

3 March 2016

Kevin Stewart MSP
Convener of the Local Government and Regeneration Committee
The Scottish Parliament
EDINBURGH
EH99 1SP

Dear Convener,

Thank you for your letter of 22 February. The Committee raised a number of interesting questions and requests for further information. I have set out our response in detail in an attachment to this letter. I was also pleased to read the positive comments about the potential assistance the Committee and Parliament could provide when we consider there may be systemic or recurrent issues or an organisation is being uncooperative. We will note this for the future.

I would like to thank the Committee for their interest in the work of this office and am pleased you consider your scrutiny of our work forms part of the legacy of the Committee. We would, of course, be happy to provide further details on our operation and to host a visit from the existing or future Committees or members of the clerking team. This is something which could prove valuable for both in understanding how we aim to maximise impact of our work in supporting improvement to public services.

Yours sincerely

Jim Martin
Ombudsman

Annex A

1. The cost of investigating a complaint.

We recently submitted the following costs to the Government for the new role proposed for SPSO on complaints about the Named Person and Child's Plan. Given uncertainty over numbers we have agreed with the Government to recover complaints handling costs on a case by case basis. Our estimates are based on the progression of complaints through our process. Complaints will be closed at various points depending on a range of factors, particularly complexity. Enquiries and complaints which are out of jurisdiction or premature, for example, are closed by our Advice Team. Early Resolution is the first stage of our investigative process. At this stage, we try and identify any issues suitable for quick resolution or response with a minimal amount of investigation. These are cases where we can conclude the complaint quickly. This may be because the organisation can possibly meet the complainant's desired outcome without further investigation, they have responded to the complaints in a way we think is satisfactory or, possibly, where we will be unable to meet the complainant's desired outcome. Cases where this is not possible and which require further detailed investigation or advice will proceed to our investigation stage. We tend to find that, where we have wider powers (e.g. health clinical judgement), a smaller proportion of cases are resolved at early resolution and the advice costs we set out below are usually added at the investigation stage. Cases where external advice is needed are more expensive.

Advice closures	£25
Early Resolution closures	£295
Investigation closures	£1,372
External advice per case (NHS 2014-15 average)	£365
<i>Range: £250-£500 per case</i>	

These costs only include the direct costs of staff handling complaints. They do not include any proportion of costs of: management; senior management; Ombudsman; or the costs of important processes related to complaints handling, quality assurance, request for review or service complaints.

Also additional are the costs of running the office, including: accommodation; communications such as maintaining our website, leaflets, forms; corporate services support which covers facilities management, IT support and design, HR, finance and basics like stationery and printing.

These costs are shared across the whole office and now include the welfare fund and complaints standards functions. They are not easily linked to an individual case which is why we do not break them down on that basis. We have sought to keep these non-staff and overhead costs to a minimum and in recent years have undertaken significant restructuring which reduced manager numbers and took out an entire layer of senior management. We have actively sought shared service opportunities including sharing accommodation, providing HR skills to other commissioners and accessing IT infrastructure and support through the Scottish Government.

In our recent consultation on our Strategic Plan for 2016-2020, we outlined indicative figures for the costs of each strategic objective. This estimated that the costs of Strategic Objective 1, covering case handling, would amount to 84% of our budget, including staff and non-staff costs.

2. The practice of investigation

We are required to produce robust decisions which could withstand a judicial review. We take a proportionate and structured approach to investigating which allows us to focus on points in dispute and make key decisions. Prior to starting an investigation, we work to make sure we have listened to the complainant and agreed the terms of the complaint and the outcomes they are seeking. We then share the heads of complaint with the public organisation so both parties are clear and understand the matters to be investigated. This is an important stage which gives us a clear foundation. At this point we use a case assessment form which helps us to highlight any legal issues that could prevent us investigating or other matters we need to consider before we start. For example, this includes the likelihood of achieving the outcomes sought. It is also at this stage we consider the actions already taken by the public organisation to remedy the situation and seek to identify any opportunities for early resolution.

It is important to note that as an Ombudsman scheme, we take an inquisitorial approach to an investigation. This means it is our responsibility to obtain the evidence we need to make a decision. This is unlike the traditional court system which is adversarial and proceeds, in general terms, only on the basis of what is provided to it or within its own knowledge. An inquisitorial approach means that once we have agreed the complaint with the member of the public that it is our responsibility for deciding what evidence we need and how to obtain that in order to come to a decision. The reason an Ombudsman takes this approach is because it reflects the fundamental power imbalances in the relationship between the citizen and the state.

Each investigation is individual but we have sought to make this process as efficient as possible for us and also easy for organisations who may interact with us regularly. We will already be in receipt of any information or documentary evidence provided by the member of the public. Having agreed the complaint with them we then assess each case and will send, a letter notifying the organisation about what we are investigating asking for comments and relevant evidence. The letters are merely the surface of the investigation. What is critical for us is the evidence that is supplied. We list clearly what evidence we require. This will usually include as a minimum: all documents held on the complaint file, all other relevant documents they hold, copies of any policies applied. The bundle we receive back can vary considerably in size. In the case of clinical records or where planning files are provided it often runs to several hundred pages if not more, at times, it can involve boxes of files. We will also at this point consider whether we think the member of the public will hold any additional information or will have additional comments that could be of use and will also engage with them.

In some cases, sufficient information is provided at this stage for us to make a decision. We will let the member of the public and organisation know our decision and will issue a detailed report in writing in letter format. These usually run to 4-10 pages but may be longer. As noted above, we are the final decision-maker in the complaints process and all our decisions need to be robust enough to withstand judicial review. We have provided training on this and decision-making generally. Our investigations guidance considers how to make fair decisions and how to assess the sufficiency of evidence.

If we are unable to make a decision on the basis of the initial evidence, we are likely to pass the case to our investigations team. We have found this to be the most efficient way to work and it is also one being adopted elsewhere. It ensures the team focusing on quick decisions do not have complex cases in their workload and means that our early resolution team can focus on identifying cases where we cannot or should not investigate and making decisions on cases we can investigate more quickly. The investigations team will take on any further work that is required. As these cases are more complex, we use a dedicated investigation

planning tool which helps us to ensure we identify gaps in the evidence and how we will resolve these. This may involve questioning the organisation on the documents or on what evidence we would anticipate they would have but has not been provided, asking them to explain the reasons for some of their actions or non-actions. There may be contact with the complainant to ask for their views on any new evidence or to provide more information. At this point, we will know if we need detailed expert advice (we can also use expert advice earlier to make proportionate decisions). If we consider it necessary we may interview or undertake site visits although these are less common than they used to be partly because they increase cost and we need to use them on a proportionate basis only when they are necessary to make a fair decision. We have also found that technology which allows us, for example, to receive information electronically or to assess a site at a distance has helped us to reduce costs.

We also assess whether there is a public interest in the case being one of our public reports. When that occurs we are intending to put all of our report in the public domain. We issue draft reports for comment and the Ombudsman will personally make the decision before such reports are issued.

3. User focus in the context of organisations complained about

We have regular contact with many of the organisations under our jurisdiction. On a day to day basis, we have one single named liaison officer with each and they will be our main point of contact. This helps organisations manage the requests we have for information. We have conducted surveys of organisations under jurisdiction to help us improve the service we provide to them. The responses have invariably been very positive. We are currently preparing the next survey which will be based on the same service standards that we apply to our work with complainants.

We also have created sounding boards for two of the areas we have most complaints, local authority and health. Membership comes from individual councils and health boards as well as representative groups such as SOLAR. Details of the members and the minutes of meetings are published on our website¹. We use these groups to discuss proposals and also to have feedback from the sector about their experience of us. Our strategic plan was shared with organisations under jurisdiction and most responses came from them.

4. Adjusting time limits for those complained about

The committee asked specifically about the decision we made recently to extend our timescales for requesting information in an investigation. Previously, we provided 10 working days for this response. Responses primarily require the organisation to provide a copy of all of the evidence they took into consideration in reaching a decision when it was signed off as a final response within their organisation. While this 10 day timescale has largely been achieved, we have had consistent feedback that this was challenging. We also knew that although we ask for comments that organisations often did not comment at this stage but only in response to additional questions. We want to see if a more structured request and more time will help and have, working with organisations under our jurisdiction, developed a pro-forma, which allows organisations to review their own response to date and provide comments in a more structured way when they are submitting evidence. To allow for this we have extended the time they have to 20 working days. We have often been innovative in our approach to our service and this is not a process yet in use elsewhere. We will assess carefully and seek feedback to see how well it is working. We are hoping it will also help us to identify at an early stage cases where it would not be proportionate to investigate further.

¹ <http://www.spsso.org.uk/sounding-boards>

5. Taking a proportionate approach.

We have always taken a proportionate approach to investigations. It is worth bearing in mind, however, that the highest levels of dissatisfaction with our service come from those members of the public where we have told them we cannot or will not investigate their concerns either for legal reasons or because it would not be proportionate. Traditionally, there has been wide-spread criticism of public service Ombudsman across the UK from Parliaments and others because they have investigated few cases. We took the lead in increasing the transparency and the accountability of our organisation by investigating more and putting information in the public domain. It is perhaps notable that all other Ombudsmen are now following that lead.

This does not mean we intend to use scarce resources in a way that is disproportionate but that we appreciate that our role is to investigate and make decisions in direct response to an individual complaint. This is why there is no “public benefit” test in our legislation although you will see that we do take into account the efficient use of public resources in our own guidance.

In deciding what cases to investigate, we assess against legal criteria but also against proportionality. Our guidance says that we will also test against: the efficient use of practical resources; whether there is a practical outcome we could achieve and significance. We have included a copy of our internal guidance for staff on proportionality at Annex B.

Specific reference to statutory notices were made and also to the four decisions that were chosen by the Committee to consider. We noted in the compendium referred to in your letter that we made a recommendation for a redress payment which, while modest in terms of amount is unusual for us and reflects real concerns we had about the management of this process. This demonstrates that even when we do not uphold the main topic of complaint there may still be issues that require to be addressed. As the Committee will be aware, there has been a significant public scandal around the Council’s management of this system and many of the individuals who come to us are not only concerned and worried about how they have been treated but have been in dispute with the Council for a number of years because of delays in the Council’s response to their complaints. In relation to the four cases that were considered by the Committee, these were of personal significance to the individuals and they came to us with concerns about how they were treated and decisions made about them that had real impact. For many of the people who bring us concerns, the main goal of coming to this office is recognition that a large, powerful organisation did not treat them well and they are seeking personal justice as well as hoping to ensure that this will not happen to others.

The Committee referred to the low number of cases which we change as a result of the review process and wanted to know how this related to other processes and whether it was duplication. The 10% figure cited refers to our own internal Quality Assurance process, which we see as integral to maintaining the quality of our work and something that we have discussed with the committee on a number of occasions. The assessment of the decision in terms of whether it is correct or not is only part of the quality we are considering. We look at communication, accessibility and other aspects of our service standards. We do make changes as a direct result of this QA process but are pleased that while this process allows us to improve the quality of the service aspects of our role, it also provides reassurance about the technical quality of our decision-making. We use the QA alongside learning we have gleaned from complaints people make about our service and direct feedback from our customer survey to get a full picture of our service and to help us make improvements. We do not consider that any of these duplicate each other and we would regard these as standard practice for most organisations providing a service. We do assess by the same standards and this allows us to make the maximum value and most efficient use of the resources used in this area.

We do also, in cases where a decision letter rather than a public report is issued, allow the public and organisations to ask us to review those decisions. This is a distinct process which only looks at the correctness of the decision on request. We need to ensure our process is fair and, while we would always want to do this, we have been advised we need this process legally to ensure we meet the standard of fair decision-making by allowing people to raise concerns about possible errors of fact. This process is only used by a small number of complainants and does not give us the same random cross-section of the QA process which we undertake to assess the quality of our service as a whole.

6. Reusing Complaints Standards resourcing

The Committee's letter highlighted the Complaints Standards resource and asked whether the success of their work meant there was the potential for this to be used to release resources to support the rest of the office. It may be helpful to explain that when the CSA was established, it was anticipated that there would be more work involved initially in setting up the new system and therefore resourcing would be reduced over time (from 3) to the steady state level of 1.5 FTE that we have in place at present. The unit has therefore already been reduced to the minimum level required to run an ongoing service.

5. Training materials.

The reasons we do not seek to make more income from this is linked to restrictions in our legislation which mean we can only retain any monies we make for the services that are charged for and limits us to, in effect, a cost-recovery basis. It also reflects that if we plan to make more income we actually put our core budget at risk. The SPCB takes any projected income from training into account when setting our budget. Any income we make over the projected amount is used by the SPCB to reduce the budget we will receive that year. We simply receive less money from them and this operates as a profit for the Parliament. If circumstances mean we fall below the income projected, any shortfall will not be made up by the Parliament. This means that the proportion of our budget that comes from training is the most risky part of our budget and there is no real benefit to us of seeking to increase this. At present we do charge for our direct delivery training and the conference that we held.

In terms of online e-learning, we have produced and rolled out a package of e-learning training focused on frontline and early resolution and investigation skills for most of the sectors under our remit. This is free to access for public sector staff on our website and was funded as part of the initial CSA funding. As outlined to the committee we have received requests from around the world to access this resource and have allowed people outside of Scotland to use this on request. This has included New Zealand, the Irish Ombudsman and the NHS in England who have asked to adopt and adapt this for their own jurisdictions or services. Ongoing costs are minimal, and we do not charge for licensing.

Given this demand, there is clearly scope to access income from this resource. We are keen to explore innovative ways in which we can use this to help support the wider work of the office.

Annex B

Extract from our internal casework guidance on Proportionality

This section sets out criteria which could be used to consider excluding a complaint. We are not required to exclude a complaint which meets these criteria and there may be reasons why, despite a case meeting one or more of the tests below, it should be investigated. If any significant reasons not included in the criteria are identified which suggest we should still investigate, this can still be done; for example, where there is added value for the complainant, for the organisation's learning and/or wider sectoral learning. An example of added value for the complainant might include where there has been a severe impact on the family, where there is strong evidence that they have not been able to have confidence in the responses provided to them by the BUJ and, therefore, where we assess that an independent investigation of the complaint(s) has the potential to help restore some confidence in the investigation of their complaints. In these circumstances, there should be a note on file of the reasons for the decision to continue.

While discretion is broad, we are still required to act in line with natural justice and to ensure that any decisions made would meet the standards of a judicial review challenge.

Step 5 of our ER complaints handling guidance is designed to establish when a complaint is 'fit for SPSO', by interrogating all the relevant jurisdictional considerations. The consideration of proportionality, in line with Section 2, will take place after fitness has been established but will have to be addressed before complaints are agreed and any investigative activity is undertaken.

Relevant tests/criteria

The criteria identified below set out the main issues which should be explored by a CR when assessing whether it is appropriate to exercise discretion not to investigate a complaint which otherwise is within our jurisdiction to investigate. As stated above, the criteria should not be viewed as exclusive and it is recognised that there is some overlap between the different tests.

The purpose is to guide the CR's thinking when deciding to close a complaint without investigation. There may also be other reasons as to why a particular case should not be investigated. If so, these reasons should be noted on the file and a managerial view sought and noted on the file before proceeding either to close the case or to investigate it. By definition, this information cannot be exhaustive nor can it legislate for every possible circumstance. However, it sets out some key principles which can be readily applied in most cases.

Efficient use of public resources test

This requires an assessment of the level and quality of the investigation undertaken by the organisation or by another public scrutiny body (for example, COPFS, the GMC). From our own assessment of the evidence, if it is clear there has been a thorough investigation by the BUJ (or by another scrutiny body) of the complaint raised, and any recommendations made to remedy the injustice have been implemented, then it would be reasonable to consider closing the complaint on the grounds that there would be no useful purpose served by the SPSO investigating. This would avoid duplication of effort and unnecessary use of public resources. However, before reaching this decision it is important to take into consideration the respective roles, responsibilities and powers of different inspection agencies and scrutiny bodies, including the extent to which the SPSO's own remit may or may not overlap. A CR should also assess whether there is any public interest in investigating: for example, if the case raises significant issues (whether significant fault or significant injustice) that would be in the public interest to investigate and the complaint should not be closed.

Practical outcome test

What outcome can be achieved for the complainant? If it is clear that action has already been taken by the organisation to resolve the matter or acknowledge fault, and/or the outcome being sought is unachievable or unreasonable in the circumstances, then the complaint can be closed without investigation, unless there is public interest in investigating; for example, potential learning for other BUJs.

Significance test

If pursuing the complaint would not achieve any benefit for the complainant, the BUJ, or the public generally because the alleged injustices are insignificant with little or no practical consequences for the individual, then consideration should be given to closing the case without investigation.

Examples of cases closed under this test include: incorrectly addressed or dated correspondence, where the correspondence has been received; a complaint about people parking where the complainant preferred to park in the street.

Internal approval

Generally, CRs are encouraged to issue decisions under this guidance themselves. However, manager approval should be sought and noted on the file when deciding to close a case without an investigation for any reason which is not included in the above tests.

If in doubt about any aspect of a case, advice must be sought from a line manager or the Director.

Communicating the decision

Under the terms of the Act, when reaching a decision not to investigate, we must issue a statement of reasons for the decision. This should provide an assurance of the reasons why we are satisfied that matters have already been considered thoroughly and why we consider that the actions taken have been proportionate and appropriate (rather than explaining that we can do nothing further). Draft decision letter templates for this are available on Workpro.