SUPPLEMENTARY EVIDENCE TO THE REVIEW OF SPCB SUPPORTED BODIES COMMITTEE FROM THE SCOTTISH PUBLIC SERVICES OMBUDSMAN

Improving service and effectiveness – proposals for changes to the Scottish Public Services Ombudsman Act 2002

Introduction

1. In paragraph 42 of my earlier written evidence to the Committee I drew attention to discussions with the Scottish Government about amendments that would remove some ambiguities in the current SPSO legislation or, in our view, secure important service improvements for the public. I offered to provide the Committee fuller details on this. This note provides those details. It covers:

- Amendments suggested to address areas where, in our view, the wording of the current legislation does not properly give effect to the original intention of the Parliament or which cause minor operational difficulties.
- Amendments suggested to bring about improved service and effectiveness.
- Amendments relating to extensions in SPSO remit which the Cabinet Secretary for Finance and Sustainable Growth has indicated the Scottish Government supports.
- Areas the Committee will wish to look at in addressing its remit to consider whether alterations should be made to the terms and conditions of officeholders.
- Technical amendments.

2. There is some overlap between these categories. Detailed proposals are set out below. Wherever possible, we include models from other Ombudsman legislation which we feel may be helpful. As a general principle, it is suggested that the primary legislation should be drafted in terms which would not restrict the opportunity for the Scottish Parliament to continue to respond to future demands for reform which would require the SPSO to adapt flexibly without the need for further primary legislation.

General Background

3. The Scottish Public Services Ombudsman Act 2002 (the 2002 Act) received Royal Assent on 23 April 2002 and commenced on 23 October 2002. The 2002 Act gave effect to the Scottish Executive’s proposal to establish a one-stop shop combining the offices of the previously separate Scottish Parliamentary, Health Service, Local Government and Housing Association Ombudsmen (and taking on new functions). Three of the ombudsman schemes which the SPSO replaced were established on a statutory basis; the fourth (the Housing Association Ombudsman)
operated under terms of reference set by the former Scottish Homes\(^5\). In putting forward the proposal for a one-stop shop the Scottish Executive stated\(^6\) that its aim was 'to set up a new complaints system which is specifically designed to suit Scottish circumstances. Accordingly, we started this exercise with a clean sheet and did not look simply to adapt ... the Parliamentary Commissioner Act 1967 under which the Westminster arrangements are established'. The 2002 Act contained a number of new and innovative provisions relating to seeking resolution of complaints and reporting findings. These were groundbreaking in terms of ombudsman practice in Britain and it is notable that the subsequent legislation governing the SPSO’s equivalent in Wales\(^7\) reflects those innovations, but also builds on them. That said, to a very large extent the 2002 Act was based on the three pieces of legislation governing the statutory ombudsmen whose functions were taken over by SPSO. Each of these contained provisions particular to the area to which it applied but all were clearly derived from the Parliamentary Commissioner Act 1967. As a result there are several difficulties and tensions in relation to the 2002 Act:

- It carries over from the 1967 Act an assumption that the Ombudsman’s core function is to ‘investigate’ complaints (the term ‘investigate’ is not defined in either the 1967 or the 2002 Acts). This sits uneasily with the new provisions in the 2002 Act encouraging the informal resolution of complaints and raises questions as to whether it is feasible or appropriate to ‘investigate’ all of the substantial number of complaints being received by the SPSO and if so how the term ‘investigate’ should be defined\(^8\).
- There are provisions in the 2002 Act carried over from the predecessor sector-specific statutes which do not fit well with the wider SPSO jurisdiction.
- In many respects the 2002 Act fails to meet the principles of clarity set out in the booklet *Plain Language and Legislation*\(^9\) which the Office of the Scottish Parliamentary Counsel produced in 2006.

**Meeting the intentions of the Parliament and addressing operational issues**

4. There was considerable Parliamentary discussion during the passage of the SPSO Bill about the importance of empowering the Ombudsman to resolve complaints quickly and flexibly where appropriate. The report of the then Local Government Committee on the bill dealt with this issue at some length\(^10\). The Committee’s report quoted the assurance of the Minister responsible for the Bill that it:

`... does not prevent the ombudsman from resolving complaints informally. That is part of the process. It is a welcome part of the process, if it can be done.`

\(^5\) In 2005 SPSO’s jurisdiction was extended to cover complaints about Further and Higher Education institutions.
\(^6\) Ibid. Para 1.5.
\(^8\) In the first full year after the 1967 Act came into force the Parliamentary Ombudsman received 1,129 complaints and by 1970 the number received had fallen to 645. By contrast the SPSO received 4,197 complaints and enquiries in 2007/08. The investigation procedures developed when the Parliamentary Ombudsman was established have been described as painstaking and meticulously thorough but more complex and time-consuming than would have been sustainable with a larger workload (**The Ombudsman, the Citizen and Parliament**. R Gregory and P Giddings, Politico’s Publishing, London, 2002). It has also been suggested that this approach comes into its own for ‘big inquiries’ but is too costly, cumbersome and slow for ‘trivial’ complaints (**Law and Administration**. C Harlow and R Rawlings, Butterworth, London, 1997).
\(^9\) http://www.scotland.gov.uk/Publications/2006/02/17093804/0.
The bill is intended to provide the statutory framework for the ombudsman to operate effectively with the powers necessary to undertake his formal functions. The intention is that, by focusing on the ombudsman's formal functions without mentioning the informal functions, the bill will allow complete flexibility for the performance of those informal functions, which are not mentioned."

5. We would submit that the 2002 Act does not effectively meet that intention. As noted in paragraph 3, it embodies the assumption that the core function of the Ombudsman is to `investigate' complaints. Additionally it creates a requirement that all investigations result in a report laid before the Parliament. That can be a very powerful way of drawing attention to the issues raised by a complaint and enabling wider learning. However, it is not an appropriate or proportionate outcome in every case. Nevertheless, given the provisions of the 2002 Act, some members of the public understandably feel short-changed if the SPSO's consideration of their complaint results in anything less than an investigation report laid before the Parliament.

6. Our practice is to consider each case to reach a view on whether an investigation, leading to a report laid before the Parliament, is appropriate. That consideration process can involve a good deal of enquiry and gathering of evidence which amounts to investigation as the term is commonly understood. It can sometimes identify learning points of wider application. However, if our consideration of a complaint leads us to the conclusion that a report laid before the Parliament is not the optimum outcome then formally, in terms of the 2002 Act, that is a decision not to investigate. We must provide a statement of the reasons for that decision to the parties (i.e., the person making the complaint and the body complained against) but we are not allowed to publish it more widely.

7. **Proposal:** that there should be specific provision for a wider range of outcomes and options for reporting and publicising than are provided for by the 2002 Act. A potential model is provided by Welsh legislation\(^ {11}\) which allows for the publication, where appropriate, of statements of reasons for not investigating a complaint; and for alternate methods of reporting investigation results, depending on the nature of the case and the outcome.

8. A related issue is that the evidence gathering powers provided by the 2002 Act are stated as being `for the purposes of an investigation'. The Local Government Committee's report on the Bill expressed concern that this did `not require authorities, for example, to provide information outwith formal investigative procedures'. In practice, this has not proved to be a problem but there is an anomaly here which has been identified by a petitioner to the Public Petitions Committee\(^ {12}\).

9. **Proposal:** that the evidence gathering powers should expressly apply to all stages of consideration of a complaint. There is a potential model here in the legislation governing the Irish Ombudsman\(^ {13}\) which provides that evidence gathering powers apply in relation to both preliminary examination and investigation of a complaint.

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\(^{11}\) Public Services Ombudsman (Wales) Act 2006, sections 12(3) & (4), 16 and 21.


Service improvement

10. There are two related areas where we consider that changes to the legislation could improve the service we provide to individual complainants and more generally. These are the ability to pursue systemic failings; and to pursue a complaint where it leads.

Pursuing systemic failings

11. At present, the legislation limits our investigations to complaints brought to us by an individual and which relate only to matters which affect that individual. While this can and often does lead to us making recommendations for improving the general processes and procedures of an individual organization, we are prevented from pursuing these further. In practice, we have found that this has prohibited us from following lines of concern about the way policy is being generally applied by separate organizations throughout Scotland and also from pursuing concerns that relate to groups which, because of their particular vulnerability, are unlikely to pursue their complaint direct with us.

12. For example in the last year we were concerned about the way Free Personal Care guidance was being interpreted and also about issues surrounding NHS guidance on deep vein thrombosis. If we could have pursued these issues beyond the individual complaints received, we could have written to every Health Board/Council to ask for their practice – this would have allowed us to know whether this was a systemic problem and to do so quickly and efficiently while investigating this matter. In the case of DVT guidance, the family who brought the complaint have recently investigated themselves the extent to which there was consistent practice throughout Scotland: a matter which has received recent media coverage. 

Pursuing a complaint where it leads

13. People formulate their complaints on the basis of the information available to them and their perception of where responsibility lies. But it is not unusual for us to find in the course of investigating a complaint that the situation is different and that issues other than those specifically raised by the complainant warrant consideration. However, as Jane Munro comments in her guide to Public Law in Scotland, the Ombudsman has no investigative jurisdiction independent of a complaint and while complaints may result in investigations of considerable complexity and sensitivity, ombudsmen `require to bear in mind the limits placed on the scope of their investigations by the original complaint. Failure to do so may expose them to a successful application for judicial review: Cavanagh v Health Service Commissioner [2005] E.W.C.A. Civ. 1578’.

14 http://www.theherald.co.uk/search/display.var.2479132.0.long_battle_to_raise_awareness_of_dvt.php.
14. **Proposal:** that exceptionally the Ombudsman should be able to undertake an investigation in the absence of an individual complaint or beyond the stated terms of a specific complaint. A possible model for this could be: s 4(3) of the Irish Ombudsman Act, 1980: “The Ombudsman shall not investigate an action unless—(a) a complaint has been made to him in relation to the action by a person ….

15. Or (b) it appears to him, having regard to all the circumstances, that an investigation under this section into the action would be warranted’. It should be noted that Waterwatch Scotland currently has a similar power to undertake reviews of systemic problems (see paragraph 15 below).

**Suggested extensions in SPSO remit**

16. I addressed these issues in paragraphs 16-21 of my original submission to the Committee and do not propose to go over that ground again here. I will simply say that I agree with the comments made by the interim Scottish Prison Complaints Commissioner in his submission to the Committee\(^{16}\) that if, as proposed, his functions transfer to the SPSO, there are some areas in which clarity in relation to jurisdiction needs to be established. I also endorse the comment made by the Chief Officer of Waterwatch Scotland in his submission to the Committee\(^{17}\) that it is important to protect current powers for handling complaints from water customers. As I noted in paragraph 20 of my original submission to the Committee these include an ability to undertake reviews of systemic problems of the sort which I have suggested earlier in this submission should be available to the Ombudsman.

**Terms and conditions of office-holders**

17. Annex A sets out the main provisions relating to office-holders’ terms and conditions and related matters. The Committee will wish to consider how and on what basis these might be harmonised. We support the principle of harmonisation where this is consistent with necessary separation of functions.

**Technical amendments**

**Clarification of what matters may be investigated and in particular whether the Ombudsman can investigate complaints of service failure in relation to all listed authorities – Section 5 (1)**

18. One of the three statutory ombudsmen replaced by the SPSO could investigate complaints arising from service failure as well as maladministration; the remit of the other two was limited to maladministration. Section 5(1) sets out the SPSO’s remit in relation to service failure and maladministration. It is particularly complex in construction and one possible reading of it is that sections 5(1)(d) and 5(1)(e) are intended to exclude the Ombudsman from considering service failure complaints about Family Health Service providers and Registered Social Landlords (RSLs). If so it is not clear (a) why that is or (b) whether the intention is achieved. Legal advice that we have received is that we can consider complaints against all

\(^{16}\) http://www.scottish.parliament.uk/s3/committees/rssb/inquiries/rssb/RSSB(B)SPCC.pdf.

bodies within our jurisdiction rooted in either service failure or maladministration and we have proceeded on this basis.

19. **Proposal:** that a simpler formulation be adopted. For example the equivalent provision in the Public Services Ombudsman (Wales) Act 2005 states:

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7 Matters which may be investigated
(1) The matters which the Ombudsman is entitled to investigate are—
   (a) alleged maladministration by a listed authority in connection with relevant action;
   (b) an alleged failure in a relevant service provided by a listed authority;
   (c) an alleged failure by a listed authority to provide a relevant service.
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**Clarification of who is a member of the public for the purposes of the Act (and therefore able to complain to the Ombudsman) – Section 5 (6)**

20. The generally accepted role of an ombudsman is to consider complaints about service providers from users of those services rather than from, for example, other service providers. It seems that the intention of s5(6) is to give effect to that by precluding listed authorities (i.e., bodies within the Ombudsman’s jurisdiction) from complaining to the Ombudsman about other listed authorities but to allow complaints from other bodies and individuals. However we have been advised that s5(6) does not necessarily preclude RSLs from bringing complaints to the Ombudsman and it is possible that this is also the case with Further Education and Higher Education institutions. Conversely, we have been advised that s5(6) precluded Community Councils from making complaints in their own right.

21. **Proposal:** a simpler and less ambiguous formulation such as that in the Public Services Ombudsman (Wales) Act 2005 which reads: ‘4 (2) “Member of the public” means any person other than a listed authority acting in its capacity as such’.

**Clarification of what is meant by ‘commencement of proceedings’**

22. Paragraph 2 of Schedule 4 excludes the Ombudsman from investigating matters relating to the commencement or conduct of civil or criminal proceedings before any court of law. The proposition underlying this exclusion is that the Ombudsman’s role is to consider administrative matters rather than issues which are for the courts. We have no problem with that. However, some bodies under our jurisdiction, such as the Scottish Environment Protection Agency and Scottish Fisheries Protection Agency, have enforcement powers the exercise of which can lead to court proceedings. Issues can arise as to whether, and if so, when, such an agency’s consideration of whether to exercise enforcement powers moves an exercise of its administrative functions to being the commencement of proceedings. We have for some time been in discussion with the Crown Office about a possible Memorandum of Understanding between our organisations which would include an agreed definition of the commencement of proceedings. However, an MOU clearly has no force in law and would not prevent us from being challenged by a complainant or listed authority so a definition in the Act would help with any future queries.
23. **Proposal**: that the Act should include a definition of “commencement of proceedings”. The definition we have proposed in discussing an MOU with the Crown Office is “the service of an indictment or a complaint”.

**Clarification of whether paragraph 2 of Schedule 4 covers Fatal Accident Inquiries**

24. Clearly Fatal Accident Inquiries should be covered by the exclusion relating to civil and criminal proceedings. However, we have received legal advice that this has been placed in doubt by an Opinion\(^\text{18}\) which indicates that the current law is that fatal accident inquiries cannot safely be regarded as either criminal proceedings or civil proceedings.

**Proposal**: that paragraph 2(a) of Schedule 4 be amended to read “fatal accident inquiries or civil or criminal proceedings before any court of law, or”.

**Release of information when we consider an individual is at risk – s 19 (3)**

25. Generally, information we obtain in relation to a complaint must be treated as confidential but s19(3) allows us to disclose information ‘that a person is likely to constitute a threat to the health or safety of patients’ to any person to whom we think that information should be disclosed ‘in the interests of the health and safety of patients’. This provision is derived from health ombudsman legislation in which context the use of the term ‘patients’ does not raise issues. However, given SPSO’s wider jurisdiction we might uncover information about potential ‘threat to the health or safety’ of persons other than patients (for example, a social worker’s clients) which it would be proper for us to disclose.

26. **Proposal**: that in s19(3) the word ‘patients’ be replaced with ‘persons’ (and that throughout the sub-section the phrase ‘health or safety’ is used rather than ‘health and safety’).

**Clarification of whether the Ombudsman is precluded from considering complaints about matters leading up to the issue of a contract. – Schedule 4, paragraph 7 (1)**

27. This paragraph provides that we must not investigate ‘Action taken in matters relating to contractual or other commercial transactions of a listed authority’. The Scottish Executive Legal and Parliamentary Services Department Circular on the 2002 Act\(^\text{19}\) states “the Ombudsman will continue to be able to investigate maladministration in the process leading up to contracts or commercial transactions”. However, we have received legal advice that paragraph 7(1) precludes us from considering such complaints. It is for the Parliament to decide whether we should be able to investigate the process leading up to contracts and commercial transactions. But it is important that the Parliament’s intentions are clearly embodied in the Act.


\(^{19}\) [http://www.scotland.gov.uk/Publications/2002/10/15564/11761](http://www.scotland.gov.uk/Publications/2002/10/15564/11761)
28. **Proposal:** that there should be a clear statement in Schedule 4 as to whether we are empowered to investigate the process leading up to contracts and commercial transactions.

**Confidentiality and disclosure provisions – sections 12, 13, 19 and 20.**

29. Our discussions with the Scottish Government about possible legislation included discussion around these provisions, their relationship with the FOI and DPA regimes and the impact of any legislation which would encourage improved knowledge sharing between public bodies. It is not clear whether any legislation resulting from the Committee review will impact on these areas and we fully support the openness that the FOI and DPA regimes have brought. However, it should be borne in mind that our legislation gives us both extensive powers in acquiring information and responsibility to keep that confidential and these factors should be considered when any review of our powers and duties are undertaken.
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<thead>
<tr>
<th>Office-holder</th>
<th>Appointment</th>
<th>Term of office</th>
<th>Removal from office</th>
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<tbody>
<tr>
<td>Ombudsman</td>
<td>By Her Majesty on the nomination of the Scottish Parliament.</td>
<td>Up to five years, eligible for reappointment once and, in special circumstances, twice.</td>
<td>By Her Majesty in pursuance of a resolution of the Parliament which, if passed on a division, must be voted for by a number of members equivalent to no less than two thirds of the total number of seats for members of the Parliament.</td>
</tr>
<tr>
<td>Information Commissioner</td>
<td>By Her Majesty on the nomination of the Scottish Parliament.</td>
<td>Up to five years, eligible for reappointment once and, in special circumstances, twice.</td>
<td>By Her Majesty in pursuance of a resolution of the Parliament which, if passed on a division, must be voted for by a number of members equivalent to no less than two thirds of the total number of seats for members of the Parliament.</td>
</tr>
<tr>
<td>Parliamentary Standards Commissioner</td>
<td>By the SPCB with the agreement of the Scottish Parliament.</td>
<td>Up to five years, eligible for reappointment once.</td>
<td>By the SPCB, on resolution of the Parliament. If the resolution is passed on a division, the number of votes cast in favour of it must be not less than two thirds of the total number of votes cast in the division.</td>
</tr>
<tr>
<td>Public Appointments Commissioner</td>
<td>By Her Majesty on the nomination of the Scottish Parliament.</td>
<td>Up to five years, eligible for reappointment once and, in special circumstances, twice.</td>
<td>By Her Majesty in pursuance of a resolution of the Parliament which, if passed on a division, must be voted for by a number of members equivalent to no less than two thirds of the total number of seats for members of the Parliament.</td>
</tr>
<tr>
<td>Commissioner for Children &amp; Young People</td>
<td>By Her Majesty on the nomination of the Scottish Parliament.</td>
<td>Up to five years, eligible for reappointment once.</td>
<td>By Her Majesty if the Parliament has passed a resolution for removal on the ground that the Commissioner has breached the terms of appointment; or that the Parliament has lost confidence in the office-holder. Such a resolution, if passed</td>
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<tr>
<td>Chair of Human Rights Commission</td>
<td>By Her Majesty on the nomination of the Scottish Parliament.</td>
<td>Up to five years, eligible for reappointment once.</td>
<td>If the SPCB is satisfied that terms of appointment have been breached, and the Parliament resolves that the individual should be removed from office for that reason; or the Parliament resolves that it has lost confidence in the office-holder. Such a resolution, if passed</td>
</tr>
<tr>
<td>Deputies etc</td>
<td>Up to three. Appointment, terms of office and arrangement for removals as for Ombudsman.</td>
<td>No specific provision.</td>
<td>No specific provision.</td>
</tr>
<tr>
<td>Staff</td>
<td>May appoint subject to SPCB approval as to numbers, terms &amp; conditions.</td>
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</tr>
<tr>
<td>Advisers etc</td>
<td>In connection with a complaint may obtain advice; SPCB approval required for fees and allowances.</td>
<td>No specific provision.</td>
<td>May, with SPCB consent, appoint any person to provide services by assisting or advising.</td>
</tr>
<tr>
<td>Location of offices</td>
<td>No specific provision.</td>
<td>No specific provision.</td>
<td>No specific provision.</td>
</tr>
<tr>
<td>Independence &amp; accountability</td>
<td>Not subject to direction or control of the Parliament, Scottish Government or the SPCB except in respect of requirement to keep accounts and lay Annual Report (on which</td>
<td>Not subject to direction or control of the Parliament, Scottish Government or the SPCB except in respect of requirement to keep accounts.</td>
<td>Must comply with any directions given by the Parliament. However, any direction shall not direct as to</td>
</tr>
<tr>
<td>Subsequent employment</td>
<td>Ombudsman and Deputy Ombudsmen debarred from employment by body within remit for three years after demitting office.</td>
<td>Must lay Annual Report.</td>
<td>whether or how any particular investigation is to be carried out.</td>
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