



Law Society
of Scotland

Consultation Response

Patient Safety Commissioner role for Scotland

27 May 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Health and Medical Law sub-committee welcomes the opportunity to consider and respond to the Scottish Government consultation: Patient Safety Commissioner role for Scotland.¹ The sub-committee has the following comments to put forward for consideration.

General Comments

We welcome the opportunity to comment on proposals to establish the role of Patient Safety Commissioner. Patient safety depends on a vast and complex system. We agree that the Patient Safety Commissioner role must add further benefit for patients in Scotland, rather than duplicating what already exists. Such duplication could lead to additional cost and administrative burden for Health Boards, which are already under pressure as a result of COVID-19. There must be a clear public interest justification for introducing a further role, alongside existing and well-established oversight in this area.

Subject to the above comments, the role of Patient Safety Commissioner is an important one as it has the potential to create change where there have been failures in the past and contribute to a culture of improvement. The role should be independent of both political influence, and the NHS. It should also have clear stipulations regarding conflict of interest disclosure, to avoid multi-level conflict of interest playing a role in undermining patient safety.

In order to be effective, the Patient Safety Commissioner must have clearly defined powers set out in legislation, including powers to obtain relevant information and intelligence from health boards. These powers must be accompanied by effective sanctions available to any commissioner to enable them to fulfil their role and ensure accountability. There is a risk that if the role of Patient Safety Commission is not afforded suitable powers and sanctions, it may be ineffective in achieving the aims of championing the value of listening to patients and promoting users' perspectives in seeking improvements to patient safety and may not lead to measurable change.

¹ <https://consult.gov.scot/healthcare-quality-and-improvement/patient-safety-commissioner-role-for-scotland/>

It is also essential that the Patient Safety Commissioner is properly resourced, and that proper consideration is also given to the resource implications of creating such a role for other organisations including Health Boards. It is likely that Health Boards will need to put new administrative systems in place to respond to issues raised by the Patient Safety Commissioner. Such additional costs can only be justified if the creation of a Patient Safety Commissioner role leads to a clear positive impact on patient care. The creation of the new role of Patient Safety Commissioner must not detract from necessary improvement work on a local level, which has the potential to identify and prevent harm.

We would suggest that a review of existing oversight provisions should accompany the creation of the Patient Safety Commissioner role, with particular reference to the ways in which the new role would interact with existing complaints systems and patients' ability to make claims for clinical negligence. Consideration should be given to the risk of the Patient Safety Commission being asked to consider vexatious or ill-founded complaints, and to Health Boards and their staff being subject to a multiplicity of complaint processes in respect of the same matter. Safeguards should be put in place to mitigate against these risks and to ensure that all parties, including complainers, have reasonable expectations about the role and powers of the Patient Safety Commissioner. What also seems to be absent from the consultation is how the relationship between the Patient Safety Commissioner and the Crown Office and Procurator Fiscal Service (COPFS) would operate.

In Scotland, the COPFS is responsible for investigating all sudden, unexpected, unexplained and suspicious deaths. Relevant deaths will be reported to them and thereafter, such deaths could if it were appropriate be the subject of a public inquiry in Scotland most commonly – a Fatal Accident Inquiry (FAI) held under section 4 of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (2016 Act). Since the scope of the deaths to be reported is not limited, deaths falling within the Patient Safety Commissioner's remit may also be reported to COPFS and be subject to a FAI where the circumstances are appropriate.

A FAI may be held into the death of a person which occurred in Scotland if the Lord Advocate (a) considers that the death (i) was sudden, suspicious or unexplained, or (ii) occurred in circumstances giving rise to serious public concern, and (b) decides that it is in the public interest for an inquiry to be held into the circumstances of the death.

We appreciate that most of the responsibilities of the Patient Safety Commissioner lie in safety issues and not necessarily deaths. However, there is already a degree of correlation between patient safety and the investigation of deaths in certain circumstances. Under the Organisational Duty of Candour Procedure, there are processes that require to be applied by law where there has been an unintended or unexpected incident that results in death or harm. The consultation document notes that "The purpose of the legislation is to make sure an unintended or unexpected incident has happened, apologise, involve them in meetings about the incident, review what happened so they can find areas that could be improved, and learn from the incident (taking account of the views of relevant people)."² Much of that responsibility echoes the scope

² <https://consult.gov.scot/healthcare-quality-and-improvement/patient-safety-commissioner-role-for-scotland/>, chapter 4

of a FAI in seeking what findings form part of the sheriff's determination under section 26 (2) of the 2016 Act. We would suggest in setting out the role for the Patient Safety Commissioner that this relationship is recognised and understood as it may involve liaison and co-ordination.

Consultation Questions

Question 1: Do you agree that the Patient Safety Commissioner role should first focus on medicines and medical devices, as set out in the Cumberlege Review?

We have no specific comments.

Question 2: If the role were to expand in the future, which specific aspects of patient safety do you feel the Patient Safety Commissioner should focus on?

We have no specific comments.

Question 3: Do you believe that the Patient Safety Commissioner should be independent of the Scottish Government?

Yes. See our general comments, above.

Question 4: Do you believe that the Patient Safety Commissioner should be independent of the NHS?

Yes. See our general comments, above.

Question 5: Who should the Patient Safety Commissioner be accountable to?

As above, the Patient Safety Commissioner should be independent. Whilst accountability is important, it must not undermine the independence of the role. Careful considerations should be given to establishing the Patient Safety Commissioner role in a way which strikes an appropriate balance in this regard. The Patient Safety Commissioner should be under a statutory duty to involve patients in their work.

Question 6: How much do you know about existing policies and organisations already in place (listed in table 1 on page 11) to support patients' voices to be heard within the healthcare system?

We have no comment.

Question 7: In your view, despite the existing ways patients can make their voices heard (listed in table 1 on page 11), why do you think people still feel that this is not happening?

No comment

Question 8: In your view, what should the main functions of the Patient Safety Commissioner be?

We have no specific comments.

Question 9: What skills and expertise do you think the Patient Safety Commissioner needs to carry out their role?

The skills and expertise of the Patient Safety Commissioner and the team established to support the role will be crucial in differentiating the Patient Safety Commissioner role from existing oversight bodies, and therefore in establishing the value of the role alongside these existing organisations.

Question 10: What support do you think the Patient Safety Commissioner would need?

See our response to question 9, above.

Question 11: Do you think that the Patient Safety Commissioner role should be established in law?

Yes. To effect measurable change and ensure accountability, the Patient Safety Commissioner should be established in law and have clearly defined statutory powers.

Question 12: What are your views on how creating a Patient Safety Commissioner might affect the protected characteristics of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, and sex?

We have no specific comments.

Question 13: The Fairer Scotland Duty places a legal responsibility on certain public bodies in Scotland to actively consider how they can reduce inequalities caused mainly by people's financial situation. What are your views on how having a Patient Safety Commissioner might affect this inequality?

We have no specific comments.

Question 14: If you live in an Island Community, what are your views on how having a Patient Safety Commissioner might affect access to safe, high-quality public services where you live?

We have no specific comments.

Question 15: What are your views on how having a Patient Safety Commissioner might affect respecting, protecting and fulfilling the rights of children and young people as set out in the UN Convention on the Rights of the Child?

We have no specific comments.

Question 16: Do you have any further comments on the Patient Safety Commissioner role that you haven't covered in your responses to the previous questions?

We have no further comments.



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