

## **Summary position paper for Subscribers**

### **Criteria in which ISCAS Adjudicators will seek an expert opinion**

#### **1. Introduction**

1.1 Cases come to ISCAS for adjudication which may involve complaints about the quality of clinical care provided. These may relate to the clinical care provided by any regulated health care professional. ISCAS Adjudicators are able to examine whether a clinician has fallen below a recognised standard of care or has taken action that is not regarded as reasonable. However, ISCAS Adjudicators will not address whether any identified failure against a standard of care caused any harm to the complainant. ISCAS Adjudicators will consider the impact on complainants of any head of complaint that has been upheld.

1.2 ISCAS Adjudicators will consider the use of a clinical expert to provide an opinion on the quality and reasonableness of the clinical care provided. This position paper sets out the circumstances in which ISCAS Adjudicators will carefully consider if the use of a clinical expert is appropriate.

1.3 ISCAS is aware that the cost of a clinical expert is an expenditure that is met by Subscribers in addition to the cost of the adjudication. ISCAS Adjudicators are mindful of the need to be proportionate with the use of an expert and the specific questions they require answers to.

1.4 ISCAS is also aware that the use of a clinical expert is likely to extend the timeframe for conclusion of the adjudication, so that will be kept in mind so as to ensure the case is not delayed unnecessarily.

1.5 The requirement for a clinical expert is likely to be significantly reduced if good practice is followed at the earlier stages of the complaint process. Guidance for Subscribers can be found in section 4 below.

#### **2. Standard of clinical care and use of clinical experts**

2.1 ISCAS does not have a remit to consider or provide an opinion on whether the clinical care provided could be determined as negligence.

2.2 However, ISCAS does have a remit to consider complaints about the quality of the clinical care provided. This relates to the standard of care provided and the reasonableness of the clinician's actions.

2.3 There may be aspects of clinical care in which ISCAS Adjudicators are able to reach a finding in the absence of a clinical expert report. For example, the quality of the consent process.

2.4 ISCAS Adjudicators do not have the expertise to make a finding whether care has fallen below a recognised standard or whether the actions of the clinician involved in the complaint were reasonable. ISCAS Adjudicators may require the assistance of a clinical expert to assess these matters.

2.5 ISCAS Adjudicators will not make any findings about the consequences of care falling below a recognised standard. This is the role of the courts in determining whether any action could be found to have been negligent.

### **3. Criteria to be used by ISCAS Adjudicators in deciding to use a clinical expert**

#### **3.1 Nature of Complaint**

A complaint made to ISCAS may justify the use of a clinical expert if there is an aspect that relates to the quality of clinical care provided. If it is clear that there will be no closure for the complainant without expert evidence – for example, trust and confidence has completely broken down – it may be in both parties' interest for ISCAS to appoint an independent clinical expert. The ISCAS Adjudicator will explain the rationale for the use of a clinical expert when the draft Heads of Complaint are shared with the parties.

#### **3.2 Failures in Complaint Handling**

ISCAS Adjudicators will consider whether complaints about the quality or reasonableness of the clinical care provided have been addressed as complaints in their own right during Stage 1 and Stage 2 of the complaint handling process. There may be situations where one of the central complaints relates to a failure to obtain independent clinical advice, or complaints that the clinical advice obtained was not truly independent. When reviewing a case, ISCAS adjudicators will take into account whether independent clinical advice should have been obtained as part of the complaint handling process and whether the advice that was sought and obtained was truly independent (if any advice had been obtained at all). In such cases, ISCAS Adjudicators will consider whether the complaint could be formulated as a failure in complaint handling that does not require obtaining a clinical expert opinion.

#### **3.3 Formulation of Heads of Complaint for adjudication**

ISCAS Adjudicators will consider whether the complaint can be formulated in a way that would enable the ISCAS Adjudicator to reach a finding without the use of a clinical expert. ISCAS Adjudicators will only make a decision that a clinical expert is required after considering whether there may be a different way of drafting the Heads of Complaint that would not require the use of a clinical expert.

#### **3.4 Independent clinical advice obtained by the Subscriber**

The decision regarding whether independent clinical advice is obtained during Stages 1 and 2 of the complaint handling process lies with Subscribers. Complainants may not be aware that Subscribers have the option of seeking independent clinical advice on matters related to the quality of clinical care provided. Where a Subscriber has obtained independent clinical advice during the complaint handling stages at Stage 1 or Stage 2 and shares this with ISCAS, it may be less likely that ISCAS Adjudicators will need to obtain a clinical expert opinion.

### **3.5 *Independence of clinical advice***

In some cases the Subscriber may have obtained independent clinical advice from informal or internal sources. There is the risk that this may be regarded by the complainant as a conflict of interest, particularly if the clinical advisor providing the clinical advice is known to the clinician against whom the complaint has been made. In such cases, ISCAS Adjudicators are more likely to seek an expert clinical opinion.

### **3.6 *Quality of independent clinical advice***

In some cases, independent clinical advice is obtained during Stage 1 or Stage 2 which does not address, or adequately address, the central concerns raised by the complaint. In such cases, ISCAS Adjudicators are more likely to seek expert clinical advice on the central matter of concern.

### **3.7 *Potential bias or inappropriate use of independent clinical advice***

Where independent clinical advice has been sought by the Subscriber at Stage 1 or Stage 2 but there is evidence of potential bias or an inappropriate choice of independent advisor, ISCAS Adjudicators may be more likely to seek a clinical expert opinion.

## **4. Good practice for Subscribers**

4.1 Subscribers who agree the Heads of Complaint with complainants at the start of the complaint handling process are more likely to be able to identify whether independent clinical advice is required.

4.2 Subscribers may consider it appropriate to obtain independent clinical advice. Subscribers who agree in consultation with the complainant the questions to be covered in the independent clinical advice are more likely to receive advice that covers the key issues for the complainant. This is also likely to increase trust on the part of the complainant, reassure them that their concerns have been taken seriously, and help them to feel actively involved in the complaints handling process.

4.3 Subscribers who can demonstrate the independence of the clinical adviser are more likely to gain trust from the complainant that the content of the advice, even if adverse in the view of the complainant, has managed to answer the queries in a way that is fair.

4.4 Subscribers who obtain independent clinical advice that provides only a general overview of the quality or reasonableness of the clinical care provided, rather than advice on agreed Heads of Complaint, are unlikely to obtain advice that will be sufficiently focused on the substance of the complaint. This could lead to the complainant being concerned that the subscriber has not taken genuine action to address their concerns.

4.5 Subscribers who obtain independent clinical advice from an adviser who is not connected with the clinic or hospital in which the care was provided are less likely to receive concerns from a complainant that the advice is biased.

4.6 ISCAS Adjudicators are unlikely to have the need to instruct an expert where Subscribers have taken the following steps:

1. Subscribers have informed complainants whether they consider it appropriate to obtain independent advice to be able to respond to the complainant's concerns.
2. Subscribers have explained the degree and nature of the independence of the clinical expert adviser.
3. Subscribers have agreed with the complainant the nature, designation and seniority of the person providing independent clinical advice and have informed complainants about any conflict of interest with the treating clinician.
4. Subscribers have agreed with the complainant the Heads of Complaint upon which independent clinical advice will be sought.
5. The independent clinical adviser had been asked to respond to the relevant Heads of Complaint rather than providing a general overview.
6. The questions to be asked of the independent clinical adviser had been agreed with the complainant in advance.
7. The independent clinical advice has been disclosed in full to the complainant.
8. The independent clinical advice has been shared with ISCAS Adjudicators.

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