

WHISTLEBLOWING COMMISSION CONSULTATION – “STRENGTHENING LAW AND POLICY”

Introduction

This response is from the Scottish Social Services Council (SSSC). The SSSC is a Non Departmental Public Body (NDPB) and was established by the Regulation of Care (Scotland) Act 2001. The SSSC is a “prescribed person” under the Public Interest Disclosure Act 1998 (PIDA). The SSSC is responsible for registering people who work in social services in Scotland, for regulating their education, learning and development and for generating workforce information for the sector, including the publication of Official Statistics. The SSSC is also one of the partners of Skills for Care and Development, the Sector Skills Council for the social service workforce in the UK.

The SSSC is committed to the highest standards of conduct and practice in social services. There are approximately 195,000 workers in the social service workforce in Scotland and this workforce provides care and support for some of the most vulnerable people in Scottish society. These workers often deal with complex care needs and have the potential to make a real difference to individuals’ lives. Our role is to raise standards of practice, strengthen and support the workforce and increase the protection of people who use social services.

The SSSC vision is that our work means the people of Scotland can count on social services being provided by a trusted, skilled and confident workforce. Our purpose is to raise standards and protect the public through regulation, innovation and continuous improvement in workforce planning and development for the social services workforce.

We set out our responses below in line with the relevant questions as set out in the Whistleblowing Commission’s consultation paper. Where the SSSC has no response to make, we omit the question.

Section 1 Encouraging whistleblowing within organisations

Question 1	How can we embed good practice whistleblowing arrangements in all sectors of the UK? For example, should they be mandatory?
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Whistleblowing is an essential element of good governance and it is to an organisation's benefit to have a clear whistleblowing policy in place. The PIDA was introduced in response to major corporate failures in the 1980s and 1990s, where workers had known of the dangers that lead to disaster, but were unwilling or unable to warn of them effectively. More recent failures, for example in the Winterbourne View care home and the Mid-Staffordshire NHS Foundation Trust, underline the need for greater clarity in whistleblowing and support for responsible whistleblowers.

A key point is that people need to feel safe and supported in speaking up when they see something wrong. For this to happen, they should have a clear understanding of what qualifies as a protected disclosure, they should feel secure that they will not be penalised for whistleblowing and they should believe that action will be taken to investigate their concerns seriously and address them if appropriate. Similarly, employers need to feel secure that people will not make mendacious or spurious complaints. And finally, public understanding of whistleblowing also needs to be improved.

Both social service workers and their employers are obliged to meet the SSSC Codes of Practice for Social Service Workers and Employers¹. These set out workers' responsibilities to identify and report poor and unsafe practice and employers' responsibilities to address such concerns. The SSSC also publishes Conduct Rules² that set down how we will investigate and hold hearings about allegations of misconduct against workers on the register. It is arguable that this effectively makes whistleblowing mandatory in the social services sector.

Section 2 Rewards

Question 2	Do you think there should be financial or other rewards for whistleblowers? What are the advantages and disadvantages? How would the rewards be funded? And what about non-financial wrongdoing?
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The SSSC does not support financial rewards for whistleblowing. There may be a risk of creating perverse incentives that could have implications for the conduct of social service workers. Under PIDA, issues must be raised in good faith and the worker has to have a reasonable belief that the facts being raised

¹ http://www.sssc.uk.com/doc_details/1020-sssc-codes-of-practice-for-social-service-workers-and-employers

² <http://www.sssc.uk.com/Useful-Information/registration-rules-and-conduct-rules.html>

are true. Financial incentives may undermine public confidence that the purpose of whistleblowing is public protection.

Non-financial rewards may be a possibility (as distinct from financial rewards for non-financial wrongdoing). Positive public recognition of the benefits of whistleblowing in particular cases (e.g. where harm has been demonstrably avoided) might help engender a wider culture change in favour of whistleblowing.

Fundamentally, whistleblowing should be embedded in the culture of the social services workforce as part of workers' responsibility under section 3 of the SSSC's Code of Practice for Social Service Workers to protect service users as far as possible from danger or harm. Workers have a particular responsibility under paragraph 3.2, to use established processes and procedures to challenge and report dangerous, abusive, discriminatory or exploitative behaviour and practice. Arguably, it is counter-productive to reward to someone for what they are obliged to do and it may give the impression that they had the option to do otherwise.

Section 3 Law

Question 4	Should wrongdoing be more broadly defined within PIDA? Are there any other categories which should be added?
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The SSSC has no specific comments to make. Our focus is on the safety and wellbeing of service users and that is covered.

Question 5	Do the Government's amendments to the public interest test and good faith achieve a fair balance between employer and employee interests?
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It is important that guidance is given on the test to be applied and the meaning of the term 'public interest' which has been considered by the courts on many occasions and is a term which might otherwise be misconstrued. Such guidance needs to be clear and very easy to follow.

Question 6	Should there be a broader, more flexible definition of worker within PIDA to deal with the many different types of worker and working arrangements? Are there any categories of persons not now covered that ought to be?
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The SSSC has had an issue brought to its attention regarding social work students on a temporary work placement who see some wrongdoing. Our view is that such students are covered by the existing definition of worker in the PIDA

because a work placement during study can be considered as an element of a student's training.

Because the SSSC is a prescribed person under the PIDA, students could make disclosures about social service workers to the SSSC, or to the Care Inspectorate (CI) if the disclosure is about the provision of a care service rather than about an individual. It would be helpful if the guidance made explicit reference to students, including those present in an observational capacity but not engaged in work.

It would also be helpful if the guidance addressed the issue of those employed under self-directed support arrangements.

Question 9	Should there be a broader, more flexible definition of prescribed persons within PIDA? Are there any types of prescribed persons not now covered that ought to be?
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Currently prescribed persons are defined in PIDA as those persons prescribed by secondary legislation. This secondary legislation also specifies the descriptions of matters in respect of which those persons are prescribed. However, it remains up to the worker to decide whether the wrongdoing they have uncovered falls within the remit of a particular prescribed person. The fact that it may not always be clear who to contact may act as a barrier to whistleblowing.

It would be helpful if the guidance made clear that there is a distinction between the interests of a workforce regulator and a service regulator.

Within our sector, employees might consider making a disclosure to the Care Inspectorate, the SSSC, the Nursing and Midwifery Council, the Health & Care Professions Council and the General Teaching Council for Scotland. Not all are prescribed persons. It would be manifestly unfair if an employee lost protection because of this gap and this should be rectified.

Section 4 Regulators

Question 14	Should regulators take an interest in the whistleblowing arrangements of the organisations they regulate? Do they make adequate use of information brought to them via whistleblowing? Should regulators do more to protect whistleblowers?
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The SSSC's view is that service regulators should take an interest in the whistleblowing arrangements of the organisations they regulate. The SSSC's Code of Practice for Employers, at paragraph 2.3 requires that employers have systems in place to enable social service workers to report inadequate resources

or operational difficulties which might impede the delivery of safe care. Under section 4 of the Code employers are required to put into place and implement written policies and procedures to deal with dangerous discriminatory or exploitative behaviour and practice. The CI is required to take the Code into account in its decisions on registered services. The SSSC and the CI share relevant information.

We note the Speaking Up Charter³ launched last year as an example of good practice in regulators working together to support whistleblowing.

Question 15	Should the UK set up a whistleblowing ombudsman service? If yes, what should this look like (an ombudsman for each sector or an overarching ombudsman)?
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Not in cases where public protection is at risk as this would just add unnecessary delay into the system.

Section 5 Tribunals / procedure

Question 18	Should the referral of PIDA claims to a regulator be mandatory?
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As a workforce regulator, where public protection or public confidence in the social services workforce is at issue, we would like to be notified.

Question 21	Should the Employment Tribunal have the power to refer regulatory or criminal matters to the appropriate authorities?
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Yes.

**Scottish Social Services Council
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³ <http://www.cqc.org.uk/public/news/care-regulators-professional-bodies-and-unions-join-forces-launch-speaking-charter>