

THE PUBLIC SERVICES REFORM (THE SCOTTISH PUBLIC SERVICES OMBUDSMAN) (HEALTHCARE WHISTLEBLOWING) ORDER 2020

Draft Explanatory Document

1 Introduction

- 1.1 In April 2019, the Presiding Officer of the Scottish Parliament, on behalf of the Scottish Parliamentary Corporate Body ('SPCB'), requested in writing that the Scottish Ministers bring forward proposals to make provision by order under section 14 of the Public Services Reform (Scotland) Act 2010 ('the 2010 Act') to amend the Scottish Public Services Ombudsman Act 2002 ('the 2002 Act') to extend the ability of the Scottish Public Services Ombudsman (SPSO) to investigate complaints made about healthcare whistleblowing matters, to improve the exercise of public functions.
- 1.2 The Scottish Ministers consider that this order will improve the exercise of public functions in regard to efficiency and effectiveness by enabling the Scottish Public Services Ombudsman to exercise similar functions for whistleblowing complaints as they do for patient complaints about health services.
- 1.3 The Scottish Ministers were requested to propose provision to allow the SPSO to consider complaints about the handling of healthcare whistleblowing cases and the merits of decisions made in respect of these, and also to enable the effective sharing of information between the SPSO, Healthcare Improvement Scotland, National Education Services, the Mental Welfare Commission and National Services Scotland, to improve the effectiveness of these bodies' respective scrutiny and investigation functions.
- 1.4 Provision contained in the draft order is made under section 14 of the Public Services Reform Act, principally section 14(1), (3) and (7).
- 1.5 The draft order amends relevant sections of the Scottish Public Services Ombudsman Act 2002 ('the 2002 Act') to provide power to the Scottish Public Services Ombudsman (the SPSO) to investigate whether a relevant body or provider has handled a whistleblower's complaint properly in accordance with the SPSO's model complaint handling procedure for whistleblowing complaints and any action taken by or on behalf of the body or provider in respect of that complaint, including the treatment of any person including the whistleblower. By doing so, the Order confers the role and functions of an Independent National Whistleblowing Officer for NHS Scotland (INWO), upon the Scottish Public Services Ombudsman (the SPSO).
- 1.6 The draft order does not confer any function of legislating.

2 Background

- 2.1 Establishing this new role of the INWO for the SPSO came from the recommendations from the Freedom to Speak Up Review, chaired by Sir Robert Francis QC. The review provided independent advice and recommendations aimed at creating an open and honest reporting culture. Although the Review related entirely to NHS England, the Scottish Government and key stakeholders considered the main themes on the need for culture change, improved handling of cases and measures to support good practice when developing the proposals for this role.

3 Consultation on proposals for the role and remit of the INWO

- 3.1 With this in mind, detailed proposals for 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. Fifty-eight 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 should be hosted within the SPSO.
- 3.2 The Scottish Government recognised the appetite for the role of the INWO to extend to those providing adult social care services for local authorities. However, we have since established that the Care Inspectorate undertake a similar role to the INWO for those in the registered social care sector. The Scottish Ministers view was that access to the INWO was therefore not required for individuals in this sector at this time.
- 3.3 Four INWO engagement workshops were held in January and February 2018. These were attended by a range of key representatives including employers, staffside and whistleblowers. These engagement events highlighted that there was consensus that individuals working or volunteering in primary care settings and with independent providers (providing services under contractual arrangements with the NHS), should also be given access to the INWO, to ensure they are treated equally to whistleblowers in health board settings. Scottish Government officials then met key representatives from the primary care sector who were also supportive of the proposal. The scope of the role has now been broadened to reflect these views.

4 Consultation on draft Order

- 4.1 The consultation requirements in section 26(1) and (2) of the 2010 Act. On 29th April 2019 the Scottish Ministers laid a draft of the Order together with a draft Explanatory Document subject to the required 60 day consultation. On the same day a consultation on the draft Order was issued to all relevant stakeholders. This consultation was issued at the same time and to the same stakeholders as the draft Whistleblowing Standards (see Section 6) which have been developed independently by the SPSO. The intention was that

both consultation documents could be considered in conjunction with each other.

4.2 The consultation ran from 30 April 2019 until 28 June 2019 and received a total of 29 responses (10 responses from individuals and 19 responses from organisations) the majority of which were related to the health sector.

4.3 The consultation asked 4 substantive 'yes/no' questions and allowed for comments. The questions were as follows:

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

For both categories above, of the 29 respondents 27 agreed with this proposal and 2 did not provide an answer.

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 purpose of the INWO investigation?

Of the 29 respondents 20 agreed with this proposal, 3 did not agree, and 6 did not provide an answer.

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?

Of the 29 respondents 26 agreed with this proposal, 1 did not agree, and 2 did not answer the question.

We propose that the SPSO in her role as the 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?

Of the 29 respondents 19 answered yes, 7 answered no, and 3 did not answer the question. A range of organisations were suggested, including regulators for health and social care professions as well as the Care Inspectorate.

4.4 The draft Order was also considered by the Health and Sport Committee which issued a general call for written views on the following questions:

- ***How will the order affect the whistleblowing process?***
- ***Should the Ombudsman fulfil the role of the INWO?***
- ***Does the order give the INWO adequate powers?***
- ***Is there anything you would add, amend or remove from the order?***

15 responses were received.

4.5 An oral evidence session was held on 28 May 2019 where evidence was provided by:

- Rosemary Agnew (Scottish Public Services Ombudsman)
- Rhona Atkinson (Non-Executive Director, Vice Chair and Whistleblowing Champion NHS Grampian)
- Alison Mitchell (Non-Executive Board Member and Whistleblowing Champion NHS Lothian)
- Bob Matheson, Head of Advice and Advocacy (Protect)
- Jeane Freeman MSP (Cabinet Secretary for Health and Sport)
- Dr Stephen Lea-Ross (Scottish Government)

4.6 All responses and comments provided in the consultation were given balanced consideration by the Scottish Government alongside the Health and Sport Committee report on their consideration of the proposed order which was published on the 25 June 2019.

4.7 It was concluded that the only substantive amendment required to the draft order prior to it being laid in Parliament for further scrutiny was the inclusion of a definition of “whistleblowing” on the face of the order; accordingly, that definition can only be amended by means of a further order.

4.8 It should be noted that the full consideration was also given to the request for inclusion of the Care Inspectorate for the purposes of sharing information. However the Inspectorate (Social Care and Social Work Improvement Scotland) was already added to schedule 5 of the 2002 Act by The Public Services Reform (Social Work Complaints Procedure) (Scotland) Order 2016/157. This already allows the SPSO to share information with Social Care and Social Work Improvement Scotland where it is directly linked to their role as such further provision is not required.

In these circumstances and with reference to section 26(4) of the 2010 Act the Scottish Ministers do not consider that further consultation is necessary or appropriate.

5 The Scottish Public Services Ombudsman (SPSO)

5.1 Currently, the SPSO is the final stage for complaints made about public authorities in Scotland. The SPSO also has a role as the Complaints Standards Authority for public authorities and is the independent review stage

for Scottish Welfare Fund decisions, under section 7 of the Welfare Funds (Scotland) Act 2015.

- 5.2 The standards by which the SPSO assesses complaints are maladministration (which broadly covers matters such as bias, unfairness, failure to consider a person's rights, unnecessary and unreasonable delay, rudeness and/or failure to apply the law/procedural rules properly) and service failure. The SPSO cannot usually question the merits of a decision taken by a listed authority without evidence of maladministration. However, there are exceptions (health service bodies, family health service providers, the Scottish Welfare Fund and social work decisions). For complaints about health service bodies the SPSO can also question the merits of clinical decisions.
- 5.3 Generally the SPSO would not accept a complaint where an aggrieved person has or had (a) a right of appeal to a Minister of the Crown or the Scottish Ministers, (b) a right of appeal, reference or review to or before any tribunal constituted by or under any enactment or by virtue of Her Majesty's prerogative, or (c) a remedy by way of proceedings in any court of law, unless the Ombudsman is satisfied that, in the particular circumstances, it is not reasonable to expect the person aggrieved to resort or have resorted to the right or remedy. This discretion is used by the Ombudsman based on the merits of the complaint brought to her.
- 5.4 Listed authorities can also ask for a review of a decision. There is no external appeal mechanism but an SPSO decision may be subject to judicial review.
- 5.5 The SPSO adopts an inquisitorial approach and looks at what is fair in the circumstances, taking account of good practice as well as the law. It is for the SPSO to interpret the facts and the available evidence. The SPSO also has discretion to decide how investigations are conducted.

6 Policy objectives

- 6.1 The broad purposes of the provisions contained in the draft order are to improve the exercise of public functions of health service bodies (other than the Scottish Dental Practice Board) having regard to efficiency, effectiveness and economy.
- 6.2 The policy objective for the introduction of this draft order is also 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.

6.3 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.

6.4 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.

6.5 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 setting standards for handling whistleblowing complaints that the SPSO intends to set for this new function. This would be done through model Whistleblowing Procedures to be published under section 16B of the 2002 Act.

6.6 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 SPSO have been developed rather than creating a new office of the INWO.

6.7 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.

7 Whistleblowing Standards

7.1 The SPSO will be required (under new section 16BA) to publish a model procedure for the handling of whistleblowers' complaints by the relevant health service bodies, family health service providers and independent providers (as defined by schedule 2 of the 2002 Act). This was part of the

'Draft Whistleblowing Standards for the NHS in Scotland' that the SPSO consulted upon at the same time as this draft order. The model Whistleblowing Procedure refers to the INWO investigation as the third and final stage in the whistleblowing process. The INWO would review the internal handling of a whistleblowing case against these Standards, where there has been a complaint by the whistleblower. The model Whistleblowing Procedure will include definitions of who may bring a complaint under the procedure ('the whistleblower') as well as reflecting what will be considered ("whistleblowing"). As outlined previously the draft Order has now been amended to include a definition of whistleblowing which must also be included in the Whistleblowing Standards (see section 4.7 above).

8 Effect of the provisions of the draft order

- 8.1 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.
- 8.2 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.
- 8.3 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;
 - allow the sharing of information between the SPSO and the relevant bodies (where relevant to their scrutiny or investigatory functions); and
 - require the SPSO to reflect the definition of "whistleblowing" contained within the Order in the Model Complaints Handling procedure (Whistleblowing Standards) published in accordance with the new section 16 BA which will be added to the 2002 Act.
- 8.4 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 procedure which the relevant body has adopted in accordance with the requirements under section 16C of the 2002 Act, as amended by the 2010 Act. 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.

- 8.5 The effect of conferring new powers of investigation into whistleblowing complaints is that existing powers in the 2002 Act will continue to apply, except where they have been modified by the draft order.
- 8.6 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.
- 8.7 The SPSO has the ability to recommend that decisions on matters within its jurisdiction should be reconsidered.
- 8.8 The SPSO may initiate an investigation following a complaint from an individual, or at the request of the relevant body (as mentioned in section 2 (2)(a) and (b) of the 2002 Act).
- 8.9 New Section 6A(4) in the draft order makes it clear, that it will be for the SPSO to define through the model procedure who is defined as a whistleblower for the purposes of the SPSO's INWO investigation and can therefore make a complaint to which section 6A applies. Article 3(5) will however require the definition of whistleblowing included at 16 BA (3) of the draft Order to be included in the Model Complaints Handling procedure (Whistleblowing Standards) published in accordance with the new section 16 BA which will be added to the 2002 Act. This will define what would be considered as a whistleblowing matter for the purposes of the SPSO's INWO investigation. This has been included in direct response to the Health and Sport Committee's report on the draft Order.

- 8.10 Section 6A(8) in the draft order clarifies that any action taken by the relevant listed authority 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 SPSO's INWO investigation.
- 8.11 This means that the SPSO would have discretionary powers to investigate 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 that is under review by the SPSO.
- 8.12 Section 8(3) of the 2002 Act provides clarity that nothing in section 7 or schedule 4 prevents the SPSO from conducting an investigation into actions of the relevant body under the model Whistleblowing Procedure. Section 7 and schedule 4 exclusions relevant here include proceedings before a tribunal and action taken in respect of appointments, removals, pay, discipline or other personnel matters.
- 8.13 Consideration of the treatment of the individual could therefore include the Ombudsman investigating whether the whistleblower has been victimised as a result of raising a concern, including by bullying and harassment or inappropriate application of policies.
- 8.14 New section 6A(7) in the draft order should also be read alongside section 13(1) and (2) of the 2002 Act that requires the listed authority and/or certain other persons to supply information or produce documents relevant to the SPSO's, INWO investigation.
- 8.15 The SPSO's 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.
- 8.16 Subsection (4) of section 13 of the 2002 Act provides that for the purposes of investigations the SPSO has the same powers as the Court of Session in respect of:
- the attendance and examination of witnesses (including the administration of oaths and the examination of witnesses abroad); and
 - the production of documents.
- 8.17 Subsection (9) of section 13 of the 2002 Act provides that subject to subsections (5) and (6) no person can be compelled, in respect of an investigation by the SPSO, to give evidence or produce documents that they could not be compelled to give or produce in civil proceedings before the Court of Session.
- 8.18 New section 6B(2) clarifies that dealing with whistleblowers' complaints made

in the context of providing services under arrangements with the NHS, is to be regarded as part of providing those services. This means that the providers' handling of such complaints falls within the SPSO's jurisdiction.

- 8.19 New Section 6B(3) clarifies that there is no implied duty for the SPSO to exercise her discretionary powers under section 16C of the 2002 Act, to make a model complaints procedure for whistleblowers' complaints relevant to any body or provider.
- 8.20 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 as defined in the model Whistleblowing Procedure. This could include any decision taken without maladministration, and any decision not connected to an exercise of clinical judgement.
- 8.21 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 SPSO.
- 8.22 Under section 7(10) of the 2002 Act the SPSO also has a discretionary authority to intervene where in the absence of the exhaustion of any internal process, the SPSO 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.
- 8.23 Section 10 of the 2002 Act provides time limits for making complaints to the SPSO, and the required format for making complaints.
- 8.24 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 SPSO has discretion to accept late complaints if they consider there are special circumstances that make it appropriate to do so.
- 8.25 Section 10 also provides that complaints must be made in writing or electronically unless the SPSO considers there are special circumstances appropriate to the complaint being made orally.
- 8.26 Article 3(4) of the draft order inserts new subsections (9) and (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 in relation to whistleblowing, and the treatment of the whistleblower by any of those bodies or providers. This may include observations on whether the relevant body or provider is discouraging whistleblowing, dealing with internal investigations ineffectively or incorrectly and/or are subjecting whistleblowers to detriment, as a result of whistleblowing.

- 8.27 Section 15 of the 2002 Act sets out how the SPSO 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.
- 8.28 Section 16 of the 2002 Act makes provision for a special report where the SPSO 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.
- 8.29 Section 19 of the 2002 Act requires information provided to the SPSO to be kept confidential except in certain limited circumstances. Subsection (1) provides that information obtained by the SPSO or any of their advisers in connection with any matter in respect of which a complaint or request has been made (relevant information) must not be disclosed.
- 8.30 Subsection (2) provides for exceptions to subsection (1) whereby relevant information may be disclosed for:
- the purposes of either considering complaints or requests, undertaking an investigation, reporting on an investigation, or making a statement of reasons for not undertaking an investigation; and
 - the purposes of proceedings under section 14 of the Act relating to a person's obstruction of the SPSO's performance of their functions or a person's action or failure to act in relation to an investigation.
- 8.31 The section also makes provision as to when relevant information may be disclosed in the interests of the health and safety of patients, exempts the SPSO or the SPSO's advisers from providing relevant information in proceedings other than those detailed in subsection (2), and that relevant information must not be disclosed when its disclosure is deemed to be against the public interest.
- 8.32 Subsection (3) ensures that section 19(1) does not prevent the disclosure of information for the purposes of this section.
- 8.33 Section 19(3) of the 2002 Act, allows the SPSO to share information with other bodies but only if it is specifically for the purpose of the SPSO undertaking its own investigation, or, if the information indicates that a person constitutes a threat to the health and safety of others.
- 8.34 Section 20 enables the SPSO to disclose information obtained under the Act to the UK Information Commissioner, auditors and examiners as listed in the

first column of schedule 5 to the Act, if the information appears to the Ombudsman to relate to matters set out in the second column of that schedule.

8.35 The SPSO's INWO role is not intended to replicate the functions of other organisations such as Healthcare Improvement Scotland. Instead, article 3(7) 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 SPSO can share proportionate information on practice issues.

8.37 This change in legislation will:

- support the SPSO 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 SPSO's findings at any stage, not just the outcome; and
- support inspections that are more efficient by ensuring they are targeted and that organisations have access to all relevant information.

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

9 Why conditions in section 16 of the 2010 act (where relevant) are considered to be satisfied

9.1 With reference to provision contained in the draft order, the Scottish Ministers consider the conditions in section 16(2) (where relevant), of the Public Services Reform (Scotland) Act 2010 to be satisfied as outlined below.

9.2 *The effect of the provision is proportionate to the policy objective.*

9.2.1 The Scottish Ministers consider that having a statutory basis for the functions of the INWO role is no more than is necessary to ensure the role is effective. The Scottish Ministers consider that the effect of the provisions in the draft order are proportionate to the policy objectives and that these provisions are required to enable the SPSO to carry out this role.

9.2.2 The overarching policy objective behind the introduction of the draft order is to improve performance on whistleblowing matters by the relevant healthcare bodies by promoting an open and honest reporting culture within our NHS. This in turn could lead to improved patient care and safety, as well as efficiency savings through reports of financial malpractice or

maladministration.

- 9.2.3 The functions of the SPSO are only being slightly expanded to include whistleblowing matters, broadly in line with patient complaints, and in the main, reflect the SPSO's current responsibilities. The Scottish Ministers therefore believe that the effect of the provisions are proportionate to the policy objectives and are in-line with the SPSO's current remit.
- 9.2.4 The present arrangements carry the risk that where complaints are made by an individual about the relevant body's handling of a whistleblowing case and/or the decision-making, closure of cases can be compromised or delayed. In some cases, whistleblowers are not satisfied with the handling or outcome of their case because the case is usually investigated, and the outcome decided by their employer. If the whistleblower does not believe that their case has been handled properly, or they disagree with the decision making or the outcome there is currently no route to appeal the decision.
- 9.2.5 The Scottish Ministers also consider that the new information sharing powers conferred on the SPSO under article 3(7) are proportionate to the policy objectives as article 3(7) enables the SPSO to share information with health service bodies who have a role in supporting health boards, for example by investigating fraud and irregularities, seeking to improve quality or providing education and training. The overarching policy objective of the order is stated as being to improve performance on whistleblowing matters by the relevant healthcare bodies by promoting an open and honest culture within the NHS. As stated above it is anticipated that this will in turn lead to improved patient care and safety, as well as efficiency savings through reports of financial malpractice or maladministration which is part of the policy objective.
- 9.2.6 The Scottish Ministers therefore consider the proposals proportionate to the matters they are addressing.

9.3 *Ensuring provisions do not remove any necessary protection.*

- 9.3.1 The provisions made in the draft order do not remove the protections under the Public Interest Disclosure Act 1998 (PIDA). PIDA is often called the whistleblowing law and is there to protect workers (as defined in the Employment Rights Act 1996) who have made what is known as a 'protected' or 'qualifying' disclosure from detriment arising as a result of making the disclosure.

9.4 *Functions consistent with general objects or purpose of the person, body or office-holder.*

- 9.4.1 The functions of the INWO are consistent with the role of the SPSO as the final stage for complaints about most Scottish public bodies and authorities including as set by the 2002, and the 2010 Act.

- 9.4.2 The draft order slightly expands the role of the SPSO to include whistleblowing matters in NHS settings. While this explicit role is presented in statute for the first time, adding the role to the SPSO's current responsibilities appears to be a natural move that aligns with the SPSO's existing role and purpose.
- 9.4.3 Bringing the INWO role under the auspices of the SPSO also provides an opportunity to effectively integrate existing functions such as patient complaints and the proposed whistleblowing functions. The SPSO currently also has access to the clinical and legal expertise required for the INWO role, which would be an effective use of existing resources to support this new function.
- 9.4.4 In principle, it would be possible to secure the desired separation of functions by setting up a freestanding statutory body to investigate the handling of such complaints. Instead, the proposed draft order would extend the role of the SPSO without changing its status. This approach is designed to minimise costs (through sharing of overheads) and provide an appropriate and proportionate legislative approach. There are also precedents for this in legislation such as the SPSO taking on the additional functions of Scottish Welfare Fund decisions.
- 9.4.5 The Scottish Ministers also consider that Article 3(7), which adds to the existing information sharing powers of the SPSO is also broadly consistent with the general objects and purpose of the SPSO as it will enable information sharing with the relevant health service bodies who have a role in supporting health boards and thus help to deliver improved services and greater efficiency in public services which is consistent with the overall purpose of the SPSO.

10 Improvement in the exercise of public functions having regard to efficiency, effectiveness and economy

10.1 Efficiency

- 10.1.1 The order will provide a mechanism independent of government and with the relevant expertise to set clearly defined Whistleblowing Standards and review the handling of whistleblowing cases. This will demonstrate the importance placed on whistleblowing, and its contribution in improving both patient safety and the efficiency of the delivery of public health services in Scotland and as such, the public functions of health service bodies, independent providers and family health service providers.
- 10.1.2 The order will improve the efficiency of health service bodies, independent providers and family health service providers by enabling resolution of whistleblowing matters at the earliest possible time, facilitating continuous improvement, best practice, recording, reporting and learning from

whistleblowing cases.

- 10.1.3 Establishing the SPSO as the holder of the INWO role would bring efficiencies to the current performance of health service bodies, independent providers and family health service providers by providing a fully independent mechanism for bringing whistleblowing cases in NHS settings to a clear, fair and final conclusion within a reasonable timeframe. This would potentially mean that vulnerable staff and patients would be better protected, than under the current arrangements.
- 10.1.4 The introduction of the INWO role and functions will also lead to efficiencies by reducing the time it takes for some cases to be concluded internally in Health Boards. This will be done through the introduction, by the Ombudsman, of a model Whistleblowing Procedure that is focussed on early resolution, with clear target timescales for investigation at Stage 2 of the process. This will lead to improvement in the exercise of public functions through cost savings and savings on resources.
- 10.1.5 In the development of policy to introduce this new role, we have worked closely with the SPSO and have engaged with key stakeholders to consider the scope of the role, practicalities and processes. From this it became clear that to maximise efficiency, ensure continuity and consistency with health service bodies, the scope of the INWO role needed to include family health service (primary care) and independent providers.
- 10.1.6 This would ensure improvement in healthcare public functions through parity in the treatment of whistleblowers across the wider NHS. The case for this is particularly strong in GP practices where staff employed directly by the practice are increasingly likely (under the new GP contract) to be working alongside workers in Health Boards.
- 10.1.7 There would also be efficiencies through more of a focus on learning and continuous improvement to the exercise of public functions by Health Boards through the ability the SPSO would have to make recommendations to the relevant bodies and providers. The SPSO also has a statutory duty to report to the relevant persons on concluded investigations and to lay a copy of the report before the Scottish Parliament. This would ensure improvement to the public functions of the relevant healthcare bodies by increasing transparency and openness.
- 10.1.8 The Scottish Ministers recognise the distinction between the functions proposed for the SPSO's INWO role and the functions of scrutiny bodies and regulators, including inspection. Keeping these functions separate from those proposed for the SPSO's INWO role allows for an efficient system of investigation for the SPSO, regulators and scrutiny bodies with clear cross-organisational boundaries.
- 10.1.9 The provisions in Article 3(7) of the draft order allow the SPSO to disclose information to the Common Services Agency for the Scottish Health Service, Healthcare Improvement Scotland, NHS Education for Scotland and the

Mental Welfare Commission for Scotland over and above those already listed in schedule 5 of the 2002 Act. This will:

- support the INWO role in helping these bodies fulfil their statutory functions, building in best practice and greater efficiencies at the point of delivery of these services;
- reduce the likelihood of multiple, overlapping complaints by being able to share INWO findings, not just the outcome; and
- support inspections that are more efficient by ensuring they are targeted and that organisations have access to all the relevant information.

10.1.10 The Scottish Ministers consider that the powers the draft order gives to the SPSO to investigate complaints made about the internal handling of whistleblowing cases by the relevant healthcare bodies and providers should go a long way to support more efficient, cohesive learning and improvement. The provisions in the draft order to this effect should help increase the focus on the development of whistleblowing best practice and provide a parity of approach for those staff members delivering services on behalf of the NHS. This new review function for the SPSO should also lead to more consistent, efficient recording and reporting procedures, which in turn should also improve the accuracy of data and confidence across the system.

10.1.11 Establishing the SPSO as the responsible body for oversight of these new whistleblowing functions provides the best potential for ensuring that efficient and consistent procedures and processes are followed by the relevant bodies. Where they fall short of the Standards set by the SPSO, the relevant body would be given the opportunity to provide redress to the individual and to make improvements to their internal processes where necessary, which in turn would help to improve the exercise of public functions by health service bodies.

10.2 *Effectiveness*

10.2.1 The current whistleblowing arrangements in the relevant healthcare bodies and providers are not as effective as they could be in terms of independence from the employer and from the Scottish Ministers. The provision made by the draft order would improve the public functions of health service bodies in this respect by situating the INWO under the auspices of the SPSO. The SPSO operates independently of health service bodies, family health service and independent providers and the Scottish Ministers and reports directly to Parliament.

10.2.2 One of the key aims of the introduction of the INWO role is to ensure learning from the outcome of whistleblowing concerns and to identify opportunities to improve NHS services.

- 10.2.3 Close linkages between the INWO and regulators and scrutiny bodies with the option for the INWO to refer or re-refer cases to them would also be a considerable benefit of the new system as, when necessary, the INWO could ensure that identified problem areas and systematic failures are regularly monitored, and any issues addressed promptly, thus better safeguarding patients and staff.
- 10.2.4 The Scottish Ministers therefore consider that the provisions in the draft order, by making scrutiny and governance of whistleblowing arrangements in NHS settings more effective, will improve the exercise of public functions by health service bodies having regard to effectiveness.

10.3 *Economy*

- 10.3.1 Although the new system would incur set-up and running costs, it would potentially mean cases are closed in a more timely manner, than is sometimes the case under the current arrangements. This, in the longer term could provide for a more economical system than the existing regime where individuals sometimes wait for long periods, sometimes on periods of sickness leave, whilst cases are investigated and closed.
- 10.3.2 The Scottish Government has committed to resourcing this new role and there are no direct costs that would need to be met by the relevant bodies within the jurisdiction of the INWO. However, the relevant healthcare bodies and providers may be required to allocate additional resources to train and prepare staff for the new arrangements and to investigate whistleblowing cases in potentially shorter timescales than under the current arrangements.

11 **Impacts**

- 11.1 An Equalities Impact Assessment (EqIA) has been developed for this draft order and will be published along with the order and the Explanatory Document. This includes consideration of whether a Children's Rights and Wellbeing Assessment is required. The Scottish Ministers do not foresee any discrimination against equality groups arising from this new role.
- 11.2 A Privacy Impact Assessment has not been completed for this draft order, as this is a matter for the SPSO to consider for the relevant bodies that would be within the jurisdiction of the INWO.
- 11.3 A Business and Regulatory Impact Assessment has not been prepared for this draft order, as it has no impact on the cost of business.