

MEMORANDUM OF UNDERSTANDING

BETWEEN

**SCOTTISH PUBLIC SERVICES
OMBUDSMAN**

AND

THE MENTAL WELFARE COMMISSION

FEBRUARY 2012

MEMORANDUM OF UNDERSTANDING

between

THE SCOTTISH PUBLIC SERVICES OMBUDSMAN

and

THE MENTAL WELFARE COMMISSION

1. PURPOSE OF THE MEMORANDUM OF UNDERSTANDING

The purpose of this understanding is to clarify the responsibilities of the Scottish Public Services Ombudsman (SPSO) and the Mental Welfare Commission for Scotland (the Commission) in relation to their respective functions and the handling of complaints.

2. SCOPE OF THIS MEMORANDUM

This Memorandum sets out an agreed framework for co-operation between SPSO and the Commission to ensure that the two organisations complement and facilitate the achievement of each other's respective roles and functions.

It sets out the working arrangements between SPSO and the Mental Welfare Commission for Scotland in respect of joint working, co-operation and collaboration.

This Memorandum is not a contract, is not legally enforceable and it does not provide a definitive guide to the relevant legislation. In cases of doubt reference should be made to the appropriate statutes.

3. FUNCTIONS, DUTIES AND POWER OF THE COMMISSION

The Commission is established as an independent body corporate under Part 2 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (referred to as the 2003 Act). The constitution of the Commission is set in schedule 1 of the 2003 Act (as amended by the Public Services Reform (Scotland) Act 2010). The principal functions, duties and powers of the Commission are set out in Sections 4-20 of the 2003 Act (as amended by the Public Services Reform (Scotland) Act 2010) and in the Adults with Incapacity (Scotland) Act 2000 (referred to as AWI Act). They include:

- a) Acting to protect the welfare of individuals with mental illness, learning disability or personality disorder
- b) Monitoring the practical application of the observance of Part 1 of the Act and promoting best practice in relation to the practical application of the observance of Part 1 of this Act.

- c) Providing statistical reports on the operation of the Act and bringing matters in relation to its operation to the attention of Scottish Ministers.
- d) Investigation of any case where it appears to the Commission there may be ill-treatment, deficiency in care or treatment, or improper detention of any person who may be suffering from a mental disorder.
- e) Carrying out visits to people with mental disorder as often as the Commission considers appropriate.
- f) Giving advice in connection with any aspects of the Commission's functions.
- g) Bringing general and specific matters, in relation to the care and treatment of people with mental disorders, to the attention of various parties.
- h) Raising concerns about any social service or health care service with the Care Inspectorate, HIS or other relevant persons in terms of section 8A of the 2003 Act.
- i) Ensuring that the safeguards in place for patients receiving compulsory care and treatment are adhered to.
- j) Publishing information or guidance about any matter relevant to its functions and its conclusions in relation to an investigation, inquiry or visit carried out under the 2003 Act.
- k) Publishing an annual report and submitting it as soon as practicable after the end of each financial year to Scottish Ministers, who will lay copies before Parliament.
- l) Under Section 9 of the Adults with Incapacity Act 2000, the Commission continues to have general functions in relation to adults to whom the Act applies by reason of mental disorder. The functions under that Act include: to consult with the Public Guardian and any local authority on any case of common interest; to receive and investigate complaints relating to the exercise of functions relating to the personal welfare of the adult in relation to welfare attorneys and guardians or persons authorised under intervention orders (where they are not satisfied by an investigation made by a local authority or where the local authority has failed to investigate); and to provide a guardian, welfare attorney or person authorised under an intervention order with information and advice in connection with the performance of his or her functions under the 2000 Act.
- m) In discharging its statutory functions the Commission is accountable to Scottish Ministers but at the same time it carries out its work and produces reports independently.

4. GOALS, OBJECTIVES AND TARGETS OF THE COMMISSION

The Commission's goals are to:

- Help individuals using mental health or learning disability services to get the best possible care and treatment;
- Help people working in mental health and learning disability services to provide the best possible care and treatment for each person using those services;
- To be independent experts in promoting best practice as to applying best ethical and legal practice in care and treatment of individuals with mental disorder.

5. FUNCTIONS, DUTIES AND POWER OF SPSO

The SPSO has the functions set out in the Scottish Public Services Ombudsman Act 2002 (the 2002 Act).

The SPSO can consider complaints from members of the public who claim to have sustained injustice or hardship as a result of maladministration or service failure on the part of an authority within the SPSO's jurisdiction, providing that the matter complained about is one which the SPSO is entitled to investigate. Schedule 2 of the 2002 Act lists health service bodies which fall within the SPSO jurisdiction, this includes Health Boards, Family Health service providers; independent providers providing services for the NHS and the Commission.

The functions of the SPSO include raising awareness of its service, promoting good administrative practice by Scottish public services and leading the development of simplified and standardised complaints handling procedures across the public sector. The SPSO aims to work in partnership with public services across Scotland to help prevent complaints from arising and to help public services to improve their complaint handling processes.

6. RESPONSIBILITIES RELATING TO COMPLAINTS

The responsibilities of the SPSO are set out in the 2002 Act. Those of the Commission are set out in the 2003 Act and the Adults with Incapacity (Scotland) Act 2000.

The SPSO took over the Commission's functions in relation to complaints concerning NHS mental health services in October 2002.

Under the 2003 Act the Mental Health Tribunal for Scotland is the appropriate body to consider requests from patients subject to compulsory powers to have those powers revoked and/or varied. The Commission retains powers to revoke certain compulsory measures but does not envisage using those powers unless some exceptional circumstances prevent an individual from

accessing the Tribunal. The SPSO is unable to investigate a complaint about a detention that is current, under either the Mental Health (Care and Treatment) (Scotland) Act 2003 or the Criminal Procedure (Scotland) Act 1995, though the SPSO can investigate a complaint about a detention that has ended. Where a complainant is subject to a Compulsory Treatment Order the SPSO may not consider complaints about the decision that is subject to that Compulsory Treatment Order, but it is able to consider complaints about services that have been provided by the body subject to a complaint during that period of time.

The SPSO does have the power to investigate any complaint about the services delivered under either “the 2003 Act” or the Criminal Procedure (Scotland) Act 1995. The SPSO could investigate complaints about a failure to access information about local availability to Advocacy services and to provide signposting to the service.

Designated Medical Practitioners

The Commission is responsible for the appointment of Designated Medical Practitioners (DMPs) under Section 233 of the Mental Health (Care and Treatment) (Scotland) Act 2003 and Sections 48 and 50 of the Adults with Incapacity (Scotland) Act 2000. Complaints about DMPs can be investigated by the Commission, which has the sanction to withdraw their appointment. The SPSO has no locus to investigate decisions taken by DMPs as they are independent practitioners. The SPSO is able, however, to investigate complaints about the Commission’s processes for appointing DMPs.

Adults with Incapacity (Scotland) Act 2000

The Commission can receive and investigate any complaints about actions relating to personal welfare taken by Welfare Attorneys or by Welfare Guardians or persons authorised under Intervention Orders when the Commission is not satisfied with any investigation made by a local authority, or where the local authority has failed to investigate the complaint. The SPSO can investigate the policies and procedures implemented under this duty. Other complaints about actions taken by public services in relation to the Adults with Incapacity Act are the responsibility of the SPSO.

Complaints procedures and requirements to publicise complaints

Section 16A of the 2002 Act requires listed authorities to have in place a complaints procedure which complies with the Complaints Handling Principles approved by Parliament in February 2011. Section 16B allows the Ombudsman to create a model complaint handling procedure for a sector. Subsequent sections deal with how a listed authority would be informed such a procedure applies and the enforcement action the Ombudsman may take in the event of non-compliance. Section 16G places obligations on the Ombudsman to share best practice and to monitor complaint handling trends.

Section 22 of the 2002 Act (Information about right to make a complaint) requires a listed authority to take reasonable steps to publicise the application and effect of the 2002 Act. It includes in particular, the right conferred by the 2002 Act to make a complaint, the time limit for doing so and how to contact the SPSO. This information must be included in, or provided with, any

document published by the listed authority that contains information about the services it provides to members of the public, or about how it deals with complaints. The information must also be included in any response to a complainant who may be entitled to complain to the SPSO.

7. SHARING INFORMATION

The SPSO and Commission agree that where the functions and actions of one body affect the functions and actions of the other, they will consult and co-operate together in order to fulfil their respective functions as fully, effectively and efficiently as possible. This co-operation will include the sharing of appropriate information and maintaining effective communication. This will take into account the legislative restrictions on transfer of information which may apply. Within available resources, the SPSO and Commission will invite representation from the other party to project teams, work groups etc. where both parties believe there would be advantage in joint working. The two parties will encourage formal and informal contacts between their staff to raise awareness of the roles, responsibilities and methods of working of each.

8. DISPUTE RESOLUTION

- Wherever possible any disputes should be resolved locally on a case by case basis, between officials, if necessary by reference to each organisation's line management.
- If officials are unable to reach agreement, disputes should be referred to the Chief Executive of the Commission and the Ombudsman. They will work together to agree the appropriate route for resolving the dispute.

9. MEETINGS BETWEEN THE SPSO AND THE COMMISSION

The Commission and the SPSO will meet as appropriate and at least annually to consider matters of mutual interest arising from their respective responsibilities.

10. REVIEW OF THIS MEMORANDUM

This memorandum will be reviewed every 5 years by the Commission and SPSO.

Signatures to the Memorandum

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