



PE1495/J

RESPONSE TO PUBLIC PETITIONS COMMITTEE

T3.40, Scottish Parliament, Edinburgh EH99 1SP

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 underlying aim of the petition is to ensure that no action is taken by an employer to restrict through compromise agreements (or Settlement Agreements as they are now described legally) an employee's right to 'whistleblow' or what in law is considered to be a 'protected disclosure'.

NHS Ayrshire and Arran 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.

NHS Ayrshire & Arran completely supports the principle that staff should be supported to, encouraged to and feel able to openly raise issues of concern and to have a confidence that these issues will be dealt with. The NHS in Scotland has a wide variety of routes through which staff can and do raise issues that are concerning them – formal and informal, and internal and external.

NHS Ayrshire & Arran has been undertaking a range of programmes of work to support and embed these principles of openness and transparency as part of our developing culture work through embedding our agreed values and behaviours, and as part of the work to support the implementation of two important updated policies - our new Whistleblowing Policy and our new Bullying and Harassment Policy.

(b) Board Use of Settlement Agreements

Settlement Agreements are a useful tool for employers and staff to have available to help to resolve difficult employment related disputes, are regulated by legislation and are not used to silence staff. The use of settlement agreements by NHS Ayrshire and Arran is limited to resolution of otherwise difficult employment related matters, primarily in relation to a breakdown in working relationships.

All of the Board's Settlement Agreements have been prepared in conjunction with the Central Legal Office.

(c) Board Use of Confidentiality Clauses

Within the Settlement Agreement the paragraphs covering confidentiality requirements are, firstly, agreed between both parties, secondly, a general confidentiality statement relating to the terms of the agreement and thirdly intended to offer mutual protection of both parties around their future conduct.

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 and this is explicitly stated in the agreement document. Any move to do so would not be supported by NHS Ayrshire and Arran.

Employees who are agreeing to progress a Settlement Agreement solution are required to do so in conjunction with their legal advice, and their legal advisor will reinforce the position on protected disclosure to ensure they understand the nature and terms of the agreement.

(d) Legal Position

NHS Ayrshire and Arran has separately sought from Central Legal Office their view on the formal legal position and use of Settlement Agreements, confidentiality clauses, and rights related to protected disclosures. This is attached at Appendix 1 for the Public Petition Committee's consideration.

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?

Within NHS Ayrshire & Arran, during April 2013 we launched our new Whistleblowing Policy to coincide with the launch of the new national confidential Alert Line, and this was supported by a comprehensive communications plan and a series of management training sessions and staff awareness raising sessions.

During October 2013 we launched our new Bullying and Harassment Policy, and this was supported by a comprehensive communications plan and a series of management training sessions and staff awareness raising sessions.

Over the last year we have been working with our staff on our culture development programme to agree our Purpose, Commitments and Values & Behaviours. Over 3,000 staff have personally participated in shaping this programme. The aim is to create an open, fair and just culture underpinned by the key organisational values that staff have agreed – Caring, Safe and Respectful – and evidenced by the agreed organisational behavioural statements:

- I will show concern for others and care about the health, safety and wellbeing of everyone I come into contact with.
- I will do my job well, striving to learn and do things better, while taking responsibility for the quality, safety and effectiveness of my actions.
- I will see everyone as an individual, be open, approachable and treat everyone with dignity and respect.

The first step in embedding the culture is rolling out the leadership and culture development programme that we have developed for all staff who manage people – 'Engaging our Staff'. This will be a key route to reinforce these key messages.

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?

The funding sought by NHS Ayrshire and Arran was not to tackle bullying and harassment in the workplace but instead to support our developing culture programme. As outlined in the

question above over the last year we have been working with our staff on our culture development programme to agree our Purpose, Commitments and Values & Behaviours. Over 3,000 staff have personally participated in shaping this programme. The aim being to create an open, fair and just culture underpinned by the key organisational values that staff have agreed – Caring, Safe and Respectful – and evidenced by the agreed organisational behavioural statements:

- I will show concern for others and care about the health, safety, and wellbeing of everyone I come into contact with.
- I will do my job well, striving to learn and do things better, while taking responsibility for the quality, safety, and effectiveness of my actions.
- I will see everyone as an individual, be open, approachable, and treat everyone with dignity and respect.

The first step in embedding the culture is rolling out the leadership and culture development programme called 'Engaging our Staff' that we have developed in partnership with our Trade Unions and will be delivered to all staff who manage people within the Board. Non-recurring funding of £40,000 was provided to the Board, which is being used to provide additional short term Organisational Development capacity to assist with the roll out of 'Engaging our Staff', as well as specific culture support work within certain departments.



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.



Central Legal Office



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



Central Legal Office



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.



Central Legal Office



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