Introduction

Action against Medical Accidents (AvMA) is an independent charity working across the whole of the UK, specifically focussing on the promotion of patient safety and the support of people who have been affected by medical accidents (or 'patient safety incidents'). AvMA is widely recognised as the leading consumer voice on patient safety and clinical disputes including complaints and clinical negligence. AvMA's policy is informed by its direct contact with people affected by medical accidents over 25 years (dealing with circa 5,000 enquiries a year) and by working closely with other patients' organisations, Community Health Councils, the NHS and other stakeholders. AvMA is committed to delivering its charitable objectives in Wales. It has worked closely with the Welsh Assembly Government and other stakeholders on the development of the 'Speedy Resolution' Scheme, and has an ongoing relationship with Welsh CHC's, specialist clinical negligence solicitors in Wales, and officials of the Welsh Assembly. AvMA made extensive and influential contributions to the development of the NHS Redress Act in England.

AvMA is therefore pleased to respond to this consultation, and would be equally pleased to give oral evidence to the Committee.

Response to Committee's Questions

Question 1 "Why is a Redress Scheme required?"

AvMA welcomes the development of a Redress Scheme in Wales. People who have been affected by clinical errors in the NHS sometimes find it very difficult to find out the full facts about what happened; to be assured that steps will be taken to reduce the risk of similar errors affecting other people; and to obtain compensation for injuries or losses that they have suffered as a result of sub-standard care in the NHS. People in these circumstances are often left with no alternative but to take legal action. This is a lengthy and stressful process which has no guarantee of achieving the claimant's objectives, if indeed taking legal action is feasible for them. For many this is not an option either because of the restrictive definition of negligence used by the courts, or because it is impossible for them to access funding to meet the legal costs involved in making a claim. For the NHS the current situation does nothing to help develop an open and fair patient safety culture. There is a tendency to see patients who complain or who claim as adversaries. There are barriers to learning from the incident that give rise to complaints and claims. Finally, the NHS wastes resources in dealing with clinical negligence claims where legal costs often outweigh the damages being claimed.

An appropriate Redress Scheme has the potential both to improve access to justice for people harmed by sub-standard NHS care; to make the culture within the NHS more open, fair and responsive to learning from incidents that occur; and to redirect resources from legal costs to compensating patients and learning from mistakes.

Question 2 "Does the proposed Measure achieve the policy objective?"

The Measure does in our opinion have the potential to make things better, but the extent to which the Redress Scheme actually does achieve the policy objectives will depend on the detail of the regulations and to whether or not the Assembly does obtain the power from Westminster to move away from a scheme based on 'liability in tort' (see response to Question 6). Below we highlight some concerns we have about the wording of the Measure:

1(2) We believe it would be a missed opportunity to restrict the scheme to incidents which would represent a liability in tort under the law of England and Wales (see our response to Question 6).

2(6)(b) We do not agree that a limit should be put on the amount of compensation that could be awarded for pain and suffering. If the scheme uses the definition of liability in tort and is to be a credible alternative to legal action, it must award damages which it would be expected would be awarded by a court of law.

5(3)(a) We believe it is essential that the report of the findings of an investigation includes, where appropriate; what measures the NHS body is taking to reduce the risk of the same kind of incident being repeated as well as full explanations; an apology; details of redress which is being offered; or if it has been judged that the case does not qualify for redress, a detailed explanation of why this is the case.

5(4) We have very strong concerns about the proposed provisions for restricting access to an investigation report. We believe that it should be a fundamental right of any person whose case has been the subject of such an investigation to receive the report. This should be equally the case where an offer of redress is not being made.

7(1) We believe that access to legal advice without charge for people taking part in the scheme is an absolute necessity if the liability in tort model is retained. We therefore recommend that Ministers "must" make such provision rather than "may".

Question 4 "What will be the practicality of making the system work and does the proposed Measure make provision for these"

Practical issues that the Measure does not make specific provision for include:

The need to increase capacity and expertise within NHS organisations to be able to conduct the kind of investigation that will be required. This will require considerable investment, but will be money well spent as this will also provide the NHS with extra capacity to learn lessons and improve patient safety. This should reduce the human cost of errors and also result in savings from avoiding additional treatment resulting from errors and unnecessary litigation costs.

A recurrent theme in debates over the English NHS Redress Act was the need to have some form of independence in determining cases where the NHS does not itself recognise the case as qualifying for redress when the patient / family insist that it should. This is where the power to jointly instruct an independent medical expert needs to be made use of (building on the experience of the Welsh 'Speedy Resolution Scheme). It is also vital that the advice and support available to people going through the scheme is both independent and sufficiently expert in the field of medical negligence / medico-legal disputes.

Consideration needs to be given as to how the Redress Scheme would work alongside the NHS Complaints Procedure. Some amendments to the NHS Complaints Procedure may be needed to allow cases which start as complaints to be seamlessly considered for Redress.

We would welcome the extension of the Welsh scheme to primary care and care commissioned from the independent sector, so that there is a consistent approach no matter where you are receiving NHS funded care.

Question 5 "Is it appropriate that so much be done by regulations?"

AvMA would prefer to have more detail in the primary Legislation/Measure. Welsh Assembly Government has a good track record in consulting and involving stakeholders. However we believe it would be appropriate that the Measure put a duty on Ministers to consult on draft regulations before they are agreed.

Question 6 "Would it be better for the Assembly to seek the power from Westminster to introduce a 'no-fault' scheme?"

AvMA believes that restricting eligibility for redress under the scheme to cases that would qualify as a liability in tort would be a huge wasted opportunity. Wales has an opportunity to develop a scheme which could act as a shining example to the rest of the UK, Europe and beyond. The size of Wales and cohesiveness of its institutions and NHS bodies makes it ideal to pioneer an approach which builds on good practice in other smaller nations in Europe and

is developing an open and fair patient safety culture as well as access to justice for injured patients.

To retain liability in tort' as the test for qualifying for Redress would not move things forward much from where they are now. There is nothing preventing the NHS admitting liability and offering to settle a potential claim without litigation now. Use of the legal definition of liability in tort (often referred to as the Bolam test) would mean that the scheme would re-enforce some of the most unsatisfactory aspects of litigation. The Bolam test invariably forces people to pin blame on individuals rather than systems. Such a blame culture is not conducive to the open and fair patient safety culture which the NHS in Wales aspires to. In addition the test is designed for the adversarial court system with evidence being robustly tested on both sides and there being an independent judge. The scheme would be forcing people's entitlement for redress to be decided by the same test that the court applies, but without the rigour and independence of the court. The application of the legal test would also encourage the continuance of a defensive culture. In considering cases for the Redress Scheme, NHS staff would be forced to look at whether it would be possible to mount a credible defence under the Bolam test rather than considering whether the patient 'deserves' redress.

We do not subscribe to the term 'no-fault' compensation scheme but believe that what the committee means by this term is very similar to what we would propose. Namely, an alternative to using liability in tort as the qualifying criterion and using a test which is less focussed on apportioning individual blame. The expression 'no-fault' is both inaccurate and unhelpful. Firstly, we do not believe any of the schemes in existence around the world are not actually based on some notion of 'fault' (or 'failure', 'error') being the rationale for providing compensation. Secondly, as a matter of principle, there is no reason why a reasonable person should expect redress where there has been no fault. Acknowledgement of the 'fault' and action to reduce the risk of the same thing re-occurring is often more important to injured patients and their families than any form of compensation. Below we set out our suggested alternatives.

<u>The 'Avoidability Test'</u>

AvMA propose that what we have called an 'avoidability test' is applied to determine eligibility for redress. In essence, this would mean that in cases which are being considered under the Redress Scheme the first question to be asked would be

"Could the adverse outcome have been avoided if the organisation responsible for the treatment had followed accepted good practice?"

If it could be demonstrated that good practice had been followed, there is no qualification for redress. If the practice is not considered to be good/in accordance with standards and guidelines in Wales, there would be a qualification for redress, unless the NHS body could demonstrate, on the balance of probabilities, that the adverse outcome was not caused by the failure to follow good practice.

We believe this approach has significant advantages. For example

- It moves away from the blame culture/focus on pinning blame on individual health professionals which is considered a hindrance to improving patient safety

- It focuses on root causes and systems issues, meaning that one investigation should result in the answers needed to help improve patient safety as well as to whether or not someone deserves redress.

- It is fairer. Most people would agree that someone who has suffered harm as a result of sub-standard treatment should be entitled to redress.

- It would drive quality improvement by making the acceptable standard 'good' practice rather than practice which is not so bad as to be categorised as 'negligent'.