Response to the Scottish Government consultation: Consultation on proposals for the introduction of the role of an Independent National (Whistleblowing) Officer (INO)

February 2016

1. Introduction

1.1 The Professional Standards Authority for Health and Social Care promotes the health, safety and wellbeing of patients, service users and the public by raising standards of regulation and registration of people working in health and care. We are an independent body, accountable to the UK Parliament. More information about our work and the approach we take is available at www.professionalstandards.org.uk.

1.2 As part of our work we:

- Oversee nine health and care professional regulators and report annually to Parliament on their performance
- Conduct research and advise the four UK governments on improvements in regulation
- Promote right-touch regulation and publish papers on regulatory policy and practice.

1.3 We responded to the consultation on similar aspirations for a whistleblowing guardian in England by the Care Quality Commission. Our response, which made many of the same points as we do here, is available online.[1]

1.4 We welcome the opportunity to respond to this Scottish Government consultation about the role of the INO in the Scottish NHS. We offer a number of general comments, many of which answer consultation questions.

2. General comments

2.1 We agree that there are immense benefits for patients, service users and the wider public if the health and care system is open, transparent and honest. We support the view that patient safety depends upon organisations creating a learning culture, where near misses and errors are openly discussed and learnt from. We also consider healthcare systems should develop what Carl Macrae calls a '*shared accountability*' culture whereby all staff see patient safety as part of their role and responsibility.[2] Macrae explains how this trait has been developed within the aviation sector in response to avoidable aviation disasters. Pilots, air traffic control, mechanics and so on all give each other permission to

[1] Available on our website www.professionalstandards.org.uk.
[2] Learning from patient safety incidents: Creating participative risk regulation in healthcare, Carl Macrae http://web.a.ebscohost.com/ehost/pdfviewer/pdfviewer?sid=1944289c-f22b-44aa-b624-6273e1404354%40sessionmgr4001&vid=1&hid=4214

'constructively challenge' and check each other's decisions. In the light of recent research, we think it essential that attempts to change culture are rooted in a better understanding of the human and organisational behaviour factors that underpin it, if it is to succeed.

2.2 The Authority welcomes the efforts of the Scottish Government to prevent victimisation of individuals and improve processes for investigation of complaints. The creation of a culture open to new ideas and challenge is the responsibility of all members of the healthcare workforce. In our advice to the UK Department of Health on best models of performance management in the NHS, we mentioned the need to 'normalise conversations' about performance management and 'facilitate constructive challenge'.[3] In the long term this would mitigate the likelihood of poor care and create the optimum conditions for staff to speak out to improve care.

Interaction with other bodies

2.3 We support the INO's emphasis on complementing the work of existing bodies and aiming to avoid duplication of responsibilities. Narrowing the scope of what the INO can investigate will ensure it stays focused on its core purpose.

2.4 It would be useful to specify in more detail under what 'exceptional circumstances' an employee should or could take their concern to the INO and not their local Board. Provision of clear guidance of what counts as 'exceptional circumstances' will help to ensure NHS Scotland employees' concerns are handled most appropriately by Health Boards and the INO.

2.5 We recommend that it is made clear the INO is available to all NHS Scotland employees, including those working outside direct healthcare provision (for example within Health Improvement Scotland or NHS Education Scotland).

2.6 On the question of what powers the INO should hold, we anticipate that the Scottish Government would make these decisions based in part on how the Health Boards and other bodies will interact with the INO. It may also want to give careful consideration to the impacts of each power, to ensure that they do not duplicate or hinder existing regulatory and quality assurance frameworks.

Hosting the INO

2.7 We agree it is essential that the host of the INO should not encroach on the INO's ability to be 'independent and truly impartial' when considering cases. We think there is a risk that HIS might not be perceived to be so if hosting the INO because:

- HIS already deals with complaints from NHS Scotland employees. If it was also hosting the INO, this could appear to duplicate this function
- HIS scrutiny, assurance and inspection role might give rise to conflicted loyalties on the part of staff or otherwise inhibit staff from reporting,

[3] Improving employee performance management in the health and social care sector, p. 6, http://www.professionalstandards.org.uk/docs/default-source/psa-library/performance-management-advice-to-the-secretary-of-state.pdf?sfvrsn=0

particularly if they think the information they provide may inform HIS scrutiny of the organisation in which they work[4]

- It could cast doubt over the INO's impartiality in scrutinising the whistle-blowing process of NHS Scotland Local Health Boards, as HIS is also part of NHS Scotland
- If Healthcare Improvement Scotland employees were allowed to take their whistleblowing concerns to the INO, this might create a conflict of interests.

2.8 Being separate from the Scottish Government, the Scottish Public Services Ombudsman (SPSO) could be an appropriate host for the INO. If HIS were to host INO care would be needed to ensure the governance arrangements maintain its actual and perceived independence.

Social Care access to the INO

2.9 In the light of the integration agenda in health and social care, the Government may wish to establish whether similar whistleblowing issues exist in this sector, and what could be done to address them.

2.10 Where and how the INO is set up will affect whether adult health and social care employees have ready access to it. If the INO is set up within a health-orientated organisation like Healthcare Improvement Scotland, it will need to develop the expertise to deal with whistleblowing issues in adult social care services. However, if the INO is set up as part of the Scottish Public Services Ombudsman, for example, it could take a broader view across the sector.

Local Counterparts

2.11 We would welcome more information about the role of the 'Non-executive whistleblowing champions' which would be introduced in each NHS Scotland Board as mentioned on page 8. We presume their role would be to provide leadership and support. In our response to the CQC's desire for 'Local Guardians', we noted potential difficulties with staff concerns being reported to the local representative of the National Guardian. While this could be positive for patient safety on the one hand, the person with whistleblowing responsibility will need to be aware of the importance of building trusting relationships with different stakeholders (commissioners, employees and senior organisational staff), particularly as whistleblowing can put a strain on relationships. In addition, research suggests overlapping roles and divided loyalties can create cognitive dissonance and prevent people from speaking up[5] – the local representative will need to be prepared for these challenges.

2.12 Whistleblowing champions will need to inspire the confidence of staff and boards alike, and avoid conflicts of interest. If they are to retain their current

[4] We discuss the factors that prevent people from speaking up in our research paper prepared in support of our advice to the Secretary of State for Health on the Duty of Candour. This includes conflicted loyalties towards employer and patients. Available at: http://www.professionalstandards.org.uk/docs/default-source/psa-library/candour-research-paper---final.pdf?sfvrsn=0

[5] Available at: http://www.professionalstandards.org.uk/docs/default-source/psa-library/candour-research-paper---final.pdf?sfvrsn=0

jobs in the local organisations, they will be acting both as a representative of the local provider and of the National Guardian. Local Guardians will need to be clear about their remit and responsibilities. In addition, it might be helpful to provide clear guidance to both employers and employees on what the Local Guardian can and cannot do.

2.13 In the *Freedom to Speak Up Review* (the foundation for the creation of the INO), the non-executive whistleblowing champion or '*Freedom to Speak Up Guardian*' (term used in the document) would be '*appointed by the organisation's chief executive to act in a genuinely independent capacity*'.[6] Perhaps the INO could issue guidance or advice on how the process of appointing whistleblowing champions could be made as independent as possible.

2.14 Perhaps champion whistleblowers could focus on the formation of formative or 'reflective' spaces where staff can challenge colleagues' performance and their own[7]. The INO could work in tandem with these groups and encourage professionals and Trusts to use them.

3. Further information

3.1 Please get in touch if you would like to discuss any aspect of this response in further detail. You can contact us at:

Professional Standards Authority for Health and Social Care
157-197 Buckingham Palace Road
London SW1W 9SP

Email: michael.warren@professionalstandards.org.uk
Website: www.professionalstandards.org.uk
Telephone: 020 7389 8030

[6] Freedom to Speak Up review, p.26, http://webarchive.nationalarchives.gov.uk/20150218150343/https://freedomtospeakup.org.uk/wp-content/uploads/2014/07/F2SU_Executive-summary.pdf

[7] Dynamics of Effective Regulation, 2015, p.140, http://www.osteopathy.org.uk/news-and-resources/document-library/research-and-surveys/dynamics-of-effective-regulation-final-report/