



THE LAW SOCIETY
of SCOTLAND
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Consultation Response

Consultation on proposals for the introduction of the role of an Independent National (Whistleblowing) Officer (INO)

The Law Society of Scotland's response
February 2016

Introduction

The Law Society of Scotland is the professional body for over 11,000 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 legal 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 legal 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 Society's Health and Medical Law Sub-Committee welcome the opportunity to consider and respond to the Scottish Government's consultation on a proposal to introduce a role of an Independent National (Whistleblowing) Officer (INO). We have the following general comments and responses to put forward to the questions raised in the consultation.

Following recommendations from the Freedom to Speak Up Review,¹ the Minister for Health, Wellbeing and Sport, Shona Robison MSP, committed to establishing an Independent National (Whistleblowing) Officer (INO). It is intended that this role will, where necessary, provide an independent and external level of review on the handling of whistleblowing cases.

General Comments

Whilst we note and understand the necessity for a distinction to be made between what constitutes a 'public concern' or a 'private concern'², we believe that this may give rise to confusion especially on the part of the individual who is raising either type of issue. This is particularly so when it is proposed that the onus rests with the complainant to provide a

¹ <https://www.gov.uk/government/publications/sir-robert-francis-freedom-to-speak-up-review>

² As discussion in the Consultation paper, Consultation on proposals for the introduction of the role of an Independent National (Whistleblowing) Officer (INO) available from <http://www.gov.scot/Resource/0048/00489177.pdf> at pp.14 and 15.

statement to the INO as to why they should have jurisdiction in their complaint.³ If the role of the INO is to be introduced, it needs to be made clear that they have no role in determining whether or not a member of staff has suffered detriment and that the existing legal mechanisms will continue to apply. It is not considered that the establishment of the INO fully addresses the concerns most recently encapsulated in the House of Commons Briefing Paper - CBP 7442, 4th January 2016.⁴

Questions

With regard to the questions contained in the consultation paper, we should like to respond as follows;

Question 1: What should the role of the INO be?

- **Option 1 - To consider complaints about the application of the local whistleblowing process only. OR**
- **Option 2 - To consider complaints about application of the local whistleblowing process, including examination on the decision making and outcome of the whistleblowing complaint.**

We would suggest that option 2 would provide for a more thorough and consistent examination of any potential complaint. However we refer to our general observation above since we note that potentially the INO could recommend that the Health Board make an apology to the complainant.⁵ There has to be clarity as to the parameters of the proposed INO role in relation to how the complainant has been treated and possible resolutions. The INO and or equivalent (see 6a below) and its role should be clearly identified, including in written responses made by Health Boards and any other employer providing services to the Health Board to potential whistleblowing complaints as an appellate body with the power to examine how an employer has handled a complaint internally both in terms of the procedure followed and the substantive merits of the complaints. Limiting the INO powers to reviewing procedure would materially reduce its effectiveness and may be

³ Consultation on proposals for the introduction of the role of an Independent National (Whistleblowing) Officer (INO) available from <http://www.gov.scot/Resource/0048/00489177.pdf> at p.27

⁴ <http://researchbriefings.files.parliament.uk/documents/CBP-7442/CBP-7442.pdf>

⁵ Consultation on proposals for the introduction of the role of an Independent National (Whistleblowing) Officer (INO) available from <http://www.gov.scot/Resource/0048/00489177.pdf> at p.21

counterproductive giving an air of legitimacy to procedurally correct but otherwise bad decisions of an employer.

Question 2: Do you agree with the principles and process for raising concerns with the INO?

We partly agree. However, we do believe that the principle that ‘the INO should not consider historic cases’⁶ may be a little restrictive and historic cases may form a necessary part of a current review. We consider that the proposed prohibition on matters pertaining to an individual’s contract of employment should not be so restrictive as to act as defence to an INO reference.

2a. Do you feel that there should be any additional principals of changes to the process for raising concerns with the INO?

Yes. The INO should, we suggest, be able to receive requests from Employment Tribunals to submit written opinions or give live evidence to live cases.

2b. Do you agree with the proposed INO Whistleblowing complaint criteria?

Yes. We would suggest that too prescriptive or technical an approach will discourage individuals.

Question 3: Do you agree that consideration should be given to the INO having prescribed powers?

Yes. The Freedom to Speak Up Review⁷ considered and acknowledged the range of existing policies and mechanisms in place, despite which, they believed, still left some ‘gaps’⁸. If this role is perceived as a way to address these, then it should have clear and accountable prescribed powers. Without enforcement powers the value of the role would be advisory which would ‘allow’ Health Boards to ignore the advice provided.

⁶ Consultation on proposals for the introduction of the role of an Independent National (Whistleblowing) Officer (INO) available from <http://www.gov.scot/Resource/0048/00489177.pdf> at p.24

⁷ <https://www.gov.uk/government/publications/sir-robert-francis-freedom-to-speak-up-review>

⁸ Consultation on proposals for the introduction of the role of an Independent National (Whistleblowing) Officer (INO) available from <http://www.gov.scot/Resource/0048/00489177.pdf> at p.7

Question 3a: If yes, do you think that these powers should be?

The powers should be to both compel a public body to provide evidence and to enforce recommendations, if required. We suggest that the INO should provide a 'best practice' whistleblowing policy that Health Boards should have as a minimum standard of practice.

Question 4: Where should the INO role be hosted?

Option 2 - Scottish Public Services Ombudsman (SPSO). We believe that the expertise at the SPSO closely mirrors what the INO role is intended to do.

Question 5: Do you think employees of adult health and social care services, who are not employed by NHS Scotland, should have access to the INO?

Yes. As the Consultation document acknowledges- '*the Public Bodies (Joint Working)(Scotland) Act 2014 provides the legislative framework for the integration of health and social care services in Scotland. This Act requires local integration of adult health and social care services.*'⁹ The public interest in the effective administration of health and social care demands that anyone working within these sectors should have an effective rights of reconsideration of any internal whistleblowing matter considered internally by their employer. Given the overlap and increased integration the facility should be available to all who would within social and health care in Scotland.

The Act provides the framework which will support the improvement of the quality and consistency of health and social care services in Scotland. It also requires Health Board and local authority partners to enter into arrangements (the integration scheme) to delegate functions and appropriate resources to ensure the effective delivery of those functions. Whilst this may present some challenges, a successful integration will lead to clarity and consistency in approach; two of the main objectives of the proposed role of the INO.

5a. If yes which IJB services should be covered?

We would suggest that as many as many IJB services as possible should be covered

⁹ Consultation on proposals for the introduction of the role of an Independent National (Whistleblowing) Officer (INO) available from <http://www.gov.scot/Resource/0048/00489177.pdf> at p.35

5b. If yes to Question 5 do you have a view on how employees who have access to INO be defined?

We would suggest that reference be made to their profession/occupation.

Question 6a: What do you feel would be an appropriate title for the INO in Scotland if the role also covered staff not employed by NHS Scotland who deliver health and social care services in Scotland?

If the role were to be extended to staff not employed by NHS Scotland then the INO's title should reflect this. For example we suggest; *Independent Whistleblowing Ombudsman for Health & Social Care Agencies in Scotland.*

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