

# SPSO comments on the complaints provisions in the National Care Service (Scotland) Bill

## About the SPSO

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1. The Scottish Public Services Ombudsman has a number of different functions under the Scottish Public Services Ombudsman Act 2002:
  - 1.1. the final stage for complaints about most devolved public services in Scotland including councils, the health service, prisons, water and sewerage providers, Scottish Government, universities and colleges (public service complaints). This includes being able to make decisions about professional practice in relation to health and social work.
  - 1.2. specific powers and responsibilities to set complaints handling standards, publish complaints handling procedures, and monitor and support best practice in complaints handling.
  - 1.3. independent review service for the Scottish Welfare Fund with the power to overturn and substitute decisions made by councils on Community Care and Crisis Grant applications.
  - 1.4. the role of the Independent National Whistleblowing Officer (INWO) for the NHS in Scotland.
2. The SPSO adds value to Scottish public services in many ways, such as helping people, particularly the vulnerable, in crisis or need, promoting local resolution, improving consistency of decision-making and promoting the value of good complaint handling. In particular, we encourage learning for improvement, to enable more effective delivery of Scottish public services.

## Summary of key points

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3. In summary, as drafted, the complaints handling provisions in the National Care Service (Scotland) Bill (the Bill) risk
  - 3.1. further complicating an already complex complaints handling landscape by creating an additional overlapping process with no reference or understanding of existing provisions
  - 3.2. preventing and frustrating developments to simplify and improve the complaints experience for users, and
  - 3.3. undermining the ability of the SPSO to meet key international standards.
4. SPSO supports the underlying goal of the provisions to reform the existing process and ensure that co-design and a rights-based approach are at the heart of complaints handling. The provisions, unintentionally, make that harder and there is a simpler, alternative approach
  - 4.1. support SPSO to co-design a complaints process for the NCS using their existing power, and
  - 4.2. support reform of the SPSO to ensure that complaint handling improvements occur across the public sector.



## **Complaints Provisions in the National Care Service (Scotland) Bill**

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5. Since the publication of the Bill, SPSO have had positive and encouraging discussions with Scottish Government officials and there is considerable agreement on changes that are needed to existing processes and that the best way to get there is to pursue a co-design approach.
6. As drafted, SPSO's view is the complaints provisions in the Bill run the risk of
  - 6.1. perpetuating issues that, collectively, there have been significant attempts to resolve (such as complexity and overlap), and
  - 6.2. potentially, makes the reform we consider necessary to achieve the aims of the Bill more difficult.
7. This is unfortunate as it would undermine the progress so far.

### **Barriers to improvements to accessibility and person-centred complaints**

8. The Bill places National Care Boards directly under SPSO's jurisdiction. The NCS, as a function of Government will automatically come within our jurisdiction.
9. This means NCS and Care Boards will, on their creation, be subject to the legislation in the SPSO Act 2002 (s16A) requiring them to have a complaints process that aligns with complaint handling principles laid before and approved by Parliament, and SPSO will have the power to issue a model complaints handling procedure (MCHP) for both Care Boards (including the services they provide) and the NCS.
10. However, despite this, the NCS Bill (additionally) requires the Government to put in place a complaints process for the NCS and services provided by them.
11. Alongside the requirement to issue a complaints process, the Bill provides the Government with broad powers to issue regulations over a broad area including social work and social care. Social work complaints procedures were subject of a Public Services Reform Order in 2017 and complaints about social care are already subject to a complaints provision set out in the Public Service Reform (Scotland) Act 2010.
12. These changes are not only unnecessary given existing statutory provision but follow the NHS Model which has already proven challenging to implement. Like the proposals in the Bill, the NHS is both under SPSO's jurisdiction and subject to regulations.
13. SPSO thought it would be helpful to set out briefly the NHS position as a way of illustrating the current Bill's impact.
  - 13.1. When it was introduced in 2017, the current NHS MCHP required there to be simultaneous changes to statutory regulations because of similar legislative structures to those proposed here. The Government worked with us to ensure this happened.
  - 13.2. However, when SPSO wanted to update and strengthen MCHPs to emphasise the importance of resolution and the need to support vulnerable people, the Government did not have capacity to change the regulations and has not been able to tell us when



they will be able to do so. This means that the NHS MCHP is now some years behind developments in other areas, and out of step with good complaint handling principles.

- 13.3. SPSO is currently working on changes to the MCHP, at the request of the Scottish Government, to update them to include Child-Friendly Complaints (CFC) procedures in anticipation of the incorporation of the UNCRC. The need to change the NHS regulations may make it difficult for SPSO to require the NHS to follow the proposed child-friendly additions to the MCHP.
14. It is also unclear to what extent the Bill risks unintentionally ending or curtailing SPSO's current powers (given by Parliament) to consider the merits of professional social work decisions. Reforms to the social work complaints process in 2017 gave us this power and, over time that has significantly increased both the volume of social work complaints we receive *and* strengthened and improved the outcomes we have been able to achieve. For example, we have managed to support kinship carers with significant back payments and had assessments changed when the local authority concerned did not evidence a rights-based approach. As currently worded, our power is linked to social work functions delivered by local authorities. We have asked the Government to confirm what the impact of the Bill could have on that power.
15. Finally, there is no clarity in the Bill about what happens if the existing NHS regulations also apply to services transferred to, provided by or integrated with those provided by the NCS; or that reflect the already overlapping jurisdiction with the Care Inspectorate (currently, when the delivery of care is directly provided by or on behalf of local authorities, it falls within our jurisdiction and the statutory complaints functions of the Care Inspectorate).
16. In summary, the Bill, therefore, both places the new services under SPSO's complaints jurisdiction while also displacing those powers, limiting our ability to reform, monitor and support best practice; and, potentially, requiring organisations jointly delivering services to ensure compliance with conflicting procedures, making them accountable to different systems.
17. It makes future improvements to the complaints systems more complex as they will require changes to complaints processes issued under different legislation and regulations.
18. **Key point: the proposed changes make reform more difficult, links complaints to the service rather than the person, removes existing complaints powers and there is a fundamental lack of clarity about the relationship between the new and existing systems in the Bill or the policy document suggesting that this has not been thought through.**

## **An alternative approach**

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### **Ensuring consistency and a holistic approach by using existing legislative powers**

19. SPSO are aware the Government has already started a co-design process and we would be happy to work with them, and to issue a model procedure that reflects that work.



20. Alongside this SPSO would like to see moves to wider, holistic reform of the complaints procedure. While this may take some time, the benefits of having done this in 2012 are evident. The risks from seeking to improve complaints systems one service at a time are that this approach perpetuates and embeds existing issues, reduces the ability to integrate complaints processes (particularly as services integrate) and makes future reform more difficult. It also adds complexity for service users by undermining consistency and increasing complexity.
21. **Key point: currently, there are sufficient legal powers for us to create a model process and to provide support for that. SPSO would actively engage, create and support through existing networks and relationships to ensure improvements in service delivery.**
22. **Key point; if the co-design process highlights the need for further reform, that is likely to extend beyond the NCS in order to be effective, the Government taking regulatory powers in this Bill will be unlikely to fully resolve that issue and instead lead to further confusion.**

#### **Supporting a review of SPSO to ensure wider reform of the complaints system.**

23. SPSO appreciates that it may be unusual for organisations themselves to ask for a review but for the reasons above and set out in more detail in the appendix, we consider that it is now time to consider whether SPSO, and the structure for complaints remains fit-for-purpose. Review would also enable complaints systems to reflect the way service delivery is evolving to be more person-centred and allow us to better reflect a rights-based approach. An approach that we know from our early work around child-friendly complaints has broad support. At the same time, this would allow us to better meet international standards.
24. The Committee may be aware SPSO intend to initiate this ourselves by issuing a report, but the impact of Covid-19 means we have had difficulty resourcing this. We would welcome the opportunity to work with the Scottish Parliament and the Government to explore how we can most effectively initiate this process at a time of limited resources. In an appendix to this submission we set out in more detail, the existing complaints handling landscape, the need for reform and steps that could be taken to achieve this.
25. Because of SPSO's role as both complaints adjudicator and standards setter, reform of our office has the potential to achieve significant broad impact and holistic reform of the complaints system but reform of complaints relating to individual services will likely make that more difficult. This means, while it may take some time and resource, reform of SPSO is, in the medium and longer term, a more efficient and effective lever for broader change when compared to changing complaints on a service by service basis.
26. **Key point: A simpler and more effective alternative route is possible:**
- 26.1. SPSO use their existing powers to work with the Government to co-design a complaints process for the National Care Service.**



**SPSO legislation is reformed to ensure that it remains fit for purpose and person-centred and rights-based. This would ensure reform is holistic and cross-sector.**

## **The status of the Scottish Public Services Ombudsman and international standards**

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27. On 15 March 2019, the “Principles on the Protection and Promotion of the Ombudsman Institution”, (“The Venice Principles”) were adopted by the Venice Commission. The Venice Commission is the Council of Europe’s Commission for Democracy through Law providing legal advice to its Member States.
28. On 16 December 2020 United Nations General Assembly adopted the Resolution A/RES/75/186 on “The role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law”. The resolution provided strong endorsement of the Venice Principles, establishing them as the new global standard for ombudsmen institutions.
29. The 25 Venice Principles represent the first, independent, international set of standards for the Ombudsman institution. They are the equivalent of the Paris Principles which set out the standards against which national human rights institutions are judged. They play a key role in protecting existing Ombudsman offices who are facing threats, provide guidelines for the improvement of current Ombudsman offices and set a template for new offices where none are present.
30. The first principle supports the need to ensure the independence of the Ombudsman institution from Government and the second suggests, where possible, that it be given constitutional status.
31. When the Public Services (Reform) Scotland Act 2010 gave Government the power to issue regulations relating to this office and other Scottish Parliamentary supported office-holders, there was considerable disquiet and concern about the impact of that on the ability of those office-holders to retain independence (actual and perceived). In order to allay those concerns that Act ensured that a super-affirmative procedure is needed to ensure change by regulation to an independent office-holder can only be undertaken in specific circumstances and protections are in place to ensure consultation and the active involvement of the Scottish Parliamentary Corporate Body.
32. As drafted, the Bill takes regulatory powers over all Parliamentary office-holders while reducing and undermining those protections. This not only runs contrary to decisions Parliament made the last time regulatory powers and Scottish Parliamentary Supported Office-holders were considered, but is now out of step with the international statements supporting Ombudsman independence.
33. Should that independence be considered compromised by the international community, when considered against the Venice Principles, this could have the unintended effect of making the SPSO ineligible to be formal members of that community.



34. The Government has told us that the reason for this is in case it becomes clear that changes are needed to SPSO as they go through the co-design process for their complaints process. They have also suggested that the power, as it relates to the NCS and complaints alone is narrow and that they would work with SPSO around these. Even if this were truly a narrow power, it would still potentially undermine the independence Parliament has put in place for a number of public organisations. However, it cannot be ignored that it is intended the NCS have broad powers across a significant area of public service.
35. For SPSO, complaints are not a narrow function but the *raison d'être* for the Parliamentary creation of our office. While our discussions with Government officials to date have been positive, the legislation will endure and it is not certain that the goodwill and co-operation as currently experienced will always be the case. This is not in the public interest.
36. **Key point: SPSO strongly argue that:**
- 36.1. **provisions giving powers over office-holders are excluded from the Bill.**
  - 36.2. **if it is felt that the reforms needed require legislation these should be introduced properly to ensure that reform both respects the (statutory) independence of the SPSO and the need to prevent complaints reform being siloed by service rather than implemented across the public service consistently.**

## Financial memorandum

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37. SPSO note that there is no mention of the potential financial impact on SPSO (or complaints handling wider) within the financial memorandum. There is reference to the possibility of increased complaints to the Care Inspectorate but no recognition that it may also be the case for SPSO who currently handle social work complaints and some social care issues; and that SPSO will, additionally, have the NCS and Care Boards within our jurisdiction.
38. Given there is little information about what may come out of the regulations it is difficult to anticipate what the impact would be from them.
39. It should also be noted that complaints handling, investigation, support and training, require resource and, while the financial memorandum notes that there will be a need to resource this within the budget for the NCS, there is not a detailed budget for this and it is not clear, therefore, whether there is sufficient budget to ensure that there is appropriate resourcing to undertake that role in full.
40. **Key point: the budgetary position and affordability of the current provisions are unclear and we welcome further consideration and discussion of the financial implications of any proposed changes on the SPSO.**



## Appendix: The current approach and the need for holistic reform

### The current approach to complaints handling

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#### Simplifying structures to improve accessibility

41. Two independent reviews, the Sinclair and Crerar reports highlighted problems as early as 2008 with existing public service complaints processes including complexity and confusion. This resulted in the processes over time becoming less accessible.
42. As a direct result, and in line with our legal duties, since 2010 SPSO has taken the lead as the Complaints Standards Authority (CSA) to reform complaints handling in areas under our jurisdiction by standardising and streamlining the landscape of complaints handling bodies in Scotland. In addition, action has been taken by Government and Parliament to reduce the number of conflicting complaints processes and, together, significant improvements have been made, resulting in simpler, more transparent processes.
43. One of the areas where existing provisions have been simplified is social work (recognising that there are still improvements to be made). An existing statutory process for social work was abolished in 2017 and the process is now part of the standard local authority process, which is compliant with the SPSO's model complaints handling procedures (MCHPs).
44. These procedures were drafted to enable them to work in conjunction with the NHS process where health and care services are integrated. That reform also gave the SPSO strengthened statutory powers: to consider and make decisions about the merits of professional social work decisions, and the ability to share information with named scrutiny and regulatory organisations. These changes ensured better outcomes for complainers, greater independent oversight and improved the collective ability to learn jointly from complaints.
45. **Key point: Any changes to the complaints landscape that re-introduces additional complaints routes would, in the SPSO's view, be a retrograde step in the ongoing work to simplify the complaints landscape.**

#### Improving accountability and focusing on learning and improvement

46. As the statutory complaints handling body for the majority of public services in Scotland, it is essential that the SPSO has the legislative power to enforce a Parliamentary-approved set of principles which, in summary say that complaint processes should be:
  - **User-focused**
  - **Accessible**
  - **Simple and timely**
  - **Thorough, proportionate and consistent**
  - **Objective, impartial and fair ...and should:**





- **Seek early resolution** and
- **Deliver improvement**

47. Sitting below those are model complaint handling procedures (MCHPs) with which organisations under the SPSO's jurisdiction must comply. SPSO has a statutory duty to monitor compliance with MCHPs and share best practice. Independently to our powers to decide complaints and make recommendations, we have enforcement powers in relation to complaint handling built into our legislation.
48. The existing suite of MCHPs have been designed to be simple, accessible and, importantly, similar enough to allow for public bodies who are jointly delivering services to have a single process.
49. Scotland led the way in this approach and much of the legislation in the SPSO Act that makes this possible has been adopted in both Wales and Northern Ireland as a model of good practice.
50. SPSO also has the power to share information about complaints with named regulators and scrutiny organisations, ensuring learning (in relation to good and poor practice) is shared widely and improvements can be made quickly.

## **The need for further reform**

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51. The focus to date has been on embedding consistent complaint handling structures and procedures across Scottish public services because that is where the most urgent action was required. However, reform is still needed.

### **Remaining significant structural barriers to complaining**

52. Legislation about complaints procedures remain focused on the structure of public services rather than on the person receiving them, and their life journey. This can create complexity when services are delivered jointly or in sequence with the complaints procedures struggling to consider the holistic experience of an individual (or groups of individuals).
53. While SPSO have powers to implement, monitor and enforce MCHPs, it is more difficult to apply these powers where there are conflicting legislative provisions. This means that
- 53.1. when SPSO revised MCHPs recently to focus on resolution and vulnerable complaints we were unable to make those necessary changes to the NHS complaints process. This is because statutory provision requires the Government to issue regulations for the NHS complaints procedures. Government did not have and cannot confirm when they will have capacity to allow us to work with them to make changes to the NHS complaints procedures.
- 53.2. SPSO's role in complaints handling already overlaps with that of the Care Inspectorate as SPSO can take complaints about social care when it is delivered by, or on behalf of a local authority. This means that service users are not always sure who to complain to and sometimes complain to both organisations. SPSO and the Care Inspectorate have





a data sharing agreement and, as far as possible, we work with them to clarify situations. This falls far short of the flexibility that they have in England and Wales where the two relevant organisations can jointly investigate and actively become involved in each other's work.

### **The need for cultural change and a shift to a rights-based approach**

54. Despite, the work to date on structure and procedure, we still hear that organisations can be defensive and that people remain uncertain about how to complain, and are actively afraid of complaining because of the impact it might have on ongoing services and relationships.
55. SPSO strongly support a culture shift to rights-based and enabling complaints procedures.
56. **Key point: SPSO supports the need for complaints handling reform across the public sector and a culture shift to a more person-centred rights-based approach but the legislative approach proposed risks making that more difficult and refocusing on process rather than person.**

### **Reforming complaints procedures and the experience of complaining**

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57. In order to support the changes needed, SPSO are changing how we work. SPSO are also seeking reform of the system as a whole.

#### **Using existing powers to make real improvements from consultation to co-design**

58. Since model complaints handling procedures were first introduced, SPSO has moved to a process of co-design for the development of subsequent MCHPs.
- 58.1. In 2021, SPSO issued the first set of whistleblowing standards for the NHS. The creation of those standards involved whistleblowers directly and was created through co-production and consultation with a wide range of stakeholders. As a direct result of that approach the standards include additional protection for those who are complaining and those who are complained about, and a (safe) confidential contact for those who wish to remain anonymous is built into the process.
- 58.2. We are currently embarking on an ambitious co-design project, funded by Government, to develop child-friendly complaints procedures. These will have a rights-based focus to align with the plans to implement the UNCRC. Because we already have complaints standards powers and duties, SPSO do not need additional legislation to introduce these improvements. Once developed, we will be able to roll those out to most organisations under our jurisdiction, ensuring consistency of approach. This will be supported by training and information resources, and monitoring going forward. As this is part of MCHP, we will also be able to make changes in the future quickly if, in practice, it is not meeting its goals.
59. **Key point: New and revised complaints procedures should take, as a core principle, co-design. SPSO already has the power to create and review complaints procedures using co-design and would be prepared to commit to creating a co-designed process for the NCS using those powers, replicating the work already being undertaken to create a child-friendly and child-focused complaints handling procedure. This would**



**be simpler than requiring new regulations, easier to change and allow complaints in services delivered jointly or on an integrated service to have a single complaints process.**

### **Modernising SPSO's powers**

60. **We would like to be more accessible** and remove from our legislation barriers to making complaints orally.
61. **We would like to be able to undertake own-initiative investigations.**
  - 61.1. Under current powers, the SPSO can only investigate a complaint brought to us about a named public body. Even if we identify an issue that we have reason to believe is wider spread, and would be in the public interest to investigate, we do not have the same investigatory powers to look into these matters under our own initiative.
  - 61.2. This power is common to Ombudsmen internationally and has recently been given to both the Welsh and Northern Irish Public Service Ombudsman schemes. This power can be used to help ensure there is appropriate oversight and investigation in areas, such as social care and social work, where the power imbalance means users are reluctant to complain directly.
  - 61.3. It can help to ensure systemic matters are identified and addressed, often sooner than a series of individual complaints would be able to. Currently SPSO can only consider the complaint we receive. For example, a recent investigation on an individual complaint about audiology in NHS Lothian identified concerns that this may be a wider systemic issue. We were unable to investigate our findings and recommendation to NHS Lothian ask a third party to investigate uncovered significant systemic issues.
  - 61.4. Own-initiative approaches are more efficient as they can focus on multiple organisations with a single investigation.
62. **We would like to ensure the need for a rights-based approach is on the face of the SPSO Act**, strengthening our ability to reflect those both in the procedures we issue for public bodies and in our outcomes.
63. **We would like to be able to better and more effectively share information with all scrutiny and regulatory organisations.** This would support learning and improvement.
64. **We would like complaints to be built around the person and not around the service** so it does not matter who is delivering the public service, and there is a simple, accessible route to raise issues and concerns.
65. **Key point: We recommend reform of SPSO's powers to ensure they are fit for purpose, reflect a people-centred approach and identify and drive faster improvement through learning.**