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PE1495/Q

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Andrew Howlett
Assistant Clerk
Public Petitions Committee
The Scottish Parliament

PE01495: The use of 'gagging clauses' in agreements with NHS staff in Scotland

Dear Mr Howlett,

We would like to thank the committee for giving us this opportunity to respond to the issues highlighted by the petition and during the meeting of 26th November.

By way of background, Public Concern at Work (PCaW) is a charity and legal advice centre set up over 20 years ago to encourage workplace whistleblowing. We run a confidential advice line for workers throughout the United Kingdom that has advised over 16,000 whistleblowers. We campaign on public policy issues and last year we established the Whistleblowing Commission chaired by Sir Anthony Hooper, who produced a report that I have included with this submission. We were instrumental in the creation of the Public Interest Disclosure Act 1998 (PIDA). We monitor PIDA and continue to campaign on its use. We provide professional support to organisations to establish robust whistleblowing arrangements. Our subscribers include Home Retail Group, Care UK, Barclays and NHS Scotland, for whom we run the Confidential Alert Line.

We agree with the central aim of the petition: that no part of a settlement agreement should be used to prevent someone from raising a public interest concern. As has been made clear in the meeting and from the Committee's own briefing document any agreement that seeks to stop a whistleblower from raising concerns of a public interest nature is not legally enforceable.¹ The issue now is perception, public education and further support for individuals who are worried that they are unable to speak up about a matter in the public interest.

¹ S.c. 47 the Public Interest Disclosure Act

The National Audit Office (NAO) in its June 2013 report looked at 50 comprise agreements across four government departments and found that none of the agreements would have prevented a person from raising a concern.² Unfortunately some people interviewed as part of the study that were offered, or accepted a comprise agreements believed they were gagged.³ The NAO commented that “an organisation’s culture, the events leading up to the person being offered an agreement, and the wording of the agreements contributed to whether the **individual felt gagged**”.⁴ This is a key observation and matches our experience as a legal advice centre. There are two possible reasons for the current state of affairs; one is the complicated drafting of the legal protection of 43 J within PIDA, which states:

*“(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.
(2) This section applies to any agreement between a worker and his employer (whether a worker’s contract or not), including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract.”⁵*

The Whistleblowing Commission have recommended alternative wording for this provision that would clarify the legal position:

“No agreement made before, during, or after employment, between a worker and an employer may preclude a worker from making a protected disclosure”⁶

The second is the low levels of public awareness of PIDA. Successive YouGov survey’s from 2007-2013 show that the majority of people surveyed were either unaware of the laws existence or incorrectly believed that there was no legal protection in the UK.⁷ With such low awareness levels it is unsurprising that where a settlement agreement is being negotiated a lay person would not be aware of how PIDA operates.

Our suggestion to the committee is that the Scottish Government should embark on a public awareness campaign around PIDA. By increasing the levels of awareness it will mean people are better informed of their legal rights before the negotiations starts and will ultimately encourage more people to raise their concerns.

In light of recent legal changes and given the focus on this issue, *Implementing & Reviewing Whistleblowing Arrangements in NHSScotland PIN Policy* may need updating.

² NAO “Confidentiality Clauses and Special Severance Payments” 21/07/2013 p.g.7

³ Ibid p.g7

⁴ Ibid p.g. 7

⁵ The Public Interest Disclosure Act 1998, Sc 43J

⁶ The Whistleblowing Commission, “Report on the Effectiveness of the Existing Arrangements for Workplace Whistleblowing in the UK”, p.g.22.

⁷ *Whistleblowing: Beyond the Law*, Public Concern at Work. 2011, p.g. 17-18

Such an update could remind employers of the anti-gagging provisions in PIDA and the requirement⁸ that the worker or employee must have received advice from an independent adviser as to the terms and effect of a proposed compromise agreement.

This is a complex area of law. Clear guidance will not just be beneficial to organisations and the individual, it will clearly define what is acceptable practice making the public sector more accountable.

I would like to move on to incorrect comments made during the committee meeting about the advice given by PCaW. It may be useful for the committee if this submission outlined our advice process.

When PCaW is providing advice, it is not a requirement for the caller to provide a name or identify the name of their employer, as a starting point our advisors will concentrate on the concern itself by identifying the risk, what may be preventing the individual from raising the concern and to assist or advise them on how best to raise the concern.

At first contact a member of the advice team will take all the relevant details, where the caller will provide them. If they are confident to the right advice, the advisor will communicate this in the first call and no further contact may be required. Many cases are complex and it is likely that an advisor will wish to discuss the case with senior colleagues to ensure the advice is appropriate and focused.

We encourage the individuals to raise the concern themselves. This makes it easier for the caller to receive feedback and to ask for updates, it also makes it easier for the recipient to ask further questions about the concern. Further if an individual does not identify themselves it is not possible for an organisation to protect them from victimisation, or for the individual to prove later poor treatment was because they had raised concerns (as the organisation either does not know, or can say that they do not know, the identity of the individual who raised the concern). Our status as a legal advice centre ensures the advice we give with the caller is legally privileged and our duty is to the caller, not with organisations that engage PCaW to provide whistleblowing support. This also means that we cannot act without the express consent of the caller. However where appropriate, PCaW will report the concern on the behalf of an individual if the individual consents requests.

Our advice to callers on where to raise their concern is based on the type and seriousness of risk posed, and the personal situation of the caller within the workplace. Our guiding principle in advising individuals is to ensure the public interest concern is addressed with the least damage to the caller at the centre of the situation.

⁸ Section 203(3)(c) of the Employment Rights Act 1996

In our experience often whistleblowers will want their employer to deal with the situation they have witnessed. This will also be the appropriate route in relation to addressing any immediate risk. This was shown in a major study carried out by PCaW and the University of Greenwich into 1,000 whistleblowing cases from our records showing the majority of callers want to raise their concerns with their employer. Raising a concern with the employer includes a diverse set of options: with the local or line manager; managers higher up the hierarchy who are outside the local management structure; using a whistleblowing policy; or going to the top of the organisation to a Director or Chief Executive. From our study 82% of concerns were raised internally to the organisation (e.g. line manager, higher manager, whistleblowing policy) while 15% were raised externally (e.g. a regulator, Media, MSP, MP).⁹

A key feature that was set up at the same time as the NHS Alert Line by the Scottish Government was to build specific contacts for the Alert Line in each NHS Scotland Health Board. These contacts have a particular role in receiving concerns that may have been blocked further down the management line or are particularly serious so senior level awareness is required. It is also worth flagging that half of the individuals who have contacted the Confidential Alert Line have not been willing to provide contact details, meaning feedback potential at present is limited. However we would like to move to a point where feedback is routinely provided from the organisation on the progression of the concerns raised, whenever possible. This may form part of a wider review of the Confidential Alert Line at the end of the pilot period.

Often whistleblowers are fearful that if they raise their concern externally they will be victimised or lose their job. A barrier that is specific to the health or care setting is a fear that passing a concern on to an external body will breach patient confidentiality and put them in breach of their professional duties. However where an individual fears victimisation or has already raised their concern, we will assist in advising them where they could raise their concern externally, or do this on their behalf. During the six months of the contract we referred four concerns directly to regulators and advised many others that this may be an appropriate route for them and/or a concern we could report directly on their behalf. It is never a requirement that the individual **must** raise a concern with their employer before raising a concern elsewhere, but on many occasions it will be in the best interests of the individual and the concern to do so.

I hope this submission was of use to the Committee. Please do not hesitate to contact me if you require further information.

⁹ *Whistleblowing: the Inside Story*, Public Concern at Work and University of Greenwich, 2013 pg. 13-14.

Yours Sincerely,

Francesca West
Policy Director
Public Concern at Work