

**SCOTTISH GOVERNMENT ANNUAL REPORT
ON THE USE OF SETTLEMENT AGREEMENTS
APRIL 2014 – MARCH 2015**

Introduction

1. On 11 June 2014 the Scottish Government notified the Public Audit Committee of the implementation of new guidance on Settlement Agreements and undertook to report back to the Committee on the first year of operation of the guidance, spanning the period April 2014 – March 2015.¹
2. This report fulfils that commitment and covers:
 - The status and use of Settlement Agreements;
 - Scottish Government Settlement Agreement guidance and review process;
 - The use of confidentiality clauses;
 - The number and cost of settlements entered into 2014-15; and
 - Planned improvements.

Status and use of Settlement Agreements

3. A Settlement Agreement is a legally binding contract entered into by an employer and employee to resolve an employment dispute. Settlement Agreements are recognised in law and are an accepted part of employment practice. As such, they are the subject of guidance by the Advisory, Conciliation and Arbitration Service (ACAS).²
4. Settlement Agreements are used in circumstances where:
 - a) the employment relationship has broken down or been significantly impaired;
 - b) the situation cannot be remedied through mediation or other personnel processes; and
 - c) alternative routes to resolution would involve disproportionate cost at a tribunal or otherwise at law; and impair the efficient functioning of the service.
5. Consideration of the use of a Settlement Agreement will take into account:
 - a) the direct and indirect costs of alternative proceedings and of any awards that might be made;
 - b) disruption to the effective and efficient operation of the service caused by an on-going dispute and the resultant stress on individuals; and
 - c) the likely timescales involved, against the need to bring matters to a timely conclusion.
6. Scrutiny of Settlement Agreements by Accountable Officers is undertaken because:
 - a) they may involve payments to individuals above and beyond their normal contractual entitlement;
 - b) Parliament and the public will want to be assured that, in all the circumstances of the case, their use was appropriate and reasonable; and
 - c) there is a need to ensure their use does not cut across the important protections offered to whistleblowers.

¹ Written submission from the Scottish Government to the Public Audit Committee, 11 June 2014
http://www.scottish.parliament.uk/S4_PublicAuditCommittee/General%20Documents/Written_submission_from_the_Scottish_Government_to_the_Public_Audit_Committee_dated_11_June_2014.pdf

² ACAS statutory code of practice on Settlement Agreements. <http://www.acas.org.uk/media/pdf/j/8/Acas-Code-of-Practice-on-Settlement-Agreements.pdf>

Scottish Government Settlement Agreement guidance and review process

7. Settlement Agreement guidance introduced by the Scottish Government in 2014 provides for the central review and reporting of Settlement Agreements and is designed to increase transparency, promote consistency and ensure value for money.
8. The first line of assurance lies with the designated Accountable Officer for each body as set out in the Scottish Public Finance Manual³ (SPFM). The SPFM notes that “the essence of the Accountable Officer's role is a personal responsibility for the propriety and regularity of the finances under their stewardship and for the economic, efficient and effective use of all related resources. Accountable Officers are personally answerable to the Parliament for the exercise of their functions”.⁴ The SPFM and Scottish Government guidance make it clear that final decisions on Settlement Agreements rest with the Accountable Officer.
9. Our guidance sets out the process for interaction between a designated Accountable Officer and the Scottish Government, and requires the relevant body to consult the Scottish Government before entering into a Settlement Agreement and to submit a business case.
10. For NHSScotland bodies, the reporting procedure follows a similar process and is overseen by DG Health and Social Care / Chief Executive of NHS Scotland.
11. The bodies covered by the reporting procedure in the Scottish Government guidance are set out at Annex A.
12. The reclassification of incorporated Further Education colleges in Scotland as public bodies took effect for the purposes of national accounts from 1 April 2014 and brought these colleges under the scope of Scottish Government guidance on Settlement Agreements. Scrutiny and oversight for the college sector is delegated to the Scottish Funding Council (SFC). College data is included in this report.

Confidentiality clauses

13. At the request of the employee or their legal representative, Settlement Agreements may include a voluntary provision whereby the parties agree to keep the agreement itself confidential and not disclose its details to third parties. Inclusion of such a clause protects the rights of the employee who may have legitimate concerns that disclosure of the terms and circumstances of the agreement and their identity would impact negatively on their privacy and employability. The ACAS guidance provides a model Settlement Agreement which includes a standard confidentiality clause.⁵
14. Nothing, however, in a Settlement Agreement can prevent the individual from making a protected disclosure under whistleblowing legislation. Any agreement which sought to prevent staff from raising concerns about health and safety or malpractice would be void under the Employment Rights Act 1996 (as amended by the Public Interest Disclosure Act 1998).
15. The Public Audit Committee expressed concern about the use of confidentiality clauses in Settlement Agreements, particularly in relation to their use by NHSScotland. The Cabinet Secretary for Health and Wellbeing determined that there would thenceforth be a presumption against the use of any confidentiality clauses in NHSScotland Settlement Agreements unless there were clear

³ <http://www.gov.scot/Topics/Government/Finance/spfm/Intro>

⁴ <http://www.gov.scot/Topics/Government/Finance/spfm/Accountability>

⁵ <http://www.acas.org.uk/media/pdf/n/h/Settlement-agreements-a-guide.pdf> p.69

and transparent reasons for their inclusion. The NHSScotland consultation procedure includes an explicit requirement that Boards notify Scottish Government of any proposal to include a confidentiality clause and, with effect from 1 April 2015; all such proposals will be put to the Chief Executive of NHS Scotland.

16. We intend to adopt the NHSScotland approach to the use of confidentiality clauses across wider public bodies during 2015-16.

Information sharing

17. In presenting material for scrutiny by the Public Audit Committee, we are mindful of the need to respect the confidentiality of Agreements and the general entitlement of individuals to privacy. We have thus provided information on the number of Settlement Agreements entered into and the costs involved.
18. Disclosing the name of the body entering into the agreement alongside the cost can effectively disclose the identity of an individual. An anonymised breakdown of each of the agreements and the associated costs is thus provided at Annex B. We would be happy to provide the Committee with associated information to consider in private on individual bodies should they require this for the purposes of their Parliamentary scrutiny.

Numbers and costs of settlements

19. Headline costs and number of Settlement Agreements for the first year of operation are set out below. A full anonymised breakdown is provided at Annex B.

20. **Table of Agreements and associated costs**

Oversight Body	Number of Agreements	Number of bodies	Total cost (£)	Non-contractual element	Number of confidentiality clauses used
Scottish Government / Public bodies	23	12	875,421	225,879	21
NHSScotland	30	15	895,134	532,975	13
Scottish Funding Council	14	9	411,185	152,837	13
TOTALS	67	-	2,181,740	911,691	47

21. The costs above include the total gross cost of the Settlement Agreement to the employer, including the contractual and non-contractual payments made to the employee and ancillary costs, such as the cost of negotiating and concluding the settlement and any legal costs.
22. Contractual payments are those to which the employee is legally entitled. These will include payments such as, on termination, notice payments and pay in lieu of time owed. They will also include lump sum and pension payments to which the employee is entitled on termination of employment through the Civil Service Compensation Scheme or an equivalent scheme.
23. Non-contractual payments are those offered in order to resolve the employment dispute.
24. The level of proposed non-contractual payment is included in the draft business case submitted for consideration. This is weighed against the risks and costs of not entering into a Settlement Agreement, as set out in paragraph 5 above.

Planned improvements

25. In this first year of scrutiny it is not possible to analyse trends. However, when considered against the overall size of the public sector workforce and the number of leavers per annum, it is clear that, as expected, Settlement Agreements are used only in very limited circumstances – in NHS Scotland for example, amongst a cohort of over 10,000 leavers, 30 agreements were concluded.
26. Continued vigilance is required however and improvements have already been identified and implemented. NHSScotland has reviewed procedures on confidentiality agreements which is to be applied more widely. The SFC have identified areas for improvement and are currently developing revised guidance for colleges on severance arrangements generally and Settlement Agreements specifically to respond to points raised in Audit Scotland's report 'Scotland's colleges 2015'.⁶
27. The process of review within Scottish Government process is being similarly refined and improved. An initial review has been conducted with Internal Audit to consider the guidance and the process for handling individual cases. Once the reporting process to the Scottish Parliament is complete we will review this feedback and advise the Committee of the procedures and safeguards that will obtain, in 2015-16, and at the discretion of the Committee, to continue to submit an annual report.

Conclusion

28. **The Committee is asked to note this report.**

⁶ http://www.audit-scotland.gov.uk/docs/central/2015/nr_150402_scotlands_colleges.pdf

**LIST OF PUBLIC BODIES COVERED BY REVISED REPORTING PROPOSAL
FROM 1 APRIL 2014 – 31 MARCH 2015**

[N.B. this list will be updated from time to time as required]

Scottish Government

The Crown Office and Procurator Fiscal Service

Executive Agencies

Accountant in Bankruptcy
Disclosure Scotland
Education Scotland
Historic Scotland
Scottish Prison Service
Scottish Public Pensions Agency
Student Awards Agency for Scotland
Transport Scotland

Non Ministerial Departments (NMDs)

National Records of Scotland
Office of the Scottish Charity Regulator
Registers of Scotland
Scottish Court Service
Scottish Housing Regulator

Public Corporations

Caledonian Maritime Assets Ltd
David MacBrayne Ltd
Highlands and Islands Airports Ltd
Scottish Canals
Scottish Water

Executive NDPBs

Architecture and Design Scotland
Bòrd na Gàidhlig
Cairngorms National Park Authority
Care Inspectorate
Children's Hearings Scotland
Creative Scotland
Crofting Commission
Highlands and Islands Enterprise
Loch Lomond and The Trossachs National Park Authority
National Galleries of Scotland
National Library of Scotland
National Museums of Scotland

Police Investigations and Review Commissioner
Quality Meat Scotland
Risk Management Authority
Royal Botanic Garden, Edinburgh
Royal Commission on the Ancient and Historical Monuments of Scotland
Scottish Agricultural Wages Board
Scottish Children's Reporter Administration
Scottish Criminal Cases Review Commission
Scottish Enterprise
Scottish Environment Protection Agency
Scottish Funding Council
Scottish Futures Trust
Scottish Legal Aid Board
Scottish Legal Complaints Commission
Scottish Natural Heritage
Scottish Qualifications Authority
Scottish Social Services Council
Skills Development Scotland
Sportscotland
VisitScotland
Water Industry Commission for Scotland

Advisory NDPBs

Judicial Appointments Board for Scotland
Local Government Boundary Commission for Scotland
Mobility and Access Committee for Scotland
Scottish Advisory Committee on Distinction Awards
Scottish Law Commission
Scottish Local Authorities Remuneration Committee

Tribunals

Additional Support Needs Tribunals for Scotland
Lands Tribunal for Scotland
Mental Health Tribunal for Scotland
Parole Board for Scotland
Private Rented Housing Panel
Scottish Charity Appeals Panel

Health Bodies

Healthcare Improvement Scotland
Mental Welfare Commission for Scotland
NHS 24
NHS Boards
NHS Education for Scotland
NHS Health Scotland Board
NHS National Services Scotland
National Waiting Times Centre Board
Scottish Ambulance Service Board
State Hospital Board for Scotland

Other Significant National Bodies

Drinking Water Quality Regulator
HM Chief Inspector of Constabulary in
Scotland
HM Chief Inspector of Prisons in Scotland
HM Chief Inspector of Prosecution in Scotland
Office of the Queens Printer for Scotland
Scottish Roadworks Commissioner
The Scottish Police Authority
The Scottish Fire and Rescue

Note: Some bodies came within the scope of the SG guidance during the financial year, such as **Prestwick Airport**, from 28 July 2014, and **Revenue Scotland** from 1st January 2015. They will be included from next year's report. Further education colleges came within the scope of the SG guidance from April 2014. Scrutiny and oversight for the **college sector** is delegated to the **Scottish Funding Council (SFC)**.

LIST OF AGREEMENTS AND COSTS

TABLE A: All Agreements in cost order
(including Scottish Government and public bodies, NHSScotland and Further Education colleges)

Number	Overall cost (£)	Contractual cost (£)	Non contractual cost (£)	Ancillary costs (£)	Confidentiality Clause used
1a	1,000	0	500	500	No
2a	1,107	507	0	600	Yes
3a	2,298	0	2,298	0	Yes
4a	2,567	297	1,794	476	Yes
5a	2,700	0	2,500	200	No
6a	3,450	0	1,500	1,950	Yes
7a	4,000	0	4,000	0	Yes
8a	5,300	5,000	0	300	No
9a	5,500	0	5,000	500	Yes
10a	5,500	0	5,000	500	Yes
11a	5,500	0	5,000	500	Yes
12a	5,889	2,981	2,608	300	Yes
13a	6,144	790	4,878	476	Yes
14a	6,250	0	6,250	0	Yes
15a	8,000	0	8,000	0	Yes
16a	9,000	0	9,000	0	Yes
17a	9,000	0	7,000	2,000	No
18a	10,000	0	10,000	0	Yes
19a	10,071	221	9,000	850	No
20a	10,837	2,337	8,000	500	No
21a	11,621	621	11,000	0	Yes
22a	11,919	7,069	4,000	850	Yes
23a	12,000	0	12,000	0	No
24a	12,628	1,828	10,000	800	Yes
25a	12,855	8,005	4,000	850	Yes
26a	13,347	3,347	10,000	0	Yes
27a	14,422	11,409	2,913	100	No
28a	15,084	9,034	5,000	1,050	Yes
29a	15,300	0	14,000	1,300	No
30a	15,500	0	15,000	500	No
31a	15,830	0	14,530	1,300	Yes
32a	17,500	0	17,000	500	No
33a	18,883	6,689	11,894	300	Yes
34a	19,272	10,288	8,684	300	Yes
35a	19,647	4,647	15,000	0	Yes
36a	20,227	6,714	11,714	1,800	No
37a	21,300	0	21,000	300	Yes
38a	21,300	0	20,000	1,300	No
39a	21,549	17,049	0	4,500	Yes
40a	22,297	11,779	10,218	300	Yes
41a	22,392	11,325	10,767	300	Yes
42a	23,002	20,626	2,126	250	No

Number	Overall cost (£)	Contractual cost (£)	Non contractual cost (£)	Ancillary costs (£)	Confidentiality Clause used
43a	23,199	6,399	15,000	1,800	Yes
44a	25,300	0	25,000	300	Yes
45a	29,621	28,677	0	943	Yes
46a	30,600	30,000	0	600	Yes
47a	31,092	4,269	26,224	600	Yes
48a	31,925	14,462	17,163	300	Yes
49a	37,204	25,250	11,654	300	Yes
50a	38,932	29,333	9,089	510	Yes
51a	44,470	13,920	30,000	550	Yes
52a	49,675	48,034	0	1,641	Yes
53a	50,781	0	49,481	1,300	No
54a	53,870	31,160	12,819	9,891	Yes
55a	54,050	23,750	30,000	300	Yes
56a	55,104	25,497	28,857	750	No
57a	62,220	61,920	0	300	No
58a	62,921	15,536	47,085	300	Yes
59a	66,432	13,257	52,175	1,000	No
60a	68,190	66,890	0	1,300	Yes
61a	75,242	17,442	56,300	1,500	Yes
62a	95,820	95,000	0	820	Yes
63a	102,683	66,383	35,000	1,300	No
64a	112,400	111,980	0	420	Yes
65a	140,750	140,000	0	750	Yes
66a	157,546	157,246	0	300	Yes
67a	189,724	40,054	142,670	7,000	No
TOTALS	2,181,740	1,209,021	911,691	61,028	47 Yes

TABLE B: NHSScotland Agreements in cost order

Number	Overall cost (£)	Contractual cost (£)	Non contractual cost (£)	Ancillary costs (£)	Confidentiality Clause used
1b	1,000	0	500	500	No
2b	1,107	507	0	600	Yes
3b	2,567	297	1,794	476	Yes
4b	2,700	0	2,500	200	No
5b	5,300	5,000	0	300	No
6b	5,500	0	5,000	500	Yes
7b	5,500	0	5,000	500	Yes
8b	5,500	0	5,000	500	Yes
9b	6,144	790	4,878	476	Yes
10b	6,250	0	6,250	0	Yes
11b	9,000	0	7,000	2,000	No
12b	10,000	0	10,000	0	Yes
13b	10,071	221	9,000	850	No
14b	10,837	2,337	8,000	500	No
15b	12,628	1,828	10,000	800	Yes
16b	14,422	11,409	2,913	100	No
17b	15,300	0	14,000	1,300	No
18b	15,500	0	15,000	500	No
19b	15,830	0	14,530	1,300	Yes
20b	21,300	0	20,000	1,300	No
21b	23,002	20,626	2,126	250	No
22b	25,300	0	25,000	300	Yes
23b	50,781	0	49,481	1,300	No
24b	55,104	25,497	28,857	750	No
25b	62,220	61,920	0	300	No
26b	66,432	13,257	52,175	1,000	No
27b	68,190	66,890	0	1,300	Yes
28b	75,242	17,442	56,300	1,500	Yes
29b	102,683	66,383	35,000	1,300	No
30b	189,724	40,054	142,670	7,000	No

TABLE C: Further Education College Agreements in cost order

Number	Overall cost (£)	Contractual cost (£)	Non contractual cost (£)	Ancillary costs (£)	Confidentiality Clause used
1c	2,298	0	2,298	0	Yes
2c	4,000	0	4,000	0	Yes
3c	8,000	0	8,000	0	Yes
4c	9,000	0	9,000	0	Yes
5c	12,000	0	12,000	0	No
6c	18,883	6,689	11,894	300	Yes
7c	19,272	10,288	8,684	300	Yes
8c	21,300	0	21,000	300	Yes
9c	22,297	11,779	10,218	300	Yes
10c	23,199	6,399	15,000	1,800	Yes
11c	37,204	25,250	11,654	300	Yes
12c	38,932	29,333	9,089	510	Yes
13c	54,050	23,750	30,000	300	Yes
14c	140,750	140,000	0	750	Yes

TABLE D: Scottish Government and other public bodies Agreements in cost order

Number	Overall cost (£)	Contractual cost (£)	Non contractual cost (£)	Ancillary costs (£)	Confidentiality Clause used
1d	3,450	0	1,500	1,950	Yes
2d	5,889	2,981	2,608	300	Yes
3d	11,621	621	11,000	0	Yes
4d	11,919	7,069	4,000	850	Yes
5d	12,855	8,005	4,000	850	Yes
6d	13,347	3,347	10,000	0	Yes
7d	15,084	9,034	5,000	1,050	Yes
8d	17,500	0	17,000	500	No
9d	19,647	4,647	15,000	0	Yes
10d	20,227	6,714	11,714	1,800	No
11d	21,549	17,049	0	4,500	Yes
12d	22,392	11,325	10,767	300	Yes
13d	29,621	28,677	0	943	Yes
14d	30,600	30,000	0	600	Yes
15d	31,092	4,269	26,224	600	Yes
16d	31,925	14,462	17,163	300	Yes
17d	44,470	13,920	30,000	550	Yes
18d	49,675	48,034	0	1,641	Yes
19d	53,870	31,160	12,819	9,891	Yes
20d	62,921	15,536	47,085	300	Yes
21d	95,820	95,000	0	820	Yes
22d	112,400	111,980	0	420	Yes
23d	157,546	157,246	0	300	Yes