

ISCAS Position Paper **Complaint handling v clinical negligence**

Patients' expectations of successful outcomes from surgery or medical care and dissatisfaction with the care or treatment provided may occur in relation to medical treatment and can lead to disputes in the public and private arenas.

Patients whose expectations of health care or treatment have not been met or who wish to complain about the care or treatment provided to themselves, a relative or a person on whose behalf they are acting may lodge formal complaints and allege negligence in the hope of obtaining redress in the form of financial compensation. They are often disappointed to find that the complaints process does not provide a mechanism for allegations of clinical negligence to be determined as such or through which financial compensation can be obtained. This is the case in both the independent sector and the NHS.

This Position Paper explains the differences between the complaints process in the independent sector and the NHS and the mechanism to be followed by patients who wish to pursue allegations of clinical negligence for the reasons outlined above.

The complaints process

1. The complaints procedure in independent healthcare organisations provides complainants with a vehicle through which they can raise concerns about the care or treatment that has been provided by the treating medical practitioner, another healthcare professional, or by the organisation itself.
2. Each healthcare organisation is required to have a three-stage complaints procedure that outlines the steps to be followed by patients who are not satisfied with the results of the internal complaint-handling processes of the hospital or clinic that provided their care.
3. The first stage of the complaints process is local investigation into the concerns being raised with a view to resolution being reached; the second stage is an independent review carried out by a senior member of staff in the organisation that has not been involved in the matters that led to the complaint or the handling of the complaint at Stage 1. The third and final stage involves the complaint being reviewed by an external party or body that is wholly independent of the organisation being complained about.

The principles of effective complaint handling

4. All organisations that subscribe to ISCAS are required to have in place complaint handling procedures that reflect the good complaint handling principles of the Parliamentary and Health Service Ombudsman (PHSO).
5. The ISCAS Code of Practice for Complaint Handling¹ (the 'Code') recognises, and is aligned with, these principles as outlined in the PHSO Complaint Standards Framework².

¹<https://iscas.cedr.com/download/code-of-practice-for-complaints-management/>

²https://www.ombudsman.org.uk/sites/default/files/Complaint_Standards_Framework-Summary_of_core_expectations%20.pdf



5.1 The principles:

- 5.1.1 Promoting a just and learning culture
- 5.1.2 Welcoming complaints in a positive way
- 5.1.3 Being thorough and fair
- 5.1.4 Giving fair and accountable responses.

6. Recommendation 6 of the Paterson Inquiry Report (2020)³, which has been accepted by the UK Government⁴, reinforces the requirement for an external review process at Stage 3:

6.1 Recommendation 6a

“We recommend that information about the means to escalate a complaint to an independent body is communicated more effectively in both the NHS and the independent sector”.

6.2 Recommendation 6b

“We recommend that all private patients should have the right to mandatory independent resolution of their complaint”.

Complaints about treatment provided in the independent sector

- 7. Patients who wish to complain about the care or treatment that they have received are encouraged to raise their concerns directly with the staff member of the healthcare facility involved. In some cases, complaints can be resolved informally without going through the formal complaints process. In other cases, complaints are formalised at which time the organisation’s complaints procedure should be followed. If complaints are unable to be resolved locally following the completion of the two internal complaint handling stages, an external review is required to be carried out by an impartial, independent body.
- 8. In the independent sector, a significant number of healthcare organisations have subscribed to ISCAS as the external body that will carry out the impartial, independent review of the complaint at Stage 3.
- 9. Those independent healthcare providers that subscribe to ISCAS are required to ensure that they manage and respond to complaints in a way that is compliant with the standards outlined in the Code.
- 10. Any complaints that are escalated to Stage 3 will be reviewed by an independent adjudicator with consideration being given to the extent to which the organisation’s complaint handling has complied with the standards set out in the Code. Where relevant, the adjudicator will signpost complainants to seek independent legal advice if they consider that clinical negligence may have occurred.
- 11. The Code clearly outlines those matters that ISCAS can address and those that it cannot⁵.

³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/863211/issues-raised-by-paterson-independent-inquiry-report-web-accessible.pdf

⁴<https://www.gov.uk/government/publications/government-response-to-the-independent-inquiry-report-into-the-issues-raised-by-former-surgeon-ian-paterson/government-response-to-the-independent-inquiry-report-into-the-issues-raised-by-former-surgeon-ian-paterson#recommendation-6a-1>

⁵ <https://iscas.cedr.com/download/code-of-practice-for-complaints-management/> (p5)

Matters covered by the Code

12. The Code states *“the Code covers complaints made by (or on behalf of) patients regarding all aspects of their care or the services provided by or in a subscribing organisation, including those complaints about medical care or treatment or regarding a clinician’s behaviour in connection with the care provided. The specific remedy being sought by the complainant (e.g. compensation or a refund) should not prevent complaints from being considered”*. It also states *“the ISCAS Code covers complaints about doctors and other healthcare professionals working within subscribing organisations, even where they are not directly employed by the organisation and have instead been granted practising privileges (an agreement to allow them to provide certain services within the hospital or clinic as independent practitioners)”*.
13. The Code *“covers complaints notwithstanding that there may be parallel procedures ongoing at the same time in respect of the same events, for example in the courts or involving a professional regulator”*.

Matters not covered by the Code

14. The Code states *“the complaint process cannot determine whether negligence has occurred. This is a matter for the courts to determine. Complainants who wish to pursue an allegation of clinical negligence should be advised to seek independent legal advice”*.
15. The Code *“does not cover complaints about breaches of clinicians’ professional standards, although it does cover concerns about their behaviour”*.

Complaints about treatment provided in the NHS

16. Patients who wish to complain about the care or treatment that they have received in an NHS facility are also encouraged to raise their concerns directly with the staff member of the healthcare facility involved.
17. If complaints in the NHS have not been resolved following completion of the two internal complaint handling stages, complainants have the option of escalating their complaint to Stage 3. In the case of the NHS, the PHSO is the external body that will carry out the independent review.

The difference between the management of complaints and bringing a claim for clinical negligence

18. Causation, liability and negligence are concepts that are defined by law and are investigated and tested in the courts. It is beyond the scope of the complaints process for complaints about healthcare in both the independent sector and the NHS for such allegations to be addressed via this mechanism.

Clinical negligence

19. ‘Medical negligence’ occurs when a medical professional provides substandard care to a patient which causes direct harm or makes a pre-existing condition worse. There are a number of different ways that this can occur such as through misdiagnosis, improper consenting, incorrect treatment or surgical mistakes. The term ‘clinical negligence’ is often

used instead as it encompasses allegations of negligence against a wider range of practitioners, including doctors and other healthcare professionals.

20. The term 'clinical negligence' is used in this Position Paper as it encompasses the care and treatment provided by a wider range of healthcare professionals.

Timescales

21. Generally speaking, people have three years to lodge a claim for medical negligence from the date on which the alleged negligence occurred or when they became aware of the alleged error. The timescales are different for people who are considered to be minors (under the age of 18) or for adults who have reduced mental capacity^{6,7}.

Criteria

22. To prove 'clinical negligence', the person making a claim is required to prove a number of factors:
 - a) that the doctor or healthcare professional had a **duty of care** to them i.e. to provide them with the standard of care that a reasonable clinician of the same status and experience would provide if presented with the same set of facts or circumstances;
 - b) the doctor or healthcare professional failed to fulfil their duty of care or omitted to act in regard to that duty (**breach of duty of care**); and
 - c) that they experienced damage, injury or loss as a direct result of that failure. This is called **causation**. The damage or loss can include physical or psychiatric injury in addition to financial loss.
23. Adjudicators appointed by ISCAS will be able to examine, where required, through the involvement of appropriate experts whether a clinician has breached recognised standards of care. They will not, however, be able to address allegations of clinical negligence as these matters require causation to be determined.

Parallel processes

24. Complainants should be advised that they can simultaneously pursue the formal complaints process of the healthcare organisation that is the subject of their complaint alongside pursuing a claim for clinical negligence with a lawyer. The two processes can proceed in tandem.

Recommendations

25. Allegations of medical negligence are not covered by the complaints procedures of healthcare organisations, whether in the independent sector or the NHS. Such allegations are also not covered by the ISCAS Code. Complainants who are seeking to pursue a claim for clinical negligence are advised to seek independent legal advice from a lawyer that is specialised in that field.

September 2023

⁶ <https://www.legislation.gov.uk/ukpga/1991/50>

⁷ [https://www.nhs.uk/conditions/social-care-and-support-guide/making-decisions-for-someone-else/mental-capacity-act/#:~:text=The%20Mental%20Capacity%20Act%20\(MCA,people%20aged%2016%20and%20over](https://www.nhs.uk/conditions/social-care-and-support-guide/making-decisions-for-someone-else/mental-capacity-act/#:~:text=The%20Mental%20Capacity%20Act%20(MCA,people%20aged%2016%20and%20over)