



Briefing for the Public Petitions Committee

Petition Number: [PE1495](#)

Main Petitioner: Rab Wilson on behalf of Accountability Scotland

Subject: The use of 'gagging clauses' in agreements with NHS staff in Scotland

Calls on the Parliament to urge the Scottish Government to ban the use of confidentiality, or so called 'gagging', clauses in compromise agreements with NHS staff in Scotland, which may prevent staff speaking freely about matters that affect patient safety and quality of care, as well as employment issues such as workplace bullying.

Background

This briefing seeks to provide Members with background information on the issues being raised by the petitioner. It should not be taken as an in-depth examination of what is a fairly complex set of legal and policy issues.

As stated in the background information to the petition, the petitioner has been campaigning on these and other related matters for some time. However, the recent debate on the use of gagging clauses and whistleblowing more generally followed the publication of the ['Final Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry'](#) (The Francis Report) in February 2013. The Inquiry heard of the use by organisations of contractual terms to prevent or inhibit disclosure by employees or former employees of information critical of the organisation. This led to recommendation 179 of the report, which stated:

““Gagging clauses” or non disparagement clauses should be prohibited in the policies and contracts of all healthcare organisations, regulators and commissioners; insofar as they seek, or appear, to limit bona fide disclosure in relation to public interest issues of patient safety and care.”

Following the publication of the Francis Report, a number of pronouncements and developments concerning “gagging orders” took place across the UK.

Current legal framework

Legislating in this area is reserved to the UK Parliament. The Public Interest Disclosure Act 1998 (PIDA), amended the Employment Rights Act 1996

(ERA), to “protect the public by providing a remedy for individuals who suffer a detriment by any act or any deliberate failure to act by their employer for raising a genuine concern, whether it be a risk to patients, financial malpractice, or other wrongdoing”. Employees and workers who act honestly and reasonably are given automatic protection from victimisation for raising a matter internally¹, when they believe that one of the following is being, has been, or is likely to be, committed:

- a criminal offence
- a miscarriage of justice
- an act creating risk to health and safety
- an act causing damage to the environment
- a breach of any other legal obligation
- concealment of any of the above

Under the ERA such concerns are known as “qualifying disclosures” (also known under PIDA as “protected disclosures”). A House of Commons Library [briefing](#) on whistleblowing in the NHS in England, published in 2012, discusses how recent case law has defined that the Act’s protections only apply to “information” which falls into one of the listed categories, as opposed to “allegations” (see p4).

As well as protection from victimisation in making a disclosure internally, PIDA also provides protection to individuals making disclosures to prescribed external regulatory bodies. Prescribed bodies under PIDA are provided for through Schedule 1 of the Public Interest Disclosure (Prescribed Persons) Order 1999 (as amended). For Scotland, and in relation to health, such bodies include Audit Scotland, Healthcare Improvement Scotland, the Care Inspectorate, the Health and Safety Executive, and the regulatory bodies of health and social care professionals.

PIDA also prescribes certain circumstances where protection would extend to wider disclosures, such as to a MP, MSP or the media. In addition, where a worker is subjected to a detriment by their employer for raising a concern or is dismissed in breach of PIDA, they can bring a claim for compensation under PIDA to an Employment Tribunal. Awards are uncapped and based on the losses suffered.²

As regards gagging orders, section 1 of PIDA inserted new section 43J into the ERA, which provides that any clause in a contract that seeks to “gag” an individual from raising a protected disclosure is invalid.

The House of Commons Library briefing [‘Whistleblowing and gagging clauses: the Public Interest Disclosure Act 1998’](#) (October 2013) discusses how the Enterprise and Regulatory Reform Act 2013, which came into force in June 2013, has made three changes to existing legislation in this area:

¹ In the NHS an internal disclosure can go up to the highest level and includes going to Ministers.

² NHS Scotland’s Partnership Information Network’s² (PIN) [guidance](#) on whistleblowing arrangements (p 5-6).

- amended the definition of “qualifying disclosure” to introduce a public interest test
- removed the requirement that certain disclosures be made in good faith, replacing this with a power to reduce compensation where disclosure is not made in good faith
- introduced vicarious liability for employers if a worker is subjected to detriment by a co-worker for making a protected disclosure

The UK Government position

The petitioner makes reference to the pronouncements made by the UK Secretary of State for Health, Jeremy Hunt MP, concerning the use of gagging orders. In March 2013, in answer³ to a parliamentary question in the House of Commons, the Parliamentary Under Secretary of State for Health, Dr Ian Poulter MP, stated that nothing within an employment contract or compromise agreement should prevent someone from speaking out about issues such as patient care or safety in accordance with PIDA. He added that PIDA also covered former employees, and that if any gagging clause had been used it was void. However, he also stated that the UK Department of Health had not banned confidentiality clauses per se (as there can be legitimate reasons for having one) as long as there is nothing in it that seeks to prevent or has the effect of preventing, someone being able to speak out in the public interest. As regards compromise agreement, specifically, he stated:

“Although the use and specific content of a compromise agreement is a matter for the relevant employer and is confidential to the parties concerned, some NHS employers have used such agreements that have not been as clear on the issue of speaking out in the public interest as they should be. This has resulted in some staff who have felt ‘gagged’ and therefore worried that they would not be allowed to speak out about their concerns after they have signed the agreement and left their employment [...]. In future, the Government will require that where confidentiality clauses are used in compromise agreements that they include an explicit clause that makes it clear beyond doubt to the individual concerned that nothing in the agreement will prevent them from speaking out on issues in the public interest as covered by the Public Interest Disclosure Act 1998 (PIDA).”

The Minister’s answer also stated that former NHS employees who feel they may be subject to a confidentiality ‘gagging’ clause are encouraged to initially seek professional support and advice on their particular case from the whistleblowing helpline.

European Convention on Human Rights

The petitioner argues that, “gagging orders are a direct breach of, and in contravention of, the Human Rights Act”.

³ HC Deb 26 Mar 2013 c1092-3W. As provided through Personal Communication with the House of Common Library, 14 October 2013.

The Human Rights Act 1998 (HRA) is the UK legislation which allows the European Convention on Human Rights (ECHR) to be enforceable in UK courts.⁴ The Act does not allow for freestanding claims. However, UK courts are required, as far as possible, to interpret all legislation in a way that is compatible with the ECHR. In addition, public authorities (including the NHS) are not permitted to breach the ECHR and cases can be brought in UK courts if they do so.

The ECHR can be of relevance in relation to gagging orders and whistleblowing. The most relevant provision is likely to be Article 10 which protects the right to freedom of expression. In a judgment from 2011 ([Heinisch v Germany](#)), the European Court of Human Rights examined this issue in the context of the dismissal of a geriatric nurse (Mrs Heinisch), who had brought a criminal complaint against her employer alleging that there were serious shortcomings in the institutional care in the nursing home where she worked. The court found that, as Mrs Heinisch had acted in good faith in relation to a serious issue, her dismissal breached her right to freedom of expression. However, the court emphasised that the right to freedom of expression was not an unlimited right and that it had to be balanced with other legitimate aims – for instance employees’ “duty of loyalty, reserve and discretion” to their employers. Consequently, whether a gagging order breaches article 10 of the ECHR, and hence HRA, would depend on the specific circumstances of the case.

Scottish Government Action

In specific reference to compromise agreements, the Cabinet Secretary for Health and Wellbeing [stated](#)⁵ on 27 February 2013:

“The use of confidentiality clauses in compromise agreements is entirely an issue between individual NHS boards and their employees. Certain conditions have to be met in order for a compromise agreement to be legally binding, including a requirement for the employee to have received advice from a relevant independent adviser as to the terms and effect of the agreement. Any clause which sought to prevent an individual from raising a protected whistleblowing disclosure would be illegal under the Employment Rights Act and would therefore be unenforceable.

I wrote to NHSScotland chairs and chief executives on 22 February 2013, reminding them that boards should frequently review their behaviours and practices to ensure they have a culture which actively encourages and supports members of staff to raise concerns. I also told them that I expect Boards to ensure that confidentiality clauses and non-derogatory statement clauses are not being used to suppress the reporting of concerns about

⁴ For details, see the UK Government’s guidance - <http://www.justice.gov.uk/human-rights>

⁵ Answer to Parliamentary Question S4W-12567.

practice in NHSScotland, and to ensure that these clauses are used appropriately.”

In addition, the Scottish Government⁶ has stated that NHSScotland does not have any policies which would prevent, or condone the prevention of staff from raising concerns about safety, quality, or malpractice. As regards NHS compromise agreements, it advised that they typically include confidentiality clauses as a means of ensuring that the terms of such agreements are not disclosed by either party. However, it added that compromise agreements do not contain any clause which seeks to prevent an individual from raising a protected whistleblowing disclosure, which it states would be both illegal and unenforceable. In addition, it noted that for a compromise agreement to be legally binding, an employee is required to have received independent legal advice as to its terms and effect. Finally, it discussed how earlier this year the Central Legal Office for the NHS in Scotland carried out a review of the confidentiality clause and developed a revised form of wording which explicitly makes clear that an individual’s right to raise “protected disclosures” is protected. This is shown in the [Appendix](#) to this briefing.

In addition, in April 2013 the National Confidential Alert Line for NHS Scotland employees was launched. The service is run by [Public Concern at Work](#), and was developed so that NHS staff who feel that they may be victimised as a result of whistleblowing, can obtain support and advice on raising concerns about patient safety and malpractice. During the quarter to end of September 2013, 128 NHS Scotland staff had contacted the line, of which 74 were public interest cases, and of this 35 concerned patient safety. The full breakdown can be accessed [here](#).

Scottish Parliament Action

The matters raised by the petitioner have not previously been addressed by any Committee in Parliament or in plenary debate.

Jude Payne
Senior Researcher
29 October 2013

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⁶ Personal communication

Appendix: Style revised wording from the NHS Compromise Agreement (May 2013)

CONFIDENTIALITY AND NO DEROGATORY STATEMENTS

- 1.1 The terms of this Agreement are confidential to all parties and all parties agree that all matters arising out of this Agreement and all matters relating to the termination of the Employee's employment and all circumstances leading to the termination of the Employee's employment will remain confidential between the parties and their appointed representatives, and will not be revealed to or discussed with any other parties, with the exception of: (i) the Employee's immediate family provided that the Employee has obtained their agreement to keep the information confidential; (ii) HM Revenue and Customs and any other statutory bodies; (iii) any other person to whom the employer is bound to report, or (iv) as required by law, including any court or tribunal, or as required in relation to appearance as a witness in any court or tribunal. In particular, no information will be given to the media either directly or indirectly.
- 1.2 The Employee will not at any time in the future make any detrimental or derogatory statements about matters concerning the Employer, its employees or directors, his employment with the Employer, or the termination of that Employment.
- 1.3 For the avoidance of doubt, the Employee shall not be prevented from making a "protected disclosure", as defined in Sections 43A-H of the Employment Rights Act 1996.
- 1.4 **OPTIONAL**The Employer will take reasonable steps to ensure that its employees do not make any detrimental or derogatory statements regarding the Employee. **OPTIONAL**The Employer's obligations in this regard will be fully discharged by the sending of an email, the text of which will be as set out at Schedule 3, to the following persons within seven days of the signing of this Agreement by the Employer: **INSERT NAMES**. For the avoidance of doubt, the sending of that email will not be a breach of the foregoing clause regarding confidentiality.