

Personal submission from Dee McHaffie, member of Patients First & Accountability Scotland.

Submission in support of Petition P1495 by Rab Wilson on behalf of Accountability Scotland

The use of ‘gagging clauses’ in agreements with NHS staff in Scotland.

□ **NHS Education for Scotland**

Learning Opportunities

- **“Creating an effective ‘safety culture’ in NHS Scotland means aspiring to achieve a service where actions to enhance patient safety and eliminate potential harm are driven from all levels of the organisation – from frontline staff to executive management, as an everyday priority.”**
- **PIDA 1998, amended the E.R. Act of 1996 comes under UK legislation ∴ it is important to consider how the NHS widespread use of ‘gagging clauses’ is viewed nationally, as well as in Scotland - page 2.**
- The National Audit Office published in 2005, estimated that patient safety incidents cost the UK NHS £2 billion a year in extra bed days alone – which suggests **for Scotland, a cost of £200 million per year.**
- June 2013 an investigation by The Spending Watchdog concluded that the lack of transparency, consistency and accountability in the use of compromise agreements in the public sector, *“is unacceptable.”*
- The Spending Watchdog found evidence of ‘unnecessary’ confidentiality agreements being used in the health sector, which it said, *“ may prevent genuine concerns from being raised.”*
Public money, millions of pounds, is spent silencing serious concerns rather on addressing problems.
- October 2013, The National Audit Office warned that, *“The use of ‘gagging clauses’ risks stopping employees from speaking out about failures in the public sector.”*
The NAO review found compromise agreements which prohibited staff from making derogatory or disparaging statements about their employer after they had left the organisation. The report concluded, *“ The risk is that clauses like these might discourage employees from raising genuine concerns about service failure with the appropriate oversight bodies.”*
- **The Public Interest Disclosure Act**, part of the UK wide ERA, is first and foremost a **Bill in the public interest** rather than one simply in the interests of employees’ rights.
PIDA was introduced by in 1997 by Conservative MP Richard Shepherd who outlined the purpose of the Bill, *“The Bills’ purpose is to make it more likely that where there is malpractice that threatens the public interest, a worker will raise a concern in a responsible way rather than turn a blind eye.”*
Its introduction, was his realisation that official inquiries into scandals and disasters revealed that workers had foreseen dangers but were either too frightened to speak up or had their concerns ignored.
- A ‘gagging clause’ is a confidentiality clause within a compromise agreement, in which a worker usually receives payment and in return waives rights to pursue legal claims against the employer.
Under PIDA a gagging clause is void and unenforceable in so far as it does not prevent an employee from making a ‘protected/qualifying disclosure’ to a prescribed person.
- Although managers at Lancashire hospitals denied that gagging clauses in severance agreements, banning any criticism of the hospitals or bosses, prevented employees from raising concerns through official channels, MPs Jack Straw and Andrew Stephenson disagree.
Mr. Straw said, **“This is a ‘gagging clause’ . I have no doubt they can work against the public interest by sweeping problems under the carpet. It’s a statement of fact that contractual terms cannot override statutory protections, but they can create a climate where the pressure is on those who leave to keep quiet.”** [Lancashire Telegraph 13.09.2013]
- The Francis 2012 inquiry report into the Stafford Hospital scandal, which first came to notice in 2009, demanded a change in the NHS culture to make sure patients came first.

Data showed that there were between 400 and 1200 more deaths than would be expected.
What emerged was that time and time again, the concerns of staff and complaints from patients' families were swept under the carpet by a Trust who hushed up dangerous practices rather than improve services.

- In February 2013, UK Health Secretary, Jeremy Hunt, put an end to the practice of Trusts in England, writing 'gagging clauses' and making ex gratia payments. Mr. Hunt's aim was to ensure that such clauses were not being used to stop employees 'blowing the whistle' on poor care or malpractice. Later it was confirmed that the ban on 'gagging clauses' in NHS England would be applied retrospectively.
- The use of 'gagging clauses' within the NHS hit the headlines, when in February 2013, former CEO, Gary Walker, of NHS Lincolnshire defied and broke his 'supergag' revealing that after being sacked, he had signed a confidentiality clause to go quietly and in return received a substantial pay-off; claimed to be half a million pounds. Mr. Walker spoke of the culture of fear which exists within the NHS. FoI revealed, described as staggering sums money paid to potential NHS whistleblowers to buy silence.

NHS SCOTLAND

1. With the recent spotlight focussing on these shocking cases in NHS England, can NHS Scotland be complacent ?
2. Have 'gagging clauses' been used to silence NHS Scotland employees, impacting on patient care ?
3. Why has NHS Scotland, unlike NHS England not put an end to gagging clauses as has been urged ?
4. Are the steps put in place by NHS Scotland enough ? :
 - a Letter in February 2013 from the Cabinet Secretary for Health and Wellbeing to NHS Boards, reminding them that they should frequently review their behaviours and stressing that confidentiality clauses should not be used to suppress the reporting of concerns about practice in NHS Scotland ?
 - b. The revised wording of the NHS Compromise Agreement ?
- c. April 2013 Confidentiality Alert Line set up.
 1. The answer is an overwhelming, NO.
 2. August 2012, the press revealed 390 Scottish NHS health workers paid-off in deals totalling £12 million. FoI responses from H Boards show 2009-2010 = 131, 2010- 2011 = 217 and 2011-2012 = 390 such deals. In 2011, 54 employees left NHS Greater Glasgow accumulating £1.9 million in 'gagging' deals. 2011 poll suggested that more than third of Scottish nurses were told **not** to report patient safety concerns.

In May 2013, Jackie Baillie [Sh.H & W.] addressed questions to Cabinet Secretary, Mr. Alex Neil :

 - The number of protected disclosures made by NHS staff in the last 5 years ?
 - How many NHS staff had sought protection under whistleblowing policies,?
 - Whether any NHS Boards were not implementing a policy of refraining from using confidentiality clauses and non-derogatory statements clauses in respect of compromise agreements and if so which?To each of these questions, Mr. Neil replied, "**The Scottish Government does not hold this information. This is an issue between individual Boards and their employees.**"
3. Perhaps because PIDA comes under UK legislation, the matter does not seem to have ever been debated in Scottish Parliament [according to point19 in notes by the Clerk]

As PIDA is UK legislation, why should the banning of 'gagging clauses', not apply UK wide ?
4.
 - a. The Cabinet Secretary for Health and Wellbeing simply reminding, encouraging and expecting Health Boards to use confidentiality clauses appropriately seems to be a weak, under emphasis of the their legal duty to do so. They need to understand that 'gagging clauses' are prohibited and in fact have been illegal for a long time. The law needs to be properly reinforced.
 - b. The revised wording of the NHS Compromise Agreement [Appendix p6 Clerk's notes] still seems to fall short of balancing the rights of both employee whistleblowers and NHS patients in favour of that of NHS employers, some of whom who may still seek to suppress legitimate concerns.

N.B. reminder of MP Jack Straw's views on gagging clauses and employees' deep justifiable fears.

c. Although put in place in good faith, there is cynicism that without external oversight, there is no guarantee that concerns will be now be investigated any more fully and honestly than before.

In his battle for patient safety against NHS Ayrshire and Arran, whistleblower, Rab Wilson encountered the strongest of organisational pressure and shocking treatment, which would have deterred most employees from carrying on.

Sadly, despite assurances, NHS employees have still no respect for or any trust in such organisations.

Gagging clauses must be banned and retrospectively, first and foremost in the interests of patient safety, in achieving a saving millions of pounds of NHS taxpayers money, in promoting a more open and honest culture in which constructive criticism is welcome, mistakes are admitted and used as a tool for learning. – only then will an effective and safe NHS Scotland culture be a reality.