

PE1495/N

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Your ref: PE1495
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Dear Mr Howlett

CONSIDERATION OF PETITION PE1495

I refer to your letter of 11 December 2013, on behalf of the Public Petitions Committee regarding the above petition which calls 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 Scottish Government would like to thank the Committee for the opportunity to respond to the following questions:

- ***What is the Scottish Government’s view on what the petition seeks and the discussions that took place at the meeting on 26 November?***

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 valid concerns about patient safety and quality. Quite the opposite, each Health Board has a robust whistleblowing policy in place which must meet or exceed the national ‘Implementing & Reviewing Whistleblowing Arrangements in NHS Scotland’ PIN Policy. This actively encourages staff to raise any concerns they may have.

As the Committee is aware, the use of confidentiality clauses in settlement agreements (formerly known as compromise agreements) is entirely a matter between individual Boards, as employers, and the employee. Certain conditions must be met in order for a settlement agreement to be legally binding. This includes both parties having received advice from a relevant independent adviser as to the terms and effects of the agreement, in particular, its effect on their ability to pursue their rights before an employment tribunal.

The Scottish Government wholly agree that, under no circumstances, should any member of staff be, or feel that they are being, prevented from raising valid concerns about practices in the workplace. This is not the purpose of a confidentiality clause and would be illegal under the Public Disclosure Scotland Act (PIDA) 1998, rendering any such an agreement unenforceable. Furthermore, if it was found that an individual was subjected to a detriment by their employer for raising a concern or dismissed in breach of PIDA, they may bring a claim for compensation under PIDA to an employment tribunal.

We are aware that, in general, confidentiality clauses are used in settlement agreements across NHSScotland, as they are by 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.

There are positive reasons for inclusion of a confidentiality clause in a settlement agreement, and these can often be requested by the employee. For example, where a member of staff has entered into a settlement agreement with their employer as a result of damages or the termination of their employment on medical grounds. In such instances, it is reassuring for the staff member to know that the detail of their case remains confidential and the extent of any financial recompense is private and will not be disclosed, including to any potential new employer.

As discussed at the meeting on 26 November 2013, Alex Neil MSP, Cabinet Secretary for Health and Wellbeing wrote to NHS Scotland Chairs and Chief Executives in February 2013 to affirm his expectation that Boards ensure that confidentiality clauses and non-derogatory statement clauses are not used to suppress the reporting of concerns about practice in NHSScotland, and to ensure that such clauses are used appropriately. Also, the revised confidentiality clause re-drafted by Central Legal Office (CLO) in May 2013 stresses that employees shall not be prevented from making a 'protected disclosure', re-affirming the statutory protection afforded to whistle blowers i.e. allowing any member of staff with any valid concern about patient safety or malpractice to raise these concerns.

For the reasons outlined above, the Scottish Government do not support an outright ban on the use of confidentiality clauses in NHSScotland settlement agreements.

- ***The Committee agreed that it would be beneficial to review the calls that have been made to the National Confidential Alert Line for NHS Scotland Employees since it was launched in April of this [2013] year. What action has been, and will be, taken to undertake such a review?***

We are in the process of reviewing the pilot of the National Confidential Alert Line. As part of its contract with the Scottish Government, Public Concern at Work (PCaW), the independent whistleblowing charity contracted to run the Alert Line, have produced a 6 month interim evaluation report of the service. This provides an overarching picture of the number and nature of calls and where the callers were directed. This report will be published on the

Scottish Government website shortly. PCaW are also contracted to provide a full evaluation report on completion of the one year pilot period.

To complement this, the Scottish Government also undertook a survey questionnaire to gather information on staff awareness and views of this service. All staff were invited via wage slip promotion, to complete a centrally held survey questionnaire. The survey ran from 22 November to 14 December and received 830 responses. Alongside the evaluation reports, this information will help shape any continued service. We will also be seeking the views of staff-side and Health Board representatives through our established partnership structures.

The purpose of the line is to provide an additional source of support to staff if there is doubt about whether or how to raise a concern about patient safety or malpractice, or worry about doing so. The Alert Line also provides a safe space where staff who feel that they may be victimised as a result of whistleblowing can raise concerns about patient safety and malpractice and, where appropriate, have their concerns passed to the appropriate Regulatory body.

It should be noted that the Alert Line service is not intended, nor does it have the authority to, involve itself in the statutory procedures required to properly pursue cases. Once a concern is passed to the appropriate regulator for investigation, it is then progressed in line with established procedures which are already subject to strict scrutiny.

We are aware that there are continued criticisms that the Alert Line does not directly address reports of bullying. While we acknowledge these concerns, cases of bullying and harassment remain individual employment matters that are, by law, between the employer and the employee. As with any other national employer, NHSScotland has policies in place to deal with bullying in the workplace. Should someone call to the Alert Line to discuss a case of bullying, appropriate support and advice will be given but callers must be referred appropriately, i.e. back to their employer, trade union representative, or conciliatory body.

The Scottish Government is clear that all Health Boards must continue to support and encourage staff to raise any valid concerns they may have about practices in NHS Scotland, and ensure that these are investigated. Boards are required to fully implement their local policies which must meet or exceed the national model 'Implementing & Reviewing Whistleblowing Arrangements in NHSScotland' and 'Preventing and Dealing with Bullying and Harassment in NHSScotland' PIN policies.

I trust this clarifies the Scottish Government position.

Yours sincerely

Anna Gilbert
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