

WELSH HEALTH LEGAL SERVICES

CONSULTATION PROPOSED NHS REDRESS (WALES) MEASURE COMMITTEE

Welsh Health Legal Services (WHLS) was established to provide a litigation and advice service to NHS Wales for the management of clinical negligence claims and associated issues. Qualified solicitors provide specialist advice to all the Health Trusts and Local Health Boards without direct charge. WHLS has experience of dealing with claims of all levels of complexity including those of a low to mid range value. It is notable that the claimants' legal costs in such cases more often than not exceed the damages offered or awarded.

Two of WHLS' legal staff, Vanessa Llewellyn and Managing Solicitor, Anne-Louise Ferguson were members of the Welsh Assembly Government's Project Team to devise the Speedy Resolution Scheme which has been piloted for the past two and a half years. Evaluation of the Scheme is anticipated as part of the present Consultation process.

On behalf of Welsh Health Legal Services I would wish to make the following comments in the framework of the questions the Committee is to consider.

1. Why is the Redress Scheme Required?

The Speedy Resolution Scheme (SRS) currently being piloted was set up after a long consultation, contributed to by members of Welsh Health Legal Services. It has yet to be evaluated. Subject to the outcome of the evaluation, the framework could be easily amended or adapted to achieve the proposed Measure's aim of reducing or obviating the need for as much legal assistance for the parties. Time constraints are already incorporated into the Scheme to ensure that redress is delivered in a timely manner. SRS requires the NHS body involved to have undertaken an investigation, offer an explanation, and prepare both an action plan and provide an apology, all of which are reflected in the proposed Redress Scheme.

The requirement for the NHS in Wales is the opportunity to overhaul the Complaints process, for improved learning of lessons, patient satisfaction and confidence. The inadequate investigation of incidents and poor, slow management of complaints procedures, both of which currently fail to deliver a satisfactory outcome are the primary cause of lack of confidence. To achieve improvement it will be necessary to invest heavily in staff and their

training in forensic investigation and system analysis, together with ensuring that communication with the patient is significantly improved.

In summary, there is a need for an enhanced complaints scheme coupled with a system which provides redress without delay where appropriate. This would undoubtedly lead to a reduction of litigation in low value claims.

2. Does the proposed Measure achieve the policy objective?

There is insufficient detail in the proposed Measure to know whether it will be possible for such a scheme to achieve the policy objective.

The policy objective of speedy compensation with a reduction in the cost of legal fees is unlikely to be achieved because it requires a qualifying liability in tort. Occasionally, under the existing system, the establishment of the qualifying liability in tort is a straightforward matter, for example where the wrong limb has been operated upon. In the majority of cases, however, even those of lower monetary value, the qualifying liability in tort is not straightforward for the patient to establish, often as a result of pre-existing condition or co-morbidity.

Any scheme under the measure will result in a potential for a two tier, exclusive situation. Claims involving children and persons under a disability are not capable of accepting compensation payments which require court approval. Consideration must be given to the management of this common situation.

3. What are the views of the stakeholders who will have to work with a redress system?

Welsh Health Legal Services already manages the Speedy Resolution Scheme for NHS Wales and it is not anticipated that additional difficulties would be encountered under the proposed scheme which anticipates, perhaps unrealistically, that Health bodies will manage their claims under the scheme without legal help.

4. Practical Considerations

Entry into Scheme

Arrangements for the communication to the patient of the qualifying liability in tort and, accordingly, qualification for entry into the scheme are not set out in the measure. Under current arrangements a patient who has suffered an

obvious adverse outcome as a result of an obvious error might be given this information at the earliest opportunity by a member of hospital staff, apologies and explanation are actively encouraged in the more open and transparent culture which has been promoted for some time within the health service. An adverse incident may not be recognised as such until after an adverse outcome has manifested itself some time after treatment or surgery. Without adequate investigation it will not be known whether there exists a qualifying liability in tort which would justify entry into the redress scheme to enable compensation to be made. Therefore it is unlikely that medical staff will be more likely to offer explanations and apologies than is currently the case. The investigation, followed by the explanation, apology and action plan if appropriate, must be provided before monetary compensation can be provided. The situation will be further complicated if the patient has been offered some kind of rehabilitation or extra care as part of a Redress Scheme which made lead to an unfounded expectation of a financial pay out.

Communication

Paragraph 5(3)(b) of the proposed measure makes provision for a copy of the report to be provided to the individual seeking redress but at 5(4)(a) it is provided that the report is not disclosed to the complainant until after an offer is made. It is anticipated that there will be many situations where no offer will be forthcoming though an explanation and apology are appropriate and some situations where an explanation of the incident is sufficient. The anticipated openness and transparency underlying the Measure would be defeated by this proposal. For the patient to be in a position to accept an offer of redress or to decide whether it is appropriate to take legal advice, it will be necessary to be provided with a copy of the report on its completion.

The measure does not provide any indication of the importance of and by what means the patient is kept at the centre of the investigation, and similarly, the expectations of clinical staff affected by an adverse incident or outcome do not appear to have been considered as part of the overall process.

Legal Assistance

It is not clear whether it is envisaged that free legal advice will be offered at specific points or throughout the process. Anne-Louise Ferguson is chair of a small sub-group whose aim is to consider the provision of legal advice under the scheme. It is improbable that the majority of patients accepted into the scheme would refuse an offer to have their case considered by a lawyer, both to consider qualifying liability and tort and in respect of any redress offers. As currently drafted, there is no provision in the measure for dispute resolution at any stage. Disputes are likely to arise both in respect of the decisions

regarding qualification for redress, appropriate choice of joint expert, appropriate offer of redress. Such disputes may not be enough to terminate involvement in the redress scheme but would, inevitably, lead to delays until resolved. Availability of an arbitrator or mediator, preferably independent of the health body, may obviate the need for legal advice for those whose understanding of the process is sufficient.

Supervision, monitoring and audit of the legal service providers are not provided for under the measure.

Redress other than money

The proposed Measure includes provision at paragraph 2(4)(a) that redress may be in the form of care or treatment either in addition to, or as an alternative to, financial compensation. Consideration must be given to the way in which this may be provided. It will be unacceptable to increase the waiting time for patients in need of rehabilitative care such as physiotherapy who have not been the subject of sub standard care. Similarly, reorganising a surgical list to accommodate a patient to the detriment of others is likely to lead to controversy. At present rehabilitation services are in very short supply resulting in many patients seeking treatment in the private sector which, under the Scheme, would need to be funded.

5. Is it appropriate that so much be done by regulation?

It is unfortunate that the proposed Measure has not been subject to full consultation from all stakeholders prior to its presentation to the Assembly. At the initial scoping meeting it was anticipated that all areas of concern leading to patient dissatisfaction with the NHS after adverse outcomes would be considered by different sub groups which would report back to the main committee. This was to ensure that there was no danger in jettisoning good practices by replacing them with new, untried and potentially unworkable ones. It is therefore essential that as much detail as possible is incorporated into the Measure to ensure it can be debated by as wide an audience as possible. The proposed Redress Scheme has the potential to be innovative and may become a blueprint for the rest of the United Kingdom.

6. 'No fault'

A 'no fault' scheme is a utopian goal which would avoid the gross unfairness inherent in a system which compensates those who can prove breach of duty of care but gives nothing, not even adequate rehabilitation services, to those who cannot prove the existence of a qualifying tort. However, the administrative costs in addition to the costs of the compensation would be far

in excess of anything yet undertaken. Such a scheme could not operate in Wales and not elsewhere in the UK.

There is a case for reopening the debate which was begun in the CMO's report 'Making Amends' relating to the proposed scheme for financial and rehabilitation support for all babies born with severe neurological disability.