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**\*Sent by Email\***

Mr Andrew Howlett  
T3.40  
Scottish Parliament  
EDINBURGH  
EH99 1SP

Date	15 January 2014
Your Ref	
Our Ref	GD/LS/150114-1
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Dear Mr Howlett

**PUBLIC PETITION COMMITTEE REQUEST: PETITION PE1495**

I refer to the request from the Committee for information related to petition PE1495.

I now attach a copy of the formal response from NHS Tayside together with the additional information requested.

Yours sincerely

**George Doherty**  
**Director of Human Resources**

**Enc**

**NHS TAYSIDE**

**RESPONSE TO PUBLIC PETITIONS COMMITTEE**

T3.40, Scottish Parliament, Edinburgh EH99 1SP

[Andrew.Howlett@scottish.parliament.uk](mailto:Andrew.Howlett@scottish.parliament.uk)

**PETITION [PE1495](#)**

*Calling on the Scottish 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.*

**1. What are your views on what the petition seeks and the discussions that took place at the meeting on 26 November?**

**(a) Board View on Petition Aims**

The focus of the petition, and subsequent Public Petition Committee discussions, centre on ensuring no step is taken by an NHS employer to restrict through compromise agreement (now described legally as a settlement agreement) an employee's right to make what in law is considered a protected disclosure, more commonly called 'whistle blowing'.

NHS Tayside does not support the use of any measure that seeks to prevent the legitimate raising of a concern by any current or former employee, nor do we apply any clause within a settlement agreement or any other arrangement that restricts the right to raise such a protected disclosure.

**(b) Board Use of Settlement Agreements**

The use of settlement agreements by NHS Tayside is limited to resolution of otherwise difficult employment related matters, primarily in relation to a breakdown in working relationships. In the main these agreements are reached on economic grounds, after careful consideration with the NHS Scotland legal advisory service (Central Legal Office), and against an assessment of best use of public funds. The circumstances of NHS Tayside use and financial appropriateness of any settlement agreements is subject to regular prudent scrutiny through the NHS Board governance committee structure for assurance purposes.

Any settlement reached must be agreed by both parties, i.e. any proposed agreement can be refused by either party. The individual employee or former employee is specifically advised and required to ensure that they have received full and separate independent legal advice on the content of a settlement agreement before its signing.

The terms of settlement agreements used by NHS Tayside, as prepared by Central Legal Office, make clear the separate right of an individual to make a protected disclosure irrespective of their signing a settlement agreement.

### **(c) Board Use of Confidentiality Clauses**

The use of confidentiality clauses within settlement agreements are intended to offer mutual protection of both parties around their future conduct. The use of such a provision is often at the request of the individual who seeks inclusion of an agreed forms of words that limit any public commentary to an agreed narrative.

Any inclusion of a confidentiality clause by the NHS Board takes the form of wording prepared by employment law specialists within the Central Legal Office, and which ensures the Board's full legal compliance.

Agreeing the application of a confidentiality clause within a settlement agreement cannot legally restrict, or otherwise 'gag', an individual from raising a 'whistle blowing' concern. Any move to do so would not be supported by NHS Tayside.

### **(d) Legal Position**

NHS Tayside has separately sought from Central Legal Office their view on the formal legal position on use of settlement agreements, confidentiality clauses, and rights related to protected disclosures. This is attached at Appendix 1 for Public Petition Committee reference.

## **2. What management training do you have in place to ensure that all staff are enabled and encouraged to raise matters that may affect patient safety and quality of care, as well as employment issues such as workplace bullying?**

NHS Tayside commenced work in the Summer of 2012 to develop and promote values and behaviours that demonstrate a 'fair and just' culture of respect in all our workplaces. These values and behaviours were developed through a programme of wide consultation with staff, patients, their families and carers that described the issues most important to them in having contact with or in delivering our services.

The Board work in this area culminated in the formal launch in December 2013 of the NHS Tayside 'Vision, Values and Behaviours', and of our Clinical Governance Strategy that aims to ensure person-centred, safe and effective care across our services.

By end of March 2014 all members of staff across NHS Tayside will have had a conversation with their line manager on what this means for them and their role in ensuring everyone has the best care experience possible.

This culture and values work followed earlier NHS Tayside Board endorsement in April 2012 of our "Give Respect, Get Respect" campaign, developed in partnership with our trades unions and professional organisations, which implemented a Board-wide "Code of Positive Behaviour" applicable to all staff and communicated through comprehensive communications programme.

The "Code of Positive Behaviour" underpins NHS Tayside's existing and ongoing approach to issues of Bullying and Harassment, described within our published policy framework - which was again developed in partnership with trades union/professional organisations - and communicated through management, partnership and staff training and awareness sessions.

Separately, NHS Tayside actively supported the April 2013 launch of the Scottish Government's National Confidential Alert Line through an all-staff personal communication from our then-Chief Executive. This communication raised staff awareness of both the new Alert Line, and explained in detail how to raise concerns under the Board's own existing 'Whistle Blowing' policy. This policy was developed with staff side representatives and reflects published national NHS Scotland best practice guidance.

Further presentation to senior managers on recent developments and best practice in this area is scheduled for late January 2014, and jointly with staff side colleagues at the Area Partnership Forum in February 2014.

These steps help ensure NHS Tayside maintain an environment where it is safe and acceptable for staff to speak up about concerns, formally or in confidence, and our public commitment that no individual will suffer blame, penalty or victimisation as a result of raising a genuinely held concern.

- 3. What were the reasons for you seeking funding from the £200,000 made available by the Scottish Government to tackle bullying and harassment in the workplace, and has this additional resource had the desired impact?**

In August 2013 NHS Tayside successfully secured £29,700 to support a twelve month Organisational Development (OD)-led staff engagement programme within our maternity service. This funding enabled the provision of a short-term contract OD post to support local management teams in embedding the principles of a fair and just culture across that service.

This bid followed NHS Tayside's work around development of the national staff engagement programme ("i-matter") and, through assessing the impact of initiatives in that service, offers NHS Tayside an opportunity to pilot, test, learn and inform effective approaches to embedding that fair and just culture.

*Attachments:*

*Appendix 1 - Response received from Central Legal Office*

GD/Correspondence/150114-1a



Central Legal Office



## **CLO NOTE FOR RESPONSE TO PUBLIC PETITIONS COMMITTEE REGARDING SO-CALLED "GAGGING" CLAUSES IN SETTLEMENT AGREEMENT WITH NHS STAFF IN SCOTLAND**

### **What is a Settlement Agreement?**

Settlement Agreements - formerly known as Compromise Agreements - are agreements between an employer and employee which are used to settle employment related disputes. They are commonly used in connection with termination of employment, but can also be used with employees who remain in employment.

The key elements are that the employee agrees to waive certain specified claims or potential claims against their employer, usually in return for some form of payment or benefit. In this way, the Settlement Agreement allows both employee and employer to achieve closure on the matters in dispute, and to move on.

Settlement Agreements are used throughout all industries and sectors in the UK and are by no means unique to the NHS.

A Settlement Agreement is a statutory creation, and is only effective if certain statutory conditions are met. These include that the employee must have received independent legal advice on the effect of the Agreement from a named adviser, and in particular on its effect on their ability to pursue the statutory right in question. The Adviser is either a solicitor or a qualified union official.

The contents of Settlement Agreements are frequently the subject of detailed negotiation between the parties, and employees are always in a position to suggest revisions, additions or deletions as they see fit, before deciding whether to agree to the terms contained in the Agreement.



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**Is the purpose of a Settlement Agreement to “gag” departing employees?**

As referred to above, the principal purpose of a Settlement Agreement is to resolve employment disputes. These can be live Tribunal claims, or outstanding grievances which could become claims.

The purpose of Settlement Agreements used within the NHS in Scotland is *not* to stop employees from speaking out about patient safety issues or bullying within the workplace. In fact, as discussed below, the standard Settlement Agreement provided to Boards by the Central Legal Office (“CLO”) contains an explicit confirmation that by signing the Agreement, the employee is not being prevented from “whistle blowing”.

**What about settling a whistle-blowing claim?**

If for example an employee has made a disclosure to their employer about poor medical practice within the workplace, and says that they have been treated unfavourably as a result of doing this, then they could bring a claim in an Employment Tribunal seeking redress for that less favourable treatment. If the employer decided that, for whatever reason, the best course of action would be to settle that claim (a claim for less favourable treatment as a consequence of having “blown the whistle”), then that can be done by means of a Settlement Agreement. However, as always it is up to the employee to decide whether they want to enter the Agreement or not.

However, even if a Settlement Agreement were to be used to settle a whistle-blowing claim, then this would not prevent (and indeed in law *could* not prevent) the employee from making any further disclosures which they see fit to make at any point in time.

In the majority of Settlement Agreements with which CLO deals, no whistle blowing claim is involved.

**What about Confidentiality Clauses or “No Derogatory Statements” Clauses?**

It is a common practice in Settlement Agreements used throughout the UK for there to be a Confidentiality Clause. In addition there is frequently a clause agreeing that there will be no



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derogatory statements made about either party after the Agreement has been entered into. This is often combined with an agreed reference for the employee.

These clauses benefit both parties, as often the employee wants certainty about what might be said about them after they leave. Equally, an employer will often want to avoid the terms of any settlement from being made public, in order to avoid a precedent being set. An employer may also have legitimate concerns about a disgruntled former employee criticising the employer or colleagues in a general way after employment has ended.

However what should be emphasised is that the style CLO Settlement Agreement contains an explicit exception to the Confidentiality Clause and the No Derogatory Statement's clause, which reads as follows:

*"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."*

A protected disclosure as defined in Sections 43A – H of the Employment Rights Act 1996 amounts to "blowing the whistle", as it is commonly understood.

This clause puts beyond doubt that, regardless of any other terms in the Settlement Agreement regarding confidentiality or derogatory statements, the employee is not being prevented from "blowing the whistle". Indeed the Adviser will be able to advise the employee that this would be the position in law regardless of whether this particular clause was contained in the Settlement Agreement or not.

Given the contents of the CLO Settlement Agreement, the view of the CLO is that it is simply incorrect to state that the terms of this document are intended in any way to "gag" whistle blowers.





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In any event, any employee who is negotiating the terms of a Settlement Agreement can ask to take out the confidentiality clause or the no derogatory statements clause. Very few do so.

**What about withdrawal of grievances?**

When a dispute about employment related matters is being resolved by means of a Settlement Agreement, it is standard practice to seek to resolve all elements, including any internal grievance process. This is usually seen as being in the best interests of both parties, who typically wish to achieve closure to any dispute. However, where the employee does not wish to withdraw the grievance or to pursue the subject matter of the grievance, this can be part of the discussion about the terms of the agreement.

On behalf of the Central Legal Office

Rhidian Davies

14 January 2014