

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

1. The research team supporting the review reported (Farrell *et al*, 2010¹⁹) 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 apology²⁰. 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?

The RCN recognises the importance of apologies being made by the NHS and other bodies to individuals who have been wronged or who have received an inadequate service. An apology acknowledges the situation, ideally sets out a course of action to ensure the situation won't arise again, and may assist the individual concerned in potentially affording some 'closure'. As mentioned in the consultation, the Scottish Public Services Ombudsman's guidance on apologies is useful and welcome in this regard.

The aim of the 'Can I help you?' guidance issued in March 2012 is designed to "help to support the development of a culture across the whole of the NHS in Scotland that actively encourages and welcomes feedback, comments, concerns and complaints. A culture that values all forms of feedback whether this is good or bad in order to learn from patients', carers and service users experiences."

We believe that this shift to a culture that encourages and values feedback is central to the implementation of a no fault compensation scheme. It is vital that front-line staff understand their roles, have the necessary communication skills and are supported by managers in listening to all forms of feedback and responding respectfully. This will include, at times, meaningful apology, followed by explanation of what happened and what action will be taken to ensure that the same does not happen again.

¹⁹ <http://www.scotland.gov.uk/Topics/Health/NHS-Scotland/No-faultCompensation/Volume-II-report>

²⁰ http://www.spsso.org.uk/files/2011_March_SPSO%20Guidance%20on%20Apology.pdf

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
- 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 ✓

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

There are no principles to which we would attach particular priority.

Building on the recommendations in Chapter 6 of the review group's report we would like to add the following principle:

The scheme is embedded within joined up systems for complaints handling, adverse incident reporting, organisational learning and disciplinary systems.

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 ✓

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

Our view is that all of the above the criteria should be considered essential.

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?

We consider that the success of the scheme is inextricably linked to its relationship with these wider issues. There must be absolute clarity in guidance to patients, professionals and service managers as to how the systems fit with one another and which is appropriate at what stage; whether things can run concurrently and where the rate determining steps lie. Without clear guidance as to how the systems fit together and complement one another there will not be the necessary engagement from the key stakeholders.

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 ✓

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

The Swedish system runs in the context of an excellent tax funded welfare system. At a time when health and local authority budgets are being cut it is difficult to guarantee the levels of support which are recommended in a settlement and this must be taken into account when planning the implementation of a No Fault Compensation Scheme.

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 ✓

If not, why not?

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

This was discussed at length by the review group, and the issues are complex. We would recommend the establishment of an expert panel to set out the parameters of 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 ✓

Independent contractors providing NHS care should be included within the scheme. It would not be fair to a patient to say that only care provided by directly employed NHS staff would be covered under the scheme if their treatment was delivered under the auspices of the NHS.

Where a patient enters into a private agreement for care with an independent provider, the case for inclusion within a publicly funded scheme is less clear cut. . The Welsh Redress Scheme only covers NHS funded care. Whilst we have no objection in principle to a scheme which covers both NHS and independent healthcare, we would like it noted that there are significant difficulties and complications of a scheme which covers the independent sector.

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?

The scheme should only apply to ‘incidents’ arising after the date of implementation, and that existing claims should continue to be dealt with under current legal rules.

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 ✓

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

Clearly this is a huge assumption, but currently compensation payments are carefully costed in a not dissimilar way to that envisaged within the proposed scheme. The key issue which will determine the level of payments is whether there is an expectation that care needs will be met within the existing publicly funded system. If this is in the form of a service guarantee as described in the report, then the assumption remains reasonable.

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?

No ✓

If no, why not?

The view of the RCN is that there is no good reason to retain the residual right to litigate once a no fault compensation scheme and appeal system is introduced.

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?

No ✓

If yes, what are your concerns?

As discussed within the review group, our understanding is that the appeals system ensures full compatibility with ECHR.

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 Review²¹ 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 Scotland²², 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 ✓

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

The RCN has no particular comments except to support the review group's views on this important issue.

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.

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 ✓

²¹ <http://www.scotcourts.gov.uk/civilcourtsreview/>

²² <http://scotland.gov.uk/About/taylor-review>

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?

At a time of financial downturn and public sector spending cuts, it is optimistic to assume that ongoing care needs will be entirely met within a normal public sector care package, particularly as budgets will become under increasing pressure over time. A legal guarantee of service with recourse to a rapid appeal system would be the most effective way of providing care to meet the ongoing needs of someone who has been injured as a result of clinical treatment. This will minimise cost by providing care within the public sector, but retain the right of the injured party to the care which is awarded under the scheme, regardless of health and care budgets at any point in time.

General Comments

The RCN welcomes the proposed scheme. A no fault compensation scheme is important to the NHS in Scotland by establishing a proper means for timely redress for patients who are injured as a result of clinical treatment. It would provide greater access to justice and compensation for patients suffering medical injury.

In addition, it is expected that a scheme of this nature would promote more open and effective patient-professional relationships, removing the defensiveness associated with the fear of individual blame and the threat of litigation.

We feel strongly that a no fault compensation scheme can only work well if it is combined effectively with an independent patient complaints process. The potential to see systems improvement in the quality and safety of healthcare can only be realised if a no fault compensation scheme runs hand in glove with critical incident reviews and systems for organisational learning and quality improvement.

This requires a significant shift in the culture and values of the NHS in line with those set out in the NHS Scotland Quality Strategy (2010), and clarified further in the 'Can I help you?' guidance on handling complaints (2012).