

**Correspondence from the Scottish Government to the Health and Sport Committee
(Copied to the Public Audit Committee), dated 27 February 2014**

You will be aware that there has been much focus recently on the use of confidentiality clauses within settlement agreements and a perception that staff are being 'gagged' by such clauses. I am writing to the Health and Sport Committee to set out my position on this important issue. I am also copying this letter to the Public Petitions and Public Audit committees given their recent consideration of these issues.

In light of concerns raised I have worked with the Director General Health and Social Care to carefully consider the position on the use of confidentiality clauses within settlement agreements in NHSScotland and have decided to make changes to make it absolutely clear that staff cannot and will not be gagged in NHSScotland.

While there is a clear difference between gagging clauses and confidentiality clauses, I recognise that there can be a perception that these could be used to prevent staff from speaking out about failures in care offered to patients. I have always been clear that this is not tolerated in NHSScotland. Staff should not feel they are being prevented from voicing their concerns about any aspect of patient safety or malpractice. You will no doubt be aware that under existing arrangements any agreement which sought to prevent staff from raising concerns about patient safety or malpractice would be void under the Employment Rights Act 1996 (as amended by the Public Interest Disclosure Act 1998).

I have taken the decision that a new standard agreement will be drafted, which will remove the automatic inclusion of confidentiality clauses. These clauses may still be used in some cases but only where there is explicit agreement between both the employer and employee that this is required. To make it clear this will mean staff who receive the new agreements will not be bound by any confidentiality clauses, unless both they and the Board explicitly agree to its inclusion.

The new template agreement, which will be developed in discussion with stakeholder groups, will be finalised over the coming months. Any use of any confidentiality clauses would also result in the Scottish Government being notified, to allow them to be better scrutinised.

This template will also make clear that any confidentiality clauses could not be used to prevent relevant parliamentary committees or audit bodies from carrying out their appropriate oversight and scrutiny functions.

I will be writing to Health Boards to set out these arrangements and confirm that the presumption must be against the use of any confidentiality clauses unless there are clear and transparent reasons for inclusion.

I hope this is helpful in setting out the Scottish Government's position and that it makes it clear that under these new arrangements a Health Board would not be able to impose a confidentiality clause and a member of staff will not enter an agreement without understanding and agreeing the content.

ALEX NEIL