No-fault Compensation for injuries resulting from clinical treatment

RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Action against Medical Accidents (AvMA)

Title **Mr** ☒ **Ms** ☐ **Mrs** ☐ **Miss** ☐ **Dr** ☐ ***Please tick as appropriate***

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3. Permissions - I am responding as…

Individual ☐ / **Group/Organisation** x☒

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

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

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available ☐

or

Yes, make my response available, but not my name and address ☐

or

Yes, make my response and name available, but not my address ☐

(c) The name and address of your organisation ***will be*** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your ***response*** to be made available?

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

(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?

Openness and honesty with patients and their families when things go wrong is an essential part of a patient safety culture and should be given higher priority. There should be a statutory 'Duty of Candour' requiring healthcare providers to promote and practice openness with patients and allowing them to be held to account if they do not. Experience has shown that guidance, however well framed, is not enough.

It should be noted also that the SPSO advice and the NHS Scotland guidance whilst good, are not binding. Also, they only apply to NHS organisations whereas the no-fault scheme is proposed for all healthcare providers.

Whilst the guidance is useful and the introduction of a statutory Duty of Candour would help tremendously and send the right message about the importance of this issue, there also needs to be a campaign of training and support for healthcare staff (and managers) on why this is so important, and on how to do this in practice. There also need to be better support structures for staff caught up in a medical accident, and in communicating errors to patients/families. In this way, the necessary culture change can be delivered.

A related point is the need for better protection and support of 'whistle-blowers'.

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

[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 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?

We think the following are particularly important principles:

- "The scheme provides an appropriate level of compensation to the patient, their family or carers"

By this we mean, and I believe that working group meant, that this should be commensurate with what would be awarded by a court in a medical negligence compensation case

- 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;

In order to be empowered in the scheme patients or their families will need to have access to **specialist** & **independent** advice and support at different stages such as: during an investigation into an incident; in deciding whether or not to use the scheme to claim compensation or to claim through the courts; in considering other options such as complaints or referral to regulators. The organisation(s) providing such services must be seen to be independent; experienced in working with people who have been affected by medical accidents; and have significant medico-legal expertise and experience.

We also think that there is other vitally important principles not currently on your list:

- Patients'/families' rights to litigate through the courts should not be affected by the existence of the 'no-fault' scheme. The option of seeking compensation through the scheme needs to be voluntary.
- The scheme should complement and be aligned with work on patient safety – to make it more likely for lessons to be learnt from incidents. The provision of a report on lessons learnt and action plan to address any patient safety issues should be part of the compensation 'package' offered and indeed as part of a decision not to offer financial compensation, together with a meaningful apology.

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?

It is particularly important that the current policy of the NHS not conducting complaints investigations if the patient/family is taking legal action or intending to is reversed. Any NHS patient should have a right for their complaint to be fully investigated and responded to notwithstanding their desire or need to take legal action or to take part in a future 'no-fault' scheme.

However, the opportunity should be taken, if a 'no-fault' scheme does go ahead, to align the investigations and processes as much as possible, which will avoid duplication.

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?

See above responses. We believe it would be a massive wasted opportunity if the creation of a scheme was not combined with an enhancement of patients' rights in the form of a Duty of Candour aligned with and complement work on patient safety. If patient safety is improved a fraction as a result, the costs of the scheme will be repaid many times over.

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, broadly, but with the modifications contained elsewhere in this response.

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

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.

No, not if based on the understanding suggested by this question.

If not, why not?

The existence of a known risk does not necessarily mean that the risk becoming a reality was not avoidable, or even that it was not negligent. For example, a 'risk' can be turned into a 'probability' or 'certainty'. For example, a

known risk of any operation is infection. If a surgeon decides not to wash hands / wear gloves / or uses equipment likely to be contaminated they have dramatically altered the likelihood of that risk. <u>The onus should be on the health provider to demonstrate that the outcome could not have been avoided by following known good practice or guidelines.</u>

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

N/A

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, every NHS patient, wherever treated, should be covered by the scheme. It would be a nonsense if primary care where so much NHS care is provided and many medical accidents occur, were not covered. However, it may be pragmatic to introduce the scheme in stages starting with acute care first. A distinction should be made between NHS patients receiving NHS funded care and any private patient. Whilst it may be ideal, we believe there would be serious practical problems in devising a scheme which applied to all purely private healthcare as well as the NHS. It would be more pragmatic to start with the NHS.

If not, why not? N/A

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

Medical defence organisations will object to this, but it should be remembered that they have a vested interest in remaining the indemnifiers of GPs etc and defending them in adversarial litigation.

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

The NHS Scotland could indemnify GPs etc as well as acute care / Health Boards. This would mean that there was a more consistent approach to any injured NHS patient. It may mean that money could be saved also as currently GPs are reimbursed at a level to compensate them for paying for indemnity cover from private organisations. It should be cheaper for the NHS to provide this cover.

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 would suggest that a date is set after which either any unsettled case will be considered by the scheme, or a date after which an incident occurring after that date can be considered by the scheme.

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

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?

This needs to be a fundamental principle underpinning the scheme, otherwise it will be perceived as unfair and just a means of seeking to save money by short-changing patients/families of the compensation they need and deserve. Savings will accrue from less involvement of lawyers and improvements to patient safety.

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

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?

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

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

We believe the section on 'Perceived lack of openness' is slightly misguided and misleading. There is wide consensus internationally based on evidence that there are real and large problems with open and honest disclosure of incidents – not just a 'perception' of such. Various reasons are given for this including, prominently, fear on behalf of health professionals and managers of possible consequences such as complaints or litigation or a perception that NHS staff have an overarching duty to 'protect' the NHS or their Health Board. This culture needs to be addressed by making clear that the opposite is the case and that it is totally unacceptable to 'cover up'. The best way to support this culture change is to introduce a statutory Duty of Candour which applies

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

to organisations and managers as well as health professionals. Whilst guidance exists in the health professional codes referred to they apply solely to the registered health professional and not managers or the organisation corporately. In our experience, it is often at this level that the problems lie. Also, the codes are discretionary and the GMC has shown little interest in taking action against doctors who do not abide by this part of the code. In fact, the last time we asked them under the Freedom of Information request, they could not provide a single example of action taken as a result of breach of that part of the code.

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?

Possibly, subject to the precise deign of such a 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?

We believe the injured patient / family should have the right to choose the arrangement which is in their best interests within reason, just as they would under the court system.

General Comments

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

The development of a 'no-fault' compensation scheme would be a very worthwhile but huge undertaking and we are conscious that much more work is required beforehand. We are very happy to contribute further to the consideration of options in the light of this consultation. However, we are keen that progress on various fronts is not delayed further whilst we wait for the final version of a scheme. For example the necessary change to the complaints procedure to take away the bar on pursuing legal action for compensation should be reversed, and the identified improvements to the current legal system implemented without waiting for final decisions about 'no-fault' compensation.

Also, the development of a new scheme is much more likely to be affordable and successful if it is done in stages. For example introducing the scheme to the NHS first (even if it is to be extended to private healthcare) and to acute NHS care first whilst arrangements are made for bringing in GPs, dentists etc

would be more manageable and allow for learning to take place a s a result of the earlier stages of the scheme.

We can not allow there to be no progress, simply because the bigger aspirations are so daunting.

We are grateful for your response. Thank you.