tier review stage of the previous fund, the Independent Review Service, which annually received thousands of complaints from Scotland. We worked with the Scottish Government to ensure that local authorities were referring to us at the correct point and we produced leaflets for the public and for advisers to help provide information and explain our role. We were not sure what to expect but did anticipate significantly higher numbers at second tier review and, therefore, potentially higher numbers to us. The consultation outlines a number of possible reasons for the lower than expected numbers. This is a new interim scheme and the analysis is necessarily provisional. This means it is not possible to estimate with confidence what the demand for any second tier review would be in the future.

In most of the contacts we have had, we have been providing advice by telephone to people who wanted to know how to proceed. We have only received a handful of complaints that we could look at in detail. We have publicly reported on three of these¹. In a further case, which we have concluded but not yet published, we found that a council had not taken the relevant factors into account when they refused to use the SWF to support a man with multiple needs². Given the urgency of the need, our recommendation to review their decision had a reduced time limit and the Council responded within this time to let us know that following review, support was granted.

These cases are typical of the concerns that have been raised with us in other contacts about the SWF, which have mostly been about the clarity of the reasons given and alleged failures to follow the guidance. The low numbers mean we do not at present have enough information to assess the overall quality of provision.

The proposed Scottish Welfare Fund

Given our limited experience of complaints from the interim scheme, the comments we make below reflect our general experience of public service complaints.

Issues likely to result in requests for review

The main driver for complaints to this office is communication failures. This is what we have also seen in the few SWF cases we have looked at so far.

The current scheme is fairly detailed with limited room for discretion. While the fund as a whole is discretionary, the guidance limits the way that discretion is exercised. Concerns we've seen so far have been that the individual circumstances have not been fully understood or taken into account. The person has either considered the guidance does apply to them and they have been unfairly excluded, or they did not understand the reasons given for the exclusion and are confused about why they did not receive a grant.

Local authorities have the ability to put in place additional policy and practice to reflect local conditions. This has not to date been a significant factor in complaints, although the issue of confusion around such a policy has been raised with us.

Based on the limited information available and our experience elsewhere, we anticipate that most requests for review in the interim scheme are likely to relate to claims from people who consider they are covered by the guidance but have been told they have not or who are unhappy about the application of a particular local authority policy.

Before the launch we anticipated that we would receive complaints that the SWF had run out of money, or was only able to pay out to a high category of need. This has not yet happened but may occur as the scheme becomes more established. If the classification becomes more important, this could lead to applicants arguing at review that they have been wrongly classified. It is also possible in these circumstances that complaints about a failure to properly manage the fund could be made through the normal complaints process.

Factors to take into account when considering the options for review

- Accessibility

Given the vulnerability of the users, any option must be genuinely accessible by them. This means it should be an option most users could use without representation or advocacy. We

¹ <http://www.spsso.org.uk/decision-reports/2013/november/decision-report-201301468-201301468>

<http://www.spsso.org.uk/decision-reports/2014/january/decision-report-201302081-201302081>

<http://www.spsso.org.uk/decision-reports/2014/january/decision-report-201300769-201300769>

² This related to an application for a Community Care grant rather than a crisis grant

fully support and appreciate the benefits of advocacy and, ideally, it should be available, but the system should be designed in such a way that it is possible to proceed without it.

- **Timeliness**

Both grants are aimed to help people who are at risk, either because they are in a crisis, or because they need help to avoid one. This means that the ability to respond in a timely fashion is key.

- **Proportionality of cost for the administration of the fund**

The average grant, while it will be of significance to the individual, is likely to be of relatively low value. The funds for administering a second tier review will need to come from somewhere and there is a need to ensure that any solution is not disproportionately expensive to the average level of award being made. Funds should be directed to those at need.

- **Transparency and impartiality**

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 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.

- **Helping 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 impartiality. It is also important to note that local authorities will have access to invaluable information from their own first reviews, whatever second tier option is chosen. Given the higher numbers that they will see, learning from local first tier reviews is as – if not more – important than learning from second tier reviews. However, any system of second tier review should be able to support this learning.

- **The volume of applications**

The current numbers of second tier reviews are sitting at around 3% of the number the consultation anticipates. Whilst there are reasons why the current position may be artificially low, and they may increase by some margin, there is a large gap of between 100 3000 cases. We deal below with the challenges this uncertainty may hold for us, and all solutions will need to be tested for their ability to deal with this. The Scottish Government will need to consider what impact a low or fluctuating number of reviews may have on the ability of each solution to deliver against the other factors. One of the reasons the IRS was so well-regarded was because their large, specialist caseload gave them the experience to deliver decisions quickly and confidently and also allowed them to keep the cost per case low. That will be difficult to replicate with low numbers. I set out the particular issues this will pose for us below.

- **Person-centred**

In assessing these factors, the views of those who are using the current scheme or 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 the fund resources for the review 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.

Specific proposals relating to SPSO

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

It is my view that the proposals relating to SPSO are ones that we could, in theory, take forward. The Ombudsman is a flexible concept and we have experience of both taking on new jurisdictions and of managing different powers of investigation in different areas. The proposals, therefore, if appropriately resourced and if we have time to prepare are possible. This does not mean that this option would be without issues that require careful consideration and I set out below the practical impact and challenges the proposals may have for SPSO.

Extension of powers

At present, we can already look at concerns about the operation of the SWF. The standards we use are our general standards of maladministration or service failure. Maladministration includes a broad range of factors that change over time and it is designed to ensure that where public authorities make decisions that impact on individuals, these decisions are being properly made. Maladministration presently 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 right questions. Local authorities need to be able to demonstrate that they have taken human rights into account but if they can, and the question is then about two differing but reasonable interpretations, only a court can resolve that issue.

Under option 2, it is suggested we could have more power over the discretionary decisions involved in the fund. This would replicate our current additional power in health cases, where we can consider clinical judgement.

What this would mean in practice for welfare fund cases would depend on how much local authority discretion was set out in regulations. It would allow us to assess whether any discretion available was exercised reasonably. We could therefore assess the quality of the discretionary decision. This would not mean, however, that we would necessarily replace our judgement for that of the local authority.

If the decision was clearly reasonable, we would not interfere with it, even though another equally reasonable decision was possible. We would, however, be able to challenge a decision that was not well made. If we found that a decision was not reasonable, an additional power over discretionary decisions would mean we would be significantly more likely to recommend a different decision rather than recommend that the existing decision be reviewed which is the more likely outcome under our existing powers. The urgency of such cases and the limited time within which a new decision would be needed would also encourage us to take this approach.

It is also suggested in the consultation that SPSO should be provided with directive powers, giving us the ability to compel a local authority to comply with our decisions. As noted in the consultation, this 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.

We do have a power to issue a special report to Parliament if there is a failure to follow a recommendation and an injustice to an individual remains, yet we have never had to exercise this power. This does not mean that we have not at times had difficult discussions with organisations before suitable action was taken. However, even this has been a relatively rare occurrence, and I have said to 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.

The practical impact

In 2012/13 we investigated just under 1,000 cases across all the areas under our remit. The cases we investigate are often complex and the investigations may involve reviewing large numbers of documents and considering specialist advice. The information we request from organisations may take them time to collate and we currently give them two weeks to do so, with limited extensions of time available.

In order to prepare for the interim scheme, some of my staff visited the IRS. The caseload they dealt with, which is the nearest comparator to the role proposed, was very different. They were a high-volume, quick turnover organisation dealing with only a few subjects. The cases they dealt with rarely had more than a few documents. They dealt with only one organisation and system, which meant a high percentage of documents would be with them within four days. They built up expertise over a number of years and in response to a large number of cases. There are also some similarities, in that they did not have hearings, used telephone contact and took an inquisitorial approach.

The IRS did not include in their turnaround figures the time spent waiting for DWP information, and only reported on time taken from the point they (IRS) had enough information to make a decision. In contrast, we calculate the time we take to deal with a matter from the moment the person contacts us, to reflect what the reality is for the individual. However, even taking this into account, the timescales achieved by IRS are challenging. The Scottish Government have suggested this would be possible within a specialist unit. We agree that this would be a way to deliver this and have discussed in outline terms the resources that might require. Such a unit is, however, only possible if there are sufficient numbers to justify it. Even if the numbers are enough to justify a unit, individual cost per case will increase if numbers are lower than anticipated. With a workload of at times 50-70,000 the UK-wide IRS could draw on economies of scale, which none of the current options can.

In discussions with the Scottish Government we have been considering a case load of around 2-3,000 based on the previous Scottish caseload of the IRS. A unit would still be possible with numbers lower than that but the lower the numbers the higher the cost per case. And at some point, numbers could make it impossible to run a separate unit. We estimate that we would likely need to plan for a few hundred cases as a minimum. We would also stress that, for management reasons, while we can commit to doing this, putting the commitment to run a separate unit in legislation or regulations would not only be unnecessary but might restrict our flexibility in managing our workload.

So far, the current interim scheme seems to have a very different profile to that seen by the IRS and given this, I want to explain what would happen if numbers were to be too low either initially or over time. It is possible that improvements in decision-making mean that numbers reduce from that initially anticipated.

If we were only to receive the current numbers of second tier reviews local authorities have had (which may be less than a hundred for the first year) they could go through our normal process. We would simply need some small, additional staff resource. It would not, however, be possible to achieve the same speed of turnaround and it would take time to build up the expertise that comes with handling a large volume of cases.

Given the uncertainty about the numbers that may go to second tier review, we would recommend that, if it is decided we should take on this role, any resource agreed with Scottish Government at the outset should be reviewed after two years to see if it remains appropriate and proportionate.

Conclusion

In this response, I have concentrated on the factors I think are key to a successful second tier review and also the specific practical issues that any option may face. The uncertainty over the numbers is perhaps the key difficulty in assessing each option as they may have different strengths and benefits depending on whether the numbers are low or high.

In terms of this office, the options presented are possible and I have set out where there may be challenges for us, and how we could respond to the different scale of low or high numbers.

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
Scottish Public Services Ombudsman
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