

House of Commons

Health Select Committee
Inquiry into
Complaints and Litigation

Memorandum from



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Executive Summary

Effective handling and resolution of complaints is a **cornerstone of good healthcare delivery**. It helps ensure that **patient satisfaction** with the overall service is not adversely impacted and, if **intelligent corrective action** is taken, allows for **service learning and improvement**.

The **Independent Sector Complaints Adjudication Service** (ISCAS) has for over ten years operated by reference to a well-established Code of Practice for Handling Complaints

(http://www.independenthealthcare.org.uk/index.php?option=com_phoca_download&Itemid,131/download,295/id,14/view,category/) across the independent sector, the management of which is undertaken by Independent Healthcare Advisory Services (IHAS). This includes the provision of a small dedicated secretariat.

Key learning over those 10 years is as follows:-

1. A **Code of Practice**, owned by IHAS members, summarises the importance of effective complaints management, and sets out **consistent standards** to be achieved by members.
2. A **three-stage complaints process** has been running for over ten years. The stages are: Stage 1, *Local* Resolution; Stage 2, *Organisational* Resolution; Stage 3, *Independent External Adjudication* (these are sometimes referred to as *In, Up and Out*). ISCAS manages Stage 3.
3. A three-stage complaints process maximises the ability of healthcare service providers to take ownership of complaints (in Stages 1 and 2), and resolve them within the provider. It thus **minimises the number of complaints coming through to Stage 3** (adjudication).
4. External adjudication has a **high success rate** in resolving the more difficult or intractable complaints.

5. Adjudication is **not focused on a 'win' or 'lose' approach** and, ideally, does not seek to blame or to discredit any of the parties but rather to explain what has happened.
6. The main aim of adjudication is to leave all the parties with a better understanding and insight into the issues that have been raised, which leads to a greater focus on the lessons learnt.
7. The outcomes can include an apology being offered or compensation or recommendations being made, or it can include all three remedies. **Financial compensation** (with a maximum set at a sensible level) awardable by the Adjudicator **can help reduce litigation**, and in fact becomes a viable alternative - especially for service complaints.
8. Medical Defence Organisations acknowledge the benefits that this system has brought forward.
9. **Private Patients treated within the NHS have no ability to complain to any external body about their treatment.** The NHS Complaints Ombudsman has no jurisdiction, and NHS PPU's are not members of ISCAS. With the removal of the cap on private income, this will be a developing problem.

IHAS would welcome an opportunity to give evidence in person should this be helpful to the Committee.

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1. Introduction

1.1 ISCAS membership comprises members and specialists across the health care industry in all four countries, to share a unique level of knowledge, experience and understanding on the effective management of complaints about any aspect of service provided within the healthcare units of its members.

1.2 Almost all members of ISCAS also subscribe to services from IHAS, which provides advisory and support services in the areas of regulatory compliance and policy setting.

1.3 IHAS core objectives are to:

- facilitate effective communication between subscribers, the government and external organisations
- strive to develop and drive policy advancement through shared subscriber input and consultation
- deliver focused, practical information and guidance in all areas of regulation and policy, sharing and distributing knowledge

1.4 IHAS's primary focus is in the area of operational policy and the regulation of the sector. As such it seeks to:

- Facilitate the development of operational policy, through consultation with its member organisations
- Provide its members with accurate and timely information regarding regulatory and policy matters
- **Administer an independent complaints and adjudication process and promote best practice**
- Develop a range of quality initiatives to raise awareness of good practice within independent providers
- Represent independent health care providers to government, external organisations, and the public, providing a channel for effective communication and dialogue

1.5 The terms of this inquiry refer to NHS complaints. However it is important to consider complaints across the entirety of the sectors involved in the provision of healthcare (NHS and independent) as the patient pathway will cross both sectors. In addition the experience and achievements of managing complaints in the independent sector can provide a comparator for the NHS. This response sets out some of the key successes and achievements of the IHAS Code of Practice. IHAS would however welcome an opportunity to give evidence in person should this be helpful to the Committee.

2. Ten Years Experience

2.1 For over 10 years, patients using the services of the independent sector have had the benefit of an effective complaints resolution procedure from organisations signed up to the Code of Practice and the independent adjudication service. The Code of Practice was commenced following the work of the Health Select Committee in 1999 in which the private sector was criticized for not having a complaints system that could be recognised by patients. That situation is dramatically different today. A recent chair of the Care Quality Commission described the IHAS complaints process, and the ISCAS process as “.....*better than any system operating in the NHS*”.

3. What is the IHAS Code of Practice?

3.1 The Code of Practice was agreed by the sector over 10 years ago and is now 'hosted' by IHAS. ISCAS has been set up as a member-owned co-operative, operated by its members who are independent healthcare providers. ISCAS operates the third stage of the complaints resolution procedures of the IHAS Code of Practice:

- Stage 1 - local resolution (hospital/clinic level)
- Stage 2 - Internal review (CEO/Board of Trustees)
- Stage 3 - Independent External Adjudication

3.2 The three stages are essential in managing complaints and achieving resolution for the vast majority without accessing the final adjudication stage. The

second stage allows an organisation to review a complaint outcome at senior level and is one step removed to make sure all options have been exhausted to resolve the complaint.

3.3 What sets the IHAS Code apart from its NHS equivalent is the comprehensive and progressive three-stage process of complaints management, as opposed to the two-tier approach seen in the public sector. The Code of Practice emphasises a preference for Stage 1 (local) resolution but incorporates a 'safety-net' Stage 2 (internal review), which is still conducted under the local complaints procedure. Only once the internal processes of the first two stages have been exhausted does an independent external adjudication, overseen by the ISCAS whose secretariat is supplied by IHAS, become activated.

3.4 The purpose and outcome of adjudication is principally to offer answers and then, if possible, to put things right in the most appropriate way. The complainant benefits by not only being offered a deeper insight into the issues raised but may also receive a financial award in recognition of any failings. Importantly, for complainants, there is no cost to them through participation and, therefore, no risk involved. Additionally, the decision to engage in the adjudication process does not preclude the complainant from pursuing litigation at a later stage if that is what they wish to do although it is important to remember that the outcome of the adjudication process is likely to be taken into account by any subsequent judgment.

3.5 The Adjudicator can review the case by reference to the correspondence and clinical records, or convene a full panel hearing for the case. This would include attendance by the complainant. The panel is made up of the Adjudicator and 2 expert witnesses and may include a lay person where necessary, all facilitated by the secretariat. However many cases are completed through a case file review and may or may not require expert advice. The Adjudicator produces a comprehensive report for the complainant and the healthcare provider.

3.6 The Code provides clear expectations and principles in managing a complaint (http://www.independenthealthcare.org.uk/index.php?option=com_phoca_download/Itemid,131/download,295/id,14/view/category/) and has retained

timescales to meet the expectations of complainants. In addition complaint managers have best practice guidance based on shared learning from organisations.

4. Effective local resolution

4.1 In 2008 one major provider had 1,573¹ stage 1 complaints and, of these, 38 needed to be escalated to stage 2 internal review. From these 38 cases only 3 cases could not be resolved and therefore moved to independent adjudication with ISCAS.

4.2 The independent sector healthcare providers have a culture that actively captures patient's complaints and uses the information to improve services and patient satisfaction. A good complaints system is seen as a sign of a quality service.

5. Funding the Adjudication Process

5.1 The subscribers to ISCAS pay an annual fee for the secretariat services and support from IHAS. This base cost is shared across all members on a sliding scale according to size. Compliance with the IHAS Code and the Independent External Adjudication scheme is the basis of membership of the ISCAS.

5.2 Each case accessing adjudication incurs a cost, which is paid for by the individual organisation. The allocation of the costs of complaints to an organisation can help to facilitate an effective local resolution in the majority of cases and learning lessons from previous experiences. In addition the Code of Practice allows the Adjudicator to award an ex gratia payment to a complaint in recognition of any inadequacies identified by the complaint which is paid by the individual organisation. The complainant does not contribute to the financial costs of adjudication.

6. ISCAS Annual Report Highlights

6.1 ISCAS publishes an annual report highlighting complaints activity for the year and setting out key learning and other messages from the Adjudicator and the secretariat

(http://www.independenthealthcare.org.uk/index.php?option=com_phocadownload/Itemid,131/download,265/id,14/view/category/). The secretariat saw a 33% increase in complainant contact for 2009 and looks set to see a continued increase for 2010.

¹ A rate of 1 complaint per 115 admissions.

However, this does not equate to a 33% increase in complaints to each member, as the membership continues to grow.

6.2 The majority of these contacts are at stage 1 of the procedure with the provider and generally involve the complainant seeking independent clarification of the way forward, or signposting to the provider organisation. Of 184 contacts in 2009 with the ISCAS secretariat, only 7 of those continued to adjudication as the provider was able resolve the majority of complaints locally.

6.3 The secretariat continues to receive enquiries from complainants who have been treated within the NHS and experience real difficulty in accessing clear information about how to complain about the service provided by the NHS hospital. In particular, IHAS has raised the issue of NHS Private Patient Units (PPUs) whose complainants have no access to any form of independent review. This is because a complaint about private medical care and treatment cannot be referred to the health service ombudsman and NHS PPU's are not subscribers to ISCAS which leaves a significant gap in a complaints process for these complainants.

6.4 There has been a steady rise in the number of adjudication cases, with 22 cases held to date in 2010. This may indicate a growing recognition by the sector of the benefits of the adjudication process. Since 2006, there has been a significant rise in the number of Heads² of Complaint across the industry, and this figure has increased again in 2009. In part, this reflects an increase in the number of complaints received but it is also indicative of greater detail in the identification of the individual issues that make up a complaint.

6.5 The benefits of the increase in the analysis of complaints, which provides a more specific identification in the Heads of Complaint, is that the response is more complete, and better targeted to the complainant and to the member organisation complained against.

² 'Heads of Complaint' are the number of issues raised within a complaint identified by the complainant or the adjudicator

6.6 As well as providing a resolution process for complainants, one benefit of the adjudication service is to resolve the complex burden placed on providers by particularly difficult or intractable cases.

6.7 Complex cases often demand a disproportionate amount of management time to resolve but the timely use of adjudication offers a solution both to complainants and to providers. One of the key benefits of the service is that the Adjudicator is able to offer a more distanced perspective of the issues which focuses on the broader picture while, simultaneously, scrutinising the case in detail. The service has a high success rate in resolving the more difficult complaints.

7. Monitoring ISCAS

7.1 The secretariat meets on a regular basis with the Adjudicator and with specific representatives from the sector, to review the adjudication process and how it is working. This results in development opportunities and keeping up to date with the issues facing provider organisations as well as complainants. It also serves to assist in the smooth running of the service to make sure it delivers to both the complainant and the provider. Recently ISCAS started a more streamlined report for less complex cases which provides a more concise focussed report for the complainant and reduced costs to the organisation. New organisations wishing to join ISCAS must also make a declaration of compliance with the Code of Practice which can then be monitored by the secretariat.

8. Sharing experiences and practice

8.1 ISCAS shares learning and best practice with organisations through the IHAS monthly update briefing paper issued widely to all subscribers. This contains relevant references to current complaint news and a monthly message from the Adjudicator. (<http://www.independenthealthcare.org.uk/index.php/?ihas-update-december-2010.html>)

8.2 The annual report also contains a summary of recommendations based on thematic outcomes of the adjudication cases for the year. These provide practical learning points for organisations to improve their practice in managing complaints and use learning points from individual organisations (although these do not identify the organisation).

8.3 The success of ISCAS is becoming increasingly known amongst a wider group of independent healthcare providers, with new organisations wishing to subscribe and adopt a well established Code of Practice. This includes stand-alone smaller organisations that need to offer an independent review process to complainants. For example, recently a small private GP practice has recently joined ISCAS to ensure it meets required standards for providing its patients with an effective complaints procedure.

9. Recognition of the Code of Practice

9.1 The Code of Practice was refreshed and launched in 2009, building on nearly ten years experience, following a review by the IHAS working group made up of leaders with experience and knowledge of successful complaints handling. The then Care Quality Commission (CQC) Chair, Baroness Barbara Young, afforded the revised edition a ringing endorsement, telling delegates: *'I would encourage the independent sector, both providers and doctors, to embrace this Code as it is currently better than any system operating in the NHS.'* It was the second stage of the procedures that Baroness Young singled out for praise, as a robust buffer between the ultimate Stage 3 procedure and a first line of management which is not always as dispassionate as it could be, at the Stage 1 phase. ISCAS also welcomed the positive support of the revised Code of Practice from the Medical Defence Organisations who attended the launch; the MDU, MPS and MDDUS.

9.2 CQC continue to recognise ISCAS by signing up to an Operating Protocol with IHAS which means complainants are better signposted to the right procedures and which facilitates sharing of information with the secretariat. This year Health Inspectorate Wales (HIW) has also signed a similar Operating Protocol recognising the value of the Code. HIW have strongly recommended new applicants for registration as independent providers in Wales to join ISCAS to demonstrate compliance with the regulations governing complaints management.

9.3 The self regulation scheme Treatments You Can Trust for Botulinum Toxin and Dermal Fillers has incorporated the complaints management system run by IHAS for registrants of the scheme. Patients having Cosmetic Injectable treatments have previously not had access to a Complaints system (www.treatmentsyoucantrust.co.uk).

10. Providing information for patients and the public

10.1 The ISCAS Guide for Patients, supported by the Patient's Association, about making a complaint continues to be very much appreciated by patients from feedback to the secretariat. With the contributions of the working group, the guide has been reviewed to ensure it is up to date and continues to be an easy read and source of essential information for patients and the public resulting in a new publication being planned for early 2011. The web page for members of the public is dedicated to complaints information and often receives comments of support and appreciation from patients for its clarity.

11. Adjudication versus Litigation in the handling of complaints

11.1 Before making a decision about whether to pursue litigation or adjudication, complainants should be encouraged to consider which is the most appropriate route - based on the nature of the case and on their desired outcome. The different options deliver different benefits.

11.2 Time spent at this early stage in identifying the core objectives of the complainant and the most suitable resolution process can save time; reduce cost and deliver more meaningful benefits for all parties involved. The secretariat will always encourage a complainant to undertake this assessment.

11.3 **Litigation** is the preferred route where there are issues of negligence and where there is a potential claim of loss and damage because, normally, the principal aim of the complainant is to achieve compensation. It is essential, however, before proceeding with litigation that a detailed risk/benefit analysis is carried out as part of the process of evaluating whether there is merit in the case. This is because the costs of proceeding may not be outweighed by the compensation which is sought. In addition, the experience of litigation - which may run over many months or even years - can be a gruelling and challenging one for the complainant and should be considered carefully. These issues need to be factored into the evaluation of the options as there may be greater value in seeking alternative possibly more rapid solutions that could bring equally satisfying benefits to the complainant.

11.4 The fundamental difference between litigation and adjudication is that litigation is an adversarial process where the parties engage in argument with each other in order to 'win' the case. The process is driven by, and focused upon, this central goal which aims to persuade those in judgement of the validity of the case being argued. The way in which information is disclosed is managed strategically in order to gain advantage, rather than to achieve openness and transparency and this impacts on the outcome of litigation which, essentially, is focused on financial compensation rather than on lessons learnt.

11.5 Litigation is a lengthy and costly process but it does not always deliver what the complainant most wants which might include an explanation, an apology; a financial remedy or more frequently with health complaints, positive action to ensure that the same mistake is not repeated. The over-emphasis on achieving compensation can eclipse the focus on these wider objectives.

11.6 **Adjudication** as an alternative method of complaint resolution offers a number of benefits which reflect the fact that it is a non-adversarial process designed to conduct a detailed investigation of the facts and sound evaluation of the evidence in an unbiased manner. All the facts are set out in a transparent way and the judgement should be linked closely to the evidence base, and be well reasoned and fair to all parties. Adjudication is not focused on a 'win' or 'lose' approach and, ideally, does not seek to blame or to discredit any of the parties but rather to explain what has happened. The outcomes can include an apology being offered or compensation or recommendations being made, or it can include all three remedies. The main aim of adjudication is to leave all the parties with a better understanding and insight into the issues that have been raised, which leads to a greater focus on the lessons learnt. The emphasis on lessons learnt is a significant benefit of the adjudication process for those complained against because previously hidden systemic weaknesses may be identified which can lead to meaningful solutions being offered and implemented to introduce improvements.

11.7 As indicated earlier, the purpose and outcome of adjudication is principally to offer answers and then, if possible, to put things right in the most appropriate way. The complainant benefits by not only being offered a deeper insight into the issues

raised but may also receive a financial award in recognition of any failings. Importantly, for complainants, there is no cost to them through participation and, therefore, no risk involved.

11.8 The decision to engage in the adjudication process does not preclude the complainant from pursuing litigation at a later stage if that is what they wish to do although complainants are encouraged to treat the adjudication as final. It is important to remember that the outcome of the adjudication process, particularly an award of compensation, is likely to be taken into account by any subsequent judgment.

11.9 The clear distinction, therefore, between litigation and adjudication is that adjudication is focused on answers and explanations; on learning from the mistakes; on making recommendations to improve future service delivery as well as on compensating the complainant where appropriate.

11.10 Above all, adjudication is able to offer all these benefits at a significantly lower cost than litigation.

Further Information

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