Scottish Public Services Ombudsman Response to the Consultation on Proposals to Introduce a "No-blame" redress scheme.

Background

The Scottish Public Services Ombudsman (SPSO) is the independent body that investigates complaints from members of the public about devolved public services in Scotland. This includes complaints about care provided by the NHS . When we investigate a complaint about the NHS, we can review directly the clinical decisions made and have access to clinical experts to support our investigations. As a Parliamentary supported body, we respond to Scottish government (SG) consultations when we consider that our experience may provide useful in the development of policy. In this response, we are providing information based on our experience of health care complaints.

The importance of ensuring the proposed No-blame redress scheme fits with existing processes

Since the Crerar and Sinclair reports (2007 and 2008), Scotland has been developing simpler and clearer routes for complaints. This work is on-going and we are currently working with others to develop a new NHS complaints procedure.

Complex routes can be both confusing and intimidating. Faced with a messy landscape, people either end up not taking any route and suffering in silence or spending excessive amounts of their own and the public organisations time and energy pursuing them all. Given this, we would argue that it is not only appropriate but essential that careful thought should be given to how the proposed scheme will fit with existing processes.

The relationship between the complaints process and redress

The first step in doing so is to understand how the complaints system works and currently provides redress. It is one of the founding aims of a complaints process to provide some redress whenever possible and appropriate. Traditionally, the SPSO has not provided financial redress for personal injury in either the NHS or any of the

other sectors. Our focus has been on other aspects of redress by providing: direct practical fixes[1]; apologies; explanations; and also by helping to ensure the problem do not recur. This last outcomes is often the key driver for people using the NHS complaints process.

It is worth noting that this position is a matter of policy and Ombudsman across the UK take different views. For example, we understand that the Parliamentary and Health Service Ombudsman which deals with health complaints in England provides financial redress for personal injury and at a level similar to those which would be achieved under a civil claim for negligence. The SPSO position to date has been that the complexities that surround compensation for personal injuries mean that the individual who is seeking this is best served by being directed to the claims route. Those complexities include the difficulties in clearly establishing causation, the different standards that are used (we would uphold a complaint on a basis lower than that of negligence) and the expert analysis needed to establish the appropriate level of compensation that is currently undertaken through the claims process.

For us, the position that we remain outside of the claims which ultimately may result in litigation remains sensible and allows us to focus on where our expertise is: helping to provide explanations and helping systems to improve. However, it does mean that sometimes we do not fully resolve the matter and we know that a claim is sometimes made when the complaints process has completed. We always ask people what outcome they seek and, while the main outcomes sought remain preventing the problem from happening again, we are also seeing an increase in people raising compensation for personal injury as a goal. The existence of a scheme such as that proposed may, therefore, help to fill a gap in the current system. To get maximum benefit from this, it is important to ensure that any new scheme works well alongside the complaints route and avoids requiring the person to split their concerns and the outcomes sought.

[1] We do provide some financial redress when a direct financial loss can be demonstrated which in the NHS is likely to be the purchase of private care when NHS care should have been available.

The key to this will be starting from the perspective of a possible user of the system. And starting from there, it is possible to quickly generate some questions which, if resolved, would help to keep this simple. To give just a few examples:

- Can one complaint go through two processes at the same time? Could someone come to us seeking explanations, apologies as well as pursuing a claim in this new scheme?
- Could information be shared between the processes and could complaints be transferred from one to the other?
- Would the "no-blame" scheme accept one of our reports as direct evidence or would they need additional clinical advice?
- What happens if the clinical advisers in different schemes are coming to different views – If we uphold a complaint but the "no-blame" system finds there were no failings? This may occur because the schemes are using different standards but it could be confusing for both the user and the NHS and there needs to be clarity around this.
- Could we take complaints about the way an application has been handled in the claim process? We can look at NHS clinical judgement, would this include their clinical judgement about causation or a decision to support or not support a referral to the scheme?

We do not consider any of the questions are insurmountable but the success of the new scheme will depend on considering these and others at an early stage and ensuring careful wording of any legislation and related policy and guidance. In the event of a decision following the consultation to take this forward, we would be happy to be involved in any work that considers how the new scheme should be developed.

Other comments

While our main focus has been on the relationship between the proposed scheme and the complaints process, we thought the following comments may also be of assistance.

Scope

We appreciate the reasons for limiting this proposal initially to directly employed staff. In practice, the scheme may need some discretion to investigate the role of an independent contractor when there is confusion about the cause of the problem – we do find situations where the issue has been around communication. This is particularly common in complaints surrounding a late diagnosis and situations can arise where the Hospital and GP consider the other was the source of the miscommunication.

Discretion around the cap and the six month limit.

The scheme may also benefit from having some discretion around these areas. Strictly applying these may lead to some injustice for those who fall narrowly on the wrong side. We appreciate lines do need to be drawn but allowing discretion in "special or other circumstances" would allow those implementing the scheme to take a common-sense approach to some of these border-line situations.