



Department
of Health

From Dr Dan Poulter MP
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David Stewart
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By email: Andrew.Howlett@scottish.parliament.uk

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Dear Dave,

**SCOTTISH PARLIAMENT PUBLIC PETITION PE1495 ON THE USE OF
'GAGGING CLAUSES' IN AGREEMENTS WITH NHS STAFF IN SCOTLAND**

I would like to thank the Committee for the opportunity to be able to comment on petition PE1495 and the related issues raised at the meeting on 26th November 2013.

This Government is committed to fostering a culture of openness and transparency in the NHS. Culture change will not happen overnight in a system as large and as complex as the NHS. We have, however, taken significant steps to achieving this ambition including ensuring whistleblowing rights are included in the contracts of all NHS staff and made guidance available to employers on best practice to support whistleblowers. The Care Quality Commission is embracing whistleblowing as part of their new inspection methodology and the NHS Constitution has been amended to highlight the rights and responsibilities of NHS staff and their employers in respect of whistleblowing.

Turning specifically to the issue of the use of confidentiality clauses within settlement agreements (formally known as compromise agreements), NHS guidance has been consistently clear that where confidentiality clauses are used they should go no further than is necessary to protect the legitimate interests of both the employer and employee. Local policies should prohibit the inclusion of confidentiality clauses in contracts of employment and settlement agreements which seek to prevent an individual from making a disclosure in the public interest in accordance with the Public Interest Disclosure Act 1998 (PIDA). Such clauses are often referred to as "gagging clauses". Where clauses of this nature are included they are deemed void in any event.

We are, however, aware that some confidentiality clauses may make some people 'feel' as though they are being gagged even though they are not. Such clauses can be described as having a 'chilling effect' on some individuals.

For example, a clause may be included against any derogatory comments being made which prevents the employee from making vexatious or disparaging comments about the organisation or its staff. Where this is used, there is usually a mutual clause which similarly protects the employee. It may be appropriate for an employer to use such a clause depending on the circumstances of the case. However, we accept that even with independent legal advice (which is a statutory requirement for a settlement agreement to be effective) some employees may not fully understand their rights.

This is why we updated our guidance to the NHS in March 2013 to require the inclusion of an explicit clause in settlement agreements to make it absolutely clear to staff signing an agreement that they can make a disclosure in the public interest regardless of what other clauses may be included in the agreement. This helps to mitigate the chilling effect that some confidentiality clauses may have and makes absolutely clear to the individual that they have a legal right under PIDA to whistleblow, if they choose to do so, regardless of what other clauses are included in the agreement they have signed. This policy has been adopted by the Department, its Agencies and Arms' Length Bodies (ALBs). The National Audit Office (NAO) recognises this as good practice - it is one of the recommendations in its June 2013 report *Confidentiality clauses and special severance payments* that other Departments adopt this policy.

We also worked with the Treasury, Monitor, the NHS Trust Development Authority and NHS England to ensure business case templates used by NHS bodies for special severance (non-contractual) payments are amended. From April 2013 special severance business cases should include a specific section asking for confirmation that where a settlement agreement is used, it should include an explicit clause to say that nothing in the agreement can prevent the individual from raising a legitimate concern under PIDA. Business cases will not be supported for onward HM Treasury approval without this confirmation. Another recommendation in the June 2013 NAO report is that the Treasury should replicate this confirmation in its template for use by all public bodies.

In April 2013, the NHS Employers organisation in England issued guidance *The Use of Compromise Agreements and Confidentiality Clauses* on the use of compromise agreements and confidentiality clauses. The guidance suggests some model confidentiality clauses and also offers model wording for the explicit clause now required in NHS agreements. The guidance was updated in December 2013 to reflect changes introduced by the Enterprise and Regulatory Reform Act 2013 and is now known as *The Use of Settlement Agreements and Confidentiality Clauses*.

DR DAN POULTER