



Law Society
of Scotland

Written evidence

Patient Safety Commissioner for Scotland Bill

December 2022



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.

We welcome the opportunity to consider and respond to the Scottish Parliament's Health, Social Care and Sport Committee's call for views on the Patient Safety Commissioner for Scotland Bill.¹ We have the following comments to put forward for consideration.

Questions

What are your views on the establishment of a Patient Safety Commissioner to scrutinise safety issues, deliver systematic improvements and amplify the patient voice in the provision of health care?

The establishment of an independent Patient Safety Commissioner (PCS) has the potential to provide a clear path to highlighting safety issues, improving communication, and working collaboratively across the entire healthcare market to improve patients' experiences.

We note that the report of the Independent Medicines and Medical Devices Safety Review (“the Cumberledge Report”) found that patients often struggle to successfully navigate healthcare complaints procedures to raise reports of harm,² and anecdotally we are aware that many give up and litigate before getting answers to their questions.

We also note that the Cumberledge Report identified difficulties in the present system in identifying and responding to adverse trends, particularly where bodies receiving reports of patient harms are under limited requirements to communicate and work co-operatively.³ At present, there is no obvious route to ensuring that health boards and other healthcare providers collaborate to identify and resolve safety issues.

¹ Patient Safety Commissioner for Scotland Bill – Bills (proposed laws) – Scottish Parliament | Scottish Parliament Website

² Cumberledge, J (2020) First Do No Harm: The Report of the Independent Medicines and Medical Devices Safety Review. Available at https://www.immndsreview.org.uk/downloads/IMMDSReview_Web.pdf, para 2.127 at pages 63

³ Ibid

The establishment of a PCS may contribute to addressing the above identified issues in the health care sector, but much will depend on the detail of the role and how it is delivered in practice. We have previously highlighted⁴ that patient safety depends on a vast and complex system, and that any new role must add further benefit for patients in Scotland, rather than duplicating what already exists.

What are your views on the proposed role and responsibilities of the Patient Safety Commissioner?

An independent PCS may give patients and members of the public a clear route to raising concerns, whether they have received care from independent health care provider, GP and dental practices, a local pharmacist or NHS board. Each organisation will be subject to the same processes and procedures of investigation. The development of consistent investigation policies is key to promoting trust in the role of the PCS.

We welcome the statutory duty to involve patients' representatives in the work of the PCS via the advisory group provided for in section 16 of the Bill.

What are your views on the proposed powers of the Patient Safety Commissioner?

To ensure accountability, the PSC must be established in law and have clearly defined statutory powers including powers to obtain relevant information and intelligence from health boards. The proposed powers are necessary to ensure compliance across the wide range of healthcare providers. The proposed power in section 14 for the PSC to report a failure to supply information to the Court of Session which may then make an enforcement order is an important mechanism to ensure enforceability.

Independence is crucial if the PSC is to be trusted to hold organisations to account, particularly in light of the findings of the Cumberlege Report which indicated that patients have lost trust in those in positions of authority.⁵

What are your views on the appointment process for the Commissioner and the funding being provided to enable them to carry out their role?

We have no specific comments on the appointment process or the funding proposals. We note, however, that it is essential that the Patient Safety Commissioner is properly resourced.

4 21-05-28-hea-patient-safety-commissioner-role-for-scotland.pdf (lawscot.org.uk)

5 Cumberlege, J (2020) First Do No Harm: The Report of the Independent Medicines and Medical Devices Safety Review. Available at https://www.immndsreview.org.uk/downloads/IMMDSReview_Web.pdf, para 2.8 at pages 19

We note that the Financial Memorandum accompanying the Bill indicates that “The Bill is expected to have minimal or no financial impact on other bodies, individuals or businesses.”⁶ It is not clear that full consideration has been given to the likely resource implications for other organisation including Health Boards, who may need to put new administrative systems in place to respond to issues raised by the Patient Safety Commissioner. While Health Boards continue to operate under pressure as a result of COVID-19, it is important that resource implications arising from the creation of the new role of Patient Safety Commissioner do not detract from necessary improvement work on a local level, which has the potential to identify and prevent harm.

Would you like to see any changes to the Bill? If so, what?

There are a number of areas in which we would like to see clarification.

In circumstances where the PSC receives evidence highlighting concerns regarding individuals involved in criminality or who have seriously impaired fitness to practice, it is not clear how this would be addressed in terms of further investigation by their employer, regulatory body or Police Scotland.

It is also not clear how the relationship between the Patient Safety Commissioner and the Crown Office and Procurator Fiscal Service (COPFS) would operate. The Lord Advocate and COPFS have a role in a range of situations which may potentially relate to patient safety, including in relation to prosecutions under sections 2 and 3 of the Health and Safety at Work Act 1974 where there is an alleged failure ensure that employees / other persons (including patients) are not exposed to unnecessary risks to their health and safety, and where safety issues may have led to deaths which are also reportable to COPFS and may lead to a Fatal Accident Inquiry (FAI) held under section 4 of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016. There is a risk that resources may be spread too thinly, particularly in light of current pressures on organisational budgets and the justice sector.⁷ There is also a risk that that the PCS may represent a route to sanctions without the burden and standard of proof which come with criminal proceedings. Careful consideration should be given to the role of the PCS and the role of COPFS to avoid duplication.

The Bill would enable patients and other public members to refer issues to the PSC. Does the PSC envisage receiving whistle-blowing information from healthcare providers? If not, how would it deal with such information?

⁶ Financial Memorandum accessible (parliament.scot), at para 41

⁷ MSPs say more funding must be found for the justice sector to avoid deep cuts to staff and services | Scottish Parliament Website



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