



## Scottish Government consultation on the Public Services Reform (the Scottish Public Services Ombudsman) (Healthcare Whistleblowing) Order 2019

1. This consultation seeks your views on the draft order to amend the Scottish Public Services Ombudsman Act 2002 ('the 2002 Act'), to allow the Scottish Public Services Ombudsman (the SPSO) to investigate complaints in relation to the handling of whistleblowing cases in NHS settings in Scotland.
2. This consultation will run until 28 June 2019 and is part of the parliamentary process for the draft Public Services Reform Order (the draft order) that is proposed to establish the role and functions of the Independent National Whistleblowing Officer for NHSScotland (INWO). The consultation questions are attached at **the Annex** to this document.
3. This consultation should be read alongside the draft explanatory document and the draft order.
4. Following consultation and any amendments to the draft order and the explanatory document, the draft order will then be laid before Parliament for scrutiny by the relevant Parliamentary Committees, for a further 54 days.
5. The SPSO is also consulting on the Whistleblowing Standards (the Standards) the SPSO is intending to introduce to support the INWO role. The Standards consist of a set of Principles, which would apply to all the relevant bodies within the scope of this draft order and a model Whistleblowing Procedure tailored to meet the needs of the relevant NHS bodies within the scope of this legislation.
6. The SPSO, in her role as INWO would review the internal handling of a whistleblowing case against these Whistleblowing Standards.
7. The draft order, if approved, is expected to complete its parliamentary passage by early 2020 and come into force in summer 2020. This allows time for the relevant organisations, within the scope of the legislation, to prepare for adopting the new Whistleblowing Standards.

### Previous consultation and engagement

8. The role and remit for the INWO were the subject of a full public Scottish Government consultation that took place between November 2015 and February 2016. 58 responses were received – the majority of which were from health-related organisations and individuals. Responses showed strong support for the introduction of an INWO type role. Most respondents expressed a clear preference that the role be hosted with the SPSO.

9. The Scottish Ministers recognised the appetite for the role of the INWO to extend to individuals providing registered adult social care services. We have since established that the Care Inspectorate undertake a similar role to the INWO for those in this sector. The Scottish Ministers took the view that we did not need to consider including registered social care services within the scope of the INWO role at this stage.

10. Four INWO engagement workshops were held in January and February 2018. These events showed consensus that individuals working or volunteering for primary care and independent provider employers delivering services for the NHS should also be given access to the INWO, to ensure they are treated equally to whistleblowers in Health Board settings. This is particularly important in certain, primary care settings, where under new contractual arrangements, staff in GP practices are increasingly working alongside staff directly employed by Health Boards. Following further engagement with key stakeholders in the primary care sector, the scope of the INWO role was broadened to include primary care and independent providers.

### **Policy intention**

11. The policy objective for the introduction of this draft order is to meet some of the recommendations and emerging themes highlighted in the Freedom to Speak Up Review, including the need for:

- culture change;
- improved handling of cases;
- measures to support good practice; and
- Strengthening current assurance arrangements.

12. It is our intention for the INWO role to provide:

- an impartial, independent review of the internal handling of whistleblowing cases where there has been a complaint by the individual concerned (or where the health board or provider has asked for the case to be reviewed);
- a review that will consider the procedure followed, the decision making and the outcome, how the individual has been treated as a result of raising a whistleblowing concern, and the culture of the organisation in relation to whistleblowing; and
- a national leadership role providing support and guidance to Health Boards, primary care and independent providers under arrangements with NHSScotland.

13. The intention is to provide more reassurance and closure than under the current arrangements. The overarching policy intention is to bring whistleblowing cases to a clear, fair and final conclusion in a reasonable timeframe, so that potentially vulnerable staff and patients are protected.

14. The INWO role would also support and improve the response of health boards and the relevant providers when handling concerns by providing a benchmark, through new Whistleblowing Standards the SPSO intends to set for this new function through a model complaints handling procedure for whistleblowing complaints to be published under section 16B of the 2002 Act.

15. We propose that the INWO would have control over its own affairs with a broadly similar focus and identity to the role the SPSO has, as the final stage for complaints made about public authorities in Scotland. As such, new functions for the Ombudsman have been developed rather than creating a new office of the INWO.

16. Conferring the role and functions of the INWO upon the SPSO would provide a review function which is impartial and independent from the Scottish Government and the relevant bodies within the INWO's jurisdiction, with clear lines of reporting to Parliament.

### **Effect of the draft order**

17. The draft order creates a new route for whistleblowers in NHS settings to bring complaints about the internal handling of their whistleblowing case to the SPSO.

18. The role of the SPSO, as INWO would be to review and consider how the health board, family health service or independent provider handled the whistleblowing concern, and if it acted reasonably in making its decision. The SPSO would also consider whether the outcome reached by the relevant body is one that a body, acting reasonably, could have reached.

19. The draft order contains provisions to:

- allow the SPSO to investigate complaints by whistleblowers in NHS settings on the handling of their whistleblowing complaint;
- enable the SPSO to question the merits of internal decisions made on whistleblowing cases in NHS settings;
- clarify that the SPSO can comment upon the culture of the relevant body in relation to whistleblowing;
- clarify that the SPSO can investigate and comment upon the treatment of any individual as a result of the person aggrieved raising a whistleblowing concern; and

- allow the sharing of information between the SPSO and the relevant bodies (where relevant to their scrutiny or investigatory functions).

20. Article 3(2) of the draft order adds new sections 6A and 6B to the 2002 Act. Section 6A allows the SPSO to investigate whether a health service body (other than the Scottish Dental Practice Board), family health service or independent provider has handled a whistleblowing complaint in accordance with the model Whistleblowing Procedure. The SPSO's investigation could also include investigating any action taken by or on behalf of the relevant body in respect of the whistleblowing concern.

21. Existing powers in the 2002 Act will continue to apply, except where they have been modified by the draft order. The SPSO currently has powers to:

- investigate (in private);
- take evidence under oath;
- compel the provision of evidence/production of documents;
- report privately and publicly on its findings (with discretion to report in a way that would not be likely to identify any person involved in the investigation);
- make recommendations to the relevant body to address failings identified in the INWO investigation; and
- report to Parliament and lay special reports in cases of injustice or hardship.

22. The SPSO has the ability to recommend that decisions on matters within its jurisdiction should be reconsidered.

23. The SPSO may initiate an investigation following a complaint from an individual, or at the request of the relevant body.

24. New Section 6A(4) in the draft order makes it clear, that it will be for the SPSO to define through the model Whistleblowing Procedure who is defined as a whistleblower for the purposes of the INWO investigation and can therefore make a complaint to the INWO.

25. The model Whistleblowing Procedures will also define what would be considered as a whistleblowing matter for the purposes of the INWO investigation. This approach allows such definitions to evolve over time in line with any amendments to the Public Interest Disclosure Act 1998 and/or that are considered necessary in the model Whistleblowing Procedures.

26. Section 6A(8) in the draft order clarifies that any action taken by the relevant organisation in respect of the whistleblowing investigation, expressly includes the

treatment of any person (including the whistleblower), and as such, this can be considered as part of the INWO investigation.

27. This means that the SPSO would have discretionary powers to examine and come to a view on the treatment of the individual, particularly in relation to any detriment they may have suffered as a result of raising the whistleblowing concern.

28. Consideration of the treatment of the individual could include examining whether the whistleblower has been victimised as a result of raising a concern, including by bullying and harassment or inappropriate application of policies.

29. The INWO investigation may involve examination of any related HR processes that had been applied since the whistleblowing concern was raised. Existing powers under section 13 of the 2002 Act would be used to allow the SPSO to require the relevant body to supply information or produce documents relevant to the investigation. These may include files on any other HR investigations initiated following the whistleblowing investigation.

30. Article 3(3) of the Order amends section 7 of the 2002 Act to allow the SPSO, to question the merits of any decision taken by a healthcare body in relation to a whistleblowing matter that is defined in the model Whistleblowing Procedure. This could include a decision taken without evidence of maladministration in the process and a decision not connected to an exercise of clinical judgement.

31. Subsections (9) and (10) of section 7 of the 2002 Act ensures that, so far as reasonable, complaints are addressed locally before being considered by the Ombudsman.

32. Under section 7(10) of the 2002 Act the Ombudsman also has a discretionary authority to intervene where in the absence of the exhaustion of any internal process, the Ombudsman then concludes that invoking or completing the internal process would not be reasonable. This means that an INWO investigation could be initiated where a whistleblowing complaint has been investigated incorrectly through another process or where the whistleblowing investigation has not yet concluded.

33. Section 10 of the 2002 Act provides time limits for making complaints to the Ombudsman, and the required format for making complaints.

34. Generally, complaints must be made within 12 months of the day on which the person aggrieved first had notice of the matter to which the complaint relates. However, the Ombudsman has discretion to accept late complaints if they consider there are special circumstances that make it appropriate to do so.

35. New section 6B(4) of the draft order inserts new subsection (10) into section 15 of the 2002 Act to clarify that there is no restriction on the SPSO's discretion about what to mention in an investigation report. This enables the SPSO to include in her report any observations she wishes to make about the treatment of the whistleblower and the general culture of the body or provider to whistleblowing complaints and the treatment of the whistleblower by any of those parties. This may include

observations on whether the relevant listed authorities are discouraging whistleblowing, dealing with internal investigations ineffectively or incorrectly and/or are subjecting whistleblowers to detriment as a result of whistleblowing.

36. Section 15 of the 2002 Act sets out how the Ombudsman must report on investigations. In particular, it specifies who should receive copies of an investigation report, requires a copy to be laid before the Parliament, provides that a report must not normally identify any person (other than the listed authority), and sets out requirements for publicising an investigation report.

37. Section 16 of the 2002 Act makes provision for a special report where the Ombudsman considers that injustice or hardship has been sustained by an individual and that the injustice or hardship has not been, or will not be, remedied. In particular, it specifies who should receive copies of a special report, requires a copy to be laid before the Parliament, provides that a report must not identify any person (other than the listed authority) and sets out requirements for publicising a special report.

38. The SPSO's INWO role is not intended to replicate the functions of other organisations such as Healthcare Improvement Scotland. Instead, article 3(6) of the draft order amends schedule 5 of the 2002 Act to extend the SPSO's powers to disclose information enabling the SPSO to share information with the Healthcare Improvement Scotland, National Education Services, the Mental Welfare Commission, and National Services Scotland for the purposes specified in the Order relevant to the body in question. This will ensure that the Ombudsman can share proportionate information on practice issues:

39. The information sharing with National Services Scotland is only required for Counter Fraud Services and Information Services Division.

This change in legislation will:

- support the Ombudsman to more effectively help organisations fulfil their statutory functions, building in best practice and greater efficiency at the point of delivery;
- reduce the likelihood of multiple, overlapping complaints by being able to share information about the Ombudsman's findings at any stage, not just the outcome; and
- support more efficient inspections by ensuring they are targeted and that organisations have access to all relevant information.

The Ombudsman and the bodies listed above remain, subject to data protection legislation.

40. For further information about this consultation, please contact Alison Carmichael: E-mail: [alison.carmichael@gov.scot](mailto:alison.carmichael@gov.scot) Tel: 0131 244 1819. Please return the completed questionnaire to [john.malone@gov.scot](mailto:john.malone@gov.scot)

## Consultation questions

1. Do you agree that the following individuals should be given access to an investigation by the SPSO in her role as INWO?

individuals in the primary care sector	Yes/No
individuals delivering services for independent providers, under contractual arrangements with NHSScotland	Yes/No

Do you have any comments on this proposal?

The GPhC welcomes the introduction of a new Independent National Whistleblowing Officer (INWO) for NHS Scotland role and supports the proposals that the Scottish Public Services Ombudsman (SPSO) should fulfil this role.

We understand that your consultation and engagement with relevant stakeholders to date has revealed a preference for individuals working or volunteering in primary care settings and with independent providers (providing services under contractual arrangements with the NHS) to also be given access to an investigation by the INWO, thus ensuring equal treatment to whistleblowers in health board settings.

We strongly support this proposed change in the scope of INWO investigations. It promotes fairness, ease of access and equal opportunity for all health professionals providing NHS services in Scotland, independent of the setting or sector they work in.

It also contributes to the creation of a much-needed culture of openness in the NHS, and across healthcare in general. This culture change is critical to improving patient safety and to moving the focus away from blame and towards increased transparency, speaking up and learning from mistakes when things go wrong.

Extending the scope of INWO investigations is also reflective of changes in healthcare and society more widely, whereby people requiring health advice or services are encouraged to use primary care services, and especially pharmacy, as a first port of call.

As the regulator for pharmacy professionals and registered pharmacies in Scotland, England and Wales, we are strongly supportive of this proposal. We welcome the suggestions for a process which would provide an impartial and independent review function, greater reassurance, and fair, consistent and timely conclusion of whistleblowing cases.

**2. Do you agree that the SPSO may specify in the model Whistleblowing Procedure which individuals may qualify as whistleblowers and which types of concerns may qualify as whistleblowing matters for the purposes of the INWO investigation?**

Yes

No

Do you have any comments on this proposal?

We strongly believe in the importance of effective communication of the purpose and scope of whistleblowing investigations.

This would make sure that the INWO role is widely understood and as simple and accessible as possible. It would also add to the credibility of the new function and its potential to embed the culture of openness and make it the everyday norm.

Given SPSO's impartiality and independence from the Scottish Government, it provides a further level of reassurance that she would be responsible for setting the model Whistleblowing Procedure, defining the parameters, responsibilities and the scope for the INWO role.

**3. Do you agree that the SPSO in her role as INWO should be able to investigate and comment upon the treatment of the individual as outlined in the consultation?**

Yes

No

Do you have any comments on this proposal?

We agree that the SPSO, in her role as INWO, should be able to investigate and comment upon the treatment of any individual as a result of their whistleblowing concern.

This is the right thing to do and goes a step further towards changing the culture of specific organisations, but also the culture across the NHS more widely.

**4. We propose that the SPSO in her role as INWO should be given powers to share proportionate information on practice issues with the following bodies (where it is directly linked to their role):**

- Healthcare Improvement Scotland
- National Education Services
- Mental Welfare Commission

- National Services Scotland (namely Counter Fraud Services and Information Services Division)

Are there any other bodies that you think the INWO should be able to share this type of information with?

Yes

No

If yes, which other bodies do you think the SPSO, in her role as INWO should be able to share this type of information with?

It is our view that, in addition to the bodies already listed in the draft Order, the INWO should have the power to share proportionate information with health professional regulators. The relationship between the INWO and health professional regulators should complement and support the strong focus on openness, honesty and candour in our current work.

This applies to the GPhC in our role as the regulator for pharmacy professionals, but is also relevant to our responsibilities as the regulator and main inspectorate for registered pharmacies in Scotland and the rest of Great Britain. There is a real scope for overlap between INWO investigations and our own investigations.

## 5. Do you have any other comments on our proposals for establishing the INWO?

We would be keen to discuss any of the points raised in this response, as well as to further explore our relationship with the INWO, in terms of both our systems and professional regulation.

## Questions about you or your organisation

### 6. Are you responding on behalf of an organisation or as an individual?

Organisation

Individual

If you are responding for an organisation:

What is the name of the organisation?

The General Pharmaceutical Council (GPhC)

What is your role?

The General Pharmaceutical Council (GPhC) is the regulator for pharmacists, pharmacy technicians and registered pharmacy premises in Great Britain.

Our role is to protect, promote and maintain the health, safety and wellbeing of patients and the public who use pharmaceutical services in England, Scotland and Wales.

We have a statutory role in relation to 'system' regulation (as we regulate registered pharmacies) as well as 'professional' regulation of individual pharmacists and pharmacy technicians. Our main work includes:

- setting standards for the education and training of pharmacists, pharmacy technicians and pharmacy support staff, and approving and accrediting their qualifications and training
- maintaining a register of pharmacists, pharmacy technicians and pharmacies
- setting the standards that pharmacy professionals have to meet throughout their careers
- investigating concerns that pharmacy professionals are not meeting our standards, and taking action to restrict their ability to practise when this is necessary to protect patients and the public or to uphold public confidence in pharmacy
- setting standards for registered pharmacies which require them to provide a safe and effective service to patients
- inspecting registered pharmacies to check if they are meeting our standards

**7.** If you are responding as an individual:

Do you work / have you recently worked in the NHS?

Yes

No

If yes, what is/ was your role in the NHS?

If not, what is your experience in relation to the health service?

**8.** We may wish to publish your consultation responses in full or in part. The Scottish Government would like your permission to do so. Please indicate your publishing preference.

- Publish response with name
- Publish response without your name – for individuals only
- Do not publish response

Please provide your name:

General Pharmaceutical Council (GPhC)

Please provide your email address:

#### **Information for individuals**

If you choose the option 'Do not publish response' we will still reflect your comments in our analysis but will not include any of the free text comments in any report of the consultation.

#### **Information for organisations**

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

**9.** We will analyse all responses and may publish a report. We may wish to contact you for further information. Are you content for the Scottish Government to contact you again in relation to this consultation exercise?

- No
- Yes

If yes, please provide your name and email address

#### **Thank you**

We welcome all comments and contributions, and will use this feedback to inform any amendments to the draft order.