

# The Scottish Public Services Ombudsman on the Ombudsman in an open and participative society

## Background

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1. The Scottish Public Services Ombudsman has three distinct areas of statutory functions/powers:
  - 1.1. the final stage for complaints about most Scottish public services in Scotland including health, prisons, water, further and higher education, local authorities, Scottish government and related agencies and Scottish Public authorities<sup>1</sup>
  - 1.2. specific powers and responsibilities to publish complaints handling procedures and support best practice in complaints handling<sup>2</sup>
  - 1.3. Independent Review Service for the Scottish Welfare Fund with the power to overturn and substitute decisions made by councils on community care and crisis grant applications<sup>3</sup>.

## A: Access to Information and Transparency

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### 1. Access to information required by the Ombudsman to carry out its missions

1. The Ombudsman's power to access information varies according to the three different functions. In relation to the first function, the classic Ombudsman role, the power is extensive. Our core legislation, the Scottish Public Services Ombudsman Act 2002, gives the Ombudsman with the same power as a court of session judge (the highest court in Scotland) to compel the production of information and to take evidence under oath<sup>4</sup>.
2. The statutory powers to access information for our other two functions are not as extensive but there are still requirements in statute for public organisations and others to give the SPSO information if she needs it<sup>5</sup>. The SPSO has the specific statutory ability to hold hearings for our independent review service role to obtain and test evidence<sup>6</sup>. Although our experience is that this has not yet been required in practice.
3. To date, the powers have been sufficient to deal with the matters under jurisdiction. However, the powers devolved to the Scottish government by the UK government in Westminster change over time.

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<sup>1</sup> <http://www.legislation.gov.uk/asp/2002/11/contents> This version of the legislation is not fully up-to-date.

<sup>2</sup> <http://www.legislation.gov.uk/asp/2010/8/section/119>

<sup>3</sup> <http://www.legislation.gov.uk/asp/2015/5/contents>

<sup>4</sup> Sections 13 and 14 of the Scottish Public Services Ombudsman Act 2002 (the 2002 Act)

<sup>5</sup> Section 10 of the Welfare funds (Scotland) Act 2015 (the 2015 Act) and section 119 of the Public Services Reform (Scotland) Act 2010 (the 2010 Act).

<sup>6</sup> Section 10 of the 2015 Act

4. Recently the Scottish Government took on responsibility for the administration and payment of some social security benefits and will be responsible for delivering public assistance for the first time this year<sup>7</sup>. The Scottish Government will be working closely with the UK Agency, the Department of Work and Pensions, who deliver this on a UK-wide basis.
5. The SPSO's legislation is limited to matters devolved to Scotland and, despite our extensive powers to obtain information, the SPSO understands this does not apply to those UK-wide institutions. This is an issue the SPSO is in discussion about with the Scottish Government to ensure the SPSO has sufficient access to all the information needed to handle complaints relating to social security matters; wherever it is held.
6. The SPSO noted the questions about terrorism and the new data storage technologies with interest. There is specific provision in her legislation which means that the state cannot rely on secrecy or legislative restrictions on the disclosure of information if the SPSO is requesting information held by them for an investigation<sup>8</sup>. The organisation has not yet had experience of information held in a form of storage that we could not access. We have though had to consider and take steps to ensure that information transferred to and from our office can be transferred safely and securely. The SPSO uses the Government's secure network to do this.

## **2. Access to information held by this office**

7. The SPSO is subject to the Freedom of Information Scotland Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (EIRS). Like other public bodies in Scotland, the SPSO must publish information in line with a publication scheme and respond to information requests within 20 working days. If information is refused an applicant can ask the organisation to review its decision: the SPSO must respond to those within 20 working days. If an applicant remains dissatisfied they can appeal to the Scottish Information Commissioner (SIC) who issues a binding decision about the application by the SPSO of access to information law. The SIC's decision can only be changed on successful appeal to the Court of Session.
8. The SPSO's legislation contains specific legislative restrictions relating to her complaints and independent review service functions. These limit her ability to disclose information obtained during an investigation or when undertaking her independent review role.<sup>9</sup> This applies across all the categories of information. The SPSO can only disclose or give access to such information if it is for specified purposes. These purposes include the making of public reports and the SPSO produces anonymised reports on many of the cases considered. The SPSO also produces extensive statistical information on this work.
9. In practice the majority of information the SPSO publishes and discloses is corporate information, and advice and guidance about the SPSO's services and complaints handling.

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<sup>7</sup> More information can be found here: <https://beta.gov.scot/policies/social-security/>

<sup>8</sup> Section 13 (5) of the 2002 Act

<sup>9</sup> Section 19 of the 2002 Act

10. In terms of her decisions, the SPSO publishes all decision reports laid before the Scottish Parliament, and anonymised summaries of decisions closed by letter to the parties<sup>10</sup>.
11. The SPSO is also obliged, in common with other public organisations, to publish a range of standard accounts information, other additional corporate information for example demonstrating they achieve best value<sup>11</sup> and on climate change<sup>12</sup>.
12. SPSO is subject to the rules that protect personal data through UK-wide data protection legislation, this legislation is overseen by the UK Information Commissioner's office (ICO)<sup>13</sup>. Individuals can access their own personal data that the SPSO may hold by making a subject access request. The SPSO is required to respond to SARs within 40 calendar days. If requests are refused, the applicant can ask the ICO to consider whether the SPSO should disclose the information.
13. At present, the SPSO's legislation lists organisations and functions, to which she can disclose information obtained during investigation if it is relevant to their specified functions. This includes the ability to share information with Audit Scotland if we had concern about fraud or the SIC or ICO if we have concerns we have seen a breach of freedom of information schemes<sup>14</sup>.
14. The legislative limitations on sharing information are complex. The SPSO considers they are limiting her ability to share information with other public organisations to support wider public service improvement.

### **3. Changes to the relationship between the SPSO and access to information**

15. Providing individual redress for injustice caused by maladministration remains central to the purpose of this office. However, changes in the Ombudsman's role in recent years have led to a significant shift of emphasis towards public service improvement and prevention of maladministration leading to injustice, using the learning from complaints,. To support this, the SPSO has requested legislative changes to her powers to share information. This would allow the SPSO to share information with a broader range of regulators and scrutiny organisations than she can currently.
16. The SPSO is seeking to have her powers extended to include:
  - organisations responsible for scrutinising the quality of healthcare provision and the registration of healthcare professionals. At present she is limited to sharing trends or statistical information and can only share information from an investigation if it is in a public report or if there is an identifiable threat to health or safety.
  - anonymised information for the purposes of learning and training. At present, she can only do so for the purposes of reporting on individual cases and sometimes we hold information that others could learn from and that it would be relatively easy to anonymise but is not suitable to include in a public report of an individual case.

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<sup>10</sup> <https://www.spsso.org.uk/our-findings>

<sup>11</sup> [https://www.spsso.org.uk/sites/spsso/files/communications\\_material/annual\\_accounts/SPSOAnnualAccounts2016-17FINAL.PDF](https://www.spsso.org.uk/sites/spsso/files/communications_material/annual_accounts/SPSOAnnualAccounts2016-17FINAL.PDF)

<sup>12</sup> <https://www.spsso.org.uk/sustainability-reports>

<sup>13</sup> <https://ico.org.uk/>

<sup>14</sup> Section 20 and schedule 5 of the SPSO Act 2002

17. The SPSO is committed to transparency and the SPSO's website provides a large amount of information including:

- links to public reports and decisions<sup>15</sup>
- detailed statistical information which is presented in a searchable/usable format<sup>16</sup>
- information about complaints made about us<sup>17</sup>

## **B: The Ombudsman as catalyst for citizen participation**

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### **1. The Ombudsman's response to this trend**

18. The SPSO is under statutory obligations to consult when:

- creating or revising her strategic plan<sup>18</sup>
- creating or revising complaints handling procedures and principles<sup>19</sup>
- creating or revising a statement of practice for the independent review service<sup>20</sup>

19. The SPSO runs a series of forums and regular meetings through which different groups of stakeholders feedback their experience of the SPSO's service. This informs how services can be improved. The approach remains under constant review.

### **2. How should the Ombudsman respond**

20. The SPSO is supportive of citizen participation. In addition to moving towards developing her approach to the SPSO's services to include greater co-production with those who use and are impacted by her services, the SPSO takes every opportunity to become involved in a support, or "critical friend" capacity in relation to wider public sector improvement.

21. The SPSO sees her role as supporting public service improvement and citizen co-production, but not leading on it, except where it directly involves complaint handling.

22. The SPSO is concerned that the move to digital participation and access may exclude individuals who do not have the ability to or choose not to access services in this way. The SPSO considers an Ombudsman should use their influence to protect citizens ability to have equal and simple access to services and participation.

### **3. Presence on social media**

23. The SPSO has a twitter account which is used for the dissemination of information<sup>21</sup> and to signpost people to ways to access our service or to other sources of advice and support, finding it a useful channel for publicising our work. The SPSO does not use this

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<sup>15</sup> <https://www.spsso.org.uk/our-findings>

<sup>16</sup> <https://www.spsso.org.uk/statistics>

<sup>17</sup> <https://www.spsso.org.uk/complaints-about-our-service>

<sup>18</sup> Section 17A of the 2002 Act

<sup>19</sup> Sections 16A and B of the 2002 Act

<sup>20</sup> Section 9 of the 2015 Act

<sup>21</sup> [https://twitter.com/SPSO\\_Ombudsman](https://twitter.com/SPSO_Ombudsman)

account to have dialogues with citizens about complaints as the SPSO is required to keep such interactions confidential.

#### **4. Implementation of new technologies**

24. Technology is developing continuously. The SPSO has three broad concerns about this:

- that her own organisation has adequate digital skills and legislative freedom to understand and apply emerging technologies to properly understand and investigate public service delivery
- that the move towards digital and automated services does not exclude citizens, and
- public bodies and citizens understand how, and are able to, protect privacy and personal data.

### **C. The Ombudsman as guarantor of international commitments.**

25. The SPSO can consider international commitments to the extent these have been adopted into domestic law and are obligations on organisations under jurisdiction. To give an example, the Scottish Parliament has brought the European Convention of Human Rights into domestic law through the Human Rights Act 1998<sup>22</sup>

26. In practice, such rights are embedded into the way the SPSO investigates and while specific findings are not made about the wider international commitments or the domestic laws, findings of maladministration in public service delivery often right wrongs and unfairness.

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<sup>22</sup> <http://www.legislation.gov.uk/ukpga/1998/42/contents>