

A Human Rights Bill for Scotland: SPSO response to the Scottish Government consultation

Submitted 4 October 2023

Part 8: Ensuring Access to Justice for Rights-Holders

27. What are your views on the most effective ways of supporting advocacy and/or advice services to help rights-holders realise their rights under the Bill?

Please give us your views on advocacy

Good quality advocacy and advice, provided by well-informed experienced advocates and advisers is critical for the realisation of rights. It may be simply to advise people who are unsure about their rights. For some service users, advocacy in particular, is important. For example, service users who may be experiencing vulnerability and/or anxious about raising issues in circumstances where they feel dependent on that service. There are a number of ways to support this including:

- appropriate funding
- access to training and technical advice for advocacy and advice services
- reviewing the legislative landscape for advocacy and support which is complex and often unhelpful as it means funded support can be limited to individual services/areas of legislation and is not provided on a holistic basis (for example advice is available for health services but not related issues).

Please give us your views on legal aid:

28. What are your views on our proposals in relation to front-line complaints handling mechanisms of public bodies?

Please give us your views

We welcome the proposal to not further complicate the landscape. The principle of using existing mechanisms rather than creating distinct and separate systems for service users to raise concerns and complaints about rights in the legislation, is one we support and has benefits for users:

There is one point of entry for their concern, and they do not need to choose between multiple, possibly confusing, options.

Approaches and procedures are well-established and there is a mechanism in place to allow for their improvement and development over time.

SPSO's experience from our work on child-friendly complaints development demonstrates that the current system is flexible and responsive, and can be used to embed a rights-based approach. This work has been co-designed with children and young people and could inform a model for future work on rights-based complaints approaches.

While the current system is capable of delivering a rights-based approach, there are barriers to implementation because of the legislative complexity of related complaints legislation. This arises from the NHS, the Scottish Prison service, and the proposed National Care Service, all being subject to legislation which puts complaint handling on the face of their legislation, but has the effect of removing flexibility; for example by requiring specific approaches that mean advances and improvements in complaint handling practice cannot easily be applied universally.

While they are technically subject to the SPSO regime, the Scottish Government retains responsibility for these sectors' complaints processes, and they cannot be adapted and developed in step with other procedures. For example, some years ago the Scottish Government tried to ensure the NHS

complied broadly with the SPSO model but the need to change regulations when changes are made means that the NHS process is now significantly outdated compared with other models. The Prisons Rules are also slow to change and the legislative proposals for the National Care Service appear to be very complex and it is not yet possible to say where or how complaints will be handled; but the indications are that the proposed NCS legislation will make the system more difficult to navigate and update.

At this stage, while SPSO is confident we can support rights-based approaches in other sectors, our view is that without simplification and improvements in the underlying legislation, key areas will not be able to be updated in the same time frame, or in the same way.

29. What are your views in relation to our proposed changes to the Scottish Public Services Ombudsman's remit?

Please give us your views

The proposal to make it clear that SPSO has a specific remit and responsibility for rights is in line with the role of an Ombudsman scheme set out in the Venice Principles (the UN-approved international standards for Ombudsman schemes).

Principle 1 refers to the role of an Ombudsman in protecting human rights.

Principle 12 says, the mandate of the Ombudsman shall cover prevention and correction of maladministration, and the protection and promotion of human rights and fundamental freedoms.

The Venice Principles also emphasise the importance of Ombudsman schemes being able to act using their discretion and to be able to act without direction from authorities (Principles 14 and 15). They require to be considered and respected in any change proposed to the SPSO. This has not always been the case, for example, we have noted with concern elsewhere (in relation to the National Care Service (Scotland) Bill) that changes that give government power over the SPSO's handling of complaints or the ability to

change SPSO without appropriate Parliamentary oversight is not appropriate. Indeed, Ministers having such powers could impact on whether the SPSO is recognised as an Ombudsman institute against the Venice Principles.

Before commenting on the proposed changes in the consultation, it is important to emphasise that the SPSO's current position on rights that have been or are to be incorporated (the Human Rights Act 1998 and the UNCRC), is that we do not have the powers to determine legally that a rights breach has occurred. SPSO can use our maladministration test to decide whether or not they have been appropriately taken into account, but that is a different test as to whether, in law, there has been a breach of Human Rights. Our current practice is that we do not routinely reference rights if they are not raised by the complainant or the body under jurisdiction. This is because generally, we consider the complaint as made to us.

We note that recently, the Joint Committee on Human Rights at Westminster also recommended that: The Government should consider amending the statutes which set out the mandate of the PHSO and LGSCO (our equivalents in England) to make it clear that they can consider human rights when determining whether there has been maladministration.

Given the emphasis on rights in the Venice Principles and the recommendation at Westminster, we are supportive of changes to reflect on the face of our legislation that rights are relevant to our remit. However, as proposed, the framework covers Human Rights, not all rights as a general principle. It is important that changes proposed by the framework are cognisant of this and do not inadvertently limit SPSO's existing role and ability to refer to rights that are not included.

It may be helpful to refer to a more general right, which would encompass other rights and enable us to have a more explicit rights-based focus to other areas of our work such as complaints handling standards, whistleblowing standards, and Scottish Welfare Fund review applications. It would also provide an element of future proofing for other legislative change.

Any reference to rights, in itself, would not mean we could consider complaints that were, otherwise, out of jurisdiction under the terms of the

SPSO Act 2002. It is doubtful we could consider the rights aspect of a complaint when the subject matter was out of jurisdiction and raises the question of to whom complainants in such cases can complain to about rights.

When looking at how the proposals could be implemented, it is also notable that the SPSO Act and the approach taken in the Venice Principles is to empower and enable. A key element of the independence of the independent institution, is the ability of the Ombudsman to use discretion about deciding what (and to what extent) to investigate. This both protects the independence of the Office and allows for an approach that can remain user-focused and person-centred. Caution is needed in the drafting to ensure that SPSO retain this flexibility and independence from government. To achieve this, changes should be empowering and enabling and not restricting or based around requirements.

We wholeheartedly support the proposal that the requirement in our existing legislation for complaints to be in writing be removed. This is a significant barrier to access.

When we became the independent reviewer for the Scottish Welfare Fund, we asked for and were given the ability to take oral reviews. This has been highly successful and ensured access for people experiencing vulnerability and/ or challenging situations. It is notable that most people choose to contact us by phone. The current proposal is to replicate this for complaints. We would note, following the reference to oral complaints with regards to the SWF, we were told that wording may not explicitly extend to BSL, and we would suggest the broadest possible formulation is used in the legislation to provide the SPSO with discretion to accept complaints in any format.

We also strongly support the proposal that we should be able to undertake investigations under our own initiative, in the public interest. This is a power that is available to most international Ombudsman schemes and to the Ombudsman schemes in Wales and Northern Ireland. Own-initiative investigations are different from but complementary to the investigatory role an organisation with a specific rights-mandate like the SHRC may undertake. This is because it remains focused on and driven by the core function of an

Ombudsman but enables us to investigate matters in the public interest without having a specific complaint. This enables Ombudsmen to investigate matters that we have identified or had brought to our attention that have wider relevance or impact.

For example,

- we receive few if any complaints from a demographically diverse range of prisoners; we receive few complaints from female prisoners, or young offenders.
- we do not receive the volume of complaints that we would expect from groups considered to be experiencing vulnerability, such as the homeless.
- there are service areas where we receive complaints that suggest there are wider issues, but the complaints made to us do not give us the locus to investigate beyond what is complained about, such as the kinship care process

It is possible to see these as

- categories of people experiencing vulnerability who because of their situation are unlikely to complain against an organisation they are highly dependent on, such as social work or care.
- an area of service where people are finding solutions so they may choose not to complain, but we may be able to identify systemic improvements to improve the system for all.
- inconsistency between public bodies about which, individuals making complaints are unaware from their own experience. They may be being treated differently to others (positively or negatively) but we cannot currently pursue the wider context without a complaint. An own initiative investigation could highlight and make recommendations to ensure more organisations achieve best practice.

From the perspective of the proposed legislation, the ability for the Ombudsman to undertake an own-initiative investigation focused on the rights

in the bill would provide another route and an effective tool to support implementation by reducing the need for an individual to raise a specific issue before an area can be appropriately investigated and scrutinised.

To enable this to be fully effective and prevent duplication, there would need to be improvements to how the SPSO can share information with other commissioners, scrutiny bodies and regulators.

SPSO welcome the decision that changes should not be made to the current system of recommendations. As the consultation notes, while we hear concerns about the non-binding nature of recommendations, that is usually not based on direct experience of our work. We find the flexibility that a non-binding recommendation brings is beneficial in supporting innovation in finding solutions, in enabling public bodies to take ownership of the solution and supports longer-term and sustainable improvements. We have a concern that making binding recommendations, changes both the relationship with stakeholder and the role of the scheme, which would undermine these benefits. Schemes, such as the Scottish Information Commissioner scheme, which make binding recommendations, are required to have more formal appeal routes, and also have to take more legalistic approaches to their work as a result.

Finally, we note that the consultation says that the relationship between SPSO and the courts needs careful consideration. The relationship has been considered judicially and it was clear from that case (*McCue v Glasgow city Council* [2020] CSIH 51) that it was not considered appropriate to deny an individual the choice and right to take court action to pursue a complaint first (without having to exhaust the Ombudsman route). We strongly agree with that position and are concerned about the diagram in the consultation which suggests that an individual would need to exhaust the complaints system first.

Apart from the delay that would entail, the court has a different approach, different powers, applies a different test, and will achieve different outcomes. We see no benefit to requiring users to use a fundamentally different process before accessing the court. It is our experience that, while there are often concerns that new rights will lead to an increase in litigation and burden on

the courts, that this is not, historically, the case and there is no evidence to suggest that these rights will be different. As a society, there remains a reluctance and wariness around court action which is both public and resource intensive. That is not simply about financial resources, court action requires significant personal resilience.

We are aware that there are some individuals who, having tried a complaints process and remaining dissatisfied, are negatively impacted by court time limits which mean they can no longer pursue the original decision. We suggest a fair and a sensible alternative option would be to consider extending those time limits when an individual is actively engaging with a complaints process.

Overall, the changes proposed are significant and, while many are welcome, the ability of SPSO to implement them effectively will depend on the quality of the legislation and resources available to support them. We are offering to work closely with SG after the consultation closes to help support further developments.

30. What are your views on our proposals in relation to scrutiny bodies?

Please give us your views.

The SPSO complaints standards role is effectively a scrutiny body in relation to complaint handling practice and standards. In that role, we are required to ensure compliance with principles approved directly by the Scottish Parliament (which has the effect of making them legislative). We would not support introducing specific requirements to include reference to the limited number of conventions that will be incorporated in this legislation in relation to that role. It is both not necessary to achieve the policy outcome sought and would conflict with our status as an organisation answerable to the Parliament and not to government.

As noted above, it may also have the unintended consequence of restricting our ability to reflect rights not specially mentioned in this legislation (for example the work currently being undertaken around the UNCRC). If the Bill

places obligations on bodies within our jurisdiction and a general obligation on all public bodies, we can use our powers to reflect that without the difficulties a specific requirement relating to the setting of standards could cause.

In addition, while we support and have long argued for changes to legislation to enable and empower us to share information. We have significant concerns about introducing requirements to share information or report in a particular way (or within a particular time scale). This would add unnecessary administrative burden, and, more significantly, could undermine confidence in the SPSO if our service users thought we may have to share information. We investigate in confidence and are under obligations to protect the data of those who complain to us.

We have been given extensive information gathering powers which means that we have broadly the same powers to compel evidence as the court of session in civil matters, and in some areas, arguably more, as the legislation excludes some exemptions that can be relied on before the court. There would be no benefit or public interest in undermining those powers (albeit inadvertently).

There are also limitations based on direct conflicts of interest, which mean we would not be able to work jointly on investigations with organisations who are within our jurisdiction. While we are very cautious about suggesting any reduction in the number of organisations we can investigate as it does limit the right of the public to raise issues with a fully independent organisation, we would be interested to explore further the jurisdictional position of the SHRC which also has the status of a Parliamentary-supported organisation, but is not fundamentally a complaints body.

Currently SPSO reports to Parliament and is subject to direction by Parliament about that reporting; in line with comments above, reporting in relation to casework in particular should remain a matter for SPSO in discussion with the Parliament.

31. What are your views on additional powers for the Scottish Human Rights Commission?

Please give us your views:

32. What are your views on potentially mirroring these powers for the Children and Young People's Commissioner Scotland where needed?

Please give us your views:

33. What are your views on our proposed approach to 'standing' under the Human Rights Bill?

Please give us your views:

34. What should the approach be to assessing 'reasonableness' under the Human Rights Bill?

Please give us your views:

35. Do you agree or disagree that existing judicial remedies are sufficient in delivering effective remedy for rights-holders?

Not Answered

36. If you do not agree that existing judicial remedies are sufficient in delivering effective remedy for rightsholders, what additional remedies would help to do this?:

37. What are your views on the most appropriate remedy in the event a court finds legislation is incompatible with the rights in the Bill?

Please let us know your views.