

Scottish Public Services Ombudsman

Response to consultation on introduction of a new housing panel for Scotland

Background

The Scottish Public Services Ombudsman is the independent body that handles complaints from members of the public about devolved public services in Scotland. This includes all registered social landlords (RSLs). Since 2010, we are also the body tasked with improving the handling of complaints by those organisations.

The consultation highlights our role in the complaints process. I want to draw to your attention a significant development in this area. Over the last year, we have worked with RSLs to develop a single, standard complaints handling procedure (CHP). In April 2012, under section 16B of the SPSO Act 2002 (as amended by the Public Services Reform (Scotland) Act 2010) I published the model CHP for the housing sector in Scotland. From April 2013 all RSLs are required to have a CHP in place which is compliant with this model CHP. Details of this model can be found on our complaints standards website here: www.valuingcomplaints.org.uk

This will not only make complaining to an individual RSL easier but, for the first time, will mean consistent data will be produced about complaints handling. This should both help them improve their own service and, as the Scottish Housing Regulator requires certain data to be collected by all RSLs, will allow them to benchmark against and learn from others.

As should be clear from the work we have done on complaints standards, I support the key aims in the consultation; improving dispute resolution and taking preventative action. In responding to this consultation, I have sought to comment where I may have useful and genuine insight as a result of our roles in investigating complaints and improving complaints handling. I have not commented on areas where I felt others could do so more effectively.

Ensuring justice

Our role means we are part of the administrative justice landscape. There are two key founding principles for administrative justice. It is important that **an individual can hold public organisations to account** for actions that those organisations have taken and that impact on the individual. It is also important that any system can deal with **disparities in power and the ability to both access and use information** that occurs in any disagreement.

Socially-funded and supported housing clearly fit within the broad criteria of public organisations. However, with the creation of the Private Rented Housing Panel and the Homeowners Housing Panel, it has also been recognised that the level of disparity in power in the private sector requires particular solutions. Given this, I have assessed the consultation on the basis of how successful the proposals could be in meeting the objectives in the two principles set out above: the ability to hold to account; and to allow for real and meaningful access.

As you will see, the outcome of this assessment means I am supportive of many of the aims highlighted in the consultation. In terms of the specific proposals I would:

- strongly support steps that could be taken to ensure problems are solved as early as possible;
- support moving disputes away from the courts to a single housing panel with extended powers, a broad jurisdiction and a strong inquisitorial approach; and
- argue that careful consideration needs to be given to how this panel will operate and what support will be given to its users to ensure real and meaningful access.

Holding to account : barriers to access and some possible solutions

The ability to hold to account in this context refers to the need for an individual to have their concerns listened to and to have their disputes resolved. I have set out below some of the main barriers that can prevent this and suggested possible solutions.

Complexity

Difficulties can arise when the landscape for holding a body to account becomes cluttered. The different routes can mean that parts of the same problem are dealt with by different procedures. A concern about anti-social behaviour may be dealt with through one process and concerns about repairs and rent issues through another when, for the tenant, they are all part of a relationship with a landlord, which they are finding difficult.

The first step in dealing with complexity is to map the system. This is set out in the consultation itself. The next step is to ensure that any new system is assessed from the perspective of the user. The way to do this is to use case studies, and to understand both horizontally and vertically what the user would have to do to have their concerns heard or dispute resolved in the new system. I would suggest directly involving tenants groups and landlords in preparing case studies. This would not only identify any unintended consequences of the change, but would also provide examples, which can be used to help signpost individuals to the right place under any new system. This could include testing which cases would be particularly appropriate for any alternative dispute resolution process, such as mediation, and those that may require more support and advice.

The need to signpost an individual in a clear and straightforward way to the best route for their problem, and to agencies that may assist, is an important and often neglected step in helping to resolve disputes. A person who is faced with what feels like a maze of options, or even with complex information about a single route, may feel confused about what to do for the best and, as a result, seek to avoid the issue. However, when the issue may lead to them facing action that could lead to the loss of their home, confusion about how to approach the problem can lead to a critical failure to engage with the process. Early signposting to support and to processes put in place to resolve disputes can help the individual engage in the process more effectively before the problem escalates. In our experience, individuals are also more likely to engage in alternative, problem-solving approaches earlier in a dispute, when positions have not hardened.

Signposting should always be the responsibility of the landlord, local authority or regulator. For example, landlords should be required to provide tenants with information about their rights and responsibilities during disputes, as well as the options the tenants have for taking things forward and the support that may be available to them. This information should be provided at the appropriate time and it is important that it is not only provided in the initial tenant information pack but also when a dispute occurs. The aim should be to ensure that the right information is provided at the right time.

Disparities of power

Throughout the consultation there are references to the impact of differences in ability, skill and confidence that can affect the process. Specific mention is made of the fear about taking on a landlord, and of litigation.

This is an issue that needs resolved and addressed at each stage, not only in the latter parts of the process. In this section of my response, I set out three key points: training frontline staff; how to encourage mediation; and the inquisitorial approach.

Support for frontline staff

We have been working with RSLs to help ensure frontline staff are confident in dealing with complaints. We encourage organisations to empower staff to resolve problems as close as possible to the point of service delivery to ensure they do not escalate. There are three key elements to this: ensuring staff are trained to deal confidently with problems; providing them with the appropriate and clear authority to fix most issues so that as few as possible are referred on; and clear leadership and support from management. This helps to develop a culture which is problem-solving rather than problem-averse, which in turn can help tenants to feel more confident about raising issues.

There has been some interesting work done in Holland where staff have been trained in 'mediation-like' skills. They are not acting as mediators but when a concern is raised or they are dealing with a dispute, they are trained to use skills that allow them to ensure the person is properly listened to and a proper explanation is given of any outcome. This simple approach has significantly improved customer approval and staff morale; and has reduced the number of formal appeals ⁽¹⁾. Much of the training we have produced for frontline staff works on a very similar basis.

Encouraging mediation

The consultation refers to the benefits of mediation. These have been known for some time but mediation remains under-utilised. One benefit of ensuring that staff have some basic mediation skills may be that, while they are not themselves providing mediation, they are more confident in understanding its benefits. Mediation does not work for all people and all cases but it can be particularly helpful in dealing with disputes where the problem is between neighbours or there is a very complex situation and a need to ensure that both sides can fully understand and appreciate the position of the other.

1 There is a good introduction to this project here: [http://www.styrketborgerkontakt.dk/files/Engelske_brochure_mediation\[1\].pdf](http://www.styrketborgerkontakt.dk/files/Engelske_brochure_mediation[1].pdf)

It is easier for people to understand the benefit of a process if they have examples. Organisations that tell tenants how mediation has resolved issues in the past are more likely to see greater interest. Including mediation in signposting information would also help encourage its use.

The inquisitorial approach

The consultation refers to the benefits of the inquisitorial approach that could be developed by setting up a housing tribunal or panel. It argues that this approach can encourage problem-solving and reduce the need for legal representation, which would be of benefit to those individuals who are unrepresented in the court process. This approach is often highlighted as a key way to deal with disparities of power.

The word inquisitorial is often used to differentiate a tribunal from the adversarial process of the court. In practice, however, an inquisitorial approach is only successful if the appropriate conditions are in place to allow it to operate effectively. The presence of lawyers, a complex scheme of legislation and regulations that requires complex legal argument, and the culture of the tribunal can all greatly reduce the impact of the approach and, in some cases, a tribunal can feel very adversarial. The impact of context means that the inquisitorial approaches of different tribunals or panels can, in practice, vary from weak to strongly inquisitorial.

As an Ombudsman, my approach is strongly inquisitorial. This begins at the very first point of contact. My colleagues work with complainants to understand their complaint and discuss with them the matters they would like us to consider and the outcomes they are seeking. This early discussion also helps us to manage the expectations of the complainant and make sure they understand the process and outcomes. It also ensures that, from the outset, we do not require the individual to be skilled in presenting cases and complaints. It is then up to us what evidence we need, and we take on the responsibility of acquiring this. Indeed, once we have agreed the complaint, we take full responsibility for the process. One of the reasons I can do this is because of the flexibility I have been given in terms of my legislation about how to investigate complaints.

The inquisitorial approach taken by a tribunal will vary from that undertaken by an Ombudsman. A tribunal will already have a case presented before them with evidence prepared by the parties. For tribunals, using an inquisitorial approach generally refers to the ability of the tribunal to question the evidence directly rather than relying on arguments put by the parties; to pursue lines not brought to them but which may illuminate the issue; and to pursue novel solutions. Some, like the Private Rented Housing Panel, may take an active role in pursuing additional evidence. The ability of a tribunal to act in this way can greatly reduce the impact of the disparity of power between the individual and an authority, particularly in comparison to the court process. It is important to note that the ability of a tribunal to operate in this way can be greatly helped or hindered by the legislation and regulation under which they work. The more complex and inflexible the legislation, the more difficulty the tribunal will have in using the inquisitorial approach effectively.

Flexibility can allow them to adapt quickly and easily to the ability of the parties and I would recommend that any housing panel should have the ability to determine whether evidence should be led, and if so, by whom and to what extent; to gather

evidence themselves where appropriate; and, again, where they consider it appropriate, to extend their consideration beyond the points raised in any submission. Members of the panel will need not only appropriate training but the right level of administrative support to use the flexibility given to them.

The use of an inquisitorial approach, even a strong inquisitorial approach, does not mean that support is not needed. This is accepted in the consultation. There is a good argument that where legislation is complex and the impact on the individual may be grave, representation may still be required. A tribunal which has more flexibility can certainly deal with disparities of power in terms of their own process. However, the individual may need assistance preparing for a hearing or producing written submissions, whether or not a hearing is held. Even in our model, where we do much of the work for the complainant, we find cases where additional support is needed. Moving housing cases from courts to tribunals will not remove the need for high quality advocacy and advice.

How to get it right first time

In discussing the barriers to access, I have already touched on ways in which organisations can get it right first time, solving problems earlier and reducing the need for further dispute resolution. I would highlight again the need for empowered, supported and trained frontline staff. The best time to resolve a problem is at the first point of contact. I have referred above to the benefit of good listening skills. Interesting work has also been done in Scotland by the Scottish Human Rights Commission who have developed a human rights approach for social care staff aimed at helping make sure that the first decision is made correctly ⁽²⁾. Training developed to support the implementation of the Scottish Welfare Fund is highlighting the need for an inquisitorial approach at the very first stage of decision-making ⁽³⁾. Initiatives like these help provide the skills necessary to avoid problems arising in the first place. Where this is not possible, they can also ensure that cases which do go for further dispute resolution have not been further complicated by failings in the way the dispute has been handled.

Transparency and consistency are also important and these can be encouraged by keeping processes simple and requiring clear recording and monitoring of data at all levels.

Conclusions

In conclusion, it is clearly the case that most benefit is likely to be gained from investment at the early stages of any dispute to get it right first time and I support option 1. There are already a number of initiatives underway in Scotland which could be built on and the key is likely to be empowered and supported staff dealing with the initial contacts from the tenant.

2 <http://www.scottishhumanrights.com/careaboutrights>

3 <http://www.scotland.gov.uk/Topics/People/welfarereform/socialfund/Trainingmaterial/ScottishWelfareFundforDecisionMakerspack>

Disputes cannot always be resolved and to ensure clear accountability I support the least complex route, which is option 3. In looking at how the panel should deal with the work, I would recommend a high level of flexibility. This would allow the panel itself to develop its approach in response to both the needs of those appearing before them and proportionate to the issues raised and the possible impact on the individual.

It remains important that individuals have access to advice and support. Again this should be proportionate to the needs of the individual and the possible impact. The fact that an inquisitorial approach is used will not mean that advocacy and, at times, even legal representation is not needed.

Finally, before any system is put in place, it should be tested using case studies to ensure that the user perspective is embedded in the system.