

Scottish Public Services Ombudsman response to the Call for Evidence on the Planning (Scotland) Bill

Background

1. The Scottish Public Services Ombudsman (SPSO) is the final stage for complaints about councils, the National Health Service, housing associations, colleges and universities, prisons, most water providers, the Scottish Government and its agencies and departments and most Scottish authorities.
2. As the Complaints Standards Authority, the SPSO has the power to publish complaints handling procedure and promote best practice in complaints handling.
3. The SPSO is funded by the Scottish Parliament. This response to the call for evidence aims to support the Committee's consideration of the legislation by providing an oversight of the complaints we receive and what they may tell us about the operation of the current system.
4. In relation to planning, the majority of complaints are about local authorities but the breadth of our jurisdiction means we can and do also receive and about the involvement of agencies such as SEPA and Historic Environment Scotland. In this note, we concentrate on planning complaints received about local authorities.

Experience

5. In 2016/17, 10 %(160) of the complaints SPSO received in relation to local authorities were about planning matters. This made planning the third most complained about local authority subject. Planning has consistently been in the top five subjects of complaints about local authorities from year to year. During 16/17 we investigated 41 complaints about local authority planning matters.
6. When compared to the number of planning applications processed and dealt with by planning authorities the complaints we see about planning are relatively few in number. This means care should be taken when seeking to identify trends or themes from our casework. Nevertheless, it is our experience over a number of years that complaints about planning matters can be the most challenging to resolve because of the limitations of what the SPSO can consider. It is also our experience that those complaining about planning often express dissatisfaction with our service, the local authority and the system generally.
7. This, perhaps, reflects that, while people raise issues with us about national or local development plans, what mostly drives complaints to us are concerns about something that directly impacts on an individual. What may be a relatively modest change to neighbouring property or land can impact on someone's home, and they have to live with it on a daily basis. We often hear frustration that their concerns have not been listened to or taken into account in the decision to allow the change.

8. Unlike health and social work, where we can assess the reasonableness of professional judgement, planning is subject to legislative restriction which says we cannot look at the merits of discretionary decisions. When looking at planning complaints the SPSO cannot consider whether any professional assessments or judgements used in the decision were reasonably made.
9. This means we look at whether facts were correct and appropriately taken into account or not, or whether appropriate procedures, policy and guidance were followed in making the decision.
10. Although our role is limited, it is an indication of the complexity of the planning system that we use independent advisers with an expertise in planning to help us understand the often very technical issues that can arise. Identifying the appropriate legislation and guidance that applies and how it should be used can be an overly difficult task and is likely to be intimidating, or inaccessible, for the lay person.

Casework examples

The SPSO publishes information about decisions to help people understand both our work, and what we observe about the public service provided. The examples below are all from 2016/17 or 2017/18.

Case reference 201608718

11. In our investigation of this case we identified failures by officers to identify the impact on the complainant's property of a specific aspect of a neighbouring development (a balcony). We found the failing to include this in the report of handling was an unacceptable oversight. We also made a recommendation asking the council to take care to ensure that complaints responses are written in a way that allow laypersons to understand any technical points included. <https://www.spsso.org.uk/decision-reports/2017/november/decision-report-201608718-201608718> .

Case reference 201508154

12. This case was unusual in that it related to concerns about the property lived in by the complainant as well as the neighbours. We found that failures throughout the process meant there was unavoidable overlooking for which the council were largely responsible <https://www.spsso.org.uk/decision-reports/2017/may/decision-report-201508154-201508154>

Case reference 201604177

13. In this case, we upheld the complaint because we found that a planning condition could not be enforced as intended because it was not worded appropriately, even although the Council had tried to take appropriate steps to investigate the alleged breach. <https://www.spsso.org.uk/decision-reports/2017/september/decision-report-201604177-201604177>

Case reference 201605942

14. This complaint dealt with a situation where the Council were required to assess their own compliance with a planning condition. We upheld the complaint as the Council had not taken appropriate steps to remedy the situation and we also had concerns

that the response to the complainant lacked empathy

<https://www.spsso.org.uk/decision-reports/2017/september/decision-report-201605942-201605942>

Case reference 201602007

15. The concerns in this complaint were closely linked to a decision on planning condition. The decision itself lay within our legislative exclusion but we asked that the council ensure a reason for the decision was properly recorded. We also found that when concerns were raised about compliance with a condition on a separate application, the council officer to whom this decision had been delegated had insufficient information to establish whether or not there had been a breach and recommended the council take further action to establish the position.
- <https://www.spsso.org.uk/decision-reports/2017/august/decision-report-201602007-201602007>

Concluding comments

16. The SPSO welcomes any changes to simplify the planning system and which support broader public involvement in significant decisions about their locality. We also welcome support and training for councillors. However, in technical areas councillors are often dependant on officers for advice and may not have the technical knowledge to take a view of the robustness and quality of the advice, or to identify, for example, a potentially unenforceably worded planning condition. Many of the complaints we receive raise concerns about either decisions wholly made by officers or about the information presented by officers to Councillors.
17. It should also be evident from the examples above that many concerns we see relate to modest developments and, increasingly those are being delegated to officers.
18. In our experience the issue that causes most frustration is that complainants feel no one is able to properly challenge the professional judgment of officers. There is no appeal process for third parties and this office cannot consider the merits of discretionary decisions. This causes frustration both when the full decision has been delegated and when Councillors have made the decision relying on, often very technical, advice.
19. As noted above, the SPSO cannot consider the merits of local authority decisions unless we identify a procedural failing which undermines or in some way brings that decision into question. (The one exception to this: since 1 April 2017, the SPSO can look at Social Work professional decisions. This, in part reflects the closer working with health as a result of integration.)
20. The reason given for the limitation on discretionary decisions was to ensure that democratic decisions were fully protected.
21. It is perhaps worth explaining that in practice there are two broad “groups” of discretionary decisions:
- 21.1 Those made as a result of the democratic process and elections, for example, significant decisions about local resourcing. It is important that this remains

protected to ensure that democratic matters are dealt with through democratic processes. And

- 21.2 Decisions which are the result of professional judgement, such as those of planners or enforcement officers acting under delegated powers. The restrictions on the SPSO's legislation mean both broad types are precluded by this restriction.
22. The restriction on our ability to look at discretionary judgement is there to defend democratically made decisions and that remains an imperative. However, at a time when increasingly decisions may be delegated, and when the reports to committees by officers are so significant in planning decision-making, it may be appropriate to consider whether this should continue to apply to the judgement of officials in planning cases.