RESPONSE TO
WELSH ASSEMBLY GOVERNMENT
CONSULTATION ON

“PUTTING THINGS RIGHT”
(technical consultation - September 2010)

About AvMA

Action against Medical Accidents (AvMA) is the UK charity for patient safety and justice and has a strong commitment to pursuing its objectives in Wales. Established in 1982, AvMA specialises in advice and support for patients and their families affected by medical accidents, via its Help-Line and through individual case work. Since its inception, AvMA has provided advice and support to over 100,000 people affected by medical accidents, and succeeded in bringing about major changes to the way that the legal system deals with clinical negligence cases and in moving patient safety higher up the agenda. AvMA is therefore ideally placed to comment on these proposals from the patient's perspective. AvMA enjoys a constructive relationship with all key stakeholders in Wales and is pleased to have been able to make a significant contribution to the planning that led up to these proposals.

Consultation question 1 • proposed overall global financial limit for damages (Part 6, Regulation 29 of the draft Regulations).

1. The overall financial limit for damages should be limited to £25,000 with the proviso that a higher ceiling can be set if both parties agree. Higher value claims are likely to be more complicated, and there is a serious risk that such claims could not be properly examined by the patient's representative within the limitations of the scheme.

2. Once the scheme has become established, and shown to work effectively, consideration should be given to raising the limit above £25,000.

3. In some circumstances the regulations do not meet the Welsh Assembly Government's intentions with respect to legal advice and, therefore, need to be amended.

   At page 1 of the explanatory note accompanying the new draft regulations the Minister says "The Regulations also provide for a patient to receive free legal advice from a solicitor who specialises in clinical negligence claims in order to ensure that he or she is properly informed in relation to any offer that is made *or refusal to make an offer [AvMA emphasis]* if, on investigation, it is determined that there is no qualifying liability."

   AvMA would propose a change to the regulations so that where there is an 'incident concerning patient safety' which is defined as "any unexpected or unintended incident which did lead to or could have led to harm for a patient" a patient should always have access to initial advice under Part 6 of the Regulations. The advice available should be limited (in the same way as legal aid is limited) so that the solicitor concerned would only offer, and continue to give, advice if that solicitor would have advised a privately paying client to continue with the

matter. If the patient's solicitor advises that the matter has sufficient merit to proceed the scheme should ensure, where relevant, any dispute concerning a qualifying liability is resolved by instructing an expert jointly.

The regulations as formulated would allow a trust to investigate a concern under regulation 23 including a ''incident concerning patient safety' and decide that there was no qualifying liability at this stage. Such a decision at this stage would exclude a patient receiving any advice whatsoever 'even if harm had been caused' if in the view of the trust the harm caused did not come within the complex legal definitions arising from the law of tort.

It is possible Trusts will always move on to a Redress investigation involving the patient and access to legal advice if there is an 'incident concerning patient safety'. However, it is important access to legal advice is consistent across Wales and should not depend on how individual Trust's interpret the scheme. If the NHS in Wales is to be open and if the scheme is to be accessible it is important that patients know what has happened and can obtain legal advice if harm has been, or may have been, caused.

AvMA accepts that it is not possible or appropriate to offer legal advice with respect to every concern including concerns about matters such as waiting lists or the general conduct of staff. If harm has been caused or may have been caused this is qualitatively different from other types of concerns and the Redress framework should be engaged and legal advice should be available.

4. If a trust investigates whether there has been a qualifying liability under Part 6 of the Regulations but decides not to make an offer, the wording of Regulation 31 (3a) seems to say that the patient need not be provided with a copy of the report. This seems at odds with the spirit of the legislation and the intention of the regulations as set out in Regulation 31 (2). The regulations should be changed so that the patient is always entitled to see the report once the investigation is concluded unless the Regulation 31 (3b) applies ie Regulation 31 (a) should be deleted.

5. If a tariff is issued under Regulation 29 (4) then that tariff should be based on common law principles.

6. Regulation 33 says that an offer of redress can be "by way of financial compensation or entry into a contract to provide care or treatment or both".

The regulations or guidelines need to clarify that if care and treatment is to be included in the Redress package this is not meant to include complex and costly long term care regimes but is meant to be limited to care and treatment for a defined period eg if a replacement hip

operation had failed the Redress package might include an expedited operation to redo the surgery, physiotherapy and compensation up to the Redress limit. The scheme would not deal with more complex matters where maximum Redress damages could be offered coupled with costly, and perhaps long term, care and treatment.

7. Regulation 23 (1c) should be amended to ensure that once a concern is raised and is being investigated the patient is made aware of any advocacy services available to help the patient formulate the concern and help the patient ensure that the Trust is investigating all the matters of concern to the patient. For the scheme to be successful and for the patient to be engaged in the process the patient should have access to independent support, advice and advocacy at this stage. The patient should also be made aware that if the Trust moves on to investigate a qualifying liability under the Redress scheme legal advice (rather than general advice) will be made available.

   If the regulations are not amended the guidelines should ensure such information is made available to the patient.

   It is important to note that a concern could involve complex clinical issues and/or might raise serious patient safety issues but not lead to a qualifying liability, patients may need independent support when a concern is raised separate from legal advice at a later stage. For example screening may have failed to spot cancerous cells but the cancer is slow growing and later tests catch the condition in time and it is clear the long term outcome was not affected. No injury has been caused, there isn't a qualifying liability giving rise to legal advice, but there has been a serious incident concerning patient safety where the patient may need support when the concern is raised or during the Part 5 investigation.

8. If a responsible body is investigating a matter under Regulation 23 (1e) and is going on to consider whether "independent clinical" advice is required then the patient should be involved at this stage.

   Note that WAG's Consultation Report 2/8/10 page 4 sets out "we intend to continue with the phasing out of independent review , but will be proposing amendments to the Regulations to ensure that people are involved with the selection of expert advice (where it is required to resolve a concern)" . The regulations do not, as drafted, meet this aim with respect to investigations under Part 5.

   The simplest way of achieving this would be for the regulations to be amended so that a responsible body is required where there is an 'incident concerning patient safety' to move to an investigation under Part 6 if independent clinical advice is necessary to complete the investigation. This would involve the patient, ensure all the matters that need investigation are brought to the attention of the independent expert and would avoid the additional costs that would arise if different

matters were considered during the investigation under Part 6 compared with the matters considered under the Part 5 investigation.

9. The definition of an 'incident concerning patient safety' should be clarified so that it is clear omissions are included eg failure to diagnose.

Consultation question 2 - How the redress arrangements will operate in cross-border situations and with independent providers in Wales (Part 7 of the draft Regulations)

1. There should be an additional duty (contractual or otherwise) on independent contractors and on bodies in England, Scotland and Northern Ireland to notify the relevant Welsh NHS body if there is, or may be, a qualifying liability arising out of the treatment provided by Welsh NHS body prior to referral by the Welsh NHS body making the arrangements.

   Such duty is in addition to the duty to notify a qualifying liability that might arise out of the provision of qualifying services by the body providing treatment as part of arrangements made with a Welsh NHS body.

   Explanation - the referring Welsh NHS body may be unaware that there may be a qualifying liability eg the arrangements may have been made to reduce waiting lists to treat breast cancer. In the course of treatment it may become clear a qualifying liability should be investigated eg it appears diagnosis has been delayed. The additional duty is limited to a duty to notify the Welsh body of matters that may need investigating, in effect to raise a concern, it does not require the independent provider or non-Welsh body to carry out an investigation.

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(Action against Medical Accidents)

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