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

Citizens Advice Scotland (CAS) is the umbrella organisation for Scotland's network of 81 Citizens Advice Bureau (CAB) offices. These bureaux deliver free, impartial and confidential frontline advice services through more than 250 service points across the country, from the city centres of Glasgow and Edinburgh to the Highlands, Islands and rural Borders communities.

The Citizens Advice Service aims to ensure that individuals do not suffer through lack of knowledge of their rights and responsibilities or of the services available to them or through an inability to express their needs effectively.

The Patient Advice and Support Service (PASS) is delivered by the Scottish CAB Service. The service is independent and provides free, confidential information, advice and support to anyone who uses the NHS in Scotland. It aims to support patients, their carers and families in their dealings with the NHS and in other matters affecting their health. The service promotes an awareness and understanding of the rights and responsibilities of patients. It also advises and supports people who wish to give feedback, make comments, raise concerns or make a complaint about treatment and care provided by the NHS in Scotland.

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?

In the experience of citizens advice bureau Patient Advisers, a verbal apology at a face to face meeting can make a real difference to clients, as outlined in the case study below. Many clients find it helpful to receive a written response first, which is followed by a meeting. It is also helpful for clients to receive an

[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

accurate minute of the meeting and information about what will change as a result of their concern or complaint being raised, where this is appropriate.

CAS feel it would be helpful if the NHS are clear about what is being apologised for in letters to clients, are open to admitting when something has gone wrong, and explain what changes will be made to make sure this doesn't happen again. The latter is particularly important to clients. The reasons that most of the clients seen by the Patient Advice and Support Service raise a concern or complaint is to ensure that their experience is not repeated, and they are reassured when they are told that changes will or have been made.

Case study 1

A client contracted Clostridium difficile whilst in hospital and took antibiotics for 4 months to deal with the infection. The client was angry and upset about this.

The Patient Adviser assisted the client to write a complaint letter to the NHS Complaints Department. The client did not feel that the response from the NHS answered all the questions raised. The Patient Adviser suggested the client take up the offer of a face to face meeting as suggested in the response letter.

The Patient Adviser attended the meeting with the client and the Clinical Nurse Manager. The client's main concern was where the infection had come from. Blood test results stated that the cause of this particular strain of Clostridium Difficile was due to exposure to pigs and cows. During the meeting, it became apparent that it was this statement that had caused the client the most concern. The Clinical Nurse Manager explained that the blood test results did not mean the client had contacted it directly from pigs and cows. This had confused the client who had never been around pigs and cows. After that was cleared up, the discussion ended and the client was satisfied.

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 ☒ No ☐

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

CAS would welcome more information about the independent appeal system and how this works with the current NHS complaints process and the Scottish Public Services Ombudsman Complaints Standard Authority, as the current final stage for handling complaints about public services in Scotland.

CAS would welcome clarification on how clients will know whether to take the no-fault scheme or legal action. CAS are concerned that this could be confusing for people who are vulnerable and would welcome clear guidance being produced to clarify this.

CAS would like clarification about the definition of 'a reasonable time limit'. The timeliness of any scheme is particularly important, to get a good resolution for clients as quickly as possible. CAS would welcome information on whether there will be a cost to clients seeking no fault compensation and whether legal representation would be required. CAS are concerned about the ramifications for those seeking legal aid.

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?

CAS would welcome clarification on whether this will be administered by a national body, or if there will be one for each Health Board. CAS would also welcome clarification on whether there will be a cap on rehabilitation payments.

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?

CAS would welcome the no-fault scheme acting as an incentive to change practice. CAS would welcome clarification on how the system will work with the NHS Complaints Process which is also working towards addressing these issues. CAS would also welcome the system addressing these issues timeously in order to be effective.

CAS believes the scheme should not put barriers in place for referral to regulators and would welcome clarification of whether these referrals should take place before, at the same time or after the issues have been addressed through the no fault compensation scheme.

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?

CAS feels that there are too many variables to support this. For example, the competence of a healthcare professional could impact on the likelihood of mistakes or errors, or a complication relating to the treatment time guarantee. To cover these and other eventualities CAS would not support this recommendation. CAS are also concerned that using the avoidability test might mean that certain operations are less likely to be carried out if there is too high a risk of a compensation pay out.

CAS would also not support this approach after a recent case study.

Case study 2

The client had been in hospital to have an operation. The client states that he was informed that the procedure would not be complicated but he might have to stay overnight. During the procedure the client's bowel was perforated. As a result, the client spent the next three months recovering in hospital. The information leaflets that the staff gave to client were conflicting and felt to be inaccurate which caused the client anxiety and stress.

The board admitted that the consent form contained "most" of the information required to make an informed choice but not all.

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 ☐

If not, why not?

CAS does not feel able to answer this question without further information. CAS are concerned that this could create a 2 tier system, for example, if a client received treatment by a private healthcare professional they would not be able to raise a concern or complaint via the NHS complaints process but they would be able to use the no-fault scheme. This could be very confusing.

CAS would welcome this covering NHS treatment delivered by private hospitals. CAS would welcome clarification about who will pay for compensation if treatment delivered by private healthcare and independent contractor and paid for privately if this is intended to be covered by the scheme. CAS would welcome clarification and more information and guidance on whether/how the Medical Defence Unions and private healthcare providers will work in partnership with the no-fault scheme to provide one clear route.

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

CAS is unable to comment on this question.

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

CAS is unable to comment on this question.

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?

CAS would welcome clarification on the definition of outstanding claims - does this refer to NHS complaints or legal action cases?

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?

CAS would support this recommendation and welcome clarification on how need will be determined. This will have to be supported by welfare benefits for some clients.

CAS would welcome clarification on how need will be determined.

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

CAS is unable to comment on this question.

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?

CAS does not feel able to answer this question without further information. Regarding recommendations 6, 7 and 8 CAS would welcome clarification on the purpose of a no-fault scheme and a litigation system. If both are going to be used CAS would welcome the production of clear guidance on which cases would be appropriate for which scheme and, if there is any doubt, who would decide which scheme is to be used. CAS would also welcome the introduction of principles that can be realistically achieved in practice and clarification about what improvements are proposed for the litigation system. CAS would only welcome this if the implications of both routes are made explicit in guidance and policies. CAS are concerned that this could lead to a very lengthy process for everyone involved which would potentially be very stressful and expensive for all parties.

CAS agree with recommendation 9, that clients should be able to take this route where appropriate.

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?

CAS is unable to comment on this question.

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

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

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?

CAS is unable to comment on this question.

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 ☐ No ☐

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?

CAS is unable to comment on this question.

General Comments

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

CAS recommends that any scheme that is introduced be patient focussed, and much quicker than the current system for legal compensation in order to address issues quickly and reduce the stress for patients and healthcare professionals involved.

CAS feels it would be appropriate for the no-fault scheme to make reference to the Scottish Public Service Ombudsman (SPSO)'s Complaints Standards Authority. The scheme will have to work alongside the NHS Complaints Process, the SPSO Complaints Standards Authority, and, if/when introduced the Apologies (Scotland) Bill. CAS would welcome clarification that these regulations, guidance and the NHS 'Can I Help You? Guidance for handling and learning from feedback, comments, concerns or complaints about NHS

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

health care services' be taken into consideration in any no fault compensation scheme.

CAS feels that the no fault compensation scheme is not addressing the cultural issues in the NHS whereby the NHS are often afraid to admit liability. If they do admit liability, does this mean that a client could not use the no fault scheme as the fault has been admitted? Again, CAS would recommend very clear information and guidance be produced about this.

CAS would welcome clarification on what happens if the NHS don't meet the NHS Treatment Time Guarantee and if this is covered by the no fault scheme. Similarly, if machinery is faulty and the responsibility of an independent contractor – will this be covered by the no fault scheme?

CAS feel that receiving a meaningful apology in the first place would reduce the instances when such a scheme would be useful and would welcome more work being done in this area.

We are grateful for your response. Thank you.