

BMA response - Confidentiality clauses: consultation on measures to prevent misuse in situations of workplace harassment or discrimination

BMA Policy directorate

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Introduction

The BMA welcomes the opportunity to respond to the BEIS (Business, Energy and Industrial Strategy) consultation on the misuse of confidentiality clauses in workplace harassment or discrimination cases. We are committed to helping create a culture of equality, inclusion and openness in the medical profession and wider NHS. Our project on tackling bullying and harassment identified three clear priorities relevant to this consultation: the importance of working to end the silence around such bullying and harassment; the need to ensure a more effective response when people do speak up; and the need to create a more supportive and inclusive culture where bullying, harassment and discrimination are less likely to occur¹. Using a confidentiality clause to try and prevent healthcare staff from speaking about bullying, harassment or discrimination concerns goes against what we have identified is important to effectively reducing the current levels of bullying and harassment and building a more inclusive culture in the NHS.

The findings of the Francis review into the failings of Mid-Staffordshire NHS Foundation Trust also highlighted the significant risks to patient care and safety if staff do not feel able to speak up and raise concerns in the public interest. In response, the Government committed to ban the use of confidentiality clauses to gag NHS staff and prevent them from raising these types of concerns.² NHS Employers have produced guidance³ and a factsheet with the National Guardian's Office⁴ on settlement agreements and the use of confidentiality clauses in the NHS. They include a model clause which makes clear to staff that their statutory rights under the Public Interest Disclosure Act 1998 are unaffected, as are their obligations to raise concerns about patient safety and care with regulatory or statutory bodies. When the BMA is providing independent advice to doctors on settlement agreements with NHS employers we insist on this clause being in the agreements and advise our members of their rights. However, we recognise there are still be instances and concerns about the misuse of confidentiality clauses in the NHS⁵.

This current consultation has arisen from specific concerns and evidence about the use of confidentiality clauses to cover up instances of sexual harassment in the workplace. There is growing discussion of sexual harassment in medicine. It is not known exactly how widespread the problem is in the profession in the UK but from the experiences that have been shared with us, it is clear that when it does occur there is fear and anxiety around speaking up and a reluctance to use formal complaint or grievance processes, particularly among junior staff. For example, only one in four

¹ BMA (2018) *Bullying and harassment: how to address it and create a supportive and inclusive culture*: <https://www.bma.org.uk/collective-voice/policy-and-research/education-training-and-workforce/tackling-bullying-and-harassment-in-the-nhs/bullying-and-harassment-policy-recommendations>

² Hughes, D. (2013) 'NHS staff 'gagging clauses' are banned' | *BBC News* (14 March 2013), available online: <https://www.bbc.com/news/av/health-21783103/nhs-staff-gagging-clauses-are-banned> (accessed 26 March 2019)

³ NHS Employers (2013) *The use of settlement agreements and confidentiality clauses* | *NHS Employers*, available online: <https://www.nhsemployers.org/~media/Employers/Publications/Settlement-Agreements.pdf> (accessed 29 March 2019)

⁴ NHS Employers (2019) *Settlement agreements: a factsheet for employers and workers about speaking up* | *NHS Employers*, available online: <https://www.nhsemployers.org/case-studies-and-resources/2019/02/settlement-agreements-a-factsheet-for-employers-and-workers-about-speaking-up> (accessed 29 March 2019)

⁵ 'Whistleblowing NHS worker to challenge NDA in test case for gagging orders' *The Telegraph* (23 March 2019) <https://www.telegraph.co.uk/news/2019/03/23/whistleblowing-nhs-worker-challenge-nda-test-case-gagging-orders/> (accessed 05/05/19)

doctors in training who said they experienced bullying or harassment said it had been reported to their employer by themselves or a colleague⁶.

In the BMA's experience, complainants themselves sometimes wish to remain anonymous or seek confidentiality before formally reporting concerns. They may also sometimes be reluctant to take a claim all the way to an employment tribunal with tribunal judgements now published online. However, employers should not play on the fears, vulnerabilities and power imbalances that exist in these situations to pressure individuals into signing agreements that include unnecessarily wide-ranging or one-sided confidentiality clauses or use clauses that are unclear about the impact on statutory rights to imply that they must never speak out to anyone. Confidentiality clauses in settlement agreements may cover the fact, terms and details of a settlement and sometimes there may also be reciprocal non-derogatory comments clauses. But it must be made clear that confidentiality clauses cannot prevent someone from exercising their statutory rights to make a protected disclosure in the public interest or report criminal activities. If someone is stating facts, even if they are unwelcome, they are arguably not covered by any non-derogatory comments clause too.

The BMA is supportive of recommendations made by the EHRC (Equality and Human Rights Commission)⁷ and the WEC (Women and Equalities Select Committee)⁸ reports into sexual harassment that raise the need to address the misuse of confidentiality clauses in harassment and discrimination cases, potentially through regulation, to make clear to individuals what their rights are.⁹ However, an issue which is not addressed in the consultation questions is uncertainty about when raising concerns about harassment or discrimination are likely to be protected disclosures. For example, bullying and harassment are often perceived as personal relationship problems, a matter only for the parties concerned, with no wider public interest. However, in our view, bullying, harassment and discrimination can often be reflective of wider cultural norms in an organization and behaviours that have gone unchallenged for some time, which have a significant impact on equality and dignity at work and potentially also on the ability to provide good patient care and safety in the NHS. We therefore believe that there needs to be greater awareness and clarity about when harassment and discrimination concerns are in the public interest and raising concerns about them would constitute a protected disclosure. It may also be worth ensuring people are clearly informed about the victimization protections that exist in the Equality Act 2010 for those who complain of harassment or discrimination or assist others who do before agreeing to any confidentiality clauses in contracts or settlement agreements.

(1) Do you have any examples of confidentiality clauses, in employment contracts or settlement agreements, that have sought to cloud a worker's right to make a protected disclosure, or overstretch the extent to which information is confidential? If so, please describe these.

We do not have recent examples of misuse of confidentiality clauses in contracts or settlement agreements that the BMA has checked on behalf of our members or advised

⁶ BMA (2017) Workplace bullying and harassment of doctors – A review of recent research <https://www.bma.org.uk/collective-voice/policy-and-research/education-training-and-workforce/tackling-bullying-and-harassment-in-the-nhs/bullying-and-harassment-research>

⁷ EHRC (2018) Turning the tables: Ending sexual harassment at work | *Equality and Human Rights Commission*, available online: <https://www.equalityhumanrights.com/sites/default/files/ending-sexual-harassment-at-work.pdf> (accessed 27 March 2019)

⁸ WEC (2018) Sexual harassment in the workplace | *House of Commons*, available online: <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/725.pdf> (accessed 27 March 2019)

⁹ EHRC *supra* note ⁸, 2.3

members on. Below is the model clause that has been recommended for use in settlement agreements in the NHS, which the BMA ensures is included in agreements when it is advising members on settling claims.

10.4 For the avoidance of doubt, nothing in this Clause [10] specifically and nothing in this Agreement generally, shall prejudice any rights that the Employee has or may have under the Public Interest Disclosure Act 1998 and/or any obligations that the Employee has or may have to raise concerns about patient safety and care with regulatory or other appropriate statutory bodies pursuant to [his/her] professional and ethical obligations including those obligations set out in guidance issued by regulatory or other appropriate statutory bodies from time to time.

10.5 With regard to the confidentiality obligations generally on either party in this Clause [10] nothing in those obligations shall prevent this Agreement from being subject to scrutiny by a statutory body tasked with the scrutiny of public bodies, such as the National Audit Office or the Public Accounts Committee.

(2) In your view, should all disclosures to the police be clearly excluded from confidentiality clauses? Why?

The BMA maintains that disclosures to the police should be clearly excluded from confidentiality clauses. Individuals must be clearly informed that any confidentiality clauses cannot prevent them from accessing justice and raising potentially criminal matters with the police.

(3) What would be the positive and negative consequences of this, if any?

We cannot see any negative consequences of this. The positive consequences are that people will be more likely to report potential crimes to the police.

(4) Should disclosures to any other people or organisations be excluded?

The BMA supports an exception for disclosure of incidents of harassment or discrimination to the EHRC. As the national equality body for England, Scotland and Wales, the EHRC has unique statutory powers to request evidence and information, issue compliance notices, enter agreements with employers and organisations or launch formal inquiries if there are concerns about common issues in sectors. This would be an essential protective measure for individuals who lack faith in an organisation's internal procedures and who are aware that there may be wider issues which the organisation is trying to cover up.

The BMA also believes that workers should have the right to disclose information to an independent trade union, especially as they can play a role in addressing concerns collectively.

We also support the guidance from NHS Employers and the National Guardian's office which states that in no circumstance should individuals be prevented from seeking support from their family or a GP or similar health practitioner, and we believe that it should be clear that individuals can discuss things with a counsellor. Individuals in situations of harassment or discrimination should have available to them multiple sources of support. This is likely to be beneficial to their own mental and physical well-being and it will also help them feel able to raise and pursue matters to resolution.

(5) Are there any other limitations you think should be placed on confidentiality clauses, in employment contracts or settlement agreements?

Using a settlement agreement to resolve an individual case should have to be approved and signed off at a senior level in the organisation (while ensuring there are no conflicts of interest with the senior person responsible for approving it). Senior officers or directors need to be aware and accountable for the use of such agreements to resolve disputes. The BMA also supports all the existing provisions in the Equality Act 2010 around the use of settlement agreements and the requirement for individuals to receive independent advice, such as from a trade union official, before signing them.¹⁰

(6) Do you agree that all confidentiality clauses in settlement agreements, and all written statements of employment particulars, should be required to clearly highlight the disclosures that confidentiality clauses do not prohibit?

Yes.

(7) As part of this requirement, should the Government set a specific form of words?

In considering whether a specific form of words should be prescribed by statute or whether there should be minimum requirements, it will be important to consider the issue of enforceability. It may be easier to enforce a requirement that there be a specific form of words. As already explained there is currently a recommended specific form of words within the NHS which the BMA ensures is included in agreements that it is advising on.

(8) Do you agree that the independent advice a worker receives on a settlement agreement should be specifically required to cover any confidentiality provisions?

Yes. This follows on from our earlier response to Q.5.

(9) Do you think a confidentiality clause within a settlement agreement that does not meet any new wording requirements should be made void in its entirety? What would be the positive and negative consequences of this?

Yes. We believe that this would help ensure employers took extra care to ensure that they were compliant.

(10) Do you agree with our proposed enforcement mechanism for confidentiality clauses within employment contracts? What would be the positive and negative consequences of this?

We agree with the proposed enforcement mechanism, however thought must be given to the methodology for calculating compensation and how much may be available to a claimant.

¹⁰ Equality Act 2010, s. 147(4)