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 thatwhen an error has occurred, patients receive a meaningful apology?

In my own case, my previous GP consistently denied that a mistake had taken place which resulted in me acquiring permanent physical disabilities that will limit my employment opportunities and reduce my quality of life for me and my young family. Over 8 months of stressful correspondence(Jan2010-Sept2010),with invaluable support of my IASS/PASS advisor (….. …….), my previous GP continued to deny that she acted out with established medical practice and it took the intervention of SPSO medical advisor process to investigate and establish in late June2011 that my previous GP was wrong to adequately assess my serious health condition from a telephone diagnostic approach when a physical examination was required to exclude spinal pathology.

Having a transparent and non-adversarial no-fault compensation system process can remove the need for health professionals to always be on the defensive when a patient has sought to question their treatment. Without the IASS/SPSO process I strongly feel that my previous GP would never admit a mistake had taken place. In late July2011, I eventually received a letterof apology from my previous GP after SPSO process upheld my complaint. Having the SPSO route to screen and investigate clinical mistakes would be an essential part of the no-fault compensation process for Scotland's patients who have suffered clinical 'damage' to their health and life span from confirmed medical mistakes.

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

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[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

- 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
- 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 ✓ No ☐

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

<u>I would add the following:</u>
In the interests of justice and fairness, sympathetic consideration to allow cases <u>Upheld</u> by SPSO process after February 2011, which is when Professor Sheila McLean recommendations for No-Fault Clinical Compensation Scheme on Swedish Modelwere presented to Scottish Parliament. Representation through parliamentary committee process to support my viewpoint should be allowed for 'damaged' patients who are failed by current system and had no other redress, and limited financial resources to seek damages for permanent physical or mental disabilities acquired from lack of appropriate medical/health interventions, as identified by SPSO investigative process.

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 ✓ No ☐

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

I would like to draw policymaker's attention to Point 3.16 (page17) from 'A Study of Medical Negligence Claiming in Scotland (2012)' to support and compliment above desirable comments.

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 howa compensation scheme could more effectively contribute to the wider issues identified above?

In my case, dangers of reliance on only telephone diagnosis from my previous GP continue to have devastating impact on my health and future employment opportunities. GP training through BMA should be updated to reflect dangers of non-physical examination to establish a patient's condition in-situ, as new technology mediums become more endemic(webcam, email etc).

Appropriate funding of local IASS/PASS advice services and better resolution process for health professionals to meet 'damaged' patients who want to share how devastating their actions have changed their lives.

In December 2010, previous SPSO Director of Complaints and Investigations disregarded my request to investigate my complaint due to time bar limitation issue as indicated in SPSO 2002 Act(Section10.1), My IASS advisor and I pointed out his failure to correctly apply12month rule and my previous MSP(Ken MacIntosh) took an interest in my case.

From January 2011, appointment of new SPSO Director of Complaints and Investigations did agree that no significant time bar limitationsexisted and mycomplaint wasgiven a fair hearing.

Based on my personal experience of 12month time bar limitations rule to raise an NHS complaint,Irespectfully wish to ask for this to be looked at and extended to 24months as 'damaged' patients like myself are devoting time to recover from trauma andlifestyle changes caused from dealing with mental and physical adjustmentsand the 'rush' tocomply with 12month rule is unfair.

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?

> **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 ☐ No ✓

If not, why not?
The medical professional has the ultimate professional responsibility to clearly explain, provide medical literature detailing the risks with any medical process and ensuring they comply with accepted best practice to minimise potential harm to patients. My understanding of the Swedish 'avoidability' test criteria is that compensation would only be paid if a medical professionals practice is outwith accepted best practice and has resulted in patient suffering harm. If a clinical error has occurred from any treatment that harms patients irrespective of known risk parameters, health professionals still owe a duty of care to avoid error in diagnosis process or inappropriate treatment taking place.

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

6. The Review Group was of the view thatany 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 thatfairness 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** ☐

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?

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

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?

With respect to policymakers, I disagree with the premise that the no-fault system should only consider cases or outstanding claims that are under consideration of SPSO or legal processes. Any legislation should take a cut-off date of February2011, which is when Professor Sheila McLean recommended No-Fault Clinical Compensation Scheme on Swedish Model to Scottish Parliament.

Representation through parliamentary committee process for this point should be given a fair hearing to 'damaged' patients who are failed by current system.

In late June2011, SPSO process Upheld my complaint that my previous GP failed to adequately access my medical condition from a telephone diagnosis and as a 'damaged' patientI have been left with no alternative but to self-fund my case through existing legal avenues that are unfairly weightedin favour medical professionals where Hunter v Hanley test criteria exists.

After exhaustive researchI managed to secure a solicitor willing to consider No Win No Fee if I financed medical reports to support SPSO verdict and prove higher level of medical negligence exists.

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** ☐

If not, why not?

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

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
>
> **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 ✓ **No** ☐

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** ☐

If yes, what are your concerns?

I have concerns relating to retrospective claims not being considered as 'damaged' patients health and disabilities acquired from mistakes needs are forever and 'not time limited'and sympathetic consideration to any SPSO complaints being upheld before legislation being enacted.Any legislation should take a cut-off date of February2011, which is when Professor Sheila McLean recommended No-Fault Clinical Compensation Scheme on Swedish Model to Scottish Parliament. Representation through parliamentary committee process to support this point should be allowed for 'damaged' patients who are failed by our current system and had no other redress, resource to seeking damages for permanent physical and mental disabilities acquired from lack of appropriate medical/health interventions, as identified by SPSO investigative process.

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.

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

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

Yes ✓ No ☐

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

11. The Review Groupalso 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.

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 ✓ No ☐

I would add the following:

In the interests of justice and fairness, Sympathetic consideration to allow cases Upheld by SPSO process after February 2011, which is when Professor Sheila McLean submitted recommendations for No-Fault Clinical Compensation Scheme on Swedish Model to Scottish Parliament. Representation through parliamentary committee process to support this point should be allowed for 'damaged' patients who are failed by current system and had no other redress, resource to seeking damages for permanent physical and mental disabilities acquired from lack of appropriate medical/health interventions, as identified by SPSO investigative process.

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?

Only if care component costs for affected children is 'ring fenced' within medical and social care provisions and will not be diluted through budget cuts and inflation.

General Comments

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

Thank you for giving me this opportunity to contribute. I would welcome an opportunity to share my experiences, knowledge and views in person to any parliamentary committees responsible for shaping forthcoming legislation.
My 18 month journey from making an NHS complaint and navigating the SPSO complaints process has been a stressful and challenging period in my life when I was coming to terms with my permanent physical disabilities. This process has forever changed my view of the need for 'damaged' patients to have a less adversarial route to seek answers for inappropriate medical treatment and in my case has left me with permanent physical disabilities, that limits my future career aspirations. Thankfully I managed to retain full time employment through my employer after being on 6month sick leave and continue to support my family.

We are grateful for your response. Thank you.