Dear Mr Malone and Ms Agnew,

Consultations on Scottish INWO law and related whistleblowing standards

Thank you for the invitations from your respective offices to participate.

I write to respond to the Scottish government’s related consultations on:

- Draft Public Services Reform (the Scottish Public Services Ombudsman) (Healthcare Whistleblowing) Order 2019,
- Draft National Whistleblowing Standards

which both end at close of business today.

I will keep my answer as brief and simple as possible for clarity.

Firstly, I should say that UK whistleblowing law is fundamentally flawed\(^1\)\(^2\) and until that is addressed all else is by default, unfortunately, a fudge.

Three vital changes are needed in UK law to help protect whistleblowers:

1) Compulsion of the proper handling and investigation of concerns

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2) A protective legal duty to protect whistleblowers, to ensure early intervention and prevention of detriment, as opposed to the current situation of post detriment litigation for usually inadequate damages

3) Civil and criminal penalties for individuals who harm and suppress whistleblowers, with a view to firm deterrence of victimisation.

Nevertheless, my comments on the INWO arrangements are as follows:

The proposed office of the Independent National Whistleblowing Officer for NHS Scotland (INWO) is based on the findings and recommendations of the English NHS Freedom To Speak Up Review.

This Review had limitations. It was not evidenced-based\(^3\) in its central recommendation of a National Guardian without any powers, supported by a network of local Guardians employed by the organisations they were supposed to hold to account, thus creating unworkable conflict of interest.

Moreover, the English National Guardian is in the direct line management of the government, removing essential independence.\(^4\)\(^4b\)

The English National Guardian has in practice also operated a number of exclusions,\(^5\)\(^6\) which either do not feature in her published rules or were not part of her original remit. This has resulted in cases being turned away on questionable grounds or major aspects of cases not being properly addressed, such as the detriment suffered by


whistleblowers. Since the Freedom to Speak Up model was established, whistleblowers’ numerous concerns about its ineffectiveness have been confirmed.  

The revelations that some Scottish NED whistleblowing champions have been bullied, despite their seniority, have further underlined the inefficacy of internal models.

As does the departure and gagging of Barclay’s internal head of whistleblowing, as reported by Private Eye last year (issue 1470).

**The proposed Scottish INWO system is a welcome advance in the sense that:**

- It provides external review
- It is not within the Scottish government’s line of management
- The INWO has powers of investigation and can compel organisations to provide evidence
- The INWO seeks to deal thoroughly with whistleblower detriment and to lay special reports before parliament where it considers that whistleblower detriment and injustice has occurred
- It sets a notional timescale for the internal procedure, before whistleblowers can appeal to the INWO
- The INWO’s definition of a whistleblower is more expansive than the legal definition under the Public Interest Disclosure Act (PIDA) in that it includes Non Executive Directors, who are not currently protected by PIDA
- Unlike the English National Guardian, the INWO intends to step in early in some cases, if needed, before local processes have fully concluded. This is an essential safeguard in cases where

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8 “37. Section 16 of the 2002 Act makes provision for a special report where the Ombudsman considers that injustice or hardship has been sustained by an individual and that the injustice or hardship has not been, or will not be, remedied.”
whistleblowers report and need urgent protection from serious detriment, and or there is a cover up and destruction of evidence.\(^9\)

The draft National whistleblowing standards provide a template information sheet for Health Board staff which states that: “The \textit{INWO cannot normally look at concerns where you have not gone all the way through the whistleblowing procedure}”.

In the interests of fairness and transparency, it would be helpful to give some idea here of the types of situation in which the INWO might intervene early.

\textbf{I have four key concerns:}

1. The INWO does not explicitly seek to investigate whistleblowers’ original concerns, but only how they were \textit{handled}.

   In this respect, the proposals mirror the current operation of the English system. This does not get at the truth and is the core of many failures of whistleblowing governance.

   I appreciate that resources are an issue, but if even the INWO had just discretion to investigate the original concerns in some case, that would be better.

   The INWO implies that it has a degree of oversight of whistleblowers’ original concerns in that it intends to consider whether employers’ investigations come to reasonable conclusions\(^10\), but I am concerned that this is not a clear or strong enough provision.

\(^9\) “32. \textit{Under section 7(10) of the 2002 Act the Ombudsman also has a discretionary authority to intervene where in the absence of the exhaustion of any internal process, the Ombudsman then concludes that invoking or completing the internal process would not be reasonable. This means that an INWO investigation could be initiated where a whistleblowing complaint has been investigated incorrectly through another process or where the whistleblowing investigation has not yet concluded.”}

\(^{10}\) “\textit{The SPSO would also consider whether the outcome reached by the relevant body is one that a body, acting reasonably, could have reached.”}
2. The INWO can only make *recommendations* on follow up action from its investigation.

Employers are in theory free to disregard these recommendations.

The long-established US Office of Special Counsel which protects federal whistleblowers' rights can actually order remedy.\(^ {11} \)

3. The INWO only deals with NHS whistleblowers. There is a great need for a central whistleblowing body that applies to other sectors. I do not understand the logic of confining the INWO to the NHS when the SPSO, which hosts the INWO, covers other sectors too.

\(^ {11} \) https://osc.gov/Pages/ppp-ourprocess.aspx

### "1.1 “Remedies for Prohibited Personnel Practices"

OSC can seek corrective action (meaning an action that corrects what happened to the employee or applicant), disciplinary action (meaning an action that penalizes the federal official(s) who committed the PPP), or both. Frequently, parties engage in OSC’s Alternative Dispute Resolution (ADR) process and settle the issues with the help of a mediator.

Corrective action typically means that OSC seeks to place an employee or applicant in the position he or she would have occupied if no wrongdoing occurred. For example, an employee suspended for prohibited reasons would receive his or her back pay and related benefits, with interest, and a clean record. Corrective action can also include attorneys’ fees, as well as other reasonable and foreseeable costs. The law requires that OSC give the federal agency the opportunity to correct a PPP before filing a complaint with the MSPB.

OSC also has the authority to request that the MSPB discipline federal officials who committed PPPs. The law allows the Special Counsel to decide which cases are most appropriate for disciplinary action. Penalties for committing a PPP include removal, reduction in grade (demotion), debarment from federal employment for up to five years, suspension, reprimand, a fine of up to $1,000, or some combination of these penalties. Federal officials accused of committing a PPP in a disciplinary case have certain rights which can be found at 5 C.F.R. Part 1201, Subpart D.

Occasionally, while PPP cases are under investigation, federal agencies may seek to discipline the federal official(s) believed to be responsible for the PPP. If federal officials are under OSC investigation, federal agencies may not discipline them without OSC’s approval. 5 U.S.C. § 1214(f)"
4. I am concerned that the draft national whistleblowing standards seek to impose a six month limit in which staff can raise an internal whistleblowing concern.\textsuperscript{12} This is a very short span. I would have thought that a serious whistleblowing complaint which still has safety implications should be dealt with, for the public’s sake, even if some time has passed. In an oppressive organisation, it can take some staff time to build up courage to whistleblow. Sometimes, staff will witness several matters of escalating seriousness before they whistleblow, spanning a period of time which might exceed six months, and the earliest incidents should not be arbitrarily excluded. From a resources perspective, I am not aware of any evidence that the system would be overburdened with old complaints.

I make some additional observations about the detail of the proposed INWO law and draft national whistleblowing standards:

a. The draft national whistleblowing standards refer to training for managers. The whole workforce needs training in whistleblowing, so that staff are empowered and understand both their rights and duties to report.

b. The draft national whistleblowing standards give HR directors too little responsibility. HR directors are usually one of the key culprits in whistleblower suppression. Giving them named, personal accountability for better governance is key to deterring victimisation.

c. There is potential for the draft national whistleblowing standards to confuse staff about their statutory rights. The documentation draws a distinction between raising concerns as ‘business as usual’ and raising concerns under the formal whistleblowing procedure.

\textsuperscript{12} "\textit{Time limit for raising concerns}

19. The timescale for accepting a whistleblowing concern is within six months from when the person became aware of the issue of concern, unless the issue is ongoing. The manager has discretion to extend this time limit if there is good reason to do so, for example if the issue is still ongoing or if ‘business as usual’ procedures have led to delay.”
However, the types of ‘business as usual’ disclosures discussed by the draft national whistleblowing standards in fact meet the legal definition of whistleblowing and are covered by PIDA.

Perhaps these statutory rights under PIDA could be made clearer.

d. The draft national whistleblowing standards sets a brisk maximum of 25 working days for the internal process, which is welcome. However, it allows employers to extend this at 20 working day intervals on what seems to be an open-ended basis.

Attrition is a major employer weapon against whistleblowers and I think the proposal is too loose. One way of ensuring more scrutiny and deterring employer manipulation would be to introduce a requirement that employers must notify the INWO of all extensions, with written reasons.

e. I am concerned that the draft national whistleblowing standards include the criterion ‘high profile’ as a deciding factor for instigating a formal, stage 2 whistleblower investigation. The focus of any determinations should be on the seriousness of wrongdoing and risk, not reputation. The term ‘high profile’ and making decisions on this basis may send the wrong signal to staff about organisational values.

f. I feel the draft national whistleblowing standards could be stronger in respect to whistleblowing allegations against the senior staff of Health Boards. The current standards merely states that the governance in this area should be strong.13

13. “Handling concerns about senior staff 34.

Whistleblowing concerns raised about senior staff can be difficult to handle, as there may be a conflict of interest for the staff investigating the concern. When concerns are raised against senior staff, it is particularly important that the investigation is conducted by an individual who is not only independent of the situation, but empowered to make decisions on any findings of the investigation. The organisation must ensure there are strong governance arrangements in place that set out clear procedures for handling such concerns. For example, each NHS Board must clearly set out how it intends to consider a concern raised about the chief executive or member of the Board of Directors.”
This is perhaps the most contentious and fraught part of any internal whistleblowing process – where the interests of an organisation’s leaders are directly threatened. I think the draft NHS whistleblowing standards should specify much more clearly what ‘strong governance’ might look like.

For example, there could be reciprocal arrangements between Health Boards to undertake investigations about each other’s directors, or to commission external investigations about each other’s directors.

Alternatively, some cases could proceed directly to the INWO.

g. The draft national whistleblowing standards state: „...”The victimisation of staff as a result of any involvement in a whistleblowing case will be treated as a disciplinary matter”.

Many NHS bodies have whistleblowing policies with similar statements, but they are not acted upon. It might be useful if more detail is given, to bind organisations to a specific course of action.

The penalties for directors who victimise whistleblowers and who cover up should be more severe to reflect the serious breach of trust, and should include disbarment from director posts in the worst cases.

h. The draft national whistleblowing standards set out in helpful detail the data that employers should collect about whistleblowing activity and system response.

It would be helpful if this section is firmed up and explicitly sets out a requirement for audit against specific standards, to be defined by the INWO.

Similarly, the draft national whistleblowing standards gives only broad advice to employers to publish a statement about staff experience where confidentiality allows.

It would be helpful if employers are required to collect structured survey data on whistleblower experience, which is prospectively anonymised and can therefore be published in meaningful detail, with less risk of editing in the employer’s favour than subjective, qualitative employer summaries.
To answer some specific questions set by the consultation:

i. I feel some caution about the proposed information sharing by the INWO with other bodies. Whilst I would naturally support sharing of learning and useful intelligence for safety purposes, I would ask that great care is taken not to compromise whistleblowers’ positions. The information sharing could in theory act as a broadcasting service which facilitates blacklisting, and there need to be safeguards against this.

j. I agree with the INWO having some latitude in defining who is a whistleblower and what is a whistleblowing concern, provided that she does not apply a more restrictive interpretation than is currently set out by PIDA and PIDA case law. It is helpful for instance that she has been more expansive than PIDA in including Non Executive Directors.

Yours sincerely,

Dr Minh Alexander

NHS whistleblower and former consultant psychiatrist

Cc Health and Sport Committee
   Dr Philippa Whitford
   Alison Carmichael
   Jeane Freeman Cabinet Secretary for Health and Sport