

## Comments from the Scottish Public Services Ombudsman on the consultation on proposals for the introduction of the role of an independent national whistleblowing officer.

The Scottish Public Services Ombudsman (SPSO) is suggested as one possible home for the new role of independent national whistleblowing officer (INO). As a Parliamentary body, it is our standard practice when responding to Government consultations to provide advice based on our experience. Ultimately, it is the Parliament who will decide whether or not the role would be an appropriate addition to this office.

### **The essential characteristics of the new role**

This office does not currently have any role in this area. We cannot investigate disclosures made by whistleblowers or investigate complaints about how whistleblowing was dealt with in any of the many areas under our jurisdiction. We do have significant experience in creating processes for handling complaints and in investigating complaints. This office is used to working with varied powers across different jurisdictions, for example, we have long had an extended jurisdiction in health care to consider clinical judgment. We have also taken on a number of new areas of jurisdiction since the creation of the office in 2002 including water, prisons, prisons health and further and higher education.

In considering how best to respond to the Government, we have looked internationally and have taken advice from the New South Wales Ombudsman (NSWO). The NSWO has a broad jurisdiction which includes the traditional role of complaints handler but also allows them to monitor new legislation and provides them a proactive scrutiny role over a number of areas including reviewable deaths, children's services and auditing covert operations. As part of this extensive role<sup>1</sup>, they have specific responsibilities in relation

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<sup>1</sup> <https://www.ombo.nsw.gov.au/what-we-do/about-us/what-we-do>

to protected interest disclosures which give them not only the ability to consider specific individual concerns, but provides them with the ability to monitor the system as a whole<sup>2</sup>. We asked them about their experience of complaints from whistleblowers. They told us that in their experience concerns about the adequacy of the investigation was usually only a very small part of the complaint made to them and, even when such allegations were made, they were often tied up with general dissatisfaction with the agency. More commonly, they received complaints alleging that the whistleblower faced detriment or reprisal as a result of making such a complaint and the agency involved had failed to take action to prevent this; that their identity was not kept confidential; or they did not receive adequate support or feedback. The NSW Ombudsman have found that in many cases public and private interests are grouped together and that reports to them are often made within the context of a pre-existing workplace conflict. On a general point, they also said that, given the many regulatory organisations which already have a locus in this area, they saw benefit in the INO role sitting alongside a larger regulatory role.

The questions in the consultation look at a number of points of detail about principles and processes. Based on our experience and taking the NSW Ombudsman advice into account, we are suggesting further work may be required to clarify the fundamental nature of the role before these can be established.

In particular, we think careful consideration should be given to providing the new role with the powers to look at all aspects of the response to the allegation by the organisation being investigated including the impact on the person making the response. The INO should not be unduly restricted and should be able to take a holistic view. We appreciate the need to respect the processes in place for dealing with employer/employee disputes. However, given concerns about the impact on their employment is often raised by and a key issue for whistleblowers, any investigating body that cannot consider the whole response of the organisation being investigated to the allegation will come up against restrictions which will limit its effectiveness. This is

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<sup>2</sup> <https://www.ombo.nsw.gov.au/what-we-do/our-work/public-interest-disclosures/our-public-interest-disclosures-unit>

not to suggest that we think the INO should replace those processes, but the body needs to be able to comment on the organisation's response in total to be effective.

This ability to look and investigate holistically will need to be supported by appropriate powers including the ability to:

- compel the production of all evidence that it considers relevant to the investigation including when that evidence may relate to employment matters.
- take evidence under oath. This is a power we currently have which we have not had to use to date, but we have found that the knowledge that we can do so can make a difference in ensuring that organisations co-operate fully.
- report publicly on its findings (protecting anonymity of individuals) when appropriate.
- make recommendations and have a duty to follow up on those recommendations. If it is decided the INO would not be the regulator, this would include the ability to ensure that references to the appropriate regulator were followed up.
- report either to the Government or the Parliament when those recommendations are not met.
- engage fully with any other agencies it considers relevant while investigating or following up on recommendations.

There is also a need to ensure that the organisation will have the trust of whistleblowers and this means it should be and be seen to be independent of both Government and the NHS. While the policy is for others to decide, we would find it difficult to house a role which we felt had not been given sufficient powers to operate with full effectiveness.

If it is decided that this office would be an appropriate home for the INO, there would need to be detailed discussions about what additional skills and resources we would need to have to be effective and how we would relate with the many other agencies who already have an interest in this area.

In conclusion, we think there are potential benefits to introducing a role such as INO to the NHS in Scotland but that it needs to be sufficiently wide-ranging and powerful to be effective. We would also argue serious consideration should be given to extending these potential benefits to other public organisations. We would be happy to assist in any further consideration of how this could best be achieved.