

24 August 2017

James Dornan MSP
Convener of the Education and Skills Committee
The Scottish Parliament
EDINBURGH
EH99 1SP

Dear Convener

Complaints and the Children and Young People (Scotland) Act 2014

I am aware that the Education and Skills Committee is currently considering the Children and Young People (Information Sharing) Scotland Bill and has put out a call for evidence.

It is not my intention to comment on that bill or the underlying named person policy, but I thought it might be helpful to the Committee to have a separate briefing note outlining my related concerns, with possible solutions, as background and to generally inform the Committee.

I understand that that if the bill currently before the Committee is passed, the Scottish Government will introduce regulations for a scheme for handling complaints about Parts 4 and 5 of the Children and Young People (Scotland) Act (the 2014 Act) which this bill amends. My briefing note relates specifically to complaint handling.

I hope the Committee find the briefing useful and will give consideration to supporting those suggestions.

Yours sincerely

Rosemary Agnew
Scottish Public Services Ombudsman

Briefing note

To: The Education and Skills Committee on the Children and Young People (Information Sharing) (Scotland) Bill

From: The Scottish Public Services Ombudsman (SPSO)

Introduction

1. This briefing note is intended to provide supplementary information to the Education and Skills Committee, to inform its consideration of the Children and Young People (Information Sharing) Scotland Bill.
2. The briefing sets out the SPSO's concerns in relation to complaint handling. They have been set out in a briefing note, rather than in the call for evidence as they are supplementary to information sought through the call for evidence.
3. The Scottish Public Services Ombudsman (SPSO) is the final stage of the complaints process for most public services in Scotland including local authorities and health. As well as considering individual complaints, the SPSO plays a key role in supporting improvements in complaints handling.
4. The SPSO's concerns relate specifically to complaint handling.

Concerns

The ability to create conflicting complaints processes

5. Our first concern is that the current provisions in the 2014 Act (sections 30 and 43) provide for the Scottish Government to create by regulation a complaints process for organisations under our jurisdiction and which fulfil functions under parts 4 and 5.
6. Such organisations are already subject to requirements in SPSO legislation to have complaints procedures in line with the model complaints handling procedures we are responsible for producing and monitoring¹. (Scottish Public Services (Ombudsman) Act 2002 sections 16 A to F).
7. Effectively, the provisions result in duplication. This duplication leads to the risk of conflicting complaints provisions being put in place. This is difficult for organisations and runs counter to the considerable effort that has been made across Scotland to simplify

¹ These provisions require us to consult before introducing procedures and give us power to provide support and monitor compliance.

and rationalise complaints procedures². It is also, potentially, confusing for those wishing to make complaints.

The 2016 Complaints Order

8. The Scottish Government has previously issued regulations relating to complaints under the 2014 legislation. This was The Children and Young People (Scotland) Act 2014 (Part 4 and Part 5 Complaints) Order 2016.³ The Scottish Government's policy intent for this Order, with which we agreed, was that it should, as far as possible replicate the models already in place. However, the Order, despite these good intentions, in our view, failed to do this.
9. For example, significant effort has been made over a number of years to shift the focus of complaints handling by all bodies to resolution at the earliest time possible. The aim is to ensure that front-line staff are empowered to resolve matters quickly and empathetically.
10. Unfortunately, the 2016 Order, formalised this approach removing by flexibility and making the process overly burdensome. It placed burdens on those making complaints by setting out a prescriptive list of information that needed to be provided before a complaint would be accepted. It then limited the ability of front-line staff to respond quickly and on an individualised basis by requiring a formal written response, again with a list of information that needed to be included. Finally, it set a time limit for access to stage 2 from stage 1 which, again, has the effect of making the process more formal than the models already in use and, crucially, less responsive to the individual complainer and the circumstances of their complaint.
11. The specific requirements in the Order meant that organisations under our jurisdiction (eg: health boards and Councils) who fulfil functions under parts 4 and 5 would have been required to run two complaints process with similar but not identical provisions which could lead to one person having their concerns about a service being dealt with under two separate (different) processes. Concerns about this have been shared informally at events/meetings held by us by staff in such organisations.
12. In short, the flexibility and empowerment of front-line staff to respond to the individual and their needs built in to the current SPSO model was replaced with something that ran

² The Scale of this work can perhaps be demonstrated that it began in 2011 and it was only earlier this year that the final significant sectors (health and social work) were brought into line with the model.

³ This order was subsequently revoked when the legislation it referred to did not come in to force as anticipated.

the considerable risk of being more legalistic and bureaucratic. It should be stressed that this was despite the stated intent and efforts of the Scottish Government to align with our models. The Scottish Government was aware of our concerns about the 2016 Order and we were working with them to mitigate the problems as far as possible through the guidance but it was only possible to do so to a limited extent.

13. Following the revocation of the 2016 Order, the SPSO approached the Scottish Government to ask if they would consider making legislative changes which would allow organisations under our jurisdictions to use their current complaints processes (i.e. their sector's model complaints handling process). We were pleased that, in their response, the Scottish Government committed to working with the SPSO (and others if required) on any new complaints order which would be introduced if the Information Sharing Bill before the Committee was passed and said: "A key objective will be to keep the complaints process as closely aligned with the Model Complaints Handling Procedure as possible."
14. Although this response was pleasing, it confirmed that the Government did not intend to change the current legislative provisions which would, in our view, be the easiest and most efficient way to achieve this. We have highlighted above issues with the previous order.
15. We appreciate not all organisations who may be fulfilling functions under parts 4 and 5 are subject to a complaints procedure (such as private schools) and there will still be a requirement for some provision for them. We do though suggest that this is not a sufficient reason to compel organisations with a single complaints procedure to have two, along with the complexity for all that goes with it.
16. We also appreciate that one of the reasons the legislation on complaints exists in its current form, is that it was, at that time, the policy intent of the Government that we should have the ability to look at the merits of decision made under parts 4 and 5 and this was included in the 2016 Order⁴. This was to bring this in line with our existing powers in health (since also extended to Social Work). This though could be implemented fairly simply with a small amendment to our legislation.

Conclusion

17. There is no disagreement between SPSO and the Government about the benefits of complaints under parts 4 and 5 of the 2016 Act being dealt with in a way that aligns with
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the models already in use. Indeed, we would like to put on record that the Government have listened to our concerns and worked with us throughout. We recognise their commitment to work with us and others on regulations and guidance and their openness to our criticism of some of the detail.

18. We would highlight the following points.

- The current position is that organisations under our jurisdiction already have a complaints process in place with which they must comply.
- Our experience of the 2016 Order is that, despite the Government's intent, it is genuinely difficult to fully align regulations with the models in because of the technical process of drafting. And any failure to do so, however slight, raises the risk of imposing two sets of requirements on organisations.

19. We consider amendments could be made to the 2014 legislation which would take organisations under our jurisdiction out of the additional complaints requirements in that legislation. They could also include any extensions to our powers considered appropriate. This would better achieve the stated policy aim of the Scottish Government and would ask the Committee to encourage them to take this approach.