

HEALTH AND SPORT COMMITTEE

CONSULTATION ON THE PROPOSALS FOR NEW INDEPENDENT NATIONAL WHISTLEBLOWING OFFICER ROLE

SUBMISSION FROM SCOTTISH PUBLIC SERVICES OMBUDSMAN

Background

The SPSO has a wide remit, covering a variety of functions and services. Her powers and duties come from the Scottish Public Services Ombudsman Act 2002 which gives her three distinct statutory functions:

1. the final stage for complaints about most devolved public services in Scotland including councils, the health service, prisons, water and sewerage providers, Scottish Government, universities and colleges,
2. specific powers and responsibilities to publish complaints handling procedures, and monitor and support best practice in complaints handling,
3. Independent Review Service for the Scottish Welfare Fund with the power to overturn and substitute decisions made by councils on Community Care and Crisis Grant applications

How will the order affect the whistleblowing process

In creating a new function of INWO, the proposed order extends the first two functions to whistleblowing in the NHS.

The INWO will be able to investigate how a concern has been responded to by the NHS organisation. This will replicate the role the SPSO currently has in complaints from members of the public allowing her to review:

- how the organisation responded
- how they investigated (or if not/why not)
- the decisions made during that process, including direct assessment of any clinical judgement in that process
- the outcome, and
- the treatment of any person. This includes the person who raised the issue, but in this one critical area, the order goes beyond the current complaint-handling powers. The order brings in the treatment of witnesses/evidence-givers and any person(s) who were the subject of the complaint within the remit of the INWO. This change was at the specific request of SPSO and reflects that, for the whistleblowing process to be successful, all those involved need to be treated with dignity and respect throughout. They must also be confident in the process.

The INWO will also set standards for the way concerns should be handled (ie investigated, responded to and reported on) by the organisation.

To coincide with the publication of the order, SPSO has issued a complete set of standards for consultation [<https://www.spsso.org.uk/consultation-the-draft-national-whistleblowing-standards>]. Significantly, these include Principles to guide approach and decision-making and guidelines on governance oversight and reporting, in addition to investigation processes. Together these help support a positive culture towards speaking up, not just through whistleblowing, while building in consistency, transparency and accountability.

Sturrock review report and the INWO

We are still digesting the details and implications of the Sturrock review and considering whether any changes, or points of clarification are needed to the draft standards.

From our initial reading, the issues raised by the Sturrock review reflect deep-seated matters of local culture and relationship breakdown. The creation of an INWO for the NHS is a critical element of promoting and developing more open and inclusive cultures in relation to patient safety, but is not, in itself alone, capable of resolving all such matters.

We see the role as both one of oversight for whistleblowing and also a catalyst for change and improvement for related issues covered by other work. We recognise the value of highlighting problems at an earlier stage and allowing organisations to identify and address them themselves before they escalate. We also recognise that, significant and sustainable culture-change, requires the commitment of multiple stakeholders and embedding dignity and respect in business as usual reporting, HR procedures and all areas where NHS colleagues interact. The INWO cannot and should not be seen as a single solution to those multiple, overlapping issues.

This is why a small, but significant part of the proposed Order, extends our information-sharing powers to a list of named organisations who play a role in supporting NHS practice and improvements. This will allow us to share information quickly that may indicate systemic problems while an investigation is on-going or, at the end of an investigation, to provide them with more specific detail than it is possible or appropriate to include in any anonymised, public report.

The INWO is also not intended to supersede or replace the protections provided through the employment contract and related legislation. Instead, it provides an additional, supplement to those protections by allowing for treatment of individuals in relation to a specific area (whistleblowing) to be subject to an independent review and scrutiny. The INWO will also be able to provide some protection to those, such as volunteers, who deliver a service but do not currently have access to the benefits derived from an employer/ee relationship in this area.

Should the Ombudsman fulfil the role of Independent National Whistleblowing Officer

When this question was put for consultation previously, the support for our taking on this role was linked to our status as a Parliamentary-supported organisation. This guarantees

our independence from the NHS and the Government and means we are accountable to Parliament for our performance.

In addition, aspects of our experience in investigating health complaints will be used and developed in the new role as INWO.

We do not underestimate the differences that will exist between investigating a whistleblowing complaint and a service complaint. These include timeliness, confidentiality, and resource requirements. Experience from the introduction of the NHS complaints handling process, has shown us that organisations will need support, training and advice, so resources for this are also a critical requirement.

The absence of an existing similar function means that it is extremely challenging to assess the number of complaints that may be brought to us and the corresponding resources needed. We are currently in discussion with the Scottish Parliamentary Corporate Body and the Government to ensure we receive adequate funding, both for implementation and ongoing service, and we anticipate that resources will need to be subject to review in the light of experience in the first few years of this new role.

Does the order given the Independent National Whistleblowing Officer adequate powers

The order adopts the powers we currently have when investigating complaints. It also means that we will have the same powers to report and to make recommendations.

An Ombudsman traditionally does not have enforcement powers when investigating. While some may be nervous about this, our experience is that this is a fundamental strength of the Office. The ability to enforce recommendations brings with it legal restrictions which limit the flexibility to resolve matters. The more confrontational approach that such powers engender would also be counter to the aim of the INWO, to influence and support culture change.

Recommendations can be framed to set the outcomes that should be achieved as a result of findings, while requiring the organisation to set out how it will achieve them. As well as ensuring that the actions can be adapted for local settings, it also means that the organisation has to take an active role in seeking to solve the problem we have identified, in turn engendering greater ownership for improvement at a local level.

The Ombudsman is not powerless; she can lay reports before Parliament and, specifically, if there is an outstanding injustice to an individual, a special report. Despite having issued thousands of recommendations over many years, we have never had to issue a special report.

In the area of standards-setting, our powers are more directive. Organisations must comply with the principles and procedures and we can issue formal notices of non-compliance. Again, our experience of seven years of standards-setting is that we have not had to use

those formal powers but we do refer to them and they have helped ensure compliance and standardisation.

Although we consider it appropriate that the order reflects our current powers, we have been actively pursuing with the Government and Parliament enhancements and improvements to our legislation. If agreed, these would apply to the INWO as well as our other functions. The most significant of those proposals would see the SPSO having the ability to conduct public value investigations when no individual or no individual who is willing to be named, has raised a matter direct with us. The experience of Ombudsmen who have these powers is they are used rarely but are of particular benefit when the vulnerability of those affected means they are unlikely to raise individual complaints.

We are awaiting a response from the Government with their views and intend to approach Parliament with a full report on all of our proposed legislative enhancements. Changes under consideration are likely to require primary legislation.

Is there anything you would add, amend or remove from the order?

From our perspective, it is critical that the order fulfils the policy intent clearly in order to limit the risk of the INWO being the subject of legal challenges resulting from any ambiguities.

The drafting is technical and we would support any improvements that could make the order more straight-forward to reduce that risk. There are particular tensions around the relationships with HR processes for example.

We also note that presently the only reference to any definitions are to whistleblowers and to our ability to include these in the procedures. There is no parliamentary process needed to either create or change this definition nor any requirement to have a definition of whistleblowing. We appreciate this drafting places considerable trust and power in this office in doing so, and allows for some flexibility. However, we also appreciate that this lack of statutory definition may be seen as problematic and there are alternative options. For example: the order could place a requirement on us to include definitions in the Principles which require approval by Parliament, or non-exhaustive definitions could be placed within the order itself.