

The Environment, Climate Change and Land Reform Committee
UK Withdrawal from The European Union (Continuity) (Scotland) Bill
Submission from the Scottish Public Services Ombudsman

Part 2 Environment: Chapter 2 - Environmental governance

The Scottish Public Services Ombudsman is the final stage for complaints about most Scottish public authorities delivering public services; this includes Councils, the National Health Service, housing associations, colleges and universities, prisons, most water providers, the Scottish Government and its agencies and departments. The Ombudsman also sets complaints standards and supports best practice in complaints handling.

There are three ways in which the Bill may potentially impact on complaints handling:

- 1) as it is intended the new body, Environmental Standards Scotland will form part of the Scottish Administration, it will come under the jurisdiction of the SPSO;
- 2) when considering complaints about organisations under jurisdiction in relation to environmental matters, we will be able to consider whether they have taken the environmental principles set out in the Bill into account; and
- 3) the inclusion of an investigatory function for the new organisation (section 16 (1) (b)) of the Bill means there is a potential overlap with our own role investigating complaints.

The first two points reflect the position whenever new organisations are created or new duties are placed on public bodies and we would regard them as uncontroversial. However, the third creates the possibility of an overlap with the role of this office.

It has long been recognised that overlapping functions can confuse and misdirect rather than support individuals who want to pursue their concerns and it also can lead to public resources being used in multiple, overlapping investigations. Considerable work has been undertaken in Scotland since the Sinclair review in 2009 to simplify the complaints landscape as a result and we would generally recommend that the creation of new complaints routes should be avoided unless there are compelling reasons to do so. Having considered the new organisation and its functions, we accept that this is not strictly a new complaints route and are not recommending this be taken out of the Bill but are recommending the requirement to include information about our role in the new organisations' strategy is strengthened and, if possible, the explanatory notes provide some further information about the relationship. We want to explain our reasons for this position to the Committee.

Currently, we can take complaints from members of the public alleging that they have suffered a negative impact (injustice) as a result of maladministration (eg wrongdoing or poor service) by a Scottish public authority. Member of the public is broadly defined and can include groups of individuals. In relation to environmental issues this could be, for example, they are concerned that an action or decision taken by a public authority relating to the environment is having a negative impact on them or that they have participated in a consultation process and their views were not fairly represented or taken into account when this should have been the case.

Complaints to us which raise environmental issues may be very local, relating to the specific impact of individual roadworks on one property¹ or the failure to conduct an environmental impact assessment on an individual application². They have though also raised issues of broader impact such as flood management³ and the rerouting of trams during construction in Edinburgh⁴.

As currently expressed, the proposed investigatory function in section 16 (1) (b) could potentially cover the same set of circumstances the SPSO could consider as a complaint.

We have had some early discussions with the Scottish Government about the new organisation and recognise that, in this case, while the investigatory function potentially overlaps with the role of SPSO, it is not strictly a complaints function and there are important differences between the SPSO's function and that of the new organisation. The new body has broader discretion about when it can start an investigation and it is not subject to some of the limits in our jurisdiction, for example, time limits and discretionary decisions. An important limitation on our office, and one that has concerned us to the point we have been seeking legislative changes, is that we cannot investigate unless an issue is brought to us by or on behalf of someone who can claim they have experienced detriment. This limitation impacts all of our work but on environmental matters prevents us from investigating situations where people would like to raise environmental issues but have been unable to claim they have been directly impacted. The new body will be able to look at those issues and we welcome the closing of that gap in this area. We also appreciate the new function is intended to ensure there is no loss of accountability when routes to European institutions are no longer available.

The Bill also recognises and seeks to remedy the risk we have identified at schedule 2 where at paragraph 1 the new organisation is required to explain in its strategy how it will seek to avoid overlap with the functions of the SPSO and administrative complaints. We welcome this and will work with the Government and the new organisation to ensure that there is clarity for the public.

While there is a general duty to consult before laying its strategy, there is no specific requirement to consult with us on the way the strategy will deal with the potential overlap with our functions. Given the overlap with us is specifically identified in the legislation, this seems to us to be a potential oversight and would recommend the Bill be amended to include an obligation on the new organisation to consult with us in relation to schedule 2 (para 1 (d)).

In conclusion, given the difference focus of our complaints function and the proposed new investigatory function, we are not arguing that this function is not appropriate but given the importance of ensuring clarity for the public would ask that consideration is given to strengthening the key protection in the Bill relating to this.

¹ <https://www.spsso.org.uk/decision-reports/2020/june/decision-report-201805028-201805028>

² <https://www.spsso.org.uk/decision-reports/2019/october/decision-report-201803735-201803735>

³ <https://www.spsso.org.uk/investigation-reports/2010/march/south-lanarkshire-council>

⁴ <https://www.spsso.org.uk/investigation-reports/2011/june/the-city-edinburgh-council>