

Bernard Jenkin MP
Chair, Public Administration and Constitutional Affairs Committee
House of Commons
London
SW1A 0AA

12 January 2018

Dear Bernard,

Follow up to PHSO Annual Scrutiny Session

Thank you for your letter of 20 December 2017, following up on some of the issues the Committee raised during our annual scrutiny hearing on 12 December. PHSO's response to these points is outlined below. I have also attached separately for the Committee the data from our latest staff survey, which we will be publishing on our website as usual in the next few weeks.

I am grateful to you and your Committee members for the rigorous and fair-minded engagement at the hearing, and for the thanks you extended to my colleagues for their commitment and public service during a challenging transition period.

1. Financial compensation paid in 2016-17

The Committee asked about the amount of financial compensation PHSO paid out to complainants in 2016-17. I take this to be separate from the amount we asked bodies in jurisdiction to pay to complainants.

PHSO made 13 payments to complainants in 2016-17, totalling £26,333. This included a single payment made to a complainant's solicitors to reimburse legal fees they had incurred of £24,855 in relation to one of our investigations. The remaining 12 payments, therefore, totalled £1,478 and were relatively small consolatory payments to complainants ranging between £50 and £228.



2. Delays in dealing with feedback from complainants

There was a misunderstanding on our part during the evidence session regarding the delays in dealing with feedback from complainants about our decisions. For this I apologise. The context is that the average handing time for cases in 2012-3 was 386 days and this reduced to 216 days in 2016-17. Within this context, I can confirm that the figures the Committee had in front of them, as set out in the table below, were correct.

Table 1: time taken to complete reviews of decisions

Year	2012-13	2013-14	2014-15	2015-16	2016-17
Average days	75.27	66.14	83.99	139.37	227.71
Maximum days	363	596	274	481	636
Minimum days	4	6	3	71	82

When PHSO formally review a decision, we carry out a detailed and careful assessment of our decision making. As the table above shows, the average time it takes us to deal with such reviews of our decisions has increased since 2012-13.

One reason for this is that increasing the number of investigations my predecessor conducted over this period (384 in 2012-13 compared to 4,239 in 2016-17) led to an increase in the amount of work subject to review, increasing the time taken to reach completion. In addition, increasing the number of investigations led to a significant drop in our uphold rate, which meant that we saw an increase in the number of requests for review. Finally, more recently there has been a temporary shortage of senior casework resource in our Customer Care Team following the introduction of our new operating model and the move of operations to Manchester. This has further contributed to the delays in this area.

None of this excuses the time taken to complete requests for case reviews. We know that people who have provided feedback about our decisions have had to wait too long for a final response. From January 2018, we are putting more senior casework resource into our Customer Care Team to help us reduce the amount of time people have to wait for our response. We are working on the basis that, from April 2018, our new target will be to complete 90% of new review work in 40 working days. This target was recommended by our internal auditors as a reasonable standard when compared to other comparable activities conducted by other organisations. We anticipate that it will take 9 months to begin regularly achieving this as we work through our backlogs and embed the changes emanating from our transformation programme that we updated the Committee on including, for example, the necessary, new training for our staff.

In this context, it is also important to note that we only conduct a review of a relatively small number of the total decisions we make every year (81 in 2016-17)

and uphold an even smaller number (15 in 2016-17). Whilst we understand that some complainants have justifiable concerns about the outcome of their cases in a relatively small number of instances, I should note that our caseworkers do also regularly receive positive feedback directly from complainants about their work, even where we have not upheld a complaint.

It is worth noting as well that feedback from complainants as measured against our Service Charter is also positive. In our most recent performance report, covering the period July to September 2017, 78% of all complainants agreed that we gave them the information they needed and 70% agreed that we had provided a good service. We know that there is much more to do, but it is also easy to lose sight of the fact that a significant majority of people are happy with the service they receive from us.

3. Withdrawing final investigation reports

Our legislation requires us to produce a report of each investigation we conduct to set out the content and findings of our investigation. The Committee raised the issue of how we would approach 'withdrawing' a report where we had taken the view that our original position was flawed. The issue is not straightforward and I have commissioned advice about the way forward. I will write to the Committee well before the end of February with our conclusions on this issue.

4. Our approach to whistleblowing by PHSO staff

Although not mentioned in your letter, the Committee also asked about our approach to whistleblowing by PHSO staff. I have sent alongside this letter a copy of our current whistleblowing policy, which sets out how our staff can raise concerns about serious wrong-doing in the organisation. The policy is available to all staff on our intranet.

In addition to the usual internal routes, which includes staff being able to raise any concerns directly with me or Amanda Campbell, we also highlight in our policy that the NAO, the non-Executive Chair of our Audit Committee and the Chair of PACAC can be contacted by those staff who feel that it would not be appropriate to raise their concerns through any of the routes available within the office. You should note that this policy is shortly due to be reviewed alongside all of our other HR policies, so please do let us know if you have any comments on it that we should consider as part of this process.

5. Historic cases

Finally, I wanted to take the opportunity to reiterate PHSO's position on the issue of historic cases that the Committee explored with us. As I said during the evidence session, there should not be a permanent body that routinely and independently reviews our decisions. This would not be appropriate as the purpose of the Ombudsman *is* to be the independent complaint handler of last resort for issues that have already been considered by the NHS in England and by UK government departments and other UK public organisations. To add a further tier of review beyond that would significantly degrade the position of the Ombudsman in the system. This is a position endorsed by current legislation, by Cabinet Office,

by the Gordon Report (2014) commissioned by Government, and by most ombudsmen practitioners.

This does not mean that we do not look again at cases where we think this is needed. As highlighted through the recent correspondence with PHSO the Facts that the Committee has been copied into, there are a relatively small number of cases going through our existing customer care process that have been specifically highlighted to me during my meetings with this group where we are assessing whether there is any more work that we should do. We hope to complete this work before the end of March 2018 and we have dedicated specific resource to help us achieve this.

More widely, as you noted in the session, the Committee has previously recommended that an inquiry could be set up to look at historic cases where doing so would assist in improving patient safety in the future, or where serious outstanding legitimate grievances persist. As I explained, this is not something that PHSO is equipped for or has the capacity to undertake. We would, however, support the Committee and the Department of Health as needed to explore how another body could be set up to do this work and stand ready to be involved in any discussions about how this could best be taken forward.

I hope that this information is helpful and I would like to conclude by noting how helpful Amanda and I found the session with the Committee. The questions put to us and the points that were raised provided much food for thought, particularly as we develop and finalise our new strategy, which we will of course share with the Committee once it is ready to be published in the New Year. Please do let me know if you have any further questions.

Yours sincerely

with best wishes

Rob Behrens

Rob Behrens CBE
Ombudsman and Chair
Parliamentary and Health Service Ombudsman

WHISTLE-BLOWING POLICY

POLICY STATEMENT

1. PHSO is committed to the highest possible standards of professional conduct, including openness, honesty and accountability. This policy provides a process through which PHSO employees can raise concerns about serious wrong-doing if those standards are not met. PHSO recognises that most cases will have to proceed on a confidential basis.

PURPOSE AND SCOPE OF POLICY

2. This policy covers PHSO employees, agency workers, contractors, consultants and those on secondment from other organisations.
3. This policy provides a process by which concerns about serious wrong-doing can be raised and allows PHSO to deal with these quickly and effectively.
4. This policy follows the approach in the Public Interest Disclosure Act 1998 and the Enterprise and Regulatory Reform Act 2013 and will assist PHSO to promote high standards of governance and accountability.
5. This policy is not intended to be used for matters that are covered by other PHSO policies, for example the Grievance Policy, Equality & Diversity Policy and the Dignity at Work Policy, which should be used by employees to raise concerns or complaints about their own employment.

PRINCIPLES

6. The following principles apply:
 - PHSO's core values are Excellence, Leadership, Integrity and Diversity. Our commitment to maintaining our integrity requires us to be open, honest and straightforward in all our dealings and to use time, money and resources effectively, so that:
 - we are consistent and transparent in our actions and decisions;
 - we take responsibility for our actions and hold ourselves accountable for all that we do;
 - we treat people fairly.
 - PHSO will assume that all concerns raised under this policy are done in good faith. However, if an employee is found to have knowingly made a false allegation, in the unlikely event that a concern is found to be frivolous, malicious or vexatious, action under the Disciplinary policy will be considered;
 - employees who are responsible for any wrong-doing themselves and raise the issue under this policy will not be provided with immunity for the actual wrong-doing, although PHSO will take into account their raising of the matter;

PROTECT

- every effort will be made not to reveal an employee's identity if this is their wish. However, in certain circumstances, it may not be possible to maintain confidentiality;
- an employee raising a qualifying disclosure (see definition of whistleblowing below) will not suffer from any detriment as a result of having raised the concern;
- PHSO will make every attempt to ensure that an employee raising a qualifying disclosure is not victimised as a result of having raised the concern. Such victimisation will be subject to disciplinary action; employees are not expected to prove, beyond reasonable doubt, the truth of an allegation. However, they do need to demonstrate that they have a reasonable belief that there are sufficient grounds for their concern.

OUTCOMES

7. The outcomes of this policy are that:
 - employees have a clear understanding of how to raise concerns regarding professional standards;
 - PHSO is able to comply with its obligations under the Public Interest Disclosure Act 1998 and the Enterprise and Regulatory Reform Act 2013;
 - the integrity of PHSO is upheld and arrangements are in place for the proportionate and independent investigation of such matters and for appropriate follow-up action.

MONITORING AND REVIEW

8. This policy will be reviewed regularly and in line with relevant legislation.

Whistle-blowing procedure

1. Definition of whistle-blowing

- 1.1 Whistle-blowing is a term used to describe a disclosure made to someone in authority alleging corruption or malpractice on the part of another person. In employment, whistle-blowing refers to an employee making a disclosure about another employee's conduct in the course of employment or about the employer's practices.
- 1.2 The Public Interest Disclosure Act 1998 and the Enterprise and Regulatory Reform Act 2013 protect employees against dismissal and detriment where they raise a legitimate concern about a specified matter. These are known as 'qualifying' disclosures. A qualifying disclosure is one which is made in the public interest by an employee who has a reasonable belief that one of the following is being, has been, or is likely to be committed:
- a criminal offence;
 - a miscarriage of justice;
 - an act creating risk to health and safety
 - an act causing damage to the environment;
 - a breach of any other legal obligation; or
 - concealment of any of the above.
- 1.3 Concerns may be raised about the actions of another employee, suppliers, contractors or anyone else undertaking work on behalf of PHSO.

2. Raising a concern

- 2.1 Employees who wish to whistle-blow should initially seek advice and guidance from their line manager (unless their concern is about their line manager) or HR, People & Talent, before proceeding. The line manager will discuss with the employee the way to proceed, involving HR, People & Talent as necessary.
- 2.2 If an employee wishes to proceed with a whistle-blowing complaint they should set out the details of their concerns in writing and forward them to the Chief Executive. If the concerns raised by the whistle-blower relate directly to, or involve, the Chief Executive, they should be sent to the Ombudsman.
- 2.3 On receipt of the complaint the Chief Executive or Executive Team member will make initial enquiries to identify whether an investigation is appropriate or if the concern can be resolved through alternative action. Concerns which fall within the scope of a specific PHSO policy or procedure will normally be dealt with through that procedure.
- 2.4 If it is necessary to carry out an investigation, the Chief Executive (or other Executive Team member) will appoint an Investigation Manager, who is not directly implicated in the whistle-blowing allegation. If urgent preventative action is required, this may take place before any investigation is conducted.

PROTECT

- 2.5 Possible investigative routes include:
- internal investigation by management;
 - referral to the police; or
 - referral to the external auditor.
- 2.6 In some cases it may be appropriate to approach an external body for specialist professional or legal advice.
- 2.7 If the outcome of the complaint is that disciplinary proceedings should be commenced against another person, the person who raised the complaint will not be advised of any penalty given.
- 2.8 Where it is decided that there is no case to answer, but the employee held a genuine concern, PHSO will take such steps as are deemed necessary to ensure the employee is not subject to any victimisation or reprisal.
- 2.9 If an employee feels it would be inappropriate to raise a concern within the Office, particularly with senior management, or that a concern has been raised but has not been satisfactorily dealt with at a senior level, a concern can be raised with:
- PHSO's Audit Committee Chair, Alan Graham;
 - PHSO's external auditors, the NAO, who can be contacted regarding concerns about the misuse of public money, by calling the Whistle-blowers Hotline on 020 7798 7999 or by writing to:

The Comptroller and Auditor General
National Audit Office
157-197 Buckingham Palace Road
London SW1W 9SP
 - the Chair of the Public Administration and Constitutional Affairs Select Committee (via the Clerk to the Committee at pacac@parliament.uk, who will discuss with the Chair whether further action is appropriate, and if so what it should be).
- 2.10 If an employee raises a concern outside PHSO, they should have proper regard to the legal obligations of confidentiality under which PHSO operates. While these can cover the confidentiality of an individual's personal information, under the Data Protection Act 1998 for example, it is particularly important that the statutory restrictions on disclosure of information in the Parliamentary Commissioners Act 1967 and the Health Service Commissioners Act 1993 are respected. Because these statutory restrictions set out the basis on which PHSO undertakes all its investigations, the Office may need to bring disciplinary or legal action in respect of any breach that is not protected by the Public Interest Disclosure Act. For this reason, employees should seek advice from Public Concern at Work (see 4.1) or a lawyer before they make an external disclosure.

3. Anonymous complaints

- 3.1 Anonymous reports are not encouraged. However, if an employee chooses to raise a concern anonymously or only wishes to raise a concern orally, PHSO will investigate. However, the employee raising the concern must be aware that it may not always be possible to investigate fully in such circumstances or to reach a satisfactory conclusion.

4. Confidential advice

- 4.1 If an employee is unsure whether to put their name to a complaint or whether they should talk to their line manager or HR, People & Talent about their concern, they can get free, confidential advice from the independent charity, Public Concern at Work on 020 7404 6609 (e-mail: helpline@pcaw.co.uk)
- 4.2 Other possible contact points for advice are:
- relevant professional bodies or regulatory organisations;
 - a solicitor;
 - the police.
- 4.3 Employees can also contact the Employee Assistance Programme (EAP) providers, their Trade Union representative or a member of HR, People & Talent for advice.

5. Raising a concern regarding an external organisation

- 5.1 If an employee is concerned about serious wrong doing by an external organisation, (or an employee of an external organisation) for example a supplier, they should raise their concerns with their line manager, in accordance with any operational guidance. The line manager will escalate it to their Director/Head of Function.
- 5.2 Employees with concerns regarding a body in jurisdiction are advised to read the relevant Casework Policy and Guidance to determine the appropriate action. Further information is contained within:
- Governance Statement;
 - Clinical Adviser Guidance;
 - Disclosure of concerns about the health and safety of patients;
 - Releasing information about risk to a complainant or others;
 - PHSO's Fraud Policy.

6. Right to be accompanied

- 6.1 All employees taking part in formal meetings (including investigation meetings) can be accompanied to a meeting by a PHSO colleague or Trade Union representative. This applies to an employee:
- who has raised the concern;
 - who is the subject of the complaint;
 - who is a witness during the investigation.

PROTECT

6.2 The colleague or Trade Union representative may:

- address the meeting but not answer questions on behalf of the employee;
- confer with the employee during the meeting, requesting an adjournment, if necessary.

6.3 Managers arranging formal meetings should advise employees that they may be accompanied. Every effort will be made to accommodate the availability of the colleague/Trade Union representative accompanying the employee. However, where this causes the process to be unduly delayed, the employee may be requested to seek an alternative.

7. External complaints

7.1 Former employees, agency workers and consultants can raise a concern by contacting the Director of HR, People and Talent or the Chief Executive.