

PE1495/H

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Scotland National Office

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Dear Andrew

BMA Scotland submission in response to 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.

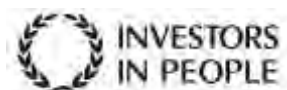
The British Medical Association (BMA) is a registered trade union and professional association representing doctors from all branches of medicine. The BMA has a total membership of around 150,000 in the UK and in Scotland represents around 16,000 members.

BMA Scotland thanks the Petitions Committee for the opportunity to respond to petition PE1495 on the issue of compromise agreements for NHS staff. The following submission provides clarity on our definition of compromise agreements and gagging clauses as well as responding to some of the points raised by the petitioner.

Compromise agreements

Now known as 'settlement agreements', a 'compromise agreement' is a standard method of terminating employment in difficult cases, drawn up between the employer and employee as a final resolution to an ongoing dispute involving one party leaving the place of work. Such disputes tend to relate to entrenched employment difficulties in which both the employer and employee recognise that the employment relationship should end. The BMA recognises the need for these agreements. These types of agreement usually contain confidentiality clauses to ensure that the terms of severance remain confidential. For example an agreement may include personal health information or financial details of any settlement, which both parties would prefer to remain private by agreeing a confidentiality clause to prohibit parties from reporting details of the terms of the separation. Such clauses are widespread in compromise

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agreements within all types of workplaces and can be mutually beneficial to both parties.

Gagging clauses

A 'gagging clause' goes beyond this, seeking to prevent the raising of a protected disclosure. The BMA does not support agreements or employment contracts which include clauses which prohibit an employee from raising a concern about patient safety issues. Clauses which seek to prevent an individual from raising such a concern under the Public Interest Disclosure Act (PIDA) 1998, are not enforceable in law. New guidance published by the General Medical Council confirms the duties of a doctor in regard to contracts:

"You must not enter into contracts or agreements with your employing or contracting body that seek to prevent you from or restrict you in raising concerns about patient safety. Contracts or agreements are void if they intend to stop an employee from making a protected disclosure."

And the duties of the manager in this context: *"If you have a management role or responsibility, you must make sure that:*

"You do not try to prevent employees or former employees raising concerns about patient safety – for example, you must not propose or condone contracts or agreements that seek to restrict or remove the contractor's freedom to disclose information relevant to their concerns.

"If you find a clause which seeks to prevent you from making a disclosure in any proposed contractor agreement, the law requires your employer to pay for independent legal advice on your behalf. In relation to compromise agreements, the advice will emphasise that confidentiality should only be in respect of the terms of agreement and should not prevent the practitioners from raising a concern. We advise you to seek additional advice from the BMA."

Furthermore, amendments to the Employment Rights Act (section 43J) make it clear that confidentiality clauses should not preclude individuals for making protected disclosures:

"43J Contractual duties of confidentiality.

- (1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure."

Employment law is a reserved matter and the Employment Rights Act applies in Scotland, thereby making any 'gagging clause' agreed as part of a compromise (settlement) agreement, void.

Gagging clauses, as we have defined them in this submission, are therefore unlawful and cannot be enforced. However it can sometimes be hard to determine the meaning of particular clauses being proposed by the employer, especially if the individual is involved in a termination of employment and feels burdened by the experience.

The BMA recognises that it is important that individuals take advice and we recommend to our members, if they think a gagging clause is being proposed, to seek legal advice and to contact the BMA (as their trade union).

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In the submission, the petitioner does not believe that the use of gagging clauses has been 'banned' in Scotland.

On February 27th 2013, the Cabinet Secretary for Health and Wellbeing said that: "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 NHS Scotland chairs and chief executives on 22 February 2013... I expect Boards to ensure that confidentiality clauses and non-derogatory statement clauses are not being used to suppress the reporting of concerns about practices in NHS Scotland, and to ensure that these clauses are used appropriately."

The BMA would suggest that it might be helpful for the Scottish Government to issue a more formal NHS circular to NHS Boards clarifying this issue in order to ensure that the Cabinet Secretary's views are not open to misinterpretation.

The petitioner states that he finds the revised wording of the CLO NHS compromise agreement relating to confidentiality clauses to be unacceptable. It is our view that the wording of the CLO clause is acceptable, as it clearly states that the employee shall not be prevented from making a protected disclosure. However, whilst the CLO revision is an improvement it should be regarded simply as a model statement and should be amended to reflect the unique nature of each individual case.

The petitioner further goes on to state that "[compromise agreements] should not routinely however include automatic use of a gagging clause to prevent the employee speaking freely in an open and democratic society about the reasons they left the NHS. These reasons usually pertain to matters of patient care and other issues that could affect us all e.g. surgical errors, suicides, workplace bullying, neo-natal deaths etc. Gagging orders are a direct breach of, and in contravention of, the Human Rights Act. The use of gagging orders to stop workers speaking out publicly about such important issues has no place in a free society and a modern open, honest and transparent NHS." Whilst we agree that settlement (compromise) agreements should not prevent issues such as those listed being raised in an appropriate way in line with the Public Interest Disclosure Act, it remains an appropriate, proportionate and legitimate aim of a settlement (compromise) agreement to keep confidential those matters contributing to the termination of the employment relationship which are not within the area of protected disclosure.

The petitioner suggests that the "default position of compromise agreements should be that there is no 'standard' confidentiality clause inserted into them – as is currently the case. People should be free to speak openly and publicly of their concerns about the NHS if they wish to do so, without fear of recrimination from employers or lawyers if they are speaking the truth...". It is our view that settlement (compromise) agreements will be unachievable without a degree of confidentiality, for example around the financial details of any settlement, and thus to have no confidentiality clause will not be in the interest of either party seeking to reach agreement. A 'standard' clause, as with all other clauses, may be altered under specific individual circumstances before reaching final agreement in any case.

In conclusion, the BMA supports the use of confidentiality clauses within settlement agreements to protect personal information, but does not agree with the use of 'gagging clauses'. We believe that existing legislation makes any such clauses invalid. We would encourage any employees to seek advice before signing any settlement agreement.

If you would like any further information regarding the BMA's views on this matter, please contact Gail Grant, Public Affairs Manager at: ggrant@bma.org.uk.

Yours sincerely,

Jill Vickerman
Scottish Secretary