Dear Mr Macdonald and colleagues,

Committee inquiry on NHS corporate governance and a culture of improvement

I write to submit brief evidence, if that is acceptable, as Dr Philippa Whitford SNP MP for Central Ayrshire has kindly informed me that the committee’s call for evidence has been extended to this week.

To introduce myself, I am an English NHS whistleblower and former consultant psychiatrist.

In short, I would like to ask the Scottish Government to include in its work programme an emphasis on enabling health and social care workers to speak up freely about any concerns and most importantly, for organisations to listen up.

The current UK whistleblowing legislation is very weak and permits many abuses. The weakness of the law is a reflection of persisting poor culture and political unwillingness at Westminster to prioritise the public interest.

This is a recent comprehensive critique of the many weaknesses of UK whistleblowing law:

Protecting Whistleblowers in the UK, Blueprint for Free Speech 2016

Key issues needed in any reform of UK whistleblowing law reform are:

- Compulsion to investigate whistleblowers’ concerns – no one is under a duty to investigate under the current law

- A proactive, pre-detriment duty of protection – at present the law basically entitles workers only to compensation after detriment, which is too little too late

- Criminal sanctions for reprisal – this would not need to be used often and its purpose would be to deter

The English NHS experience on whistleblowing is of ongoing tokenism, despite disaster after disaster in which it has been shown that deterring, ignoring and or victimising whistleblowers was a key factor. For example:

Mid Staffs Public Inquiry
Ian Paterson breast surgery scandal

Of note, Robert Francis u-turned on his own recommendations from the Mid Staffs Public Inquiry for firm deterrence of whistleblower reprisal.

Nevertheless, these were recently resurrected in the recent recommendations of the Northern Ireland Inquiry into Hyponatraemia-Related Deaths.

Justice O’Hara has recommended that whistleblower reprisal should be criminalised, as Francis did in his report of the MidStaffs Public Inquiry.

Robert Francis led the Freedom To Speak Up Review for the English NHS which was published three years ago, but the recommendations generated by this review were weak. Even these ineffectual recommendations have been watered down in the way that the government has implemented them.

Two main elements of Francis’ plans, local Speak Up Guardians in NHS provider trusts and a National Guardian’s Office – which has no powers (and seeks no powers) – have been known to fail whistleblowers seeking help with suppressed disclosures and reprisal.

This is an account of one such example:

Of arbitrariness and arbiters: The Freedom to Speak Up project three years on.

I feel that Robert Francis’ model of champions or guardians employed by employers should be abolished. It introduces automatic conflicts of interest and is wasteful. Good employers do not need these add on posts, and these posts make no difference to poor employers’ behaviour. In fact, they can cause additional harm by lending respectability and camouflage to poor employers, and make workers think that they are more protected than they really are.

The model was never based on any evidence. This is a paper that I wrote to demonstrate this:

SSOTP: Robert Francis’ exemplar trust has feet of clay, and Jeremy Hunt’s safety claims are un-evidenced

I support the Scottish Government’s plan in principle to establish a national whistleblowing officer with powers, but I would need to see the details to comment on its likely efficacy.

I think that any office should have powers to investigate, to compel investigation, to order remedy and to occasionally litigate if needed. If the office has powers of early intervention and remedy, this should hopefully avert the need for cases to become bogged down in years of conflict and wasteful litigation, whilst patient safety issues are forgotten and sidelined, as
is currently the case in the English NHS. There is a precedent in the form of the USA Office of Special Counsel, which was established to protect the interest of federal whistleblowers.

I should just point out that any office for whistleblowers will need constant refreshment and safeguards, as all are naturally prone to capture.

I also have reservations about the likely success of such an office if it is not accompanied by much needed, wholesale reform of UK whistleblowing law.

This is a general digest of some of the key issues on NHS whistleblowing governance if it of use or of interest:

   Letter to the Health Service Journal’s Patient Safety Correspondent

Yours sincerely,

Dr Minh Alexander

14 February 2018

Cc Dr Philippa Whitford MP
   Scottish Public Services Ombudsman
   Shona Robison Cabinet Secretary for Health and Sport