ROYAL COLLEGE OF PHYSICIANS AND SURGEONS OF GLASGOW

Scottish Government Consultation

"*No-fault Compensation for injuries resulting from clinical treatment*"

The attached response is the view from the Lay Advisory Board within the Royal College of Physicians and Surgeons of Glasgow.

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate ☒ **Yes** ☐ **No**

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?

It is our belief that when the occurrence of an error is flagged up to a health care professional (HCP), health authority, medical or dental practice, the responsible HCP should immediately arrange a meeting with their line manager to set up a meeting with the patient. This would be to hear the patient's perception of the problem, explain the procedure(s) involved and discuss what went wrong (If anything), and why. A personal apology should be given as appropriate. If this cannot be set up immediately, then an appointment should be made for a date within 14(?) days.

The HCP and their line manager should explain and empathise with the patient and bearing in mind that this is a "no fault" procedure, should in the first instance apologise. Should the patient not accept the apology then they should be advised that a fuller investigation will be made and the results communicated to them. In all cases an entry should be made in the HCP's record.

Experience in other fields suggests that if all front-line staff are trained in handling complaints so that they are dealt with at the lowest possible level, this can sharply reduce the number of complaints that escalate into full-blown claims for redress.

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 x **No ☐**

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

It is impossible to prioritise these principles without knowing more about the details of each and what exactly is intended, especially the quantification of all elements such as appropriate compensation, timeliness and the balance between cost and injury.

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?

We believe that the no-fault element of the scheme should be used as the basis of a performance improvement system. It is important that HCPs are given the opportunity to learn from their mistakes and that the lessons learned are translated into medical training and CPD for a wider audience across the NHS.

We believe that all bullet points from Question 2 should be included with the bullet points from Question 3. We believe that Desirable bullet points 1 and 3 from Question 3 should be upgraded to 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 feel that two issues need to be considered if the scheme is to contribute effectively to meeting the objectives outlined above;

1. **In the interests of transparency, Health Boards should publish their performance against the scheme's objectives on a quarterly basis. A commitment to transparency is crucial.**
2. **There must be a quality system in place to allow the auditing of performance against objectives.**

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 x **No ☐**

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

We are aware that the Swedish model works well. It is built around a totally different structure of social care provision when compared with the UK, paid for by the hypothecation of some general taxation income. Therefore, in the absence of detailed proposals, it is impossible to answer the question definitively.

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 x**

If not, why not?

This Recommendation, if implemented, would apparently excuse negligence on the part of the HCP, unless the appeal process specifically allowed for a lawsuit in delict.

Some of the Swedish approach is useful but we feel that it is overall too prescriptive, although the avoidability test seems better that some alternatives.

The issue of informed consent to a procedure that carries a known risk seems to us to be an inadequate exclusion from the scheme. We believe that a patient suffering from a condition that seriously impairs their quality of life is likely to give their consent without seriously considering the risks and their possible effects.

We need more clarity on what the scheme is seeking to achieve.

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

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)
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> **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 x **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?

All medical practitioners should be covered by the scheme. However, there will inevitably be "boundary issues" between practitioners' private insurance and the coverage of the planned system. It would seem necessary to agree a boundary protocol so that all parties to the system know the extent of their liabilities under the proposed system. This is particularly important in terms of the effect that the proposals might have on insurance premiums if actions under delict would no longer be available to complainants.

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

This is not a question of system design, simply an "open book" discussion between Government and the insurance companies to arrive at an agreed and equitable distribution of risk. This is a fairly common procedure in the private sector. It would be sensible to build review intervals into the agreement as no-one will know in the early days how the system and payouts will evolve.

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?

We are unable to comment without having an idea of the consequences. It would seem to be an issue for the finance people to elucidate.

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 x **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?

We suspect that there will be an initial upsurge in claims and consequent payouts as claimants perceive a less adversarial, simpler and cheaper route to receiving compensation. It may then settle down to around current levels, but it may not.

Re payments based on need:

There are serious issues around the definition of need; however the issue is one of loss to the claimant in addition to their specific needs.

We are not in favour of lump sum payments but rather favour annual payments reflecting the size of the total award. There should be an exception for small 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
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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
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> **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 NOT APPROPRIATE TO
>
> **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 ☐**

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

[21] http://www.scotcourts.gov.uk/civilcourtsreview/

considered that this would assist in resolving many of the areas identified by the Review Group. In addition, Sheriff Principal 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?

We are unable to comment at this stage.

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 x No ☐

We consider this is because of the negative impact that this potentially has on obstetric practice and because it represents a major cost in the existing system.

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?

We do not have confidence in the state's ability to provide the required levels service across the country.

We would prefer to see the provision of a level of annual funding which the parents/carers can use to purchase the required services as necessary.

[22] http://scotland.gov.uk/About/taylor-review

General Comments

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

1. **We feel that the background material provided for this consultation should have included the 2012 paper by Stephen et al "A study of medical negligence claiming in Scotland".**
2. **The general public are likely to see this as a vast improvement in the mechanism for seeking redress for clinical negligence.**
3. **The largely unquantified internal health service cost (diversion of staff etc.) in dealing with negligence claims should be reduced.**
4. **It should reduce the strain on HCPs being pursued for clinical negligence, as once the facts of the case have been established, they are unlikely to face further cross examination on the "what ifs" surrounding the case. We know of cases where HCPs have had to appear in court at intervals over a period of several years in such cases. The proposed system would appear to address this without in any way compromising the patients' rights.**
5. **We would hope that it would do away with the public perception of the medical profession closing ranks in the face of a complaint.**
6. **All complaints should be recorded on the individual HCP's record and repeated entries should trigger a detailed investigation of the circumstances.**
7. **It should facilitate the process of learning from mistakes.**
8. **It addresses the issue of the shortage of qualified medical litigation lawyers by vastly reducing the amount of work that might come their way.**
9. **The success of the scheme will depend on funding coming from central Government funds and not from the health boards' budgets.**
10. **There is one glaring omission from the questionnaire: How will cross-border cases be dealt with? i.e. what happens if say a Scottish NHS patient is sent to Newcastle upon Tyne for treatment and suffers harm as a result?**
11. **There is no mention in the consultation of how death claims might be handled.**

We are grateful for your response. Thank you.