Health and Sport Committee: Consultation on parliamentary order setting out Scottish Government proposal for the role of a new Independent National Whistleblowing Officer (INWO).

BMA Scotland response:

The BMA is a professional association and trade union representing and negotiating on behalf of all doctors and medical students in Scotland. It is a leading voice advocating for outstanding health care and a healthy population. It is an association providing members with excellent individual services and support throughout their lives.

We welcome the opportunity to respond to the Health and Sport Committee’s consultation on the parliamentary order setting out the Scottish Government’s proposal for the role of a new Independent National Whistleblowing Officer (INWO).

To respond to the questions in turn:

1: How will the order affect the whistleblowing process?

We consistently hear from our members that they fear raising concerns or ‘whistleblowing’ for the possible impact they believe it could have on their career or their relationship with colleagues. Many also believe that they won't be listened to or it won't make a difference.

This is simply not acceptable. While there has been much discussion of the need to support whistleblowers in recent times, this is clearly not translating into either the practical, or perceived reality for NHS staff.

Indeed, this was starkly illustrated in the recent Sturrock report on the culture at NHS Highland. Of course, it should not be forgotten that this was an issue first brought into the public domain by doctors concerned about bullying, yet the report itself found ample evidence that doctors continue to fear speaking out. Amongst several concerning quotes on the issue, the following, from an anonymous consultant, sums up the views expressed:

"Potential repercussions – need to keep my job, pay my bills. I've watched what happens to others who challenge. People’s careers sabotaged – cannot work again- will never work again – no pension…If I were to go and make a complaint – who would I go to? I don't have an answer – I won't turn up at the new CEO's door…"

It is therefore important that we transform this culture and ensure NHS staff feel able to speak out and raise concerns. No-one should be victimised for taking action. Doctors have both the right and duty to speak out, and they should be supported to do so. We must ensure that there is an environment in which those who have genuine concerns are listened to and safeguarded.

A lot of work has taken place in recent years in relation to whistleblowing through local systems, policies and processes. But as discussed, there is still some considerable work to do to create the kind of environment where concerns can be raised and then always responded to constructively.
The experience of our members in the past has been that UK NHS whistleblowers often become the focus of any response to concerns – instead of the issues raised.

Addressing and transforming this kind of inappropriate response, whereby it is the whistleblower and their conduct, performance and mental health which becomes the focus of the response – rather than the issue they have highlighted, is vital.

In BMA Scotland’s view, the INWO role will hopefully be instrumental in holding systems to account and helping to instil confidence in this process.

On that basis we support the extra, independent level of scrutiny this will provide to ensure whistleblowers have the protection they need.

We believe the order sets out proposals that will lead to increased awareness of a single and consistent set of standards for handling whistleblowing issues across NHS Scotland.

It will also – if it works effectively - lead to increased confidence that any unresolved issues will have a further and independent stage of scrutiny built into the process and increased assurance that if a whistleblower feels that they have suffered as a result, that there is a clear course of action for them to take.

These factors should mean general improvements in handling whistleblowing cases. Longer term it should help deliver an improved culture and increased willingness to raise concerns. That in turn, should help deliver better patient care – as the concerns bring about the improvements which are at the heart of the reason why people come forward.

However, this is of course subject to the INWO and associated systems working effectively. There is more on this in the rest of the BMA response.

However, in general, it is vital this results in a ‘levelling-up’ rather than ‘levelling down’ of standards for whistleblowing procedures across Scotland. The new standards which the INWO works to must reflect the very best processes, and not result in any watering down simply to make them applicable across all boards.

Similarly, the INWO will only deliver on its promise when it is actually seen to work in practice. There will be no change in culture, or attitudes to whistleblowing until the new system is perceived to work, inspire confidence and be truly independent.

This will inevitably again mean that brave people will be the first to seek resolution through this procedure – and the early results and effectiveness of the system will be vital in those instances.

2: Should the Ombudsman fulfil the role of Independent National Whistleblowing Officer?

The BMA has previously supported this proposal in submissions and continue to do so.

It is important that this role is seen to be operationally independent, is able to hold NHS boards, IJBs and Scottish Government to account, and that the appointment is a public one.
There should never be any question of any concerns being dealt with ‘in-house’ by the NHS, or being made to go away.

On that basis, as it is entirely separate from the NHS, the SPSO should be able to meet all those criteria.

However, it will be vital to ensure that the INWO has sufficient authority and respect to be effective in holding CEO and Chairs of NHS Boards to account through its level of seniority and positioning within the SPSO.

3. Does the order give the Independent National Whistleblowing Officer adequate powers?

The order suggests the SPSO, in the form of the INWO, are given considerable powers – and the BMA very much welcomes these.

The range of powers proposed would appear to balance both considerable and reasonable tools needed to exercise the role effectively.

In particular, it is important to note that:

- In terms of compelling the attendance and examination of witnesses, and the production of documents the production of documents – the SPSO and therefore the INWO – will have the same powers as the court of session. This would seem an important step to ensure that boards are both forthcoming and willing to co-operate with the reviews the INWO undertakes;
- The order will allow the INWO to comment not just on the case in question, but on general culture and support for whistleblowers; and
- That it will be possible for the INWO to investigate even when there are internal processes ongoing – and the whistleblowing process is not complete.

One point that will no doubt prompt further discussion is around the lack of power to impose sanctions/enforce verdicts. While legally and practically, this seems the only option as it stands, it is worth ensuring the INWO is able to recommend reinstatement, compensation or other action such as mediation, training or disciplinary action.

On the positive side of this, the power to lay reports at Parliament, particularly in the case of injustice or hardship, would seem a strong mechanism, which it would be virtually impossible for a board/employer to ignore recommendations given the large political and media attention this would draw.

There also needs to be careful consideration of when the INWO can become involved in cases. The main focus at this stage is that this would be when the whistleblower themselves raises it with the INWO. This will mean that whistleblowers will have already have had to engage in board processes – and as already discussed, many lack the confidence these processes will work in the first place.

There are two possible suggestions to consider in response:

- Although the purpose of the role is to investigate the appropriate application of whistleblowing processes, the INWO could be able to accept contacts from
whistleblowers more directly, without the whistleblower having to go through Health Board systems which are likely to be – both in reality and perception, intimidating for staff. This could also help prevent organisations silencing the raising of issues of public concern by their relative power, and ability to use procedures to close issues down;

- Clear discretion for the INWO to seek assurance, information, or formally investigate when concerns are raised not directly by the whistleblower involved. This might include newspaper reports, anonymous sources, patients/members of the public, or when a whistleblowing issues has been pursued through an inappropriate route, so is therefore not technically considered whistleblowing by the board. This discretion does seem likely, given the similar powers of the ombudsman, but further clarity would be useful.

In conclusion, these are a suite of extensive powers, but further clarification on the points raised could help bolster them further.

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

The majority of issues are considered in the briefing above. One possible element to address is the cut off period – this is currently 12 months from the day on which the person aggrieved first had notice of the matter to which the complaint relates. However, while there is built in discretion for the INWO that will allow older complaints to be considered, this may be too short a time frame to set out in the order.

For example, the Sturrock Report revealed that cultural issues in Highland reasonably described as bullying had been going on for possibly a decade. It can often take many years for people to become fully aware of a situation. To also have the courage to speak up often takes many years and currently requires disproportionate resilience. A period of 5 years would seem more reasonable.

While the issue of the whistleblowing process itself may be more for the SPSO consultation on this, the BMA would emphasise that whistleblowing champions in Health Boards must be independent of the Board, must not be line managed within the Board and must not be paid by the Board. These are all conflicts of interest which can deter whistleblowers, and cause the whistleblowing champion not to act, for fear of detriment. Whistleblowers fear that information will be leaked within Board structures where Board members feel loyalty to protect colleagues or are fearful if they act and this must be addressed.

Equally, wider explanation is required of how INWO will work with relevant regulators, inspections/assurance and quality improvement organisations (eg HIS, GMC, NWC etc). The BMA would like to see a clear explanation of how the INWO fits in with the existing governance, scrutiny and regulatory landscape.

Finally, as previously mentioned, how the INWO works in practice will be crucial. There should be a built-in review mechanism for the INWO officer role, whereby after a set period of time, the effectiveness of the role and associated systems can be reviewed for its effectiveness, and improvements made.
References/further reading:


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3. NHS Highland Whistleblowers’ Letter to BMJ. https://www.bmj.com/content/363/bmj.k4778/rapid-responses


5. Rimmer A. Bullying: GP leaders condemn victimisation of doctors, conference hears. BMJ 2019; 364 doi: https://doi.org/10.1136/bmj.l1348 (Published 21 March 2019)


8. Christie B. Hundreds of staff may have been harmed by bullying and harassment in NHS Highland BMJ 2019; 365 doi: https://doi.org/10.1136/bmj.l2166 (Published 10 May 2019)