

**Case 200503572: Scottish Executive<sup>1</sup>**

**Summary of Investigation**

**Category**

Scottish Government & Devolved administration – Policy/administration

**Overview**

The complainant (Mr C) raised a number of concerns about statements made by the then First Minister in the Scottish Parliament and about how his complaint was dealt with by the Office of the First Minister.

**Specific complaints and conclusions**

The complaints which have been investigated are that:

- (a) the First Minister made two inaccurate statements to the Scottish Parliament on 9 February 2006 (*not upheld*);
- (b) there is no clear and publicly available complaints procedure for the Office of the First Minister, which should incorporate the right of appeal to an independent body (*not upheld*);
- (c) the Scottish Ministerial Code is deficient in that it lacks a clear mechanism for bringing complaints against Scottish Ministers, including the First Minister (*partially upheld*); and
- (d) the Office of the First Minister failed to respond to a complaint submitted by Mr C (*upheld*).

**Redress and recommendations**

The Ombudsman recommends that:

- (i) Scottish Ministers and the Scottish Executive reflect on how they might bring about greater clarity in the arrangements for making different types of complaint about Scottish Ministers and the Scottish Executive; and
- (ii) the Scottish Executive review its procedures for acknowledging complaints and keeping complainants informed when target response times cannot be met.

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<sup>1</sup> On 3 September 2007 Scottish Ministers formally adopted the title Scottish Government to replace the term Scottish Executive. The latter term is used in this report as it applied at the time of the events to which the report relates.

The Scottish Executive have accepted the recommendations.

## **Main Investigation Report**

### **Introduction**

1. On 15 March 2006 the Ombudsman received a complaint from Mr C, a lawyer, on behalf of his client, an employee of the Scottish Criminal Records Office (referred to in this report as Officer A). The complaint concerned statements made by the First Minister in the Scottish Parliament in relation to the Shirley McKie case (see paragraph 3) and about how Mr C's complaint was dealt with by the Office of the First Minister. Mr C also submitted complaints from others in respect of the same matter and it was agreed with him that the Ombudsman would regard Officer A as the lead aggrieved.

2. The complaints from Mr C which I have investigated are that:

- (a) the First Minister made two inaccurate statements to the Scottish Parliament on 9 February 2006;
- (b) there is no clear and publicly available complaints procedure for the Office of the First Minister, which should incorporate the right of appeal to an independent body;
- (c) the Scottish Ministerial Code is deficient in that it lacks a clear mechanism for bringing complaints against Scottish Ministers, including the First Minister; and
- (d) the Office of the First Minister failed to respond to a complaint submitted by Mr C.

### *General background to the complaint*

3. Officer A was a Scottish Criminal Record Office (SCRO) fingerprint officer involved in the identification of a print found at a murder scene in 1997 as being the partial thumbprint of Ms Shirley McKie, who was then a police constable. Ms McKie denied that the print was hers, or that she entered the house in which it was found. Ms McKie was charged with perjury but was found not guilty on 14 May 1999. Ms McKie subsequently brought an action for damages against Scottish Ministers for malicious prosecution. On 7 February 2006 a settlement was reached and Ms McKie accepted damages of £750,000. During First Minister's Questions (FMQs) in the Scottish Parliament on 9 February 2006 the Presiding Officer announced that he would allow supplementary questions on the Shirley McKie case. Two such questions were asked and the first head of Mr C's complaint relates to the First Minister's answers to those questions.

*Statutory and administrative background*

4. Mr C wrote to the Presiding Officer on 10 February 2006 to complain about 'false statements by the First Minister'. The Presiding Officer wrote back on 15 February 2006 and advised Mr C that the content and accuracy of replies was not a matter for him but was governed by the Scottish Ministerial Code. Mr C also spoke to the Scottish Parliamentary Standards Commissioner (SPSC) on 23 February 2006 who advised that Mr C's complaint was about a Ministerial action that was governed by the Scottish Ministerial Code and that all such complaints had to be lodged with the Office of the First Minister. Mr C then made a complaint about the First Minister under the Scottish Ministerial Code and subsequently complained to this office.

5. The Ombudsman's jurisdiction is defined by the Scottish Public Services Ombudsman Act 2002 (the 2002 Act). The 2002 Act provides that the Ombudsman can consider complaints that members of the public have suffered injustice or hardship as a result of maladministration or service failure in actions taken by or on behalf of authorities including the Scottish Executive. Section 44 of the Scotland Act 1998 provides that:

- '(1) There shall be a Scottish Executive, whose members shall be-
  - (a) the First Minister
  - (b) such Ministers as the First Minister may appoint under section 47, and
  - (c) the Lord Advocate and the Solicitor General for Scotland.
- (2) The members of the Scottish Executive are referred to collectively as the Scottish Ministers.'

6. This investigation was carried out by a Complaints Investigator (referred to in the first person as 'I' or 'me' in this report) with the delegated authority of the Ombudsman. The Ombudsman made the final decisions on jurisdiction and also makes the recommendations contained in this report.

7. When I first informed the Scottish Executive that I intended to investigate Mr C's complaint their Permanent Secretary wrote to the Ombudsman about concerns that Mr C's complaints raised fundamental issues about the relationship between the First Minister, other Scottish Ministers and the Scottish Parliament. He also said that there was a difference between administrative functions as set out in the 2002 Act and the conduct of Scottish Ministers. The Ombudsman obtained legal advice to help clarify that the complaints were within her jurisdiction. The Office of the Solicitor to the Scottish Executive

subsequently wrote to the Ombudsman to ask for a review of my decision to investigate, mainly on the grounds that the complaint concerned the conduct of the First Minister in statements made to Parliament, rather than administrative functions.

8. After taking further legal advice the Ombudsman concluded that she did have jurisdiction. She reached that view taking account of the fact that, in answering questions during FMQs, the First Minister must be taken to be exercising a function of the First Minister conferred on him by virtue of his position as First Minister in terms of section 53(2)(a) of the Scotland Act 1998. Therefore, while the Ombudsman did not disagree with the Scottish Executive's assertion that there was a difference between administrative functions and the conduct of ministers she did not accept the implication that this meant that she could not consider any complaint relating to something said or done by a minister. While most such complaints might relate to ministerial conduct, and, therefore, fall outwith the Ombudsman's remit, there would be cases where what a minister had said or done could properly be regarded as relating so closely to the administrative functions of the Scottish Executive as to be open to investigation by the Ombudsman.

9. Mr C's initial complaint touched on the circumstances and substance of the Shirley McKie case. Early on in the consideration of the complaints I advised Mr C that the 2002 Act states at Schedule 4:

'Matters which the Ombudsman must not investigate

(1) Action taken -

- (a) by or with the authority of a member of the Scottish Executive, or
- (b) by any police authority or any joint police board constituted by an amalgamation scheme made or approved under the Police (Scotland) Act 1967 (c.77)

for the purposes of or in connection with the investigation or prevention of crime or the protection of the security of the State.

(2) The commencement or conduct of -

- (a) civil or criminal proceedings before any court of law, or
- (b) proceedings before any international court or tribunal ...

(8) Action taken in respect of appointments or removals, pay, discipline, superannuation or other personnel matters.'

## **Investigation**

10. The investigation of this complaint involved obtaining and reading correspondence between Mr C and the Scottish Executive (including the Office of the First Minister and the Justice Department) and other relevant documentation. I also had sight of: the Official Report of the Scottish Parliament; advice to Ministers upon which the First Minister's statements were based; the *Route Map – your guide to complaining about Public Services in Scotland*; the Scottish Ministerial Code; the Scotland Act 1998 and the Scottish Public Services Ombudsman Act 2002.

11. While I have not included in this report every detail investigated, I am satisfied that no matter of significance has been overlooked. Mr C and the Scottish Executive were given an opportunity to comment on a draft of this report. Mr C made substantial comments on the draft report in which, among other things, he disagreed with the conclusions reached. The Scottish Executive also made comments on the draft report and asked for some amendments to be made to the wording of the report. I carefully considered the comments received from both parties and concluded that significant changes were not required.

### **(a) The First Minister made two inaccurate statements to the Scottish Parliament on 9 February 2006**

12. On 9 February 2006 during FMQs in the Scottish Parliament, an MSP (MSP 1) asked the First Minister if he would order an inquiry into the Shirley McKie case. The First Minister's response included:

'In this case, it is quite clear – and this was accepted in the settlement that was announced on Tuesday – that an honest mistake was made by individuals. I believe that all concerned have accepted that.'

13. A second MSP (MSP 2) asked the First Minister about his concerns for four SCRO Fingerprint Officers involved in the Shirley McKie case. The First Minister's response included:

'I am not going to comment on individuals on either side of the situation. However, I say clearly that a settlement that I believe is fair and right in the circumstances has been reached with the McKie family. It recognises that an honest mistake was made and that they deserve compensation. All sides have accepted that.'

14. As noted in paragraph 4, Mr C complained to the Presiding Officer about 'false statements by the First Minister' but was advised that the content and accuracy of replies was governed by the Scottish Ministerial Code. Mr C wrote to the First Minister on 23 February 2006 to complain that the First Minister had breached the Scottish Ministerial Code because he had:

'knowingly lied to the Scottish Parliament, thereby misleading Members of the Scottish Parliament in respect of the Settlement of the Proceedings, *Shirley Jane McKie v. The Scottish Ministers and Others.*'

In his complaint letter Mr C said that he had made it clear to the First Minister since July 2005 that the SCRO Fingerprint Officers would not be party to any admission of an 'honest mistake'.

15. In his evidence, Mr C provided copies of correspondence from July 2005 between him and the Office of the Solicitor to the Scottish Executive on this matter. A letter of 14 July 2005 from a Divisional Solicitor to Mr C said that Officer A was no longer a party to the case of *Shirley Jane McKie v. The Scottish Ministers and Others*. The letter also said that:

'My instructions, as you know from reports in the press, are that the Scottish Ministers will admit that fingerprint Y7 is not that of Shirley McKie. That admission will be made on their behalf alone as (a) I do not act on behalf of your client or any of the other SCRO officers and (b) they are no longer parties to the proceedings.'

In response to my enquiries the Permanent Secretary wrote that the First Minister's statements 'were not intended to form part of the settlement, part of the Executive's formal response to the settlement or part of the Executive's communication of its position with regard to the settlement.'

16. As part of its evidence, the Scottish Executive disclosed a briefing note prepared specifically for FMQs and a submission from the Scottish Executive Justice Department which set out question and answer (Q&A) information in relation to the proof hearing for *Shirley Jane McKie v. The Scottish Ministers and Others* scheduled to take place on 7 February 2006. The Scottish Executive told me that they regarded both documents as 'restricted' and exempt from disclosure under the Freedom of Information (Scotland) Act 2002. Both documents refer to 'an honest mistake' in the identification of the print in the context of the Scottish Ministers' response to the action brought against them by Ms McKie and in particular their acceptance of vicarious liability for the case.

17. The Q&A information included a statement that was also part of a Scottish Executive press release of 7 February 2006 about the settlement:

'The ongoing litigation has been a stressful period for Ms McKie and her family. It has also been a difficult period for the Scottish fingerprint service and its staff. Nine years on from this unfortunate but honest mistake there is now a real opportunity for everyone involved in this sad affair to move on – personally and professionally.'

(a) *Conclusion*

18. As I understand it, the basis of Mr C's complaint that the First Minister 'knowingly lied to the Scottish Parliament' in his answers to supplementary questions during FMQs on 9 February 2006 is that by saying 'all concerned' and 'all sides' accepted an honest mistake had been made over the identification of the print, the First Minister implied that that view was shared by Officer A and the other SCRO fingerprint officers involved. The background to the First Minister's answers was the out-of-court settlement, two days previously, of the action which Ms McKie had brought against the Scottish Ministers and others. Prior to the settlement the Scottish Executive made clear to Mr C that it was not providing legal representation to Officer A in the case; that Officer A was not a party to the proceedings; that Scottish Ministers had accepted vicarious liability for the case; and that they would say that an 'honest mistake' had been made. Against that background, and taking account of the briefings provided to ministers by officials (see paragraph 16), it seems to me that the natural interpretation to be placed on the First Minister's references to 'all concerned' and 'all sides' was that these related to the parties to the proceedings – not including Officer A and the other SCRO fingerprint officers involved. It is also important to consider the context in which the First Minister was speaking. He was on his feet in the Scottish Parliament chamber responding to supplementary questions during FMQs. Although he did have the benefit of briefing notes, he was engaged in a live exchange with MSPs and he was not reading verbatim from a prepared speech. In these circumstances, a complaint relating to his choice of words lies on the borderline between matters which can properly be regarded as related to the administrative functions of the Scottish Executive, and, therefore, within the Ombudsman's remit, and those which lie outside the Ombudsman's remit (see paragraph 8). Having said that, the evidence I have seen does not demonstrate maladministration by the Scottish Executive in preparing briefing material ahead of FMQs; nor do I see any



evidence of a deliberate attempt by the First Minister to mislead. On this basis I do not uphold this complaint.

**(b) There is no clear and publicly available complaints procedure for the Office of the First Minister, which should incorporate the right of appeal to an independent body**

19. As noted in paragraph 4, in making his initial complaint Mr C was advised by the Presiding Officer and the SPSC that it related to the Scottish Ministerial Code. This section of the report deals with the Scottish Executive's public complaints procedure, which concerns complaints about maladministration in respect of the Executive as distinct from complaints made under the Scottish Ministerial Code which has a different process. For clarity, I will deal with the Scottish Ministerial Code under a separate section (see section c).

20. Audit Scotland, in cooperation with others, including the Ombudsman's office, have prepared and published a booklet called *Route Map – Your guide to complaining about Public Services in Scotland* which provides a brief guide to the agencies which deal with complaints about public bodies in Scotland. The booklet states that if someone has a complaint about 'Ministers breaking the Scottish Ministerial Code of Conduct' then they should complain to the Office of the First Minister. The Office of the First Minister is part of the Scottish Executive which operates a complaints procedure that was sent to Mr C (but not until four months after his initial letter to the First Minister, see paragraph 33).

21. The Scottish Executive complaints procedure is a separate process and is set out in a leaflet called *How to complain to the Scottish Executive – our standards of service*. A copy of this leaflet is available on the Scottish Executive website. The procedure does not incorporate or refer to, the Scottish Ministerial Code, though it does say that Ministers are accountable to the Scottish Parliament. The complaints procedure is clear that it exists to deal with complaints about 'any aspect of our service delivery or administrative performance'. The leaflet also states that:

'The Executive is led by a First Minister who is nominated by the Parliament and who in turn appoints the other Scottish Ministers who make up the Cabinet.'

and that:

'The complaints procedure does not cover all complaints. Complaints about aspects of legislation or stated policy by Ministers cannot be

legitimately dealt with under this procedure because as civil servants our role is to assist the Scottish Executive Ministers in formulating their policies.'

22. The leaflet clearly sets out the three steps of the Scottish Executive's complaint process. Once those three steps have been exhausted, if someone remains dissatisfied they can approach the Scottish Public Services Ombudsman.

*(b) Conclusion*

23. The evidence I have seen demonstrates that there is a publicly available complaints procedure for the Scottish Executive, of which the Office of the First Minister is a part. The procedure is clear in that it sets out the steps a complainant should follow to make their complaint and also incorporates information about the right to approach the Ombudsman. I do not uphold this complaint. It seems that, in making this complaint, Mr C was essentially expressing a concern about the perceived lack of a clear mechanism for pursuing complaints about an alleged breach of the Scottish Ministerial Code and not the procedure for complaints about service delivery or administrative performance. As noted, I deal with that issue in the next section of this report as well as the relationship between the two processes.

**(c) The Scottish Ministerial Code is deficient in that it lacks a clear mechanism for bringing complaints against Scottish Ministers, including the First Minister**

24. As noted in paragraph 4, in making his initial complaint Mr C was advised by the Presiding Officer and the SPSC that it related to the Scottish Ministerial Code.

25. The Office of the Solicitor to the Scottish Executive provided the following comments in relation to the Ombudsman's jurisdiction in this matter:

'The position of the Ministers is that the conduct of Ministers in Parliament is a matter for the Ministerial Code or alternatively for the Code of Conduct for Members of the Scottish Parliament. The giving of advice to Parliament knowing it to be inaccurate or misleading, would be a breach of both codes ... Ministers would further argue, however, that matters relating to allegations of knowingly giving misleading advice would fall within the purview of the [SPSC] rather than the SPSO.'

26. The Scottish Ministerial Code, in the version in force at the time of the complaint (dated August 2003), said:

'This code details the arrangements for the conduct of affairs by Ministers. It gives guidance by listing the principles and the precedents which may apply but it is not a rulebook. It is for individual Ministers to judge how best to act in order to uphold the highest standards, and it is not the role of the Permanent Secretary or other officials to enforce it ... It is for individual Ministers to judge how best to act in order to uphold the highest standards. They are responsible for justifying their conduct to the Parliament. And they can only remain in office for so long as they retain the First Minister's confidence.'

27. In his response to my enquiries the Permanent Secretary said that while he recognised Mr C's dissatisfaction with the Scottish Ministerial Code, it was the main document to which the public were advised to refer if they took issue with a Minister's conduct. He advised me that:

'The appropriate process for a member of the public to make a complaint about a Minister in connection with the Ministerial Code is to write to the Minister in question or to the First Minister. Should a complaint be received by the First Minister, the convention would be for him to consult me or my office for advice on the complaint and any investigation thereof.'

The Permanent Secretary also advised me that:

'arrangements in Scotland mirror the long established constitutional position in respect of the UK Parliament and the Prime Minister ... In line with UK practice, the constitutional position is that it should not be the place of a separate body or individual, lying outwith our elected structures, to hold power over the duration of the First Minister's period in office.'

28. In March 2006 the then Prime Minister appointed the Comptroller and Auditor General to advise UK ministers on ministerial interests and if necessary establish the facts for the Prime Minister where allegations of a breach of the UK Ministerial Code were made. At the present time there is no similar arrangement in Scotland. In July 2007 the current Prime Minister published a new Ministerial Code which provided for a new independent adviser to supervise disclosure and who could be asked by the Prime Minister to scrutinise ministerial conduct including conflicts of interest.

(c) *Conclusion*

29. It may be helpful to start this section by reiterating the point made in paragraph 8 that complaints relating to the conduct of ministers fall outwith the ombudsman's jurisdiction. The issues I am considering here are whether the Scottish Ministerial Code lacks a clear mechanism for bringing complaints against Scottish Ministers (including the First Minister) and, if so, whether that constitutes maladministration or service failure by the Scottish Executive. It is a matter of fact that the Scottish Ministerial Code does not include a specific statement of mechanisms for bringing complaints against ministers. Equally, it is clear that the Code is not, and was not designed to be, a public complaints procedure. It is simply, as it describes itself, a code of conduct for ministers and guidance on procedures. Given its status it could be argued – reasonably in my view – that it is not required to have a clear complaints handling mechanism and, therefore, it is not deficient in this regard.

30. Additionally, the *Route Map – Your Guide to complaining about Public Services in Scotland* booklet (paragraph 20) gives general guidance on where to direct complaints that ministers have breached the Code. However, it seems that there is scope for confusion, as occurred in this case, about what matters fall for consideration under the Scottish Ministerial Code and what are matters for the Scottish Executive complaints procedure. There is no agreed specific definition of what constitutes service delivery and administrative performance by Scottish Ministers as might be covered by the Scottish Executive complaints procedure, and there is no agreed specific definition of what constitutes the conduct of Scottish Ministers as covered by the Scottish Ministerial Code. The Scottish Executive have said (see paragraph 27) that 'arrangements in Scotland mirror the long established constitutional position in respect of the UK Parliament and the Prime Minister'. There are, of course, significant differences between the UK and Scottish arrangements, not least the fact that the First Minister and other Scottish Ministers were created by statute, unlike the Prime Minister. Furthermore, there have been very recent changes to the UK Ministerial Code (paragraph 28). It is perfectly proper for arrangements to differ between the UK and Scotland, as they have, for example, in relation to external advice on alleged breaches of the ministerial code. However, the interests of transparent government, ethical standards and accountability would be served by greater clarity about the arrangements for making different types of complaint about Scottish Ministers and the Scottish Executive. I partially uphold this complaint only to the extent that there is currently a lack of such transparency.

*(c) Recommendation*

31. The Ombudsman recommends that Scottish Ministers and the Scottish Executive reflect on how they might bring about greater clarity in the arrangements for making different types of complaint about Scottish Ministers and the Scottish Executive and how these will be handled.

**(d) The Office of the First Minister failed to respond to a complaint submitted by Mr C**

32. As noted in paragraph 4, in making his initial complaint Mr C was advised by the Presiding Officer and the SPSC that it related to the Scottish Ministerial Code.

33. Mr C first wrote to the First Minister on 23 February 2006 about an alleged breach of the Scottish Ministerial Code. Mr C said that he did not receive a response and referred the matter back to the Presiding Officer on 27 February 2006, who responded to Mr C the next day advising that he could not deal with the matter and that any correspondence had to be dealt with by the Office of the First Minister. Mr C wrote again to the First Minister on 8 March 2006 and, having still not received any response, referred the complaint to the Ombudsman on 14 March 2006. Mr C wrote again to the First Minister on 15 March 2006. The Scottish Executive have advised that they did acknowledge Mr C's letters of 23 February 2006 and 15 March 2006. On 24 May 2006 Mr C received a response from an official (Officer B) at the Scottish Executive Justice Department which included an apology for the delay. Mr C was not satisfied with the response and wrote to Officer B on 26 May 2006. Officer B wrote back to Mr C on 20 June 2006 advising him that if he was not satisfied he should complain and enclosed a copy of the Scottish Executive complaints procedure. Mr C replied to Officer B on 28 June 2006 to express his dissatisfaction with the Scottish Executive's response and advised that he would not be complaining via the complaints procedure but that the matter would be dealt with by the Ombudsman.

34. In his response to my enquiries the Permanent Secretary said that he was comfortable with the way in which Mr C's letter was handled. He acknowledged that the Scottish Executive did not meet their target of replying to Mr C within 20 working days, but said that this was due to the complexity of the matter and significant pressure of work at that time.

*(d) Conclusion*

35. As the Permanent Secretary acknowledged, Mr C's complaint was not handled within the target response time. I understand that pressures of work can delay matters, and I also understand that the substantive matter Mr C was complaining about was complex. It is disputed whether or not the Scottish Executive acknowledged Mr C's letters of 23 February 2006 and 15 March 2006. However, the Scottish Executive should have provided an indication of how long it would take to respond to the complaint as well as an explanation of why there had been a delay. It would also have been helpful to have advised Mr C that the matter had been passed from the Office of the First Minister to the Scottish Executive Justice Department and that a response would be coming from that department. In the event, Mr C was not adequately informed about the status of his complaint until the first response from Officer B. Although Officer B did apologise for the delay, no explanation was provided for it. On this basis I uphold the complaint.

*(d) Recommendation*

36. The Scottish Executive should review its procedures for acknowledging complaints and keeping complainants informed when target response times cannot be met.

37. The Scottish Executive have accepted the recommendations.

19 September 2007

**Explanation of abbreviations and terms used**

Mr C	The complainant (a lawyer representing Officer A)
Officer A	A SCRO fingerprint officer on whose behalf Mr C made the complaint
Officer B	An official in the Scottish Executive Justice Department
First Minister	The First Minister from November 2001 to May 2007
FMQs	First Minister's Questions in The Scottish Parliament
Permanent Secretary	The senior civil servant in the Scottish Executive
The 2002 Act	The Scottish Public Services Ombudsman Act 2002
SCRO	Scottish Criminal Record Office
SPSC	Scottish Parliamentary Standards Commissioner
MSP	Member of the Scottish Parliament
MSP 1	An MSP who asked a supplementary question of the First Minister at FMQs on 9 February 2006

MSP 2

An MSP who asked a supplementary question of the First Minister at FMQs on 9 February 2006



**List of legislation and policies considered**

The Scotland Act 1998

The Scottish Public Services Ombudsman Act 2002

The Scottish Ministerial Code

How to complain to the Scottish Executive – our standards of service

Official Report of The Scottish Parliament, 9 February 2006

Column 23254 & 23255

<http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-06/sor0209-02.htm#Col23254>