Cabinet Secretary for Health and Wellbeing
Alex Neil MSP

T: 0845 774 1741
E: scottish.ministers@scotland.gsi.gov.uk

The Scottish Government
Riaghaltas na h-Alba

LEGACY 2014
XX COMMONWEALTH GAMES SCOTLAND

Neil Findlay
MG.11
The Scottish Parliament
Edinburgh
EH99 1SP

16 January 2014

Dear Neil

The First Minister has asked me to write to you to clarify the points that you raised during First Ministers' Questions on 9 January in relation to a draft settlement agreement (formerly known as a compromise agreement) which I understand is currently subject to ongoing discussions between NHS Lothian and Dr Jane Hamilton – both of whom have legal representation.

Before turning to the specific issues you have raised I would like to make some general comments on these matters in order to clarify and raise awareness about the purpose of settlement agreements and confidentiality clauses.

A settlement agreement is a legally binding agreement in which an employee agrees to accept a financial settlement in exchange for waiving the right to pursue a legal claim against their employer or former employer. These agreements are governed by a statutory framework and there are clear rules on what they can and cannot cover. In particular, the employee must obtain independent legal advice on the settlement agreement in order for it to be valid. The settlement agreement allows both employee and employer to achieve closure on the matters in dispute, and to move on. They are most commonly used in connection with termination of employment, but can also be used for employees who remain in employment.

We are aware that, in general, confidentiality clauses are used in settlement agreements across NHSScotland, as they are with employers elsewhere in the public and private sectors, to cover a range of issues, including, amongst other things: payments made; data protection to prevent disclosure of information about patients; conduct and disciplinary issues; preventing derogatory statements concerning the employer or former colleagues.

The Scottish Government is clear that it is vitally important that all NHS staff in Scotland are supported and encouraged to raise any valid concerns that they have about practices in the NHS as this helps to improve our health service. The NHSScotland Staff Governance Standard specifically places an obligation upon Boards to ensure that it is safe and

acceptable for staff to speak up about wrongdoing or malpractice within their organisation, particularly in relation to patient safety. NHSScotland does not have any policies which would prevent, or condone the prevention of, staff from raising concerns about practices in the NHS.

In recent months, confidentiality clauses within settlement agreements have been increasingly portrayed as 'gagging orders'. I would like to clarify that there can be sound reasons for inclusion of a confidentiality clause in a settlement agreement, and these are often in the interests of the employee. For example, it can be reassuring for an employee who has entered a settlement agreement to know that the detail of their case remains will be kept confidential by their former employer and that the extent of any financial recompense will not be disclosed, including to any potential new employer.

We are not complacent. I have been absolutely clear with NHS Boards that under no circumstances should any member of staff be prevented from voicing their concerns about any aspect of patient safety or malpractice. I wrote to all Boards on 22 February 2013 to make clear that confidentiality clauses must not be used to suppress the reporting of concerns about practice in the NHS in Scotland. In any event, any agreement which sought to prevent staff from raising concerns about patient safety or malpractice would be void under the Employment Rights Act 1996 (as amended by the Public Interest Disclosure Act 1998).

Clearly, in the case you have raised regarding NHS Lothian - concern has been raised, by Dr Hamilton regarding the wording that has been used in her draft settlement agreement. I understand the concern is that a clause within the draft agreement relating to withdrawal of grievances could in some way prevent the employee from raising concerns that might amount to a protected disclosure ("whistleblowing").

I should make clear that the use of confidentiality clauses in settlement agreements, and the detail of settlement agreements, more generally, is entirely a matter between individual Boards, as employers, and the employee. The Scottish Government does not have a role in reviewing or approving the detail of individual settlement agreements, which are a matter for the individual and the employer in each case. However, given the nature of the allegations that have been made I have sought and received reassurances that the wording in the draft agreement in this case would not prevent Dr Hamilton from raising concerns about patient safety or malpractice. Furthermore, I have made it clear that the Scottish Government would not allow any Board to prevent an employee or former employee from raising any issues relating to patient safety.

NHS Lothian has categorically stated that "all of their compromise agreements are prepared in conjunction with the Central Legal Office (CLO) and the ability to make 'whistleblowing' disclosures about patient safety or workplace bullying is explicitly unrestricted". NHS Lothian has also confirmed publicly that it was never their intention to 'gag' Dr Hamilton and the draft settlement agreement does not preclude any disclosure of concerns about practice.

CLO has provided reassurance that the right of an employee to make a protected disclosure is made explicit within this agreement. The fact that an employee agrees to withdraw grievances does not bar the employee from raising concerns about practice or patient safety.

I have further been assured that it is standard practice to use a settlement agreement to seek to resolve all elements of a dispute between parties, including outstanding internal grievances. This is the fundamental purpose of a "settlement agreement": to reach a voluntary agreement in the best interests of both parties.

Where an employee does not wish to withdraw a grievance or wishes to pursue the subject matter of the grievance, this can be negotiated as part of the agreement. In some cases, it is not possible to resolve disputes between employer and employee by agreement and those employees may choose to bring a claim before the Employment Tribunal.

In light of the interpretation being placed on the grievance clause by Dr Hamilton (an interpretation which is not accepted by CLO), CLO has undertaken to consider reviewing the wording of the standard settlement agreement.

If Dr Hamilton or her advisers remain concerned about the effect of any of the wording within the draft I would expect them to raise these concerns and seek clarification through the mechanism of the ongoing negotiations.

I hope that this is helpful in clarifying the position in relation to the matters you have raised. Please note that since you raised these issues in Parliament a number of parties have expressed an interest in this case, and I intend sharing this letter in order to raise awareness on these matters.

ALEX NEIL