

15 May 2015

Stewart Maxwell MSP  
Convener  
Education and Culture Committee  
The Scottish Parliament  
EDINBURGH  
EH99 1SP

Dear Convener,

### **Education (Scotland) Bill**

I am writing in response to your call for written evidence on the Education (Scotland) Bill. The Bill covers a number of areas. In my response I concentrate on the section in relation to complaints.

### **Education complaints**

1. Douglas Sinclair, in his definitive and influential report on complaints systems in Scotland<sup>1</sup> published in 2008, highlighted education as causing particular concern. The report identified that this was an area to which priority should be given. Since then,<sup>2</sup> the SPSO as a Complaints Standards Authority working with the sector, has ensured that, for most complaints about local authority provision or about what happens in schools, a simple two-stage process is available. At the end of which those who remain unhappy are signposted to the SPSO.

2. As the Sinclair report highlighted, the complaints process is not the only one available for someone who is unhappy about issues related to education. There are specific processes available in connection with exclusions (appeal to the sheriff court) and additional support needs. And, under section 70 of the Education (Scotland) Act 1980, the Scottish Ministers can take action against a local authority and one possible trigger for that is a complaint. In this response, I concentrate on how the section 70 powers fit within the wider landscape and any implications of this for the legislation you are considering. I start by looking at overlap between SPSO complaints handling responsibility and section 70

### **Section 70 Complaints and the SPSO role**

3. Section 70 does not technically provide Ministers with a general complaints handling role. Instead it provides them with powers to act if they have are satisfied there are failings in duties relating to education provision. They may be satisfied as a result of a complaint to them or "otherwise". In practical terms, it means if they do receive a complaint, they need to consider whether or not they should investigate further and, if they do, whether it provides evidence of such a failing.

4. The Ombudsman has a general complaints investigation role and we can only investigate if we receive a complaint. When the SPSO was set up in 2002, we were given

---

<sup>1</sup><http://www.gov.scot/Topics/Government/PublicServiceReform/IndependentReviewofReg/ActionGroups/ReporttoMinisters>

<sup>2</sup> This role was a direct result of the Scottish Government's response to the recommendations in that report.

a broader jurisdiction than the previous local government ombudsman around school complaints. The Local Government Ombudsman had only been able to look at local authority action and been prevented from considering the internal management of schools. The Scottish Parliament decided that we should be able to look at this. However, they also decided to put in place some very specific restrictions to ensure schools retained discretion over curriculum, discipline and conduct matters. These matters were exempt from our investigation. Last year, we received 174 complaints about education. These can be extremely varied and, to give some examples, we published decisions which ranged from concerns about nursery allocation policy<sup>3</sup> to the impact on a child of a disruptive classroom environment<sup>4</sup> to the way statements attributed to a headteacher were used in a social work report in connection with child protection concerns.<sup>5</sup>

5. Section 70 would be available to members of the public in those areas where our remit is restricted. However, it has to be accepted that, given the broad remit of section 70 and of our legislation, there is potentially considerable overlap between our investigatory function and the ability under section 70 of ministers to investigate an individual complaint. I explain below how the guidance that Ministers set out about what complaints they will consider in terms of section 70 that could provide helpful clarity around this.

6. For completeness, I should add that Scottish Ministers are under our jurisdiction. This means if a member of the public was unhappy about how a complaint made to the Scottish Ministers under section 70 had been handled (whether investigated or not), they could complain to the SPSO<sup>6</sup>.

### **Specific questions raised by the Committee about section 70**

7. The committee have asked three sets of questions. The first is about the regulations and the proposed deadlines. Complaints can be very complex and raise new and interesting issues. It is our experience that primary legislation which sets out too many requirements about how to investigate can cause practical difficulties. I would also suggest care should be taken that the regulations should not be overly prescriptive and also allow for some flexibility in case an individual case requires it. When timescales are being considered, it is the case that it simply takes more time for an outside organisation to conduct an investigation than an internal investigation because of the need to obtain evidence and perhaps specialist advice. We have set challenging targets for ourselves and report against these directly to the Parliament. We note the Government intend to consult on their own timescales and we will look in more detail again at the proposals when they do so. At this stage, we would say, in general terms, that the timescales currently proposed by the Scottish Ministers do not look unrealistic based on our experience. Our targets are longer but that reflects the range of complaints we receive. In particular, while some decisions can be made relatively quickly, complex health complaints which may require two or three separate pieces of expert clinical advice inevitably take more time and our targets have to reflect the range of investigations. It is certainly accepted good practice to set and report on such targets.

8. The second is about the relationship with ASNTs. We are restricted by law from undertaking complaints where a right of appeal exists<sup>7</sup>. This helps to prevent someone

---

<sup>3</sup> <http://www.spsso.org.uk/decision-reports/2015/february/decision-report-201402725-201402725>

<sup>4</sup> <http://www.spsso.org.uk/decision-reports/2014/september/decision-report-201400018-201400018>

<sup>5</sup> <http://www.spsso.org.uk/decision-reports/2014/december/decision-report-201303004-201303004>

<sup>6</sup> In 2012, we published a detailed investigation report as a result of a complaint we received about the Scottish Government's investigation using a similar power in the 1980 Act to investigate private schools in certain circumstances. <http://www.spsso.org.uk/investigation-reports/2012/september/scottish-government-learning-directorate>

<sup>7</sup> We do have discretion if we think it is not reasonable to expect someone to use a court or tribunal.

using a complaints route when the appeal route may be more likely to achieve the outcome they are seeking and may be subject to more restrictive time limits. In this case the legislation that set up the process by which decisions about additional support needs should be made also set out routes to challenge those decisions. These routes do not only include access to a specialist tribunal but access to mediation and adjudication. In these circumstances, it is sensible to support the use of the routes already available. It would also be inappropriate for a Minister to consider a complaint after an independent tribunal has looked at the point and come to a decision.

9. The Committee is correct to be concerned about whether distinctions between types of complaint can be clear cut. It is my general experience that cases where additional support needs is an issue are usually relatively easy to spot. Advice is also available direct to the public from Enquire.<sup>8</sup> Despite this, signposting errors can still occur. In March 2015, I commented publicly about concerns I had that a mother had been signposted to this office when the additional support needs routes were more appropriate and likely the only way that a solution could be found.<sup>9</sup> In my comments on that complaint, I asked all local authorities to make sure that their staff were able to signpost appropriately.

10. It is important the public are not signposted in circles. This is why, if a complaint comes to us direct from a local authority which appears to us to be more appropriate for the additional support needs route, we would not signpost them to those routes without confirming with the local authority first to make sure that there is not some, perhaps not immediately obvious reason, why the additional support needs option has not, to date, been used. This should mean no one is signposted to ASNT from this office who then finds that option is not available and is signposted back to us.

11. The third set of questions asked by the Committee are around the overall effectiveness of the route and how clear it is what matters can and cannot be the grounds of complaint. The Government has said they will set out the detail of some of this in guidance. It is difficult to commit further without seeing the detail of the guidance and a number of approaches may be possible. To give an example of one possible approach, we have experience of working with regulators who do not have a general complaints handling role but who can pursue a matter if information from the public, including in a complaint, indicates there may be some broader or significant issue. This allows them to consider and, if appropriate investigate complaints which may indicate systemic failings. Whatever approach is taken, it is important that no one is lost at this point or that the confusion about what route might be best for them leads an individual to decide not to take an issue further.<sup>10</sup> It is also important that regulators are aware of the complaints that come to us in case they may indicate broader issues. This is why we publish as many of our cases as we can and share information, within limits of confidentiality set out by our legislation, to help regulators undertake their general role. We already send copies of all of our reports to ministers and we are happy to provide advice and assistance as they produce guidance on what complaints are appropriate for the section 70 route.

Yours sincerely

Jim Martin  
Ombudsman

---

<sup>8</sup> <http://enquire.org.uk/>

<sup>9</sup> <http://www.spsa.org.uk/decision-reports/2015/march/decision-report-201302996-201302996>