

Introduction

1. The Independent Sector Complaints Adjudication Service (ISCAS) welcomes the opportunity to respond to the Committee's call for evidence on this Bill and Explanatory Memorandum. As per the Committee's request, ISCAS's response addresses the Bill's terms of reference namely:
 - Accept oral complaints
 - Undertake own initiative investigations
 - Investigate private medical treatment including nursing care in a public/private pathway
 - Undertake a role in relation to complaints handling standards and Procedures
2. ISCAS provides a complaints management framework for the independent healthcare sector incorporated in its Code of Practice in the four countries. Compliance with the Code maximises healthcare operators' ownership of complaints using local resolution procedures. The Code's Stage 3 adjudication affords dissatisfied complainants an independent review process with independent adjudication procedures. It gives providers closure of the complaints process, and a learning opportunity, at low cost.
3. ISCAS is managed by the Centre for Effective Dispute Resolution (Cedr) and is independent from the Trade Association AIHO which includes WIHA as part of its membership. WIHA members of AIHO are encouraged to be subscribers of ISCAS where they are treating private patients.
4. An Information Sharing Agreement is in place between ISCAS and Healthcare Inspectorate Wales (HIW). This is currently in the process of being updated.
5. Accompanying this consultation for reference are the suite of ISCAS documents that are available to all WIHA Subscribers. These are the ISCAS Code of Practice for Complaints Management (2017), the Patients' Guide to the ISCAS Code, ISCAS Position Statements on Complaints Management and Practising Privileges (in draft) , Complaints Management: Fees (in draft) and the Guidance for Managing Unacceptable Behaviour by Complainants. These documents are all displayed on the ISCAS website - www.iscas.org.uk

6. An annual report on ISCAS activities is also produced. The 2016 report is attached. This contains the overall Adjudicator costs from January 2016 to March 2017 together with the Goodwill payments that are afforded to complainants during that period.
7. A copy of the 2016 ISCAS training programme is also attached
8. ISCAS provided evidence for the National Assembly for Wales Finance Committee on the consideration of powers for the Public Services Ombudsman (PSO) for Wales in January 2015 and also on the 18 January 2016. ISCAS also gave evidence to the National Assembly for Wales Finance Committee.

Terms of Reference Comments

9. *The general principles of the Public Services Ombudsman (Wales) Bill and the need for legislation to deliver the stated policy intention.*

ISCAS welcomes this Bill and believes it will be beneficial for patients who have a complaint spanning treatment across the NHS and independent healthcare sectors. It is right that the complaints process should follow the patient (citizen). The Ombudsman already has jurisdiction over complaints made about NHS-funded treatment provided by ISCAS subscribers in Wales.

10. *Provisions of the Bill which set out the new powers for the Ombudsman to: accept oral complaints;*

ISCAS tabulates how complaints can be submitted in both its Code and Patients Guide. Oral complaints would be accepted under the ISCAS Code.

11. *Provisions of the Bill which set out the new powers for the Ombudsman to: undertake own initiative investigations;*

ISCAS recognises the value of 'own initiative investigations' undertaken by Ombudsmen services to patients and hospital providers. All ISCAS subscribers are encouraged to recognise the Duty of Candour. ISCAS is in possession of leaflets on this subject from avma (Action against Medical Accidents). A session on this was provided during the 2016 ISCAS training session.

12. *Provisions of the Bill which set out the new powers for the Ombudsman to: undertake a role in relation to complaints handling standards and procedures*

This seems a good initiative in reducing variation in effective complaints handling standards and procedures across public services in Wales. ISCAS's understanding is that this does not apply to the independent healthcare sector. ISCAS has liaised with both HIW and the Welsh Government during the process of updating the 2013 ISCAS Code. Excellent comments were received and incorporated into the 2017 ISCAS Code. ISCAS provides annual training for subscribers on complaints handling and will be

implementing a more formal monitoring and improvement quality assurance system in March 2018 when ISCAS subscribers are asked to renew their subscription. ISCAS will be introducing a sign off of self-declaration at provider level to support good governance in complaint management.

13. *Provisions of the Bill which set out the new powers for the Ombudsman to: investigate private medical treatment including nursing care in a public/private health pathway;*

As per ISCAS's previous submission, we welcome this provision and believe it will be beneficial to patients in these circumstances. It is noted in the Explanatory memorandum para 3.44 the Ombudsman comments on a case that transgressed both the public and private sectors and the length of time it took for that case to come to Adjudication. In practice, the number of complaints against WIHA subscribers that reach an external review stage is very small. The number of complaints that involve combined NHS and private treatment is even smaller. ISCAS would be happy to establish an information sharing protocol with the Ombudsman as it does with Healthcare Inspectorate Wales in order to take this potential new power forward .

14. *The financial implications of the Bill (as set out in Part 2 of the Explanatory Memorandum).*

ISCAS recognises that the inclusion of investigations of the private health service element in a public/private health service pathway will have a small, but direct, financial impact on the Ombudsman, costing £17,535 over 5 years (Table 4, page 56). WIHA who are also giving evidence has calculated the cost of including such cases will make up less than 0.1% of the Ombudsman's yearly budget (using figures from 2017-18 found within the Summary Table on Page 45). We also note in Paragraph 11.11 of the Explanatory Memorandum that the Ombudsman could accommodate the additional cost within existing resources.

15. ISCAS recognises the right of the Ombudsman to serve a costs recovery notice on a private health service provider as a means of recovering additional costs incurred by the Ombudsman where the provider **has obstructed** the Ombudsman or done something which would amount to contempt of court if the investigation were proceeding in the High Court.

16. **Sections 21 and 22: Publicising reports and Section 24: Action following receipt of a report: investigation of a private health services provider.** ISCAS management produce quarterly a summary of the Adjudications finalised with the outcome, recommended learning and actions required which is presented to the ISCAS Advisory Governance Board. From this the themes for taking forward learning are recorded and included in the annual report.

17. Any potential barriers to the implementation of the Bill's provisions and whether the Bill takes account of them

ISCAS is not aware of any potential barriers to the implementation of the Bill's provision and notes that the Ombudsman is not seeking to extend to all private health service providers.

18. Whether there are any unintended consequences arising from the Bill

ISCAS do not anticipate any unintended consequences for independent healthcare providers arising from the Bill.

Conclusion

In summary, ISCAS subscribers support the extension of the PSOW's remit to investigate complaints that include both an NHS and a private health element of care.

We are also pleased to note that there will be a review of the legislation after five years from the date of the Act receiving Royal Assent and further reviews thereafter as Welsh Ministers deem appropriate.

ISCAS looks forward to providing oral evidence to the committee and responding to any further questions on the terms of reference.

29 November 2017

Annexes:

[ISCAS annual report 2016](#)

[ISCAS Code of Practice 2017](#)

[ISCAS Patients' Guide to the ISCAS Code](#)

[ISCAS Guidance for Managing Unacceptable Behaviour by Complainants](#)

[ISCAS Annual Training Conference](#)

ISCAS Position Statement

Complaints Management: Fees

ISCAS Position Statement on Fees:

The ISCAS position is that subscribing Independent Healthcare Providers (IHPs) are required to be transparent regarding fees charged to service users and that includes those fees charged by those granted practising privileges.

Background to position statement:

The Independent Adjudicators (IAs), engaged by ISCAS to adjudicate on complainants at stage 3 of the independent sector complaints process, identify areas of learning from adjudications. The IAs have identified that a theme in the heads of complaints of adjudications involves a lack of transparency on the fees charged to service users. This includes ambiguity surrounding the fees levied by the IHP and those levied by those granted practising privileges.

ISCAS Code and Practising Privileges Principles:

The ISCAS Code states that the Code includes complaints about those healthcare professionals granted practising privileges working in subscribing IHPs. Practising privileges are a well-established system of checks and agreements whereby doctors can practise in hospitals and clinics without being directly employed by them. There is more information in the ISCAS position statement on practising privileges.

Accountability Framework subscribing IHPs:

The Registered Person (IHP) retains the responsibility for the management and monitoring of systems and processes that support continuous quality improvement and learning, including complaint management. In addition, the Registered Person is responsible for providing written statements to service users regarding the amount and method of payment of fees (see below – CQC Regulations in England).

The Registered Person in the IHP is responsible for supervising the service provision (for example, Regulated Activities or similar such as diagnosis, treatment or surgery). The Registered Person (for example the Nominated Individual who may be at

corporate level) is responsible for ensuring 'fit and proper' Registered Managers are engaged.

The Registered Manager is responsible for engaging 'fit and proper' staff, including those with practising privileges. The Registered Manager is responsible for ensuring that those engaged to deliver the Regulated Activity for which the IHP is registered, operate in accordance with the approved policies and procedures of the IHP, including information on fees.

The Registered Manager must ensure that where there are hosting, renting or sub-contracted arrangements in place with other registered providers, the contract or service level agreement clearly defines the boundaries of responsibilities for the activities taking place, including information on fees.

As from 31st December 2017 the Private Healthcare Market Investigation Order 2014 (as amended) requires operators of private healthcare facilities to ensure that consultants (as a condition of permitting a consultant to provide private healthcare services at that facility) supply private patients with information about fees in writing, prior to outpatient consultations (see 22.3 below for detail on the information). As from 28th February 2018 operators of private healthcare facilities are required to ensure that consultants are provided with an appropriate template (approved by CMA) in order to disclose to a patient, prior to further tests or treatment, the costs and rationale for treatment (see 22.4 below for detail).

Relevant regulations:

The Care Quality Commission (Registration) Regulations 2009 make it clear that the provider (Registered Person) must be transparent about the costs of care and treatment. Regulation 19 states:

(1) Where a service user will be responsible for paying the costs of their care or treatment (either in full or partially), the registered person must provide a statement to the service user, or to a person acting on the service user's behalf (a) specifying the terms and conditions in respect of the services to be provided to the service user, including as to the amount and method of payment of fees; and (b) including, where applicable, the form of contract for the provision of services by the service provider. (2) The statement referred to in paragraph (1) must be (a) in writing; and (b) as far as reasonably practicable, provided prior to the commencement of the services to which the statement relates.

Extract on Fees Private Healthcare Market Investigation Order 2014 (as amended)

22. Information concerning consultants supplied to the information organisation and to private patients.

22.2 The operator of a private healthcare facility shall, as a condition of permitting a consultant to provide private healthcare services at that facility, require the relevant consultant to supply private patients with information in writing to be provided:

(a) as from 31 December 2017, prior to outpatient consultations, in accordance with article 22.3 and article 22.6; and

(b) as from 28 February 2018, prior to further tests or treatment, whether surgical, medical or otherwise, in accordance with article 22.4 and article 22.6; and shall provide the consultant with an appropriate template approved by the CMA for these purposes, in standard wording and in a clearly legible font.

22.3 Consultants must supply the following information to a patient prior to an outpatient consultation:

(a) the estimated cost of the outpatient consultation or consultations, which may be expressed as a range, so long as the factors which will determine the actual cost within the range are explained;

(b) details of financial interests of any kind, which the consultant has in the medical facilities and equipment used at the premises;

(c) a list of all insurers which recognise the consultant;

(d) a statement that insured patients should check with their insurer the terms of their policy, with particular reference to the level and type of outpatient cover they have; and

(e) the website address of the information organisation, and a statement in standard wording as agreed with the information organisation indicating that this website will give patients useful information on the quality of performance of hospitals and consultants.

22.4 The following information must be disclosed by a consultant to a patient prior to further tests or treatment:

(a) the reason for the relevant further tests or treatment;

(b) an estimate of the cumulative consultant cost of the treatment pathway which has been recommended. This should either include all consultant fees that will be charged separately from the hospital fee, or should include contact details for any other consultants whose fees are not included in the quote or, where applicable for self-pay patients, the total package price for treatment, where the consultant has agreed this with the operator of the relevant private healthcare facility;

(c) a statement of any services which have not been included in the estimate, such as those resulting from unforeseeable complications. Where alternative treatments are available but the appropriate treatment can only be decided during surgery, the estimate should set out the relevant options and associated fees; and

(d) the website address of the information organisation, and a statement in standard wording as agreed with the information organisation indicating that this website will give patients useful information on the quality of performance of hospitals and consultants.

22.5 For tests or treatment given on the same day as the consultation, the information specified in article 22.4 may be given orally rather than in writing.

22.6 Consultants shall supply patients with information in accordance with article 22.3 at the same time as the outpatient consultation appointment is confirmed with the patient, and other than in case of emergency shall supply patients with information in accordance with article 22.4 either within the two working days following the final (pre-treatment) outpatient consultation or prior to surgery, whichever is sooner.

22.7 Subject to Article 22.8, the operator of a private healthcare facility shall ask every privately-funded patient undergoing any inpatient, day-case or outpatient procedure, including diagnostic tests and scans at that facility, to sign a form confirming that the relevant consultant provided the information required by Article 22.4, and shall take appropriate action if there is evidence that a consultant has failed to do so. Alternatively, private hospital operators shall take equivalent measures, as approved by the information organisation and its members to monitor and enforce compliance with article 22.

22.8 The duties in Article 22.7 owed by the operator of a private healthcare facility do not apply in the case of a private patient who attends a consultation at premises which are not part of the relevant facility and who does not thereafter have treatment at the relevant facility pursuant to attending the consultation.

ISCAS Position Statement

Complaints Management and Practising Privileges

ISCAS Position Practising Privileges:

The **ISCAS position** is that subscribing Independent Healthcare Providers (IHPs) are required to provide a **single response** to a complaint. The response to complaints shall be based on an investigation that involves all relevant persons, whether those are staff who are engaged through an employment contract, agency / bank staff, or those who are granted of practising privileges. IHPs may need to obtain statements or feedback from those granted practising privileges, including on matters of the consent process, but this should be incorporated into a single response to the complainant from the IHP.

Background to position statement – poor practice:

The Independent Adjudicators (IAs), engaged by ISCAS to adjudicate on complainants at stage 3 of the independent sector complaints process, identify areas of learning from adjudications. The IAs have identified an increasing number of adjudications that show limited cooperation in the complaints process between the IHP and those medical practitioners that the IHP engages through practising privileges. Furthermore, the IAs have identified that poor documentation with regard to the consent process, as a theme in the complaints they are asked to adjudicate upon.

It is **not acceptable** for Consultants with practising privileges (or other persons engaged by the IHP) to write **separate responses** to complainants. IHPs that continue to permit multiple points of communication and responses to be forwarded the complainant will be deemed to be non-compliant with the ISCAS Code. As stated above the position of ISCAS is that the IHPs shall provide a single response to a complaint that incorporates feedback from all relevant clinicians including consultants with practising privileges.

ISCAS Code and Practising Privileges Principles:

The ISCAS Code states that the Code includes complaints about those healthcare professionals granted practising privileges working in subscribing IHPs. Practising privileges are a well-established system of checks and agreements whereby doctors can practise in hospitals and clinics without being directly employed by them. The

ISCAS Code also outlines the regulatory requirements and information about the system regulators with respect to complaint management.

The ISCAS Code does not provide details about how practising privileges operate in IHPs or information on the consent process. ISCAS and the IAs refer to the following documents published by the Association of Independent Healthcare Organisations (AIHO):

- Key Principles in Practising Privileges: <https://aiho.org.uk/689-aiho-practising-privileges-principles/file>
- Key Principles in Consent and Capacity: <https://aiho.org.uk/707-aiho-consent-and-capacity-key-principles-july-2017/file>

The Key Principles in Consent and Capacity states that *“it is important to have in mind that consent is a process which must be precisely documented”*. ISCAS position is that subscribers shall ensure those with practising privileges can answer the key question: *“would this record help me remember what happened, what was said and most importantly the thinking behind my decision if I am not here to continue the patients care, if there is an audit or if the matter comes to court in years to come?”*

Accountability Framework subscribing IHPs:

The relevant regulations of the four home countries define specific roles and responsibilities, as well as the meaning of practising privileges (see below – IH regulations). The Registered Person (IHP) retains the responsibility for the management and monitoring of systems and processes that support continuous quality improvement and learning, including the consent process and complaint management.

The Registered Person is responsible for supervising the service provision (for example, Regulated Activities or similar, such as diagnosis, treatment or surgery). The Registered Person (for example the Nominated Individual who may be at corporate level) is responsible for ensuring ‘fit and proper’ Registered Managers are engaged.

The Registered Manager is responsible for engaging ‘fit and proper’ staff, including those with practising privileges. The Registered Manager is responsible for ensuring that those engaged to deliver the Regulated Activity for which the IHP is registered, operate in accordance with the approved policies and procedures of the IHP, including complaints management and consent.

The Registered Manager must ensure that where there are hosting, renting or sub-contracted arrangements in place with other registered providers, the contract or service level agreement clearly defines the boundaries of responsibilities for the activities taking place, including complaints management and consent.

Relevant regulations and guidance - England:

In 1999 the Fifth Report of the House of Commons Health Select Committee (on the Regulation of Private and Other Independent Healthcare), identified that the directing body should accept responsibility for compliance with relevant regulation by those to whom it grants practising privileges.

In April 2002 The Private and Voluntary Health Care (England) Regulations 2001 (PVH) came into force and the requirements of “Registered Providers” with respect to practising privileges, were defined in regulations and the National Minimum Standards. In 2010 in England the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 came into force supported by the Essential Standards.

The current regulations in England (The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014) continue to include practising privileges within the employment definition, for the purposes of those regulations (that is, not with reference to any employment law). The current interpretation is that employment means:

- *employment under a contract of service, an apprenticeship, a contract for services or otherwise than under a contract, and*
- *the grant of practising privileges by a service provider to a medical practitioner, giving permission to practice as a medical practitioner in a hospital managed by the service provider,*
- *and “employed” and “employer” is to be construed accordingly;*

The Care Quality Commission guidance on the scope of registration states for practising privileges to apply:

- *.....it means that all aspects of the consultation must be carried out under the hospital’s management and policies. For example, being subject to the hospital’s requirements for clinical governance and audit, and the hospital’s policies and systems for complaints and for records (with the hospital owning*

the records). It means that the hospital takes responsibility for ensuring that essential levels of quality and safety are met. In practice, this may be done quite readily through granting 'practising privileges'.

- *....doctors (or other health care professionals) sometimes practise in outpatient departments under their own arrangements, with the hospital only acting as landlord. In that case, where the doctor or other health care professional is carrying on regulated activities independently of the hospital, the doctor or other health care professional must register [with CQC], as this does not amount to the exercise of practising privileges.*

Relevant regulations and guidance - Scotland:

The regulations in Scotland (The Healthcare Improvement Scotland (Requirements as to Independent Health Care Services) Regulations 2011) also define employment within the context of those regulations:

- *In these Regulations, references to employing a person include employing a person whether or not for payment and whether under a contract of service, a contract for services or otherwise than under a contract, and allowing a person to work as a volunteer; and references to an employee or to a person being employed are to be construed accordingly and includes a registered medical practitioner or registered dentist having practising privileges who provides medical or dental care within the independent health care service.*

Relevant regulations and guidance - Wales:

The regulations in Wales (The Independent Health Care (Wales) Regulations 2011) define practising privileges and state how employee is to be construed:

- *"practising privileges", in relation to a medical practitioner, refers to the grant to a person who is not employed in an independent hospital of permission to practise in that hospital.*
- *In these Regulations, unless the contrary intention appears, references to employing a person include employing a person whether under a contract of service or a contract for services and references to an employee or to a person being employed is to be construed accordingly.*

Relevant regulations and guidance – Northern Ireland:

The regulations in Northern Ireland (The Independent Health Care Regulations

(Northern Ireland) 2005) define practising privileges and state what employing a person includes:

- *“practising privileges” in relation to a medical practitioner, refers to the grant to a person who is not employed in an independent hospital of permission to practise in that hospital.*
- *In these Regulations, references to employing a person include employing a person whether under a contract of service or a contract for services.*