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?

There needs to be a clear policy statement which indicates the organisation's position with regards to offering meaningful apologies. Additionally there is a requirement for clear guidance for staff.

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.

[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

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?

The principles are all seen as essential in any compensation scheme.

Affordability is the major priority for Boards. Historical evidence shows that Boards have not been required to pay out anything like the level of value of claims made against them and considerable effort has gone in to achieving settlements which are equitable.

A robust independent process is also considered to be a priority and there needs to be detailed and explicit criteria for patients wishing to claim, as well as for NHS staff and others , i.e. PASS, Advocacy Organisations etc.

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 ☐

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

The criteria cited are reasonable. In terms of the success of the system, it is important that NHS Staff and others also see the scheme as delivering a fair outcome. Positive experience of such a scheme may well promote its use and encourage additional claims at a time when affordability is the main concern.

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?

The thinking behind the wider issues is that a scheme might contribute to the above is good but is likely to be difficult to evidence in reality. It is already challenging for Boards to make the links to the wider issues when it comes to complaints, incidents and claims, though this area continues to be explored. Further consideration of this issue is required in tems of how this idea would play out in practice.

There is an argument for ensuring that we utilise the existing scheme more fully before looking to replace it with anything else.

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 ☒X

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

Little evidence has been presented as to the achievements of the Swedish system, so it is difficult to comment. There is an argument for improving the management of the existing 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 ☐ X No ☐

If not, why not?

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

Where there are known risks around any intervention, which have been appropriately explained at the time of obtaining informed consent then there should be no future claim.

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 ☐X

If not, why not?

Patients do not recognise private healthcare providers as being part of the NHS, so would not expect the scheme to cover it. Independent contractors are a commercial concern and as the NHS is publically funded it would not be appropriate to carry the cost of private matters.

However they are aware that their GP and dentist deliver NHS care so it would make sense for primary care contractors to be included.

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

Independent Contractors currently pay up to £4k per annum for their own crown liability so do not pay these fees. If IC's indemnity costs are reduced as a result of the scheme, will their remuneration be reduced accordingly?

Independent Contractors can offer a wide range of services which are not core NHS provision, eg cosmetic surgery, alternative therapies

This could indeed extend the scope of claims a scheme would receive

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

A process will be required to ensure claims against the scheme will be valid and appropriate. IC's will seek assurances that they will be given the same protection as employed clinicians.

These areas already self insure and this should continue to allow each contractor the freedom to cover their own range of practices.

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?

If a no fault scheme was introduced, there would require to be continuing arrangements through CNORIS to handle any residual claims through to conclusion

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** ☐

We are not in agreement with a no blame compensation system, however if it were to be introduced then need should not come into it. Any negligence is the same regardless of the background of the individuals involved.

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?

It is a considerable assumption, and open to question, that the level of payments will be similar to those settled under the current system. There is no detail as yet of the criteria which will be used to value awards.

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 ☒X

This is creating 2 approaches for individuals to seek compensation from Boards and is doubling the work between Boards and CLO to defend the Boards position.

If no, why not?

The effect of accepting Recommendation 8 would presumably be that litigants of their legal representatives would ensure that the litigation sought full recovery of the

individual's losses. Agree that rules of the scheme would require to ensure the same compensation cannot be paid twice.

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?

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 ☐ No ☐

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

It is indeed to be hoped that any changes particularly arising out of forthcoming legislation and other legal reviews will increase the effectiveness of the judicial system for all.

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?

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

Yes ☐ X No ☐

There is support for the proposal for a scheme specific to neurologically affected children as set out in item 12 which may lead to a much quicker resolution for families and a reduction in legal expenses for the NHS. This is worthy of further exploration as to the merits of a specific scheme.

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?

There is recognised to be a view that families affected in such cases should retain rights to decide what care they need and how best it should be provided to support the needs of their child.

There is also a view that there would be merit in further examining whether future care needs can be provided by way of a guaranteed delivery of services, recognising this may be complex and difficult to achieve. An issue arising in these significant and complex cases is that, whilst monetary compensation is awarded to cover future care needs some of those needs in fact will be provided for by the NHS. Any future scheme should seek to ensure that the NHS does not bear the burden of compensating twice.

General Comments

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

We are grateful for your response. Thank you.