

Additional written submission from the Scottish Public Services Ombudsman (SPSO), 5 March 2025

SPCB Supported Bodies Landscape Review Committee

Legislative barriers

Information sharing and collaboration.

Current position

1. Sharing information can include the sharing of:
 - general, statistical, or anonymised information. There is no significant barrier to sharing this,
 - case specific information obtained during consideration of a complaint/ case, and
 - personal information, often sensitive, which is also covered by data protection legislation.
2. Section 19 of the Scottish Public Services Ombudsman Act 2002 (the 2002 Act) provides that I can only share information obtained during my work on public service and whistleblowing complaints, and welfare fund reviews for specific purposes. These purposes are broadly limited to my investigatory work, and where there is a threat to health or safety.
3. Section 20 provides for some exceptions, allowing SPSO to share with named bodies to meet named statutory purposes as listed in Schedule 5 to the SPSO Act. These include some health and social care scrutiny bodies, but the list is restricted and does not reflect the full scrutiny and regulatory landscape within which SPSO operates. While there has been a gradual extension to this information sharing provision as we have taken on new functions, this has been ad hoc, and without consideration of my potential role in supporting wider improvement across the public service landscape. (I refer to that further in paragraph 25 below.)
4. The way the legislation is framed also means care needs to be taken to ensure it is updated if the statutory purposes of any of the named bodies changes.
5. SPSO's legal position is different from many other public bodies who can actively share information to help other public bodies meet their statutory purposes, as long as they comply with data protection legislation. While data protection legislation also applies to SPSO, this is at the point we have already established we can share under our own legislation and what we want to share is personal data.
6. I recognise the importance of protecting the privacy of people who complain to me, or who are the subject of complaints, and it is critical to the trust people have in that privacy. Given the legislation in section 20 is permissive, I could choose not to share if I had a good reason. Data protection legislation also provides for specific

protection for individuals. While I consider these protections are sufficient as far as they are expressed, I would welcome a general provision that would allow me to share to named categories of organisation rather than the current restrictive provisions.

7. The barriers to my sharing information (including personal data), have the following impacts.
 - I am restricted from using any information obtained during my work from supporting the work of any organisation unless they are explicitly named in my legislation. This includes, for example, all Scottish Parliamentary Supported Bodies (SPSBs), the Police, the Crown Office and Procurator Fiscal service, all professional regulators, such as the GMC, GTC and NMC, and the Scottish Housing Regulator.
 - This makes sharing information which could help one of the other SPSBs identify or consider an issue that falls under their remit, difficult, and in some cases not possible if it is too case specific.
 - Other organisations can rely on the reports of my published investigations to the extent that they have the same or a similar issue is raised with them, but only so far as what I included in published outcomes. I cannot actively share the evidence I relied upon which means that another organisation would potentially have to duplicate an investigation to obtain it.
 - I am restricted in the extent to which I can work collaboratively with other organisations without appearing to compromise my independence and integrity, particularly if it is an organisation about which I receive complaints.
8. Turning specifically to the SPSBs, as the Committee is aware, SPSBs have wide ranging functions, some of which would dovetail well with SPSO's functions (especially if I had own initiative investigatory powers). Most SPSBs are listed as organisations about which I can take complaints (although this is not consistent, e.g. the CYPSC is not included) and this is a barrier to significant collaborative work, both because of the information sharing restrictions, and because I need to ensure I have, and demonstrate sufficient independence from them.
9. It is not clear to me that it is necessary for all SPSBs to be within my jurisdiction when balanced with the opportunities for collaborative work on systemic or holistic matters. I propose the SHRC, the Biometrics Commissioner and the Patient Safety Commissioner should be removed from my jurisdiction.

Additional powers

10. My current powers in relation to information sharing are largely restrictive. Even if they were changed, it would be helpful to also have enabling powers that give SPSO specific legislative provision to work jointly with other organisations, particularly other SPSBs (ideally not within my jurisdiction).
11. This would enable us to target or explore issues in the public interest, where we have collective knowledge and insight from our own unique perspectives. This is

not to say that having legislative powers is the whole solution; they have to fit within the context of how we are budgeted, our strategic planning, and our ability to be flexible within relatively fixed resources.

Summary of legislative changes

12. Legislative changes that would improve data sharing and collaboration include:

- a general provision that would allow me to share with named categories of organisation rather than the current restrictive provisions,
- consideration of removing some SPCBs from my jurisdiction, and
- specific legislative provision to enable joint working where it is in the public interest.

Reporting and transparency

13. Section 19 also restricts what I can report about SPSO's work. I can only report if we have begun an "investigation." This has a technical meaning under my legislation and precludes me reporting the bulk of cases other than on a statistical or very anonymised basis. These are cases where a significant amount of investigatory work is carried out to assess whether, and to what extent my office "investigates" in the statutory sense of the word. This often involves obtaining the organisation's complaint file, testing their position, obtaining professional (often clinical) advice, and/or following up on whether public bodies have done what they said they would as a result of their own investigations.

14. Allowing me to report more details about these cases would improve the transparency of this work; enable Parliament to scrutinise it more fully and enable me to publish more data to share learning and support the work of other bodies.

15. Currently, the only way I could report on these cases is to accept them for investigation in the technical terms as set out in the SPSO Act. That would require significantly more investigation resources at a cost to the public purse (SPSO and the public bodies who are required to respond to our enquiries). More importantly it would delay those cases where we achieve a resolution, would not necessarily lead to better outcomes for complainers; indeed, for some, it would prolong what has already been a challenging process for them, and/ or raise false expectations. My legislation as written, in common with other ombudsman schemes was intended and resourced to use statutory investigation on a limited basis.

16. Section 19 also limits what I can share after an investigation has concluded and there would be benefits from being able to more easily share details about how recommendations have been implemented.

Own Initiative investigations

17. I thought it might be helpful, for completeness, to cover Own Initiative (OI) investigations, even though we covered it at Committee. This way, the Committee has a single source document.

18. An OI investigation is, briefly, an investigation undertaken in the public interest, without the need to have received a specific complaint from a service user about the matter. Such an investigation is likely to be focused on more systemic issue; within public sector more widely, within a specific sector such as health, geographically across a number of public bodies, and/ or on systemic issues identified within a single public body.
19. The main section in the SPSO Act that impacts on my ability to conduct investigations is section 5(3).
- **Section 5 (3)** of the SPSO Act states
 - (3) The Ombudsman may investigate a matter falling within subsection (1) pursuant to a complaint only if a member of the public claims to have sustained injustice or hardship in consequence of—
 - (a) [...] maladministration in connection with the action in question,
 - (b) where the matter is such failure or other action as is mentioned in paragraph (c) or (d), the failure or other action in question. [i.e. service failure]
 - Section 5 (3) means in practice that I can only investigate a matter where someone complains about it and there is a claim of consequential injustice or hardship. This provision is restrictive and limiting.
20. Other provisions in the SPSO Act, while not so limiting, are not enabling in the sense that they do not always support efficient complaint handling, especially when looked at in conjunction with restrictive information sharing and reporting powers. Conferring OI powers would be a good opportunity to simplify my legislation in relation to complaints about multiple organisations, and/or from multiple complainants.
21. Having OI powers, as explained at committee, also means that existing powers such as the ability to require information, would extend to those broader investigations.
22. SPSO is now falling behind other public sector Ombudsman (Wales and Northern Ireland), who already have OI powers. OI powers would enable us to work across borders if there was a wider complaints related matter.

Summary of legislative changes

23. Legislative changes that would improve data sharing and collaboration include:

- a general provision that would allow me to share with named categories of organisation rather than the current restrictive provisions,
- consideration of removing some SPCBs from my jurisdiction, and
- specific legislative provision to enable joint working where it is in the public interest.

24. Specific legislation that would give SPSO the powers to conduct investigations under my own initiative, in the public interest.

CYPCS and the SPSO

25. My office signposts complainants to other organisations if:

- the organisation or the issues are not within my jurisdiction so I cannot investigate their complaint, or
- we consider there is a more appropriate organisation, able to achieve the outcome they are seeking.

26. CYPCS is potentially such an organisation; they have some complaint handling powers that (depending on the facts of the matter) might enable them to investigate if it is not a matter covered by my office.

27. While this is helpful in principle, it would still require the complainant to pursue the matter with CYPCS because of the restrictions around my information sharing powers. In particular, they are not a body covered under section 20. In practice this means I cannot:

- automatically refer a complaint to them, which can be unhelpful for those complaining.
- highlight individual cases that might be relevant to an issue they are investigating or reporting on under parts of their role unless it is already in the public domain. Even then, it would be restricted to what is public.
- share any details of a case or cases if we identify issues of concern that were not integral to, or directly relevant to my investigation. I can draw their attention to public reports and published complaint summaries, but cannot provide underlying detail, or details of cases where we did not investigate as described above at paragraph 13 .
- share live information, other than on generic themes. This means, as investigations take time, I may hold information that would be useful to another organisation such as CYPCS, but I cannot share it until an investigation is complete and it is in the public domain.

- routinely seek their views on individual casework other than in general terms. There may be occasions where I could seek their “professional” advice, but this would require a confidentiality agreement which would prevent them from using anything in that information in their own work.

28. I already share as much information as I can. For example,

- themes and trends
- statistical information
- general points of wider learning and
- anonymised information about wider issues.

29. The SPSO’s implementation of child-friendly complaints standards, create an opportunity for CYPCS and SPSO to explore what would be helpful to share within current limitations and we have engaged constructively with them about this; this will continue. Should there be changes to my powers in the future it will also be critical in identifying the detail of what those powers should be.

Annexe: relevant sections of the SPSO Act

12 Investigation procedure

- (1) An investigation under section 2 must be conducted in private.

19 Confidentiality of information

- (1) Information obtained by the Ombudsman or any of the Ombudsman's advisers in connection with any matter in respect of which a complaint or a request has been made must not be disclosed except for any of the purposes specified in subsection (2) or as permitted by subsection (3).

- (2) Those purposes are—

- (a) the purposes of—

- (i) any consideration of the complaint or request (including any statement under section 11),
- (ii) any investigation of the matter (including any report of such an investigation),

- (b) the purposes of any proceedings for—

- (i) an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by the Ombudsman,
- (ii) an offence of perjury alleged to have been committed in the course of any investigation of the matter,

- (c) the purposes of an inquiry with a view to the taking of any of the proceedings mentioned in paragraph (b),

- (d) the purposes of any proceedings under section 14.

- (e) where subsection (2A) applies, the purposes of a welfare fund review.

- (2A)** This subsection applies if—

- (a) the matter in respect of which the complaint or request has been made relates to an exercise of a function by a local authority on an application to receive assistance in pursuance of section 2 of the 2015 Act, and
- (b) the welfare fund review relates to the decision made by the authority on that application.

- (2B)** Information obtained by the Ombudsman or any of the Ombudsman's advisers in connection with a welfare fund review must not be disclosed

except for any of the purposes specified in subsection (2C) or as permitted by subsection (3).

(2C) Those purposes are—

- (a) the purposes of the review,
- (b) the purposes of any proceedings for—
 - (i) an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by the Ombudsman,
 - (ii) an offence of perjury alleged to have been committed in the course of the review,
- (c) the purposes of an inquiry with a view to the taking of any of the proceedings mentioned in paragraph (b),
- (d) where subsection (2D) applies, the purposes of any consideration of a complaint or request in respect of a matter, or the investigation of the matter.

(2D) This subsection applies if—

- (a) the matter in respect of which the complaint or request has been made relates to an exercise of a function by a local authority on an application to receive assistance in pursuance of section 2 of the 2015 Act, and
 - (b) the welfare fund review relates to the decision made by the authority on that application.
- (3) Where information referred to in subsection (1) is to the effect that any person is likely to constitute a threat to the health or safety of individuals (in particular or in general)], the Ombudsman may disclose the information to any person to whom the Ombudsman thinks it should be disclosed in the interests of the health or safety of the particular individuals or, as the case may be, individuals in general.
- (4) In relation to information disclosed under subsection (3), the Ombudsman must—
- (a) where the Ombudsman knows the identity of the person to whom the information relates, inform that person of the disclosure of the information and of the identity of the person to whom it has been disclosed, and
 - (b) inform the person from whom the information was obtained of the disclosure.

- (4A) The duty under subsection (4)(a) to inform a person about the identity of a person to whom information has been disclosed does not apply where informing the former person is likely to constitute a threat to the health or safety of the latter person.

[...]

- (8) Information obtained from—

- (a) the Information Commissioner by virtue of section 76 of the Freedom of Information Act 2000 (c.36); or
- (b) the Scottish Information Commissioner by virtue of section 63 of the Freedom of Information (Scotland) Act 2002 (asp 13),

is to be treated for the purposes of subsection (1) as obtained in connection with any matter in respect of which a complaint or request has been made.

- (9) In relation to such information, subsection (2)(a) has effect as if—

- (a) the reference in sub-paragraph (i) to the complaint or request were a reference to any complaint or request, and
- (b) the reference in sub-paragraph (ii) to the matter were a reference to any matter.

20 Disclosure of information by the Ombudsman

- (1) This section applies to any information (referred to in this section as “relevant information”) obtained by, or supplied to, the Ombudsman or any of the Ombudsman’s advisers under or for the purposes of this Act or the 2015 Act .
- (2) The Ombudsman may disclose relevant information to a person or body specified in the first column of schedule 5 if the information appears to the Ombudsman to relate to any matter specified in relation to that person or body in the second column of that schedule.
- (3) Nothing in section 19(1) applies in relation to the disclosure of information in accordance with this section.