

Gateway Reference: 17080

11th January 2012

To: Chief Executives and HR Directors,
NHS Trusts, PCTs and SHAs.

Dear Colleague

Compromise Agreements and the Public Interest Disclosure Act 1998

It is vital that NHS organisations support NHS staff seeking to raise concerns in the public interest.

I am sure that you will be aware of the ongoing debate in the media and in Parliament about whether adequate support is provided to whistleblowers in the NHS, and I would therefore like to take this opportunity to remind you of the requirements of 'Health Services Circular 1999/198: The Public Disclosure Act 1998 whistleblowing in the NHS'.

"Whistleblowing" constitutes an essential part of our patient safety systems and all NHS bodies should have in place whistleblowing policies in line with HSC 1999/198 that enable staff where necessary to sidestep their immediate line management chain and to raise concerns directly with a senior manager or a Board member where necessary.

Of course, in the vast majority of cases, the expectation is that concerns about potential risks to patient safety are addressed as part of good clinical governance within local clinical teams, without the organisation's whistleblowing procedures having to be initiated. Wherever staff do raise concerns about matters that are in the public interest, such as concerns about patient safety or financial mismanagement, those concerns should be taken seriously and addressed promptly.

It is for this reason that whistleblowing has been promoted through amendments to staff terms and conditions to provide all clinical staff with a right and a duty to raise concerns. And as announced by the Secretary of State the NHS Constitution will soon be amended to further underpin those rights and duties and to create an expectation that whistleblowers will be supported by their employers where they raise legitimate concerns.

The experience from a number of high profile service failures suggests that such failures are often characterised by a failure on the part of management to respond promptly to concerns about patient safety that have been raised by staff. It is therefore, absolutely unacceptable for staff to be prevented from raising concerns where it would be in the public interest for them to do so.

There has recently been concern raised in the media and by the Health Select Committee about a small number of instances where NHS organisations have used compromise agreements containing confidentiality clauses that seek to prevent employees from pursuing any complaint or grievance with regulatory bodies including the health professions regulatory bodies, the Care Quality Commission and the Information Commissioner. Inclusion of such provisions to prevent disclosures in the public interest would be contrary to policy on supporting whistleblowers.

We recognise that contracts of employment and compromise agreements are a matter between the employing organisation and its employee, and that it is likely that most contracts would include some form of confidentiality clause, as employees will have access to sensitive patient and commercial information which should not be released. However, PIDA provides that any clause or term in a contract, policy, or other agreement between a worker and their employer, is void insofar as it purports to preclude the worker from making a protected disclosure. Use of such clauses contravenes the spirit of guidance issued by the Department of Health to NHS organisations in Health Service Circular 1999/198. I would particularly draw your attention to point (v) on page 3 of that circular which states that "*NHS Trusts should prohibit the use of "gagging" clauses in contracts of employment and compromise agreements which seek to prevent the disclosure of information in the public interest*".

Our view is that where an agreement is reached that an individual will withdraw or agree not to make a complaint about a specific matter to certain bodies, the compromise agreement should make clear the right to make a protected disclosure is not affected. It is unacceptable to require an employee not to make any 'further' complaint or grievance.

If any further complaint or grievance were in fact a protected disclosure, then any provisions within a contract or compromise agreement purporting to prevent that would be deemed void under the Public Interest Disclosure Act. Our concern however, is about the potential deterrent effect of including such clauses in either contracts or compromise agreements.

I would therefore ask you to satisfy yourselves that your organisation's policies are in line with HSC 1999/198.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'D Nicholson', with a long horizontal flourish extending to the right.

Sir David Nicholson KCB CBE
NHS Chief Executive