

National Care Service Draft Stage 2 amendments, submission by Scottish Public Services Ombudsman

Overview

1. As the final stage complaints handler for public bodies, the Scottish Public Services Ombudsman (SPSO) recognise and hear concerns from members of the public about their experience of complaining. These range from
 - 1.1. uncertainty about who to contact,
 - 1.2. feeling that they are not being listened to when they do complain,through to
 - 1.3. for some, fear of a potential negative impact from complaining.
2. The solution to these issues is not straightforward but central to them is the attitude of public bodies (particularly at leadership levels) and staff to complaints.
3. Identifying and implementing long term solutions requires investment and support for front-line staff who are the key point of contact for service users. This includes simple, comprehensive access to advocacy and advice, and a governance system which welcomes complaints and uses complaints to improve learning. None of this requires legislative change and, indeed, legislation may impede change if it increases complexity and makes lines of accountability unclear.
4. SPSO note there has been no change to the proposals for complaints in the draft stage 2 amendments, despite the significant changes to the accountability structures. We are proposing that some change is needed to ensure that the Bill does not have unintended consequences and worsen the existing position for complainants. To do so, it first needs to be understood what already exists in this space in relation to both public and private services, and how they intersect.
5. The National Care Service, as proposed, will cover aspects of social work, health and social care.
6. Currently, there are three bodies responsible for setting up complaints processes and responding to complaints across these functions (the Scottish Public Services Ombudsman, the Scottish Government and the Care Inspectorate).
 - 6.1. The Scottish Public Services Ombudsman (SPSO) is the final stage of the complaints process for public services and has been given the power to set



standards and monitor complaints handling for bodies under jurisdiction, this includes local authorities, health boards and other public health providers, and integrated joint Boards. In 2017 SPSO was given additional powers for social work which means SPSO can consider the merits of professional social work decisions. This brought social work into line with health where SPSO can consider clinical judgement. Local authorities adhere to and utilise the current model complaints handling procedure for the sector published by my office.

- 6.2. The SPSO is also the final stage of the complaints process for NHS services. However, the Scottish Government under the Patients' Rights (Scotland) Act 2010 has primary responsibility for NHS complaints procedures. The NHS use an older SPSO complaints handling model which complies with the Scottish Government regulations, but this is now some years out of date and there is no sign when Scottish Government resources will be available to make the necessary updates. SPSO shares updated model complaints handling and good practice guidance with the NHS, and while SPSO see evidence of the NHS following it, SPSO cannot require compliance.
- 6.3. The Care Inspectorate has a statutory duty to consider complaints about registered care services, this includes public and private services.
7. For the avoidance of doubt, SPSO are not suggesting and would not support a change to the Care Inspectorate role in complaints. They cover not only the public, but the private sector and have a long-established approach to the care sector. We also understand that the Scottish Government does not have any intention to change this. Our concerns relate to the complexities around health/social work where there are already two existing statutory complaint schemes.
8. As noted in SPSO's earlier submissions to the Committee, the current Bill risks making this complex landscape more confusing by requiring the Scottish Government to develop a complaints process for services being provided through the National Care Service. Services for which there are already existing statutory complaints processes. This means some public bodies (health bodies and local authorities some, but not all, of whose functions would be delegated) may be required to implement multiple complaints processes.
9. Under section 15 of the Bill, the Scottish Government will have regulatory powers which could result in changes to SPSO, an Independent Scottish Parliamentary Supported Body (SPSB) through a simple affirmative procedure. This gives a lower level of protection to the independence of SPSBs than the Scottish Government and Parliament agreed in the Public Services Reform Scotland (Act) 2010 – the super affirmative procedure.
10. This super affirmative procedure has already been used to make changes to SPSO's functions and it remains unclear why a lower standard of Parliamentary oversight is considered appropriate for the National Care Service. This reduction is also arguably



not in line with international standards in relation to Ombudsman schemes' independence from Government.

11. While SPSO were not involved in the Expert Legislative Advisory Group, following stage 1, we raised our concerns directly with the Minister for Social Care, Mental Wellbeing and Sport. When responding they acknowledged concerns raised by us and others around complexity and indicated they did not think, a (separate) National Care Service complaints process would be helpful. We welcome those comments but are concerned that they have not led to any changes to the proposals for complaints in the Bill.
12. SPSO also note that the approach being taken to complaints about the National Care Service differs considerably from the approach taken by the Scottish Government in relation to complaints made by or on behalf of children. These changes are required by the United Nations Convention for the Rights of the Child (Incorporation) (Scotland) Act 2024 (the Act).
13. Prior to implementation of the Act, the Scottish Government funded the SPSO to independently lead on and create co-designed Child Friendly Complaints principles and processes. The innovative co-design approach which SPSO led on, resulted in the first set of Child-Friendly complaints principles and processes being approved unanimously by the Scottish Parliament in time for the Act coming into force. SPSO support the implementation of those principles with an ongoing programme of guidance and monitoring for all bodies under our jurisdiction.

Proposals for improvements to the complaint's provisions in the Bill

14. Given the above, SPSO consider that there is scope to improve the Bill's provisions and to reduce some of the complexities that have been introduced at stage 1. We are making the following positive proposals and recommendations. Some of these proposals may require amendments to the draft Bill.

Give clarity around delegated services and responsibility for complaint handling.

15. SPSO have long been concerned about the complex structure for complaints relating to delegated services and a lack of clarity about the relationship between local authorities, health boards and Health and Social Care Partnerships (HSCP). When the existing HSCP structure was created SPSO asked for it to be clear in secondary regulations that when services were delegated through integrated joint boards, complaints handling should also be delegated. This did not happen.
16. SPSO welcome any change that would help to ensure that there is a system which makes the following clearer for delegated services, such as
 - 16.1. who is responsible for responding to complaints?
 - 16.2. ensuring information can be shared between members/ bodies of the partnership for complaints purposes, and



16.3. how the multiple elements of the governance structure should monitor and have oversight. One concern we have is it is not clear what oversight delegating organisations have of the complaints dealt with when the services are delegated and that this may mean opportunities to learn are being lost.

17. We would be keen to assist with this.

Protect the Complaint Handling Principles approved by the Scottish Parliament

18. Scotland was the first UK jurisdiction where the Parliament demonstrated active interest and commitment to complaints by approving Complaint Handling Principles. In the last few weeks, the Parliament also approved additional Complaints Handling Principles in anticipation of the United Nations Convention for the Rights of the Child taking effect. These are rights-based principles to ensure public sector complaints handling will be compatible with the UNCRC – the first of their kind.
19. SPSO recommend an amendment to the Bill at stage 2 to ensure that any processes set up by sections 14 and 15 are compatible with these Parliamentary agreed principles. Failure to do so means there is a risk that any National Care Service complaints process would not need to comply with these Parliamentary-approved principles and that complaints processes created through different legislation may become increasingly incompatible as we move to develop more rights-based principles.

Ensuring SPSO is involved when procedures are being developed or changed.

20. When establishing the Care Inspectorate complaint's role, the possibility of potential overlap was recognised. Under section 79 of the Public Services Reform (Scotland) Act 2010, the Care Inspectorate is required to consult with SPSO when they are developing complaints processes.
21. We recommend that a similar amendment to that effect is included in sections 14 and 15 of the Bill. This is an important safeguard to ensure that existing and proposed changes in complaints procedures receive appropriate scrutiny, and should help to reduce the risk of unintended complexities in complaint processes that make the complaints landscape harder for people to navigate.

Ensuring changes to Parliamentary Supported Bodies are subject to appropriate levels of parliamentary oversight.

22. As a Scottish Parliamentary Supported Body (SPSB) there should be a genuine opportunity for Parliament to comment on a regulation that impacts on SPSO and not just to say yes or no. We would, in line with existing legislation and practice, ask for the retention of the super affirmative process for Scottish Parliamentary Supported Bodies and that there is no reduction in Parliamentary oversight for the National Care Service.



Ensure there is no reduction in SPSO's ability to consider social work complaints.

23. SPSO consider that the risk to our ability to assess the merit of social work decisions from the Bill will be reduced by the current proposed amendments as social work decisions remain the responsibility of the local authority. SPSO welcome this. Given the drafting of the stage 1 Bill risked limiting SPSO's role, SPSO would welcome a commitment that nothing in stage 2/3 amendments or regulations under section 15 will impact SPSO's ability to assess the merits of these decisions, given this is an important protection to the public (often involving people experiencing vulnerability), and given there has been no consultation on such a reduction.

Other comments

24. For completeness we also note that the reference to judicial review in the National Care Service Charter of Rights and Responsibilities doesn't accord with SPSO's understanding of the legal position which is that it is not possible to make a complaint to us at the point a judicial review of a public body's decision has been lodged. As we have been positively involved in commenting on earlier drafts of the charter, we will also raise this point with the Scottish Government directly.