

Lewis Macdonald MSP  
Convener  
Health and Sport Committee

By email to: [HealthandSport@parliament.scot](mailto:HealthandSport@parliament.scot)

12 June 2019

Dear Convener

**Consultation on the proposals for the new Independent National Whistleblowing officer role**

During the evidence session on 28 May 2019, I offered to follow-up on a question and get back to the committee. The question was whether we knew of other examples of an order dependent on a third-party that was not subject to parliamentary scrutiny.

As you are no doubt aware, it is not uncommon for primary legislation to allow for further detail in either regulations or guidance. But further detail is not the same as recognising the need for a definition and then delegating that definition in such a way that it evades parliamentary scrutiny. I have not found a comparable legislative example where definitions have been provided for in this way (There is though a significant volume of legislation and drafting practice has changed and evolved over time which means that it is not possible to say absolutely that such examples do not exist).

Even if examples existed, as I explained to the Committee, I consider it remains better practice to ensure that Parliament has an appropriate level of oversight in such a crucial and potentially impactful area.

It is important to me that the fundamental drivers behind an effective whistleblowing policy and procedure are borne in mind: the safety of patients and the protection of individuals providing NHS services. I accept fully that under the SPSO Act I am accountable through evidence giving and my Annual Report laid before Parliament. However, without parliamentary scrutiny built into what I am being held accountable against, I question the extent to which service providers, patients and others will have confidence in the whistleblowing process if the key definition required to apply Scottish legislation is left entirely to the SPSO – however well we are regarded. I still consider it is a gap in oversight if Parliament does not have the ability to approve or not the key definitions.

In my written submission I provided two possible routes for resolution. I will also put those suggestions again to the Scottish government in my response to their consultation. While there are benefits to having a definition on the face of the order, the flexibility the government are keen to provide can still be retained if they are included in the Principles and I have suggested that the Scottish Government could amend our legislation through the



order to allow for this. This could include resolving the issue about any potential issues connected to the current scope of the existing principles raised in oral submissions by the Government.

I hope the Committee find these additional comments helpful. Please get back to me if you have any further questions.

Yours sincerely

Rosemary Agnew  
**Scottish Public Services Ombudsman**