

PE1594/D

Petitioner Letter of 21 February 2016

Petition 1594: response of Dr. Richard Burton of Accountability Scotland to the statements by the Scottish Government and Mr. Jim Martin, the SPSO

Preamble

According to survey statistics produced by Craigforth Consultancy and Research in 2010, 40% of complainants responding to the survey were dissatisfied with their treatment by the Scottish Public Services Ombudsman. In contrast, the Gibraltar ombudsman achieves about 98% satisfaction, regardless of outcome. A more recent survey has shown that about a third of the SPSO staff are dissatisfied too. This petition is about one possible cause.

The Public Petitions Committee accepted our earlier petition (PE 1538) on transparency in SPSO investigations (25 November 2014) and went further in recommending investigation of the SPSO's performance. The Local Government and Regeneration Committee rejected those decisions on the grounds that the SPSO Act had only recently been reconsidered. – i.e. in 2009. The LGR Committee were unaware that what had been looked at then were only some irrelevant aspects of the Act that had been suggested for consideration by Professor Alice Brown. They are equally irrelevant to this PE1594.

Therefore that argument cannot be used against amendments in the present connection.

We obviously cannot give statistics on the extent to which dissatisfaction with the SPSO is due to their acceptance of lies and it would be inappropriate to identify particular complaints and complainants. Moreover, the cases could too easily and wrongly be dismissed as merely 'anecdotal'. However, statistics are unimportant in that every single case matters and that many cases have serious financial or psychological implications.

Here are just a few real examples of lies accepted by the present or previous SPSO:

Denial by a city council of the content of the minutes of one of their meetings.

False description of the location of a wall.

False description of the location of a tree (despite photographic evidence).

False record of daily checks in which the recorded days of the week did not match the calendar.

Contradiction of witnesses.

At present lying is not clearly maladministration and is therefore sometimes regarded as acceptable (or is at least tacitly accepted). A member of the public who has been lied to without other definable maladministration would have no grounds to complain to the SPSO.

The **Government statement** confirms our own understanding of the legal situation and its rationale makes good sense. Like the letter of 25/11/2015 to my MSP from Mr. Paul Wheelhouse, it does not discuss the realities of complaint handling and the other issues raised in the petition.

The statement of the SPSO (29/01/2016)

Paragraph 2 (“The petition asks...): We agree with that.

Paragraph 3: This is irrelevant. The petition text asks that the Crossman Catalogue be a source of examples, not that it be definitive. The SPSO already uses it. All that is required is for lying to be added to the list.

Paragraphs 4 and 5: The relevance of these is not made clear.

Paragraph 6: “Public Services Ombudsmen have” indeed “operated throughout the UK for over 40 years without” the definition. However, there has been much criticism of their operation.

The suggestion of a public consultation is worth noting; it goes beyond the present issue.

Paragraph 7: Mr. Martin wrote “We *think* it is already clear” that lying is “already included in the concept of maladministration”: The wording suggests that the SPSO is less than clear about this.

Who are “self evidently wrong”?

Having “concerns” is a bit weak. We have more than mere “concerns”, hence this petition.

The petition does not refer to “wilful maladministration”.

Paragraph 8: Intent can indeed be hard to prove, but sometimes it is obvious. Public bodies may continue lying even when contrary evidence has been brought to their attention. Faked evidence is not unknown. It is reassuring to know that the SPSO does not require proof of intent.

The main issue is not intent, as we see it, but rather the acceptance of falsehoods (deliberate or not) in the face of clear evidence.

Paragraph 9: This refers to the email from the SPSO to myself of 7/8/2015 (see the **Annex**). It states that “we *can and will* criticise organisations” and “we *could be* critical”. Note also that “we *are not prevented from and do* criticise organisations”. These all fall short of asserting that provable lying is always regarded as maladministration. Why?

Also in the **Annex** is the paragraph headed “From Oral evidence”. This simply provides one single example of the SPSO pursuing and exposing a lie. We do not suggest that the SPSO never does so. One swallow does not a summer make.

Regarding **Question 13**: The answer “Yes, *we would criticise* a body who provides inaccurate or misleading information” is a clearer statement, but it falls short of saying that all provable falsehoods are criticised.

Paragraph 11: Here again we have the seemingly evasive “we are *not prevented from and do* criticise organisations ---- who do not provide us with accurate information, whether deliberately or not”.

What is not commented on by Mr. Martin: Several points in the original petition submission are not commented on, for example the uncertainties within the SPSO office regarding policy, the unwillingness of SPSO staff to answer the stated hypothetical question, the fact that evidence for falsehood is known to be too often disregarded, the fact that if lying were defined as maladministration the SPSO would be more clearly empowered and required to investigate.

What else could be done?

If lawyers think that the Act cannot be amended to make the SPSO treat lying as maladministration, there are other ways of improving the situation.

1. SPSO investigators should be appropriately trained.
2. The Crossman list, when quoted in government documents, could be accompanied by a comment that lying by public bodies is also an example of maladministration.
3. Dissatisfied complainants should have more powers to have their cases reviewed and objections answered by the SPSO without being branded querulous and denied further communication.
5. A no-blame culture in which the emphasis is on learning from mistakes (e.g. in the NHS as in the airline industry) would reduce ‘cover up’ lying.
6. The ‘Presumption of honesty rule’ should be adopted as in the Netherlands. According to this the ombudsman starts investigations presuming that complainants are likely to be telling the truth (because few complaints are invented). In many cases this gets over the problem of complainants trying to prove negatives and puts the onus on bodies under SPSO jurisdiction to prove that they acted properly. (Consider for example, a case against the NHS that hinges on the result of a blood test, the report of which has gone missing: the Netherlands ombudsman might be expected to rule in favour of the complainant; a Scottish ombudsman would not.)

The ‘Presumption of honesty rule’ implies another presumption—the other side of the coin—that people often lie in self defence. If such denial is taken too much for granted, there is a danger that defensive lying fails to elicit censure or even adequate concern. It would be interesting to know whether SPSO reports ever treat lying or false denial as maladministration.