Quality and Nursing Division
Welsh Government
Cathays Park
Cardiff
CF10 3NQ

By email only: qualityandnursing@gov.wales 30th April 2024

Dear Sirs,

Consultation on proposed changes to the Putting things Right (PTR) process

AvMA is a patient focused organisation which provides advice to patients and or their families where they have experienced an adverse and avoidable outcome as a result of medical harm. We offer a helpline which is staffed by professional volunteers most of whom have a clinical negligence background, a written advice and information service for those who need in depth advice and an inquest service which can offer representation at inquest – all of our public facing services are free of charge.

We have not sought to respond to each question posed by the consultation on "Proposed changes to the Putting Things Right Process" but we do wish to comment on general issues which we believe the Welsh government need to be mindful of in order to make the Putting things Right (PTR) a success.

There is much to commend in these proposals. In the overview to this consultation the Welsh government's aims to "***ensure there is proper investigation when a concern or a complaint is raised, and that lessons are learned after mistakes are made. Information about the problems identified should be shared with the patient, and where possible, there should be an immediate correction of things that have gone wrong."*** AvMA is completely supportive of these aims and recognises that this is what most injured patients seek to achieve through making a complaint.

When the National Health Service (Concerns, Complaints, and Redress Arrangements) (Wales) Regulations 2011 were introduced the Welsh government said it would "***represent a significant culture change for the NHS in Wales in which it deals with things that go wrong"***. Part 6 of the Regulations organised the Welsh NHS Redress Scheme, this was supplemented by Guidance set out in "Putting Things Right" which explains and interprets that Redress scheme further.

Unfortunately, the Welsh Redress Scheme or Putting things Right (PTR) to date has not achieved its potential and promise. The failings of the current scheme are complex but unless they are tackled it will not offer patients the remedy they need and want and will continue to drive patients through frustration and anxiety to litigation to find answers.

The Welsh Redress Scheme has an opportunity to be held up as an exemplary model of redress but to do this the Welsh government needs to be aware of why it has not achieved the culture change it

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wanted. The reasons can be succinctly identified in the article by Mari Rosser (solicitor at Hugh James) entitled "The Welsh NHS Redress arrangements: Are they putting things right for Welsh Patients?" (2014) 20(6) Clinical Risk 144 – 149. The issues can be summarised as follows:

- **Regular breaches of the Regulations by NHS bodies**: There is a lack of consistency of approach amongst the Welsh Health Boards characterised by a lack of transparency, honesty and candour which is intended to be at the heart of the process.

  While it is notable that as recently as April 2023 NHS Wales introduced a statutory duty of candour through the Health and Social Care (Quality and Engagement) (Wales) Act 2020. It will take some time for that duty to bed in and is likely to take a number of years before the duty operates as it is intended, depending on the funding available for training healthcare staff.

  As a comparator a statutory duty of candour was introduced in England in 2014 under Regulation 20 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. It is accepted that some ten years later, many trusts are still learning to comply with the requirements under this regulation.

  Other incentives to ensure that health boards move to a transparent approach might include penalties for failing to act openly and with candour.

- **The Interim Report (delays)**: The 30 days stipulated for receipt of the interim report is invariably delayed. While the current proposals recognise that this target "***was unrealistic and rarely met successfully" (see narrative in consultation following Qn 10)*** reverting to the National Incident Reporting Policy and allowing a range of response times of either 30, 60, 90, or 120 days (depending on the complexity of the investigation) is likely to result in each case being dealt with as potentially complex, even if it is not.

  Perhaps a simpler and more straightforward message would be to say that the interim report should be available by no later than 120 day (4 months) and to impose a financial penalty on Health Boards who fail to meet this target. That would ensure that the message to patients and health boards alike is clear, and their expectations managed from the outset.

  As it is, many firms who have supported patients in this scheme report having waited for as long as 18 months for a report. Those sort of turnaround times are unacceptable and defeat the purpose of the scheme.

  The scheme needs more structure and timelines to enable parties to progress matters and for patients to know what the next stage in the process is and when it will be completed. Currently, the process is allowed to drift because different Health Boards are operating to different time scales – there needs to be consistency in approach for all parties concerned and to manage patient expectation.

- **The Interim Report (failure to address the issues):** Patients who have raised concerns, trusted the PTR process to deliver as promised then find it disrespectful and patronising to receive a report that does not address the issues raised by them in their complaint. The Regulations make clear that answers to questions raised is expected but despite this, patients remain dissatisfied with this aspect of the process.

Denying patients a response can compound the existing harm experienced by them, it will also heighten tensions and lend itself to a suggestion that there is something to hide, even though that may not be the case. It is another patient driver for litigation, yet the consultation offers no proposals to address this fundamental failing.

- **A lack of independence within the process:** The NHS body is responsible for determining whether there is a qualifying liability and if the issue is serious enough to be allowed into the Redress Scheme. There is a lack of impartiality and objectivity in the process, and this is reported to be one of the biggest barriers to cases entering the scheme. The Welsh government needs to suggest proposals that introduce an element of independence to this process.

  The need for independent oversight is crucial to making this process fair and effective. The NHS is also responsible for determining the level of the offer of compensation, if any which is to be made to the patient. It is reported that those Welsh Boards that do make an offer do not set out how they have quantified their offer or justified (as they are expected to do under Reg 29(4)) how they have valued the claim. Please see bullet point below for further comment.

  The NHS is wearing too many hats under this scheme for it to be considered fair by injured patients and this must change. It is even gatekeeper for whether the patient is entitled to free legal advice – only cases where the NHS finds a qualifying liability are eligible for free legal advice. This fact may account for why only 31% (as referred to in the narrative following Qn 18 of Consultation) of people have taken up the availability of free legal advice.

  Inappropriate offers of compensation made: There is rarely a detailed investigation into the value of the claim, patients are not asked to provide evidence of their losses or details of how their injuries have affected them. Little if any investigation into current condition and prognosis for recovery is carried out which means that Health Boards are not putting themselves in a position where reasonable offers can be made.

  The failure to make offers of settlement in line with awards of damages made by the courts is a factor driving patients to litigation.

  Many of those who have accepted offers have subsequently discovered that they were under compensated under the scheme by which time it is too late for them. This approach does not instil confidence in the scheme and is patently unfair on injured patients and fosters distrust in the process.

- **Increasing eligibility from £25,000 to £50,000:** This cannot be supported while the scheme is clearly failing patients to the extent it is. £50,000 is a considerable sum of money to most claimants/patients and the threshold should not be increased until the scheme can demonstrate that it is capable of working effectively and as it was intended to.

  The PTR scheme does not exclude the more sensitive types of case such as neonatal death, protected parties or issues involving death more generally. There is no worse outcome than death. The fact that the claimant lawyer is representing a bereaved family or loved one means that these cases require a sensitive approach and that takes time.

  We refer to the 2018 paper commissioned by NHS Resolution and prepared by the Behavioural Insight Team into patient motivation for making a claim. This report identified how important

compassion is to claimants. (Para 4.2.1). When we consider the effect of the loss of a child or a parent on individuals it is easy to understand why compassion is so important. Likewise, protected parties often need more time to express themselves and relay their concerns – this is about preserving and respecting their autonomy. Lawyers have a crucial role to play in identifying whether their client has capacity; capacity can fluctuate and frequently needs to be assessed and then reassessed.

It takes lawyers a lot longer to take instructions from someone with learning difficulties, capacity issues or grieving than it might otherwise do. This fact needs to be captured by allowing additional remuneration for lawyers acting for the some of the most vulnerable in society. The current scheme does not do that and is not geared towards supporting vulnerable people.

Learning: It is intended that investigations should be used to improve care in the future. Despite the best intentions of PTR, it is far from clear what improvements have been secured because of PTR to date.

Where appropriate, government bodies must be held accountable for shortcomings and AvMA suggests that the Welsh Government take this opportunity to refine the Welsh Health Board's ability to learn by retaining the original financial parameters of cases valued up to £25,000 to keep the ability to learn manageable at this stage with a view to revisiting the financial limits in say three years' time.

This is particularly important if the Welsh Government does expand this scheme into primary care as the consultation says it intends to.

- **Level of remuneration for lawyers:** AvMA does not undertake litigation and claimant lawyers are the best people to comment on the viability of the fees. However, we cannot help but note that the current scheme which was introduced in 2011 has not allowed for a regular increase in lawyer's fees since then.

  The amount offered to lawyers by way of remuneration should represent a fair, market rate. The scheme should introduce regular reviews of the levels of remuneration offered and these should at the very least be reviewed annually and increased in line with inflation. Payments should be made timeously.

  The consultation explains that currently a claimant's legal representative may receive £1,600 for considering Breach of Duty and investigating causation including the commissioning of two expert reports. Or reviewing the appropriateness of the offer made to the complainant by the NHS body.

  The consultation proposes revising this approach so that it increases remuneration by £150 such that £1,750 is payable for providing an advice on an admission of liability.

  A further sum of £868 is payable if the NHS admits a qualifying liability but refuses to offer redress. It is proposed that that too should be revised so that £1,000 is payable for providing an advice on quantum of damages where settlement is reached under redress.

  That does not appear to be fair remuneration neither does it appear to represent market rates. From the preliminary conversations we have had with our own claimant lawyer

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members, the proposed increases are meaningless, and most firms will not be able to represent patients at those rates.

Yours faithfully

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