No-Fault Compensation for injury resulting from medical treatment: Consultation Questions

1. The research team supporting the review reported (Farrell *et al*, 2010[19]) that previous research suggests that when an error has occurred, patients expect doctors to make a meaningful apology, provide an explanation and take steps to prevent the error from recurring. The findings of their research would appear to support the contention that for many, if not most, patients this is the primary aim, rather than a financial award.

2. The Scottish Public Services Ombudsman (SPSO) has published advice in relation to apology[20]. This advice was referenced in the guidance issued to NHSScotland in March 2012 on the handling and learning from feedback, comments, concerns and complaints.

Question 1: What, if any, steps do you feel are necessary or appropriate to ensure that when an error has occurred, patients receive a meaningful apology?

NHS culture has changed significantly over recent years and there is a growing recognition of the value of a meaningful apology. This is supported by the recent national guidance on handling and learning from feedback, comments, concerns and complaint; some NHS Boards additionally have policies on being open linked to their clinical governance and quality processes.

Should a no-fault compensation scheme be introduced, or amendments made to current arrangements, it would support clinical staff if these could reiterate the legal position that an apology is not an admission of guilt.

3. The Review Group considered that the following were essential criteria for a compensation scheme for injuries resulting from medical treatment:

- The scheme provides an appropriate level of compensation to the patient, their family or carers
- The scheme is compatible with the European Convention on Human Rights
- The scheme is easy to access and use, without unnecessary barriers, for example created by cost or the difficulty of getting advice or support
- People are able to get the relevant specialist advice in using the scheme;
- Decisions about compensation are timely
- People who have used the scheme feel that they have been treated equitably
- The scheme is affordable
- The scheme makes proportionate use of time and resources
- The scheme has an appropriate balance between costs of administration (e.g. financial or time) and the level of compensation awarded

[19] http://www.scotland.gov.uk/Topics/Health/NHS-Scotland/No-faultCompensation/Volume-II-report
[20] http://www.spso.org.uk/files/2011_March_SPSO%20Guidance%20on%20Apology.pdf

- Decisions about compensation are made through a robust and independent process
- The scheme has an independent appeal system
- The scheme treats staff and patients fairly/equitably
- A reasonable time limit is set for compensation claims.

Question 2. Do you agree that the principles and criteria set out above are essential in a compensation system?

Yes x☐ No ☐

2.1 Are there any to which you would attach particular priority or importance? Are there any others you would add?

One of the main drivers for commissioning the review was the length of time it can currently take for clinical negligence claims to be resolved. Equally, a significant concern in the current economic climate (when public funds are limited; and there is the potential for claims now to be made by individuals who previously would not have taken that approach) is the affordability of a no-fault compensation scheme.

It would therefore seem appropriate to attach particular importance to these as key features of any revised scheme**.**

4. The Review Group identified a number of issues it believed were relevant to the likely success of any system and agreed that the following criteria were desirable, and considered and highlighted the importance of the wider issues detailed below:

Desirable

- The public in general trusts the scheme to deliver a fair outcome
- The scheme does not prevent patients from seeking other forms of non-financial redress, including through the NHS Complaints system
- The scheme encourages transparency in clinical decision-making
- The scheme contributes to rehabilitation and recovery.

Question 3: Do you agree that these criteria are desirable in a compensation system?

Yes x☐ No ☐

Although agreeing with the desirability of these criteria, it does not necessarily follow that a no-fault compensation scheme needs to be introduced in order to deliver them. Consideration should be given to assessing whether changes to current arrangements could be made in order to deliver them.

3.1 Are there any others you think are desirable and should be included?

For the benefit of the patient and the staff / organisation concerned, the criteria for access to any scheme should include that, as at present, a complaint is not being pursued simultaneously via the NHS complaints procedure. To permit access to these two processes at the same time would result in a confused landscape and a lack of clarity as to what it was that the patient wished to achieve.

Wider issues

- The scheme contributes to:
  - organisational, local and national learning
  - patient safety
  - quality improvement
- Lessons learned can be used to influence organisational risk management in the future
- The scheme encourages and supports safe disclosure of adverse events
- The scheme does not put barriers in place for referral to regulators of any cases which raise grounds for concern about professional misconduct or fitness to practise.

Question 4: Do you have views or ideas on how a compensation scheme could more effectively contribute to the wider issues identified above?

Since the review was commissioned in 2009 (having been heralded some time previously) there have been significant steps forward in the field of clinical governance and reporting. This should be taken into account when considering the establishment of any new scheme or what changes could be made to existing arrangements.

5. When considered the Review Group's suggested essential principles and criteria against other schemes and the Swedish model came out on top. Based on this the Review Group offered:

> **Recommendation 1 -** that consideration be given to the establishment of a no-fault scheme for medical injury, along the lines of the Swedish model, bearing in mind that no-fault schemes work best in tandem with adequate social welfare provision.

Question 5: Based on the background information on the system in operation in Sweden given in Annex A would you support the approach suggested in Recommendation 1?

Yes ☐ **No** ☐

If not, why not and what alternative system would you suggest?

Prior to determining which (if any) scheme to adopt, it would be crucial to conclude the work to consider what would be covered by it and the likely volume and cost thereof, which is being undertaken at the same time as this consultation exercise.

Clarity is also needed as to how claims arising from incidents occurring under the proposed health and care partnerships would be covered i.e. by the proposed scheme or under some other arrangement.

> **Recommendation 2 -** that eligibility for compensation should not be based on the 'avoidability' test as used in Sweden, but rather on a clear description of which injuries are **not** eligible for compensation under the no-fault scheme.

Question 6: Would you support the approach in Recommendation 2? This would mean for example that where treatment carries a known risk and the patient has given consent to that treatment it would not be eligible.

Yes x☐ No ☐

If not, why not?

If yes, what other injuries would you consider should not be eligible?

It is likely that any eligibility criteria would be tested in Court to establish legal precedent. It would therefore be difficult to move away from the current principles by which liability and causation are determined.

It would be essential to determine whether and in what circumstances injuries which may not initially appear to relate to clinical treatment, for example sustained by a patient falling from a hospital bed, would be covered by the scheme.

6. The Review Group was of the view that any recommended changes to a no-fault system should cover all healthcare professionals including those not directly employed by the National Health Service. The group believed that fairness dictated that all patients whether treated by the NHS or privately should have access to an improved system if possible. If this proved impossible, the group nonetheless believed that there were benefits that could be obtained by a move to no-fault for NHS patients. The group's preference was that **all** patients should be covered by the no-fault scheme and offered:

> **Recommendation 3 -** that the no-fault scheme should cover all medical treatment injuries that occur in Scotland; (injuries can be caused, for example, by the treatment itself or by a failure to treat, as well as by faulty equipment, in which case there may be third party liability)
>
> **Recommendation 4 -** that the scheme should extend to all registered healthcare professionals in Scotland, and not simply to those employed by NHSScotland.

(As explained in the Cabinet Secretary's foreword we acknowledge that further work is needed to help in our understanding of the volume, level and cost of compensation claims handled by the Medical Defence Unions and private healthcare providers. We will seek to explore this further with the relevant stakeholders during the consultation period.)

Question 7: Do you support the view that, if introduced, a no-fault scheme should cover all clinical treatment injuries (e.g. private healthcare and independent contractors) and all registered healthcare professionals and not just those directly employed by NHSScotland?

Yes ☐ No ☐

Again, it is not possible to reach an informed view on this recommendation without knowing the outcome of the work being undertaken to establish the volume, level and cost of claims being handled by the Medical Defence Unions and private healthcare providers.

If not, why not?

7.1 What, if any, difficulties do you foresee in including independent contractors (such as GPs, dentist etc) and private practice?

Whilst this may seem the "ethical" way forward, it may be difficult to achieve in practice: would there be any "opt out" permitted for non-NHS providers? An all-encompassing scheme would require to be sensitive to the inherent differences in services delivered by the NHS, independent contractors and private practice.

7.2 What are your views on how a scheme could be designed to address these issues?

Critical to its success would be the clear definition of the criteria for access to any scheme.

Question 8: The intention is that if introduced the no-fault system will not be retrospective. However, consideration will need to be given to when and how we could transfer to a new system and how outstanding claims could be handled if/when a no-fault system was introduced. What are your views on how outstanding claims might be handled?

Outstanding claims should be handled in accordance with the arrangements in place at the time at which the injury occurred.

7. The Review Group did not favour the use of a tariff system for compensation, as it felt that this would not address individual needs and it was unlikely that people would buy into a system where compensation was based on a tariff. The group therefore offered:

> **Recommendation 5 -** that any compensation awarded should be based on need rather than on a tariff based system;

Question 9: Do you support the approach in Recommendation 5?

Yes ☐ No x☐

The current arrangements for assessing compensation levels include a tariff-based element and a needs'-based element.

If not, why not?

It is generally the needs'-based element that is the more contentious and difficult to quantify and agree.

9.1 What are your views on the assumption that the level of payments will be similar to those settled under the current system?

The majority of claims currently pursued appear to be by those supported by Legal Aid. If the intentions of a revised scheme are to simplify and speed up current arrangements there is the potential for a significant increase in the volume of claims made and, by extension, settled.

8. The Review Group was satisfied that a no-fault scheme established as they describe would be fully compatible with the requirements of the European Convention of Human Rights, based in particular on the need – as in Sweden and New Zealand – to build in appropriate appeals mechanisms, with an ultimate right to appeal to the courts on a point of fact or law. In addition, retention of the right to litigate will ensure that those for whom the no-fault system is felt to be inappropriate will still be able to raise claims using this route. The group recommended:

> **Recommendation 6 -** that claimants who fail under the no-fault scheme should retain the right to litigate, based on an improved litigation system
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> **Recommendation 7 -** that a claimant who fails in litigation should have a residual right to claim under the no-fault scheme
>
> **Recommendation 8 -** that, should a claimant be successful under the no-fault scheme, any financial award made should be deducted from any award subsequently made as a result of litigation
>
> **Recommendation 9 -** that appeal from the adjudication of the no-fault scheme should be available to a court of law on a point of law or fact.

Question 10: Do you support recommendations 6 – 9 as proposed by the Review Group?

Yes x ☐ No ☐

In supporting the recommendations it would be important that some form of time-bar be built into the arrangements such that no significant time period is permitted to elapse between referral between a no-fault compensation scheme and litigation or vice versa. Otherwise the criticism of the current arrangements over the time taken to conclude claims would simply transfer to any revised scheme.

If no, why not?

10.1 Do you have any concerns that the Review Group's recommendations may not be fully compatible with the European Convention of Human Rights?

Yes ☐ No x ☐

If yes, what are your concerns?

9. The Review Group offered suggestions for improvement to the existing system and these are reproduced in Annex B. The group recommended:

> **Recommendation 10 -** that consideration should be given to our analysis of the problems in the current system, so that those who decide to litigate can benefit from them.

10. It is proposed that the suggested improvements will be taken forward as part of the forthcoming consultation on the Courts Reform Bill later this year by the Scottish Government Justice Directorate. In particular the Scottish Civil Courts Review[21] recommended that pre-action protocols should be made compulsory and it is considered that this would assist in resolving many of the areas identified by the Review Group In addition, Sheriff Principle Taylor's Review of Expenses and Funding of Civil Litigation in Scotland[22], which is due to report at the end the year will consider a range of issues.

Question 11: Do you agree with the Review Group's suggestions for improvements to the existing system?

Yes x☐ No ☐

11.1 Do you have any comments on the proposed action in relation to these suggestions?

It would appear that the suggested improvements to the existing system would address the principal criticisms made against it such that a wholesale shift to a no-fault compensation scheme would not be necessary.

11. The Review Group also considered whether or not the establishment of a scheme specific to neurologically impaired infants should be created (in the event that a general no-fault scheme is not introduced). Members considered that this group of patients arguably represents a special case and certainly accounts for the most significant sums awarded in compensation and legal costs. The Group were of the view that this was worthy of consideration.

[21] http://www.scotcourts.gov.uk/civilcourtsreview/
[22] http://scotland.gov.uk/About/taylor-review

Question 12: Would you support the establishment of a scheme specific to neurologically impaired infants if a general no-fault scheme is not introduced?

Yes x ☐ No ☐

There is certainly an argument that separate arrangements should be made in these cases. To the possible benefits listed in the consultation document should be listed, in addition to the avoidance of under-compensation, the potential for over-compensation.

12.1 What are your views on the Review Group's suggestion that the future care component of any compensation in such cases could be provided in the form of a guarantee of delivery of services (both medical and social care) to meet the needs of the child, instead of by way of a monetary sum?

This is supported as a means of protecting both the child and the public purse.

General Comments

We would welcome any further general comments you may wish to offer here.

We are grateful for your response. Thank you.