

Consultation Response

Scottish Government consultation on the Public Services Reform (the Scottish Public Services Ombudsman) (Healthcare Whistleblowing) Order 2019

June 2019



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Health and Medical Law Sub-committee of the Law Society of Scotland welcomes the opportunity to consider and respond to the Scottish Government consultation on the draft order to amend the Scottish Public Services Ombudsman Act 2002 ('the 2002 Act'), to allow the Scottish Public Services Ombudsman (the SPSO) to investigate complaints in relation to the handling of whistleblowing cases in NHS settings in Scotland.

We previously responded to the Scottish government's consultation on a proposal to introduce a role of an Independent National (Whistleblowing) Officer (INWO).¹ Our response below is consistent with the approach taken in these papers.

General Comments

Our previous response was supportive of the introduction of an Independent National Whistleblowing officer (INW),² and that this role should be hosted within the office of the Scottish Public Services Ombudsman (SPSO)³. We are pleased to note that the proposed Order will reflect this and confer the functions of the INWO upon the SPSO. However, our specific responses below notes that it is difficult to

¹ Consultation on proposals for the introduction of the role of an Independent National (Whistleblowing) Officer (INO) Law Society of Scotland Response available at <https://www.lawscot.org.uk/media/2862/hea-consultation-on-proposals-for-the-introduction-of-the-role-of-an-in.pdf>

² Ibid at p. 3

³ Ibid at p. 4

fully answer some of the questions posed without knowing that the proposed standard and principles for addressing whistleblowing complaints will be approved in their current draft form. We note that whilst the SPSO are currently consulting on these⁴, they will not be available (in draft form) until the end of 2019⁵. They will then be published under 16B of the Scottish Public Services Ombudsman Act 2002.

Comments and responses to the consultation questions

1. Do you agree that the following individuals should be given access to an investigation by the SPSO in her role as INWO?

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| a. individuals in the primary care sector | Yes |
| b. individuals delivering services for independent providers, under contractual arrangements with NHS Scotland | Yes |

We agree that it is appropriate to include primary care staff and individuals delivering services for independent providers under contractual arrangements with NHS Scotland. This would provide for those performing NHS-related actions access to the whistleblowing process regardless of the particular method of service delivery which has been provided for a service. This also accords with the aim of providing, for service users, seamless integrated services, whether these are managed by NHS hospital or community services. It should also provide for a consistent whistleblowing process across these services which will serve to build and maintain public confidence in the system as a whole.

2. 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 purposes of the INWO investigation?

We partly agree. As noted in our general comments above, it would be helpful if the order had defined the model whistleblowing procedure or clarified if this has already been defined. We note that the Boylin Report⁶ explains that it was considered whether or not to use a legal definition such as the one found in the Public

⁴ SPSO (May 2019) Consultation on Draft Whistleblowing Standards for the NHS in Scotland: Principles and Procedure. Available from: <https://www.spsso.org.uk/sites/spsso/files/INWO/190429ConsultationOnDraftNHSWhistleblowingStandards.pdf> [Accessed June 24 2019]

⁵ SPSO (May 2019) Consultation on Draft Whistleblowing Standards for the NHS in Scotland: Principles and Procedure. Available from: <https://www.spsso.org.uk/sites/spsso/files/INWO/190429ConsultationOnDraftNHSWhistleblowingStandards.pdf> [Accessed June 24 2019] at p5.

⁶ Boylin T., (2018) Report on Outcomes from Independent National Whistleblowing Officer Engagement Events. Scottish Government. Available from: <https://www.gov.scot/binaries/content/documents/govscot/publications/progress-report/2018/07/independent-national-whistleblowing-officer-nhs-scotland-engagement-events-outcomes-2018/documents/00538416-pdf/00538416-pdf/govscot%3Adocument> [Accessed June 16 2019] at para 3.1-3.2 at p.10.

Interest Disclosure Act 1998. However, this may not be wide enough to cover the health sector. The bodies and providers in S6A(2) are required to adapt their complaints system in accordance with a model which has not yet been agreed.

3. 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?

We agree subject to our comments below.

We note that Part 4 of the Draft National Whistleblowing Standards set out a detailed 2 stage process for internal investigation of alleged complaints⁷. As defined in part 4 of the Standards⁸, comment upon treatment of the individual forms part of broader proposed duties for the INWO including:

- How the organisation has applied these Standards and investigated the issues raised;
- Whether the decisions made in relation to whistleblowing concerns were reasonable;
- The person's treatment, including any signposting relating to HR procedures linked to their raising a concern.

We suggest that the definition of 'reasonable' in the second bullet point will influence how the first and third are determined.

Q4. We propose that the SPSO in her role as 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?

No.

⁷ SPSO (May 2019) The Draft National Whistleblowing Standards Part 4 The 2 Stage Procedure. Available from : <https://www.spsso.org.uk/sites/spsso/files/INWO/04.DraftStandards%3B4The2StageProcedure.pdf> [Accessed June 24 2019]

⁸ ⁸ SPSO (May 2019) The Draft National Whistleblowing Standards Part 4 The 2 Stage Procedure. Available from : <https://www.spsso.org.uk/sites/spsso/files/INWO/04.DraftStandards%3B4The2StageProcedure.pdf> [Accessed June 24 2019] paras 57-58

The four bodies noted in the consultation have formal roles in assessing services provided by NHS Boards, and it would be appropriate for the INWO to provide information to these bodies where there is a perceived failing in service provision which has been raised by a whistleblower.

5. Do you have any other comments on our proposals for establishing the INWO?

We also believe that legislation alone is not sufficient to address the inherent challenges in whistleblowing.⁹ To be fully effective and to provide protection for all parties involved requires cultural change, ongoing training¹⁰ and transparency in the workplace. Importantly trust in the systems that have put in place. We believe that the role of the INWO should provide a positive contribution.

⁹ See for example, White, S (2019) *A Matter of Life and Death Whistleblowing Legislation in the EU*. THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM. Available from: https://eucrim.eu/media/issue/pdf/eucrim_issue_2018-03.pdf#page=32 {accessed June 16 2019} at p. 170

¹⁰ Ashton J(2015) 15 Years of Whistleblowing Protection under the Public Interest Disclosure Act 1998: Are we still shooting the messenger? *Industrial Law Journal* Vol. 44 1 at p.50

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