

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

November 2015

Ministerial Foreword



As individuals, regardless of where we work, we all expect to be treated fairly, with respect, and in an inclusive manner. In particular, if after witnessing bad practice, we brought this to our employer's attention, we would expect this to be valued and acted upon, as our intention would be to make our workplace a safer and better place.

This is no more important than in the health service in Scotland. We will all need the services of NHSScotland at some point in our lives, be it for ourselves, our relatives, or for someone we care about. As such, we put a great deal of trust in those delivering a huge variety of healthcare and support services. It follows therefore, that it is vital that staff in NHSScotland feel empowered to highlight any genuine concerns they have about patient safety or malpractice.

The NHS in Scotland continues to focus on providing safe, effective and person-centred care, and as such, it is essential that all staff are able to voice their concerns when they think something is wrong. Moreover, they should be confident in doing this and know that that they will be supported.

NHSScotland already has robust whistleblowing procedures in place, and we have continued in recent years to put in place additional supporting measures – such as the National Confidential Alert Line. However, I want to go further to help embed an honest and open reporting culture, where all staff have the confidence to speak up without fear, and with the knowledge that any genuine concern will be treated seriously and investigated appropriately and properly.

That is why, earlier this year, in response to the recommendations from the Freedom to Speak Up Review, I committed to establishing an Independent National Whistleblowing Officer. It is intended that this role will, where necessary, provide an independent and external level of review on the handling of whistleblowing cases, so that we may further improve our practices in the NHS in Scotland.

I also committed to a full public consultation with the aim of gathering as wide a range of views as possible on the Scottish Government's proposals for the establishment of this role.

I welcome your continued support and involvement in developing policies to ensure that all NHSScotland staff have a positive employee experience. All staff should feel motivated and engaged with their job, their team, and their organisation. This includes knowing that they work within a supportive organisation with an open, honest and proactive reporting culture.

We want to make sure that all staff can speak up and raise any concerns with confidence.

A handwritten signature in black ink, reading 'Shona Robison'. The signature is written in a cursive, flowing style.

Shona Robison

Cabinet Secretary for Health, Wellbeing and Sport

Background

Over the past few years there have been a number of high-profile cases involving tragic incidents in the NHS across the UK. Investigations into these and other incidents revealed that, in some cases, staff who had concerns about what was happening were unsure about whether or how to raise these concerns, or had raised the issue only to be ignored. This led to policies being developed to promote, support and encourage whistleblowing and whistleblowers in NHSScotland.

The Scottish Government and NHSScotland are committed to ensuring that all employees are encouraged, supported and confident in raising any concerns they may have about patient safety, behaviours which may lead to harm, or malpractice in the NHS, as this makes our health service better.

Through a whistleblowing policy, employees are encouraged to raise any valid concerns they may have and are guaranteed to have their concerns taken seriously and investigated appropriately. Employee concerns can relate to a wide range of matters, examples of which include, amongst other things, issues on child protection, adult protection, financial malpractice or health and safety issues.

What is whistleblowing and how is it addressed?

Whistleblowing has no legal definition, but we tend to associate the term with a worker - the 'whistleblower' - who reports suspected wrongdoing at work. This is sometimes referred to as 'making a protected disclosure', or, 'qualifying disclosure'. Workers who make a qualifying disclosure receive statutory protection from detriment. There are provisions in the ¹Employment Rights Act 1996, amended by the ²Public Interest Disclosure Act (PIDA) 1998, which protect workers who make a disclosure in the public interest (whistleblow) from detriment. But any worker can report things that they genuinely feel aren't right, are illegal, or, if anyone at work is neglecting their duties.

¹ <http://www.legislation.gov.uk/ukpga/1996/18/contents>

² <http://www.legislation.gov.uk/ukpga/1998/23/contents>

A whistleblowing concern usually involves an employee raising a concern, as a witness, relating to a risk, malpractice or wrongdoing that affects others and which they reasonably believe it is in the public interest to raise. This may be something which adversely affects patients, the public, other staff or the organisation itself.

All NHSScotland Boards are required to have in place a local whistleblowing policy based on the model national ³'Implementing & Reviewing Whistleblowing Arrangements in NHSScotland' PIN Policy. This provides the minimum standard which must be adhered to. The national policy was developed in partnership between Employers, Staffside representatives and the Scottish Government, and ensures a consistent approach across Boards. The PIN policy provides guidance on, amongst other things, legal protection for whistleblowers; the handling of whistleblowers and the concerns they raise; record keeping; and, audit and review of whistleblowing matters.

Boards also have a role in building trust and confidence across their organisation which supports whistleblowing and in turn helps promote a healthy workplace culture built on openness and accountability. It is recognised that encouraging staff to raise any valid concern they may have about patient safety, malpractice, or serious risk, as early as possible, and responding appropriately, is integral to achieving this. Importantly, it will help Boards deal with problems before any damage is done. This is why removing barriers and encouraging an honest and open reporting culture that supports whistleblowing is vital.

However, concerns about the way in which whistleblowing cases are handled have persisted, and it appears that some staff remain reticent about reporting concerns.

Freedom to Speak Up Review

The ⁴Freedom to Speak Up Review, announced on 24 June 2014 by Jeremy Hunt MP, Secretary of State for Health and chaired by Sir Robert Francis QC, offered independent advice and recommendations aimed at creating an open and honest reporting culture in NHS England.

³ <http://www.gov.scot/Publications/2011/12/06141807/0>

⁴ <https://www.gov.uk/government/publications/sir-robert-francis-freedom-to-speak-up-review>

The Review was set up in response to continuing disquiet about the way NHS organisations in England deal with concerns raised by NHS staff.

The evidence presented to the Review was comprehensive and not limited to those employed by NHS England. Over 600 individuals and 43 organisations submitted written responses; over 19,500 people responded to staff surveys sent out by independent researchers; and, the Review met with over 300 people through meetings, workshops and seminars.

We are aware that evidence was also presented from current and former employees of NHSScotland and considered as part of the Review process.

From the evidence presented, the subsequent ⁵Report detailed 5 emerging themes. The need for:

- Culture change
- Improved handling of cases
- Measures to support good practice
- Particular measures for vulnerable groups
- Extending the legal protection

Whilst the Report and its recommendations relate entirely to NHS England, the Scottish Government welcomed the Review and was clear from the outset that it would consider its findings to inform thinking on policy development to further support, encourage and promote whistleblowing.

After fully considering the recommended actions identified within the Report, the Scottish Government are confident that in NHSScotland many of the actions or similar are already in place or being developed. This includes:

- ⁶The NHSScotland Staff Governance Standard, which requires employers to ensure that it is safe and acceptable to speak up about wrongdoing or malpractice.

⁵ <http://webarchive.nationalarchives.gov.uk/20150218150343/http://freedomtospeakup.org.uk/the-report/>

⁶ <http://www.staffgovernance.scot.nhs.uk/what-is-staff-governance/staff-governance-standard/>

- ⁷The ‘*Implementing & Reviewing Whistleblowing Arrangements in NHSScotland*’ Partnership Information Network (PIN) Policy. A national whistleblowing policy which sets out minimum standards to which all NHSScotland Health Boards must adhere.
- ⁸The NHSScotland Confidential Alert Line (NCAL) - a bespoke whistleblowing helpline for NHSScotland staff.
- Training sessions for key staff within NHSScotland Health Boards.
- Removal of the standard inclusion of confidentiality clauses and derogatory statement clauses from settlement agreements across NHSScotland, ensuring that staff entering into such an agreement are clear that this does not compromise their right to whistleblow.
- Development of guidance for NHSScotland employees and employers on the appropriate use of confidentiality clauses and derogatory statement clauses in settlement agreements (formerly known as compromise agreements). This is due to be published shortly.

The Report did, however, highlight a number of practical actions which the Scottish Government recognise will further enhance and add value to existing and developing national policies of NHSScotland

It also recognised that there is a gap in mechanisms for oversight of how an NHS body deals with concerns raised by staff, and the merit of having a mechanism for external review of how concerns have been handled at local level and the impact on the individual where there is legitimate cause for concern.

Scottish Government response to the recommendations from the Freedom to Speak Up Review

That is why, in response to the Report and its recommendations, Shona Robison MSP, Cabinet Secretary for Health, Wellbeing and Sport announced in June 2015 that:

⁷ <http://www.gov.scot/Publications/2011/12/06141807/0>

⁸ <http://www.gov.scot/Topics/Health/NHS-Workforce/Employee-Experience/NHS-staff-alert-line>

- Non-executive whistleblowing champions would be introduced in each NHSScotland Board;
- Further national whistleblowing events would be provided to designated policy contacts within Boards, with a view to roll out locally;
- The Cabinet Secretary would write to all NHSScotland Boards to draw attention to relevant local actions identified within the Report, and ask that Health Board Chairs and Chief Executives consider how these recommendations can be implemented locally;
- The Cabinet Secretary would write to Healthcare Improvement Scotland (HIS), as the relevant scrutiny body in NHSScotland, to ask it to consider and feedback on how the Report's recommendation on scrutiny may be implemented.

Additionally, the Cabinet Secretary committed to:

- **The development and establishment of an Independent National (Whistleblowing) Officer (INO), to provide an independent and external review on the handling of whistleblowing cases.**

The Scottish Government recognise the benefits of introducing this role for NHSScotland employees. We are keen, however, to ensure that the INO role does not stand alone nor duplicate roles. The intention is that the INO role will complement and interact with current or developing policies in order to achieve the desired outcome of an open, honest and transparent culture in NHSScotland.

It is felt that an INO would add an element of external review which currently doesn't exist and provide assurance and a possible means of closure to difficult whistleblowing cases.

The INO could also act as an enabling role to encourage good practice, and, where appropriate, advise and assist Boards in their approach to handling whistleblowing cases.

This could provide added value to NHSScotland by ensuring a holistic approach to the application of local whistleblowing policies.

This consultation also offers the opportunity to seek views on the role of the INO extending to staff delivering integrated services. This is discussed in more detail later in this paper (Section 5: Health and Social Care Integration).

The current landscape

At present stakeholders have raised concerns that there is a need for an independent and impartial mechanism to review the way in which patient safety or malpractice issues raised by NHSScotland staff members are handled by their Health Board.

We are aware that in some cases individuals feel they have been victimised as a result of whistleblowing and can find it difficult to achieve closure on their whistleblowing experience. This is often relayed through negative perceptions of how their case has been handled, or how they feel they have been treated. These concerns were echoed by the material considered in the Freedom to Speak Up Review Report. In the NHSScotland context, this often results in Scottish Government intervention being sought. However, the Scottish Government has no locus to review the handling of cases.

Some individuals feel that current procedures do not allow a line to be drawn under cases where a member of staff is unhappy with the outcome of their case or if they feel the concern raised has not been appropriately investigated. The introduction of an INO could provide a further independent mechanism to help provide a final resolution to such issues.

NHSScotland Health Boards are autonomous employers and, as with any other concern raised by a member of staff, concerns about patient safety, behaviours which may lead to harm, and malpractice, are, in the first instance, investigated locally.

Boards may invite varying levels of external input from existing Regulators/Scrutiny bodies, as appropriate, to the concern raised, and staff may, at any time, raise their concern directly with the appropriate Regulator/Scrutiny body. These include:

⁹***Healthcare Improvement Scotland (HIS)***

Healthcare Improvement Scotland is a statutory body, part of NHSScotland, that works with healthcare providers to drive and support improvements in the quality of healthcare, and empower patients and the public. HIS do this through a combination of evidence-based standards and guidelines, a scrutiny and assurance approach, and quality improvement implementation support . These functions include:

- furthering improvement in the quality of healthcare;
- supporting, ensuring and monitoring the quality of healthcare;
- evaluation and provision of advice to the health service on the clinical and cost effectiveness of new and existing health technologies including drugs;
- supporting, ensuring, monitoring and encouraging public involvement and equal opportunities within each NHS Board;
- involving users in the design and delivery of HIS functions;
- co-operation and co-ordination with other organisations;
- spreading good practice through advice and guidance; and,
- provision of advice to Scottish Ministers.

Other statutory duties include:

- scrutiny of medical certificates of cause of death as stipulated by the Certification of Death (Scotland) Act 2011; and,
- support to the Controlled Drugs Accountable Officers Network in Scotland to improve and strengthen governance systems for the safe and effective use of controlled drugs for patients as stated in The Controlled Drugs (Supervision of Management and Use) Regulations 2013.

⁹ <http://www.healthcareimprovementscotland.org/>

In addition to these activities HIS, in conjunction with the Care Inspectorate, develop and carry out joint inspections of health and social care services provided for older people living in the 32 local authority (council) areas across Scotland.

HIS is also responsible for regulating independent hospitals, voluntary hospices, and private psychiatric hospitals. HIS will also be responsible for the regulation of independent clinics from April 2016.

¹⁰***Health and Safety Executive (HSE)***

The Health and Safety Executive (HSE) is the regulator for health and safety at work in Great Britain.

HSE leads the health and safety system and, in partnership with local authority co-regulators, secures compliance with the Health and Safety at Work etc. Act 1974 (HSWA) and regulations made under it. HSE's mission is to prevent death, injury and ill health to those at work and those affected by work activities. In summary, HSE's functions under HSWA are:

- Standard setting and making regulations
- Enforcement
- Research
- Guidance and advice
- Ministerial advice

HSE's main aims are to:

- lead others to improve health and safety in the workplace
- provide an effective regulatory framework
- secure compliance with the law
- reduce the likelihood of low frequency, high-impact catastrophic incidents.

¹⁰ <http://www.hse.gov.uk/scotland/>

¹¹***NHSScotland Counter Fraud Services***

Counter Fraud Services work in partnership with all of the NHS in Scotland. Their job is to protect Scotland's health from the impact of financial crime.

They provide a comprehensive counter fraud service through a centrally based, professionally qualified team of experienced specialists, dedicated only to counter fraud work.

They provide counter fraud guidance and advice, raising awareness of fraud, ensuring that robust systems are in place and analysing data to identify risks.

Working in partnership to share information and develop proactive approaches to countering fraud, where fraud is identified NHSScotland Counter Fraud Services ensure that relevant sanctions are applied wherever appropriate.

¹²***Audit Scotland***

Audit Scotland help the Auditor General and the Accounts Commission to make sure organisations that spend public money in Scotland use it properly, efficiently and effectively, including:

- 75 central government bodies (Scottish Government, NDPB's, Police Scotland, Scottish Fire and Rescue Service and others)
- 22 NHS bodies
- 32 councils
- 21 further education colleges
- Scottish Water

Audit Scotland staff and firms of auditors appointed by Audit Scotland carry out the audits to check whether organisations manage their finances to the highest standards, and, achieve the best possible value for public money.

¹¹ <http://www.cfs.scot.nhs.uk/>

¹² <http://www.audit-scotland.gov.uk/>

Three principles guide Audit Scotland's work:

- Auditors are independent of the organisations they audit.
- They report in public.
- They look at more than financial statements.

Audit Scotland support public scrutiny that is fair, equal and open, and that leads to more effective financial management and value for money. They produce a wide range of local and national reports about the performance and financial management of Scotland's public bodies.

¹³*The Care Inspectorate*

The Care Inspectorate regulates and inspects care services in Scotland to make sure that they meet the right standards. It also jointly inspects with other regulators to check how well different organisations in local areas work to support adults and children. It is the Care Inspectorate's job to assure and protect everyone that uses care services and make sure that everyone gets safe, high quality care that meets their needs.

There are around 14,000 registered care services in Scotland. Inspectors from the Care Inspectorate visit every care service that it regulates, with higher risk services inspected more often. The inspectors talk to people using the service as well as staff and managers. The Care Inspectorate also watches what happens in the service to help assess the quality of care people receive.

Care services are given grades when inspected. The Care Inspectorate look at the quality of:

- care and support
- environment
- staffing
- management and leadership.

Each area of each care service is assessed on a scale from 1 to 6, where 1 is unsatisfactory and 6 is excellent.

¹³ <http://www.careinspectorate.com/>

If care services are found not to be good enough the Care Inspectorate will help them improve. It offers advice, guidance and suggestions to help services reach the highest standards. If a service isn't performing to the levels required the Care Inspectorate will act. It can issue recommendations for improvement and requirements for change and check these have happened. If a service doesn't improve, the Care Inspectorate can close it down. It can also impose conditions on care service meaning they must start or stop doing something specific.

One of the most important ways for the Care Inspectorate to make sure care services improve is by listening to concerns that people have about the level of care they, or someone they care for is receiving. Very often members of staff employed, or recently employed, in care services raise concerns about the level of care with the Care Inspectorate.

The Care Inspectorate want to make sure services safeguard people, that they are managed and led well, and, make a positive impact on people's lives, based on their needs, rights and choices.

Contractual issues and the role of an Employment Tribunal

It is also important to note that legal mechanisms are already in place to determine whether or not a whistleblower has suffered any form of detriment as a consequence of making a qualifying disclosure, for example, raising concerns about patient safety or malpractice.

There is often confusion about the approach to handling a case where a member of staff who raises concerns about patient safety or malpractice which they reasonably believe to be in the public interest (a public concern) subsequently feels they have suffered some form of detriment as a result (a private concern). Although seen as linked, the nature of the two issues i.e. public vs private, dictate the way in which they are addressed.

Public Concern vs Private Concern

A whistleblowing concern is a 'public concern' because the complainer reasonably believes it is in the public interest to make the disclosure of information about which they are concerned. As outlined earlier, whistleblowing concerns can relate to a risk, malpractice or wrongdoing

that affects others and may be something which adversely affects or is likely to affect patients, the public, other staff or the organisation itself.

Private concerns relate to matters not in the public interest, for example, an individual's own employment situation, which is governed by their contract of employment. This includes concerns about the way in which a member of staff feels they are being treated by their employer or colleagues, including claims of detriment as a consequence of making a qualifying disclosure (whistleblowing). As private contractual issues, these are governed by employment law, including the ¹⁴Employment Rights Act 1996, and remain to be resolved between the employee and their employer.

With this in mind, the INO can have no role in determining whether or not a member of staff has suffered detriment as a consequence of making a protected or qualifying disclosure (whistleblowing).

Employment Tribunals have exclusive jurisdiction in such matters as provided for in the ¹⁵Employment Rights Act 1996 and amended by the ¹⁶Public Interest Disclosure Act (PIDA) 1998 . This reserved legislation falls outwith the legislative competence of the Scottish Parliament.

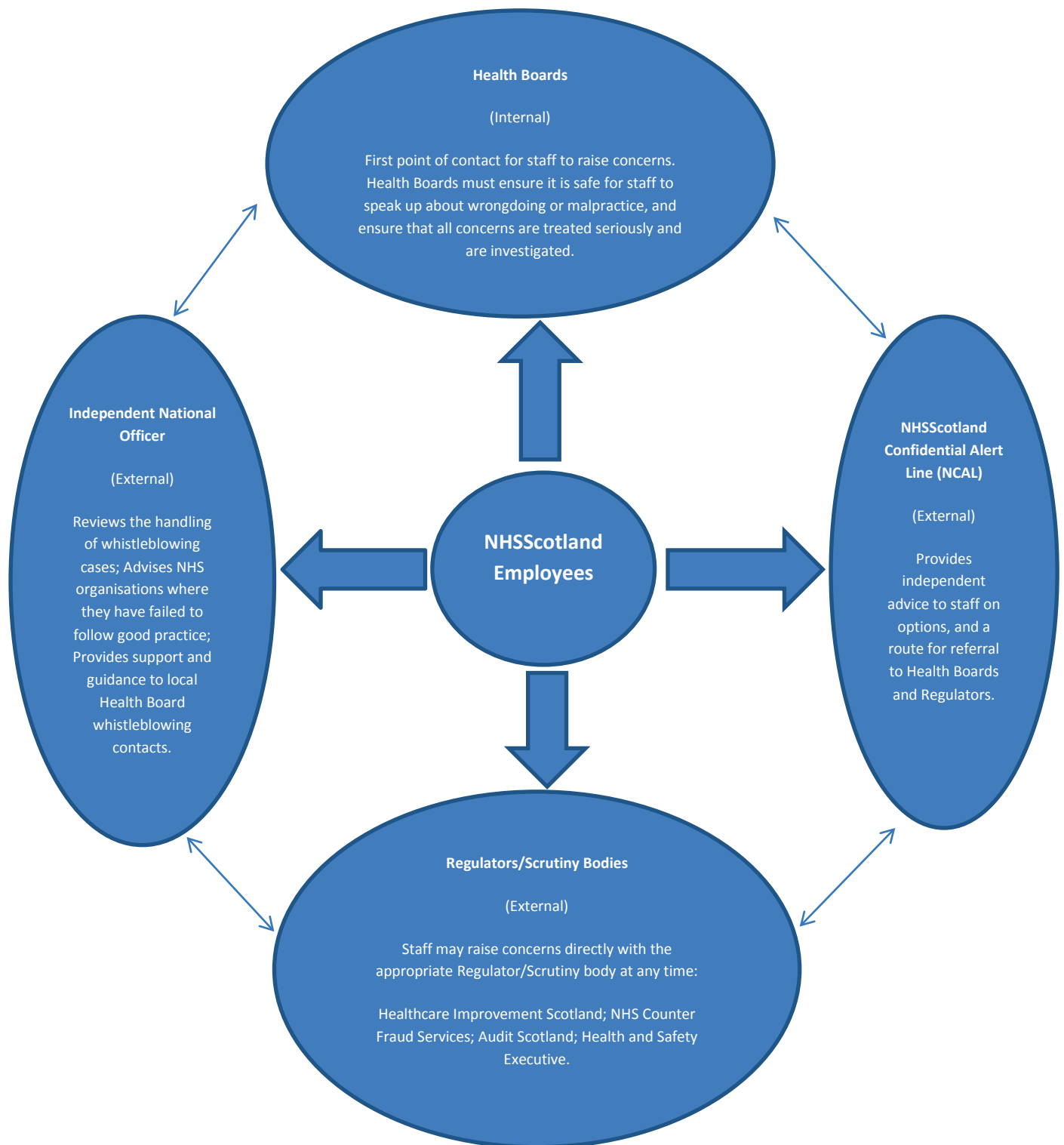
It therefore must remain the role of the Employment Tribunal to determine if a person has made a protected disclosure and, if so, whether that person has suffered any detriment from their employer in consequence.

¹⁴ <http://www.legislation.gov.uk/ukpga/1996/18/contents>

¹⁵ <http://www.legislation.gov.uk/ukpga/1996/18/contents>

¹⁶ <http://www.legislation.gov.uk/ukpga/1998/23/contents>

The following diagram sets out, from the employee's perspective, how an INO would relate to existing bodies already involved in considering staff concerns and the different roles and functions.



Proposals in this consultation paper

In developing the proposals set out in this consultation paper, the Scottish Government engaged with employers and staffside representatives via the Scottish Workforce and Staff Governance Committee.

We recognise that several different aspects must be considered when establishing the INO role. With this in mind, this consultation paper has been divided into sections focussing on each of those constituent parts, and we would welcome your views on the following proposals:

Section 1: The role of the INO.

Section 2: Principles and process for raising concerns with the INO.

Section 3: Should the INO have prescribed powers?

Section 4: Where should the INO be hosted?

Section 5: Health and Social Care Integration.

Section 6: What should the INO be called in Scotland?

Section 7: Consultation question summary.

Section 8: Responding to this consultation and Respondent Information Form

Section 1: The role of the INO

As a starting point, it is key to establish what the role of the INO should be, as this informs all other aspects considered in this paper.

Largely in line with the model described in the Freedom to Speak Up Report, we envisage the key features of the role in NHSScotland as:

- Reviewing the handling of concerns raised by NHS workers, and/or the treatment of the person or people who spoke up, where there is cause for believing that this has not been in accordance with good practice.
- Advising NHS organisations to take appropriate action where they have failed to follow good practice, or advise the systems regulator to make a direction to that effect.
- Acting as a support to local policy contacts.
- Providing national leadership on issues relating to raising concerns by NHS workers.
- Offering guidance on good practice about handling concerns.
- Publishing reports on the activities of this office.

Based on the above, and having considered the types of complaints we are aware of in NHSScotland, we consider that there are three main areas, as described in the Freedom to Speak Up Review Report that an INO could potentially consider when investigating whistleblowing complaints. These are:

Process

- Has the local whistleblowing policy been followed correctly?

Decision making/Outcome

- Is the Board's decision and resultant outcome reasonable?

Treatment

- Has the person/people who raised the complaint been treated fairly?

As outlined previously, we are clear that the INO must add additional value and not duplicate or interfere with the role of any existing body.

The role of the INO cannot impinge on an individual's contractual arrangements as governed by the ¹⁷Employment Rights Act 1996, including claims of detriment suffered by a whistleblower, as this remains the exclusive jurisdiction of the Employment Tribunal.

With this in mind, it is considered that there are two options on the types of complaints which the INO could investigate, outlined in more detail below.

Option 1: INO considers application of Whistleblowing Process only.

Under this option, the role of the INO would be to consider whether the processes outlined in the relevant Health Board's local whistleblowing policy had been properly followed.

The possible findings and response following investigation are as follows:

INO Finding	Potential Response
Flaw found in application of process outlined in local whistleblowing policy.	Complaint upheld • Recommendation to the Board that it re-run aspects of the investigation process. • Board asked to provide assurance on any required systemic changes.
Significant flaw found in application of process outlined in local whistleblowing policy.	Complaint upheld • Recommendation to Board that it re-run the investigation process in its entirety. • Board asked to provide assurance on any required systemic changes.

¹⁷ <http://www.legislation.gov.uk/ukpga/1996/18/contents>

Flaw/significant flaw found in the established process outlined in local whistleblowing policy.	Complaint upheld • Recommendation to Board that it partially re-run/fully re-run investigation process. • Board asked to fully review the local whistleblowing policy and to provide assurance that required changes are made.
Elements of process not followed but not likely to have had a bearing on the investigation outcome.	Complaint upheld. • Feedback provided to complainant and Health Board.
All elements of process applied correctly in line with the local whistleblowing policy. Policy found to be sound.	Complaint not upheld. • Feedback on the reason for the decision fed back to complainant and Health Board.

It is recognised, however, that although a process could be applied perfectly by a Health Board, the decision that the Health Board reached could potentially be flawed. With this in mind, a second option, which we feel is more robust, has also been considered.

Option 2: INO considers process, including examination of decision making and outcome.

As with Option 1, the INO would consider whether a whistleblowing concern had been investigated in compliance with the Health Board's local whistleblowing policy, but the INO would also consider how the Board came to its decision, and the subsequent outcome.

This would therefore include an additional element to that illustrated in Option 1, as follows:

INO Finding	Potential Response
Investigation decision considered to be flawed and case needs further investigation.	Complaint upheld or not upheld. Depending on the severity of the issue the case could be referred to the Board for re-investigation; the relevant scrutiny body (e.g. Healthcare Improvement Scotland (HIS); Audit Scotland; NHS Counter Fraud Services; or, Health and Safety Executive.

We consider that with our preferred option - Option 2 - the INO could also have the discretion to make additional recommendations and/or provide guidance to Boards. Examples could include:

- Suggesting mediation, where this had not already been considered;
- Recommending to a Board that they conduct an independent investigation;
- Recommending changes or reviews of policies, procedures or systems in line with good practice;
- That the Board offer an apology to the complainant.

Illustrative Example

A nurse raises a concern about staffing levels within a clinical ward in their Health Board claiming staffing levels are insufficient and jeopardising patient safety. The nurse raises the concern in line with their local whistleblowing policy.

The Health Board investigates the claim fully in line with the established whistleblowing policy and finds that the concern raised by the nurse is not having an impact on patient safety. The Board did not, however, use the national workforce planning tools to determine whether staffing levels were safe.

Having exhausted the local process the nurse remains unhappy with the outcome of the investigation. The nurse also feels that they have been victimised by the Health Board for raising the complaint as they feel they have missed out on career opportunities. The nurse contacts the INO.

With an INO set up under **Option 1**, the only role would be to consider the Board's application of process outlined in the local policy. In line with the illustrative example, as the complaint was investigated fully in line with the established whistleblowing policy, the complaint would not be upheld as the application of the process would not be deemed to be at fault. However, had the INO found the process outlined in the established policy to be flawed, it could ask the Board to re-run/partially re-run the process and review its local policy.

With an INO set up under **Option 2**, whilst the application of process would not be deemed incorrect, the INO could potentially determine that the decision was flawed as the national workforce planning tools had not been used to inform the Board's decision. Whilst the nurse would have been entitled to have raised the issue with HIS directly, the INO could refer the case to HIS, as the appropriate scrutiny body, for further investigation.

As discussed earlier, the treatment the nurse feels they have been subject to as a consequence of raising the concern forms part of the nurse's contract with their employer (i.e. it is a private issue). If the nurse feels that they had been treated unfairly as a result of raising a concern, they could, at any point, raise this through their local Grievance policy. If the nurse remains unhappy, it would be for an Employment Tribunal to determine whether they had suffered detriment in consequence of making a qualifying disclosure (whistleblowing).

Whilst we feel that it is helpful to provide an illustrative example to help clarify the scope and outcomes of potential complaints for the purpose of this consultation, we are of the view that within the parameters outlined, it will ultimately be for the INO, once established, to determine the final methodology used.

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.

Please explain your answer.

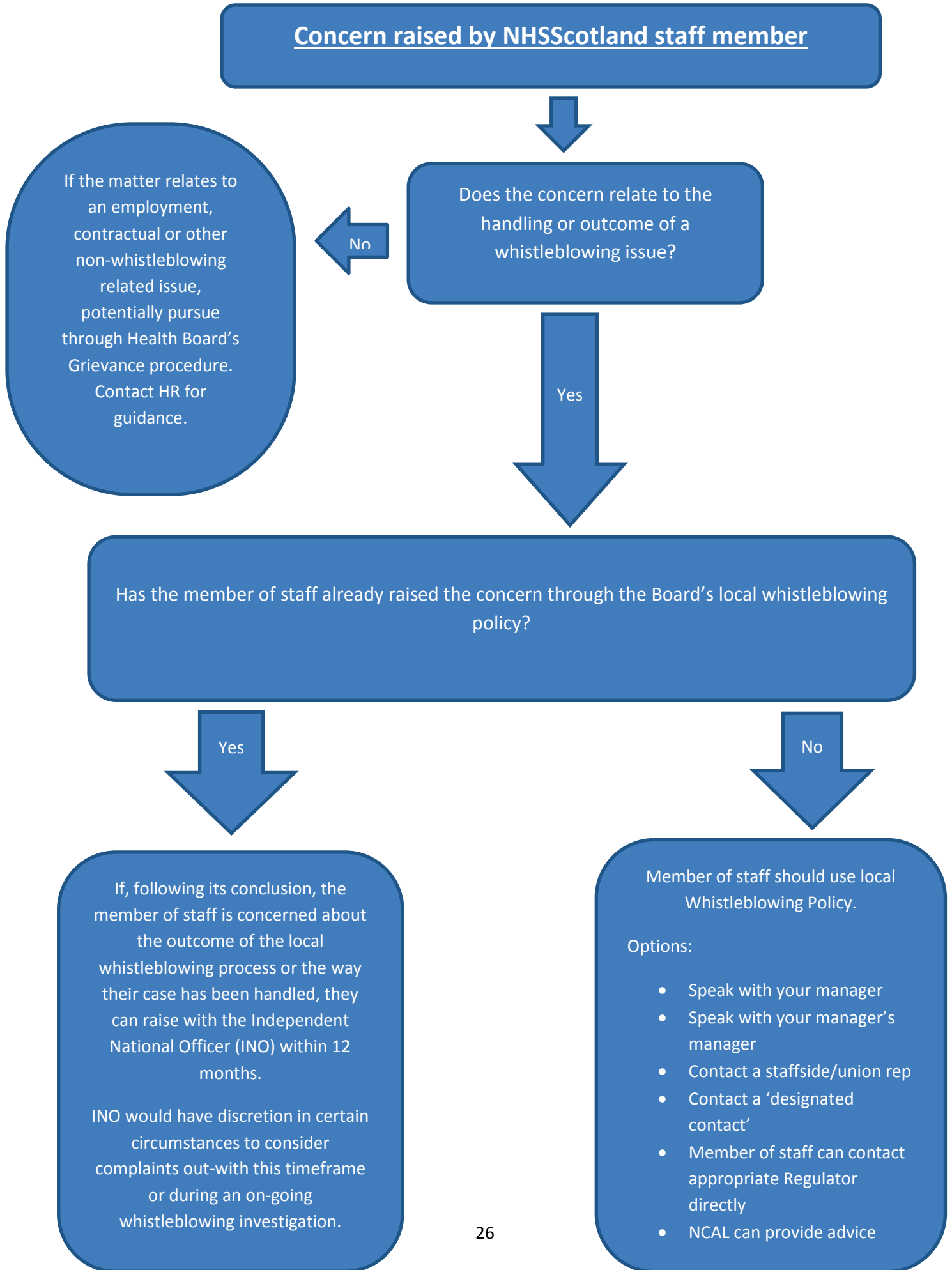
Section 2: Principles and process for raising concerns with the INO

In order to assess whether or not a complaint should be considered by the INO, we feel that it is important to have in place principles to determine the process for raising concerns. It is proposed that each complaint must comply with each of the following principles when assessing whether or not the INO should investigate it. The proposed principles are as follows:

- **The INO should add value and complement the work of existing regulatory or scrutiny bodies.** Rather than duplicate existing functions, the INO will provide a final stage and outcome to complaints raised by whistleblowers (and potentially Health Boards) on whistleblowing cases. The INO would have the ability to refer a case to a relevant body for further investigation, but would not duplicate existing scrutiny functions of other bodies involved in this area.
- **The INO should not consider historic cases.** We consider that in normal practice the INO would only consider cases brought to its attention within 12 months of the conclusion of a case being investigated by a Health Board under their local whistleblowing policy.
- **The INO would not normally consider cases that have yet to be investigated by the Health Board, or are still under local investigation.** Health Boards should retain the primary function for investigating complaints raised about the services they are responsible for delivering. However, there may be exceptional circumstances where the INO may wish to investigate a complaint at an earlier stage where the INO has sufficient concern, and evidence, that the case is not being handled by a Board in line with established procedures and good practice.

- **The INO would not investigate or make assessments on employment matters, or issues relating to an individual's terms and conditions, or contract of employment.** These are legal responsibilities of the Health Board as employer, and there are existing mechanisms – including the Employment Tribunal - which allow these matters to be addressed.
- **A member of staff would need to have raised a concern that met set criteria (outlined on page 27), for their concern to be valid for consideration by the INO.** This is to ensure the INO is only looking into complaints that have been through the employer's internal protected disclosure (whistleblowing) process and that it does not become an alternative avenue for employee grievances.

Based on the above principles the following flowchart sets out how, and at what stage, the INO would become involved in investigating whistleblowing complaints.



Proposed INO whistleblowing complaint criteria

In order to prevent complaints which should be considered under a Health Board's internal staff grievance policy or by an Employment Tribunal being referred to the INO, we feel that the complainer would need to explain why they consider that the INO has jurisdiction to consider their complaint.

We propose that this is best done by the complainer providing a statement to the INO which confirms or explains:

- i. The reasons for referring the complaint to the INO, which must concern a (perceived) failure/error in the employer's investigation process or decision making which they reasonably believe the INO should investigate.
- ii. The reasons why they believe their complaint to be in the public interest (see page 14 *Public Concern vs Private Concern*)
- iii. The reason why their original issue/complaint tends to show that, in line with the Public Interest Disclosure Act, one of the following has occurred, is occurring, or is likely to occur:
 - A criminal offence
 - Breach of any legal obligation
 - Miscarriage of justice.
 - Danger to the health and safety of any individual
 - Damage to the environment
 - The deliberate concealing of information about any of the above

The referral should not relate to the treatment of the individual at work following the concern raised.

Again, we are of the view that within the parameters outlined above, it will ultimately be for the INO, once established, to determine the final principles and process used when considering whether a complaint should be investigated.

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

Yes

No

Please explain your answer.

Question 2a: Do you feel that there should be any additional principles or changes to the process for raising concerns with the INO?

Yes

No

If yes, what so you feel these should be?

Question 2b: Do you agree with the proposed INO whistleblowing complaint criteria?

Yes

No

Please explain your answer.

Question 2c: Do you feel that there should be any additional complaint criteria?

Yes

No

If yes, what so you feel this should be?

Section 3: Should the INO have prescribed powers?

We feel that a critical success factor will be that the office of INO is publicly credible and that its independence and impartiality is recognised throughout NHSScotland and more widely. It must, therefore, have the ability to provide independent challenge and oversight for the most complex of whistleblowing cases requiring seniority and contextual understanding to allow cases to be objectively reviewed.

We consider that for the role of INO to be effective, and perceived in that way, it needs to be able to ensure that Boards take forward any recommended actions that it makes and have the ability to follow-up on and enforce recommendations where required.

Having considered the basis of the role of the INO, and principles and processes for raising complaints outlined in the previous sections we must now consider whether this role should be further strengthened to ensure that it is effective.

This could include:

- Giving the INO power, where necessary, to compel a public body to provide evidence to the INO to allow it to reach a decision and make appropriate recommendations.
- Giving the INO sufficient power to ensure that the recommendations it makes are acted upon and, where necessary, to enforce the recommendations if required.

Question 3: Do you agree that consideration should be given to the INO having prescribed powers?
Yes
No
Please explain your answer.

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

To compel a public body to provide evidence only.

To enforce recommendations, if required, only.

Both.

Do you have views on any other powers you think the INO should have?

Please explain your answer.

Section 4: Where should the INO role be hosted?

When considering different options on where the role of INO could be hosted, it was felt that where the role was hosted was fundamental to the credibility and ultimately success of the role. It is vitally important that the role is viewed as independent and truly impartial when considering all cases.

At the same time, we are clear that the role must offer added value, both in terms of a service for NHSScotland employees and Health Boards; and, in the current financial climate, in terms of set up and on-going costs. With this in mind, when considering options, careful consideration was given to a range of different factors, including:

- Costs associated with establishing the role;
- Costs associated with maintaining the role;
- Estimated volume of caseload;
- Staffing/employment considerations (including seniority of grade, levels of staffing required to support the role, accommodation; training and recruitment; and, all associated costs);
- Legislative requirements;
- Mechanisms required to access the right type of specialist HR, financial and clinical advice.

When considering numbers of cases which may be raised, we estimated different potential caseloads based on the following:

Low level:	10 cases per year (this is based on an average level of whistleblowing cases the Scottish Government has been informed of that have been formally investigated in NHSScotland each year).
High level:	95 cases per year (this is based on the number of whistleblowing calls made to the NHSScotland Confidential Alert Line in the 2013/14 financial year).

Medium level: 52 cases per year (this is based on the mid-point between the low level and high level of cases).

When considering options, the Scottish Government's commitment to achieving more effective public services for Scotland, which includes consideration of unnecessary duplication, was also taken into account. This includes the Scottish Government's previous undertaking to simplify the public sector landscape, and not increase, unnecessarily, the number of Scottish public bodies under its control.

With the above in mind, the Scottish Government gave careful consideration to 3 options on where the role of the INO could potentially be hosted, taking into account the functions described in this paper. In all cases, legislative changes would be required to either confer powers to an existing body to undertake the role; or, to set up an entirely new body.

These options have been discussed and considered with a range of internal and external stakeholders, including Partnership representatives, and are outlined in more detail below.

Option 1 – INO hosted within NHSScotland - Healthcare Improvement Scotland (HIS)

Staff can already raise whistleblowing complaints with HIS and have this investigated either directly, or via referral from the NHSScotland Confidential Alert Line. HIS is also currently listed as a prescribed body under the Public Interest Disclosure Act 1998 for the purposes of staff making a protected (whistleblowing) disclosure. However, the HIS function has typically been to investigate the patient safety aspects, rather than the Board's handling of the complaint itself – which is the perceived role of the INO.

HIS already has a scrutiny function which provides effective and impartial external quality assurance to support service improvement within the NHS and beyond. This role already includes the assessment and investigation of concerns raised by whistleblowers. It could therefore appear a logical host for the INO role bringing benefits of their wide experience and resources.

Option 2 - INO hosted within existing external organisation – Scottish Public Services Ombudsman (SPSO)

The SPSO currently acts as the final stage in the complaints process for service users relating to a range of public authorities, including Health Boards. The SPSO has power to compel the body under investigation to produce information and documents and has the same powers as the Court of Session in relation to the attendance and examination of witnesses, and the production of documents.

The SPSO may also apply to the Court of Session where a person obstructs an investigation, and the court may in turn inquire into the matter and deal with the person in the same way it would with a person who had committed a contempt of court in relation to the Court of Session. The SPSO has powers to prepare reports and may prepare 'special reports' where there is an apprehension that the injustice or hardship which has been identified has or will not be remedied. All SPSO reports are published and laid before the Scottish Parliament.

It appears that there is a synergy with our ideas about the INO role and the SPSO in view of its complaints handling methodology. SPSO already investigates complaints of service failure or maladministration relating to NHSScotland Boards and therefore already has access to relevant expertise.

SPSO is a distinct corporate body completely independent of Scottish Government, and as such is more likely to be seen as an impartial and credible option. It is also perceived by many as a credible and independent body for investigating complaints and has established procedures, skills and expertise that could be adapted to fit complaints under the INO function.

Clear consideration would need to be provided to ensure the INO role if hosted within SPSO did not duplicate or contradict existing scrutiny functions of other bodies. SPSO would also need to be able to take on the other proposed functions for the INO which go beyond or differ from SPSO's current investigatory functions.

Option 3 – INO created as a new Public Body

Consideration was also given to the option of setting up a new Public Body to carry out the role of the INO. The creation of a new public body would offer the opportunity to create a body with bespoke structures and functions, but the general national policy direction indicates a presumption against the creation of new public bodies in an already cluttered landscape.

This would also be likely to be the most expensive option as the costs would be significantly increased to take account of costs for accommodation, IT and likely additional employment costs.

Also, depending on how the body is set up and to whom it is accountable, it may still not be seen as independent of the Scottish Government, whereas the other options discussed provide established routes of governance and accountability.

With this in mind we do not propose Option 3 as a viable option. It is felt that costs to create a new public body would be disproportionate to the anticipated level of complaints which may arise.

Question 4: Where should the INO role be hosted?

Option 1 - Healthcare Improvement Scotland (HIS)

Option 2 - Scottish Public Services Ombudsman (SPSO)

Do you feel there are alternative options for where the INO could be hosted, and if so where?

Please explain your answer.

Section 5: Health and Social Care Integration

The proposals in this consultation paper relate entirely to employees of NHSScotland, however, as integrating adult health and social care services is one of the Scottish Government's top priorities, we recognise that there will be an expectation that the services of the INO should also be accessible to those staff who deliver health and social care services in Scotland.

This consultation offers an opportunity to seek views on whether consideration should be given to widening the scope of the role of the INO whereby it may be accessed by employees of the social care sector, and if so, which employees should be eligible.

¹⁸The 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, with statutory partners (Health Boards and Local Authorities) deciding locally whether to include additional services such as children's health and social care services; criminal justice; social work; or housing support services, in their integrated arrangements.

Two models of integration are available for Health Boards and Local Authorities to choose from:

1) **Lead Agency:** delegation of functions and resources between Health Boards and Local Authorities. Where a Lead Agency model is adopted, the employer will be either NHSScotland or the relevant Local Authority.

2) **Integration Joint Board (IJB):** delegation of functions and resources by Health Boards and Local Authorities to a Body Corporate. Where the IJB model is adopted the IJB does not employ staff, rather they issue directions to the Health Board and Local Authority who employ or contract staff to deliver services.

¹⁸ <http://www.legislation.gov.uk/asp/2014/9/contents/enacted>

When considering whether the scope of the INO should include staff working in services delivered by an IJB, we would also need to consider whether to include those staff working for voluntary and independent sector organisations providing commissioned services.

It is important to note that staff working in integrated services retain their employers' existing terms and conditions of service, including any policies for raising concerns with their employer. We are clear therefore that the INO mechanism should only apply where there are robust existing whistleblowing policies in place - given that the INO is intended to be a final stage in the process and not replace an employer's handling of whistleblowing complaints.

The integrated landscape is complex and we recognise that if the role of the INO is to be extended to include the adult social care sector, and potentially wider, more detailed consideration and discussion would be required. This would include consideration of resource requirements, as inclusion of the social care sector could significantly enhance the caseload and resource requirements of the INO.

It is also important to note that both the Care Inspectorate and Healthcare Improvement Scotland have existing statutory responsibilities to assure and protect everyone that use social care and health care services and to encourage and support continuous practice improvement.

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

Yes

No

Please explain your answer.

Question 5a: If yes, which IJB services should be covered?

Please explain your answer

Question 5b: If yes to Q5 do you have a view on how employees who have access to the INO could be defined?

Section 6: What should the INO be called in Scotland?

It is important that the INO has a clear title that signposts its functions to staff. Suggested titles for the role have included:

- NHSScotland's Whistleblowing Ombudsman
- NHSScotland's Independent National Officer
- Independent National Whistleblowing Officer for NHSScotland.

We would welcome your views on the title of the INO role as outlined in this consultation paper.

However, if you feel that the role should extend to those staff not employed by NHSScotland who deliver health and social care services in Scotland, we would also welcome your views on alternative titles for the INO in these circumstances.

Question 6: What do you feel would be an appropriate title for the INO in Scotland?

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 NHSScotland who deliver health and social care services in Scotland?

Section 7: Consultation question summary

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

Option 1 - To consider complaints about the application of the local whistleblowing process only.

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

Please explain your answer.

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

Yes

No

Please explain your answer.

Question 2a: Do you feel that there should be any additional principles or changes to the process for raising concerns with the INO?

Yes

No

If yes, what do you feel these should be?

Question 2b: Do you agree with the proposed INO whistleblowing complaint criteria?

Yes

No

Please explain your answer.

Question 2c: Do you feel there should be any additional complaint criteria?

Yes

No

If yes, what do you feel this should be?

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

Yes

No

Please explain your answer.

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

To compel a public body to provide evidence only.

To enforce recommendations, if required, only.

Both.

Do you have views on any other powers you think the INO should have?

Please explain your answer.

Question 4: Where should the INO role be hosted?

Option 1 - Healthcare Improvement Scotland (HIS)

Option 2 - Scottish Public Services Ombudsman (SPSO)

Do you feel there are alternative options for where the INO could be hosted, and if so where?

Please explain your answer.

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

Yes

No

Please explain your answer.

Question 5a: If yes, which IJB services should be covered?

Please explain your answer.

Question 5b: If yes to Q5, do you have a view on how the employees who could have access to the INO could be defined?

Question 6: What do you feel would be an appropriate title for the INO in Scotland?

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 NHSScotland who deliver health and social care services in Scotland?

Question 7: Do you have any other comments to make on the proposals for the introduction of the role of INO.

Section 8: Responding to this consultation and Respondent Information Form

Scottish Government consultation process

Consultation is an essential part the policy making process. It gives us the opportunity to get your opinion and expertise on a proposed area of work.

You can find all our forthcoming, open and closed consultations online: <http://consult.scotland.gov.uk>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Consultations may involve seeking views in a number of different ways, such as public meetings, focus groups, or other online methods such as Dialogue (<http://ideas.scotland.gov.uk>)

After a consultation is closed we publish all responses where we have been given permission to do so.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation.

Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Responding to this Consultation

We are inviting responses to this consultation **by Wednesday 10 February 2016.**

Please respond to this consultation online

at <https://consult.scotland.gov.uk/health-workforce/independent-national-whistleblowing-officer>.

You can save and return to your response while the consultation is still open. Please ensure that consultation responses are submitted before the close date.

If you are unable to respond online, please complete the Respondent Information Form (see “Handling your Response” below) and return it with your response to:

Robyn McCormack, Workforce Practice Unit, Scottish Government, St Andrew’s House, Regent Road, Edinburgh, EH1 3DG.

Handling your response

If you respond using Citizen Space, you will be automatically directed to the Respondent Information Form at the start of the questionnaire. This will let us know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public.

If you are unable to respond via Citizen Space, please complete and return the **Respondent Information Form** attached at the end of this document as this will ensure that we treat your response appropriately. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at

<http://consult.scotland.gov.uk>. If you use Citizen Space to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to **Anna Gilbert** at Anna.Gilbert@gov.scot.

Proposals for the introduction of the role of an Independent National (Whistleblowing) Officer (INO)

RESPONDENT INFORMATION FORM



Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Title Mr ☐ Ms ☐ Mrs ☐ Miss ☐ Dr ☐ Please tick as appropriate

Surname

Forename

2. Postal Address

Postcode	Phone	Email

3. Permissions - I am responding as...

Individual

/

Group/Organisation

☐

Please tick as appropriate

☐

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate

☐ Yes ☐ No

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Are you content for your **response** to be made available?

Please tick as appropriate

☐ Yes ☐ No

Yes, make my response, name and address all available ☐

or

Yes, make my response available, but not my name and address ☐

or

Yes, make my response and name available, but not my address ☐

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

☐ Yes

☐ No



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This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at
The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-78544-833-1 (web only)

Published by The Scottish Government, November 2015

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS60036 (11/15)