

Health and Care Bill

Committee Stage, House of Lords, 24 January 2022

Summary

- PHSO strongly supports the establishment of the Health Service Safety Investigations Body (HSSIB), but we have grave concerns that provisions relating to HSSIB will prevent PHSO fulfilling its unique constitutional role and achieving justice for patients who have been failed by the NHS. Moreover, we do not believe that the exclusion from safe space is necessary given restrictions in PHSO's own legislation to investigate in private and protect the disclosure of information.
- Part 4 of the Health and Care Bill creates a safe space for information held by the HSSIB. Safe space provisions will undermine PHSO's unique constitutional role. Parliament gave PHSO extensive powers in 1967 and 1993 to access information from all areas of public administration as it believed that we would need these in order to fulfil our role and functions. These are now being removed without proper thought and consideration.
- The Council of Europe's Venice Commission unanimously found that the safe space breached both the Venice Principles and the United Nations General Assembly Resolution on the role of the Ombudsman, co-sponsored by the British Government.
- The proposed prohibition on PHSO accessing safe space could result in different accounts being given to PHSO during its own investigations that could not be reconciled without taking HSSIB to court. This would be the worst possible outcome for a patient who has already experienced a failing in care and treatment.

About PHSO and the role of the Ombudsman

The Parliamentary and Health Service Ombudsman (PHSO) was set up by Parliament to provide an independent and impartial service to resolve disputes to drive accountability and standards in the NHS in England, UK Government Departments, and other UK public organisations. We are the final stage for complaints that have not been resolved through organisations' own complaints processes.

As well as resolving individual complaints and giving patients access to justice when they have been failed by public services, PHSO also helps NHS organisations improve. We make recommendations to individual NHS organisations. We also share the learning from complaints more widely to encourage improvement in the quality and safety of

services. PHSO's casework also helps Parliament scrutinise the NHS in England. Recent examples of reports published include failings in [NHS Continuing Health Care](#), [NHS imaging](#), [eating disorder services](#), and mental health care and treatment at [North Essex Partnership University NHS Foundation Trust](#).

Background to the amendment to grant PHSO access to HSSIB's safe space

The Bill will establish the Health Service Safety Investigations Body (HSSIB) to investigate incidents which have, or may have, implications for the safety of patients, both in the NHS and independent healthcare providers. Part 4 and Schedule 14 set out provisions for creating a 'safe space' within HSSIB investigations, to enable clinicians and others to provide information without the fear that this will be disclosed or used for disciplinary purposes. These proposals will exclude PHSO from accessing information held in safe space unless permission of the High Court is granted. This would be the first time in PHSO's 55-year history that such restrictions were placed on PHSO's ability to examine evidence relevant to our investigations.

Our amendment (see annex) will ensure that PHSO is granted access to HSSIB's safe space through the disclosure of protected information under the Parliamentary Commissioner Act 1967 and Health Service Commissioners Act 1993 for the purpose of health investigations, including those involving HSSIB itself. In effect, this would make PHSO part of safe space, thereby protecting the sanctity of safe space without impeding PHSO's unique constitutional role.

The unanimous support of the Venice Commission

PHSO and the International Ombudsman Institute welcome the [Opinion](#) of the Venice Commission in October 2021, which unanimously supported PHSO's position. In the words of one Venice Commission Rapporteur, under the current proposals, PHSO is 'a casual victim' of Government policy, by removing the powers that Parliament has bestowed on PHSO, without proper consideration.

The Commission found that:

- The UK Government's proposals on safe space contravene the international standards as set out in the Council of Europe's [Venice Principles](#) and the [United Nations Resolution](#) on the role of the Ombudsman, which was co-sponsored by the UK Government;
- It is inconsistent with the approach taken with coroners who will be granted access to safe space (though, unlike coroners, PHSO plays a unique constitutional role);
- Safeguards to ensure the aims of safe space are preserved are already available in the current legislative scheme of the Ombudsman (unlike coroners);
- The exclusion of PHSO from safe space has the potential to undermine public trust in a key national institution articulating citizens' rights.

Impact of safe space provisions on PHSO's role and functions

Safe space provisions in the Bill will have serious and adverse consequences for PHSO's unique constitutional role in investigating complaints about the NHS and other public services, achieving justice for members of the public, and encouraging public service to improve. Parliament gave PHSO extensive powers in 1967 and 1993 to access information from all areas of public administration as it believed that we would need these to fulfil our role and functions. In our view, these are being removed without proper thought and consideration.

Safe space provisions would:

- a) Undermine public confidence in the accountability of the NHS administrative justice system, as patients would have reduced access to justice. The NHS would be less accountable for its failings, and PHSO would be stripped of long-held constitutional powers and excluded from the safe space unlike coroners who are being given new powers. Allowing coroners access to information held in safe space without providing PHSO the same access, creates a confusing structure as coroners are unable to access the information that PHSO holds.
- b) Lead to the 'judicialisation' of the role of the Ombudsman, as warned by the Court of Appeal, by forcing PHSO to go via the High Court to request access to HSSIB's evidence. PHSO currently has powers equivalent to the High Court to access evidence or compel witnesses for the purpose of its own investigations. Prohibiting PHSO from accessing HSSIB's safe space would be the first restriction on the Ombudsman's powers since it was established in 1967.
- c) Risk PHSO being unable to robustly investigate complaints about the NHS. For example, if evidence given to HSSIB in safe space differs to that given to PHSO. As a result, PHSO may not be able to provide justice for people who have suffered harm and potentially risks PHSO coming to findings contradictory to HSSIB's own.
- d) Impede PHSO's ability to investigate HSSIB's own failings. If PHSO received a complaint about how HSSIB handled evidence which was held in safe space, PHSO would be prohibited from accessing this information to enable a thorough investigation. This would severely curtail PHSO's constitutional powers to conduct thorough investigations and achieve justice for individuals.

Safeguards to protect the integrity of safe space

PHSO is and should be deemed an extension of safe space, given the robustness of the provisions in existing legislation under the Parliamentary Commissioner Act 1967 and Health Service Commissioners Act 1993. PHSO has powers equivalent to the High Court to access evidence or compel witnesses for the purpose of its own investigations.¹

There are wide-ranging legislative protections, which could be used to preserve the integrity of information held in safe space. For example, PHSO is legally required to

¹ Section 8 of the Parliamentary Commissioner Act and Section 12 of the Health Service Commissioners Act 1993

investigate in private² and has the right to withhold information from disclosure to the public, or even those party to the complaint, when this is considered to not be in the public interest.³ We can provide much needed assurances to Government, HSSIB, professionals and families participating in PHSO investigations, that we will securely protect any information received from HSSIB's safe space.

Clauses 110 and 112 of the Bill set out provisions for HSSIB to co-operate and share information with relevant public bodies when carrying out investigations. However, these are very limited and appear to be based on a serious misunderstanding about the confidentiality of material held by PHSO.

PHSO has a positive working relationship with HSSIB, underpinned by the signing of a Memorandum of Understanding in 2019. We believe it is entirely practical and achievable to protect safe space through arrangements between PHSO and HSSIB. Whilst existing legislative protections are very robust and all encompassing, an operational protocol could be established between our organisations to promote co-operation and joint working to preserve the integrity of information held in safe space even further.

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² Section 7(2) of the Parliamentary Commissioner Act and Section 11 of the Health Service Commissioners Act.

³ Section 11(3) of the Parliamentary Commissioner's Act and Section 15(1)(e) of the Health Service Commissioners Act.

Annex: Committee Stage amendment - PHSO's access to HSSIB's safe space

Schedule 14

Baroness Neuberger

Baroness Parminter

Lord Etherton

Page 229, line 39, at end insert -

“5A(1) The Commissioner may under section 12 of the Health Service Commissioners Act 1993 (evidence) or section 8 of the Parliamentary Commissioner Act 1967 (evidence) require the disclosure of protected material by the HSSIB to the Health Service Commissioner for England in accordance with those sections.

(2) The HSSIB may disclose protected material to the Commissioner for the purposes of complying with a requirement imposed under a provision mentioned in sub-paragraph (1).

(3) The HSSIB may disclose protected material to the Commissioner if the Chief Investigator reasonably believes that the Commissioner could require the HSSIB to disclose the material under a provision mentioned in sub-paragraph (1).

(4) If protected material is disclosed to the Commissioner under or by virtue of this paragraph, the Commissioner must not disclose that material to another person, subject to sub-paragraphs (5) to (7).

(5) The Commissioner may apply to the High Court for an order that protected material disclosed to the Commissioner under or by virtue of this paragraph may, for the purposes specified in the application, be disclosed by the Commissioner –

(a) in the course of an investigation under the Health Service Commissioners Act 1993

(b) in the course of an investigation under the Parliamentary Commissioner Act 1967,

(c) in a report made under section 14 of the Health Service Commissioners Act (reports by the Commissioner),

(d) in a report made under section 10 of the Parliamentary Commissioner Act 1967 (reports by the Commissioner),

(e) otherwise to another person.

(6) The HSSIB may make representations to the High Court about any application under sub-paragraph (5).

(7) The High Court may make an order on an application under sub-paragraph (5) only if it determines that the interests of fairness served by the disclosure outweigh—

(a) any adverse impact on current and future investigations by deterring persons from providing information for the purposes of investigations, and

(b) any adverse impact on securing the improvement of the safety of health care services provided to patients in England.

(8) In this paragraph “the Commissioner” means a person appointed as the Health Service Commissioner for England under paragraph 1 of Schedule 1 to the Health Service Commissioners Act 1993, or a person appointed as the Parliamentary Commissioner for Administration under section 1 of the Parliamentary Commissioner Act 1963 as the case may be.”