Welsh Assembly Government

# Putting Things Right Consultation and The NHS (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2010

A response by the Association of Personal Injury Lawyers
April 2010

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they deserve. Our members are mostly solicitors, who are all committed to serving the needs of people injured through the negligence of others. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues.

The aims of the Association of Personal Injury Lawyers are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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## Introduction

The Association of Personal Injury Lawyers (APIL) is committed to campaigning for improvements in the law for people who have suffered an injury, and we welcome any steps taken to bring about such improvements. We do, however, have serious concerns about some fundamental aspects of the proposed scheme, and whether injured people will receive that full and fair redress they need.

APIL was involved in the passage of the NHS Redress Act 2006, and produced briefings for Assembly Members during the passage of the NHS Redress (Wales) Measure. APIL has more than 200 members in Wales, some of whom have had experience of the current Speedy Resolution Scheme pilot project for clinical negligence claims.

In responding to this consultation we will raise some points of principle in relation to these matters, and then make some specific comments about the regulations, and suggest amendments to some of them.

## General comments

### Independence of the scheme

It is vital that any investigation into potential negligence must be independent from the body under scrutiny. We are concerned that the proposed new system in Wales would not have sufficient independence, as the NHS will be deciding on the level of complexity in every case, carrying out investigations into concern and even deciding if the Trust is liable. If the NHS runs the entire process, it could have a detrimental effect on public confidence in the system, as people may, with some justification, suspect self interest on the part of the investigating body. This could lead to injured people not raising grievances, as they can not be confident that the right outcome will be reached. If the regulations are not amended prior to being implemented, we would

have grave concerns about the level of service, and outcomes which would be achieved for injured people, by the proposed new system.

## Legal assistance

We believe that it is a fundamental right for injured people always to have access to the best possible legal advice, and this is even more important in the context of claims involving clinical negligence, which are often very complex. All concerns that are raised under the proposed scheme will be unique to the individual, and this makes it essential for experienced, independent legal professionals to be involved, to ensure that injured people receive the level of service they deserve. All cases will require legal assistance at some stage, to ensure that complainants can participate fully in any proceedings, and achieve a favourable outcome from the process.

The draft regulations currently include no provision for legal advice until the NHS Trust has concluded its investigation, and the complainant has received a copy of the report. The consultation document says, on page seven, that 'concerns will be graded when they are received so that the right level of investigation can be carried out'.

We believe that in all incidents, other those which are the most straightforward, legal assistance should be available to the complainant from the start of the scheme, until proceedings conclude. This is vital, as the issues involved need to be dealt with prior to an admission of liability from the Trust, which would not normally take place until an incident report has been issued. The involvement of a specialist legal professional at the outset of cases will ensure that the complainant receives the best possible independent advice. The facts of the case can then be established quickly, in order to prevent mistakes being repeated, and redress can be delivered to the complainant efficiently.

We also recommend that specialist legal professionals should be involved from the start of claims where the NHS Trust does not admit liability, regardless of the complexity of the case. Establishing liability in clinical negligence cases is an extremely complex aspect of the law, and it is unreasonable to expect an injured person to be left to deal with these issues without independent legal advice.

There may, of course, be some cases, with very low levels of complexity, and an admission of liability from the NHS Trust, where professional legal assistance is not needed until an offer of redress has been made. In these cases we would be comfortable for the Community Health Councils and advocates to continue to support complainants up to that point.

It is suggested that the legal assistance provided to complainants under the scheme will be provided only by members of the Law Society and AvMA panels, in line with the current arrangements for speedy resolution. APIL also runs an accreditation scheme, which sets high standards, before recognising excellence within the field of personal injury. There are currently 71 individually accredited APIL members in Wales, and nine specialise in clinical negligence. We believe that these practitioners should also be able to bring claims under in the new system. We would be pleased to provide further information regarding APIL's accreditation scheme which has been in operation since 1999, recognising expertise in the field of personal injury and is monitored by an independent oversight council.

## Current system in Wales

We understand that the current system for settling these types of claims in Wales, known as 'Speedy Resolution', is thought to have been successful while running as a pilot. An evaluation of the scheme carried out by the school of law at Swansea University recommended that the pilot project should be continued as a permanent scheme, although some suggestions for improvement were made. We find it strange

that, after the time was taken to establish the scheme, it is being replaced without implementing the suggested improvements first.

Anecdotal evidence from members in Wales who have experienced the Speedy Resolution pilot indicates that it has been working well, and may well improve with time. We understand that, as the first piece of primary legislation passed by the Welsh Assembly, the NHS Redress (Wales) Measure is politically important, but we would urge the Welsh Assembly Government to look again at Speedy Resolution, and consider changes to the scheme, prior to giving consideration to the implementation of the draft regulations.

### Staffing and financing

We are concerned that the proposed new system would include an entirely new level of staffing in the NHS in Wales. Trusts will have neither the money, nor the people with the expertise to cope with these changes in the short term. Clauses seven and eight of the regulations would compel responsible bodies to designate both a responsible officer and senior investigations manager to deal with claims brought under the new scheme. It is not certain whether money has been allocated for this in current budgets, but if new money needs to be found, at a time when budgets are stretched, this could jeopardise the new scheme. We would also question whether the new positions are even needed, as the speedy resolution scheme seems to have worked well without this layer of staffing. There is also bound to be a period when the people in these new positions will be undergoing training, which could have a detrimental effect on the service that injured people receive.

## Specific comments and suggested amendments to the regulations

### Clause 2 – Interpretation

The current definition of "concern" should be amended to read:

> '"concern" includes, but is not limited to, any adverse event arising from a patient safety incident;'

This new definition does not change the current definition, but would make it easier for patients to know if they were able to make a complaint about an incident. It is simpler for complainants to have one general category in this definition, rather than a series of definitions, which may cause confusion.

### Clause 7 – Responsible officer

We have already covered this issue above, and reiterate our concerns that the extra money that would be involved in establishing this new layer of management would be best served by providing redress to injured people. We would, therefore, question the need for this clause to be included in the regulations.

## Clauses 11 and 12 – Notification of concerns and persons who may notify concerns

We submit that the current heading of clause 12 should be removed for practical reasons, as our amendment means the sub-clauses can become part of clause 11. We would suggest inserting a new header after sub clause (b). The new clause would read:

'11 (3) a concern may be notified by –

(a) a person who receives or has received services from a responsible body

(b) any person who is affected, or likely to be affected by the action, omission or decision of the responsible body which is the subject of the concern

(4) A concern must be notified by –

(a) a non-officer member of a non-executive director of the responsible body; or

(b) a member of staff of the responsible body'

The new wording of sub-clause four (above) would place a duty on members of staff in responsible bodies to report a concern, even if it is not reported by the patient. This will improve accountability, as staff will be under no obligation to report a concern as the draft regulations have been drafted.

In sub-clause (7) of regulation 12, as currently drafted, the responsible body is only under an obligation to advise the patient that a concern has been notified and to involve the patient, or a representative, in the investigation. It is also vital that the patient, or the representative, is kept fully updated on the investigation on a regular basis, and given the outcome as soon as practicable.

In sub-clause (8) of the draft regulations, the responsible body decides whether or not it is in the interest of the patient to be informed of or involved in the investigation. In cases where a complainant has appointed a legal representative to act on his behalf, the representative should be informed of the decision not to inform the complainant about the process. The legal professional is independent from the process, and will, therefore, be able to give an opinion on whether or not the complainant should be involved in the process.

### Clause 14 – Matters excluded from consideration under the arrangements

Subsection (1) (i) of this clause should be deleted, as it contradicts one of the ideas of the scheme, which is to avoid expensive litigation taking place, while ensuring that the complainant receives redress. We understand that there may be a desire to prevent people from commencing proceedings in a court at the same time as bringing a claim under the new system, but believe that this would not be achieved by this sub-clause, as currently drafted.

This would also be a step backwards compared to the current situation in Wales. Under the 'Complaints in the NHS: A Guide to Handling Complaints in Wales', there is no ban on people who intend to litigate bringing a claim under the scheme, only those who have already officially started court proceedings.

### Clause 20 – Investigation of concerns

We believe that it is important, for confidence in the new system, to have the injured person involved throughout the process. While we recognise that sub-clause (c) means that the responsible body will have to give particular regard to the 'most appropriate method of involving the person who notified the concern with the investigation', we believe that the injured person must be involved in a structured way, and in a way that will lead to the reasons for the complaint being uncovered, and

lessons being learned. It is imperative, as we have said previously, that the injured person finishes this process satisfied that his complaint has been dealt with fully.

In sub-clause (g) the independent clinical advice should be available from a wider range of experts than those currently held on the All-Wales register. We believe that the best option here is to include the same experts who are available to give advice under the current Speedy Resolution system.

There is a drafting error in sub-clause (a), which should read:

> '(a) the carrying out *of* an initial grading assessment of the concern to assist in its determination of the level of initial investigation required and keeping this determination under review.'

There is a further drafting error in sub-clause (k), which should read:

> '(k) where the responsible *body* is an NHS body –'

**Clause 21 – Duty to consider redress**

Sub-clause (a) of this clause should be deleted, and sub-clause (b) can be joined to the remaining text. The clause would be joined to read '*provision of qualifying services exists or may exist, it must give consideration to the form…'*

We suggest that this amendment is made because, as we argue below, the 'limitation holiday' should not run from the time that the NHS admits liability, but from the date that the concern is raised. This will ensure that the limitation period does not expire prior to clause 27 coming into effect.

### Clause 22 – Response

It is vital that the injured person, or his representative, receives a copy of the incident report at the same time as the NHS, to ensure that the NHS is not at an advantage in the future stages of the scheme.

### Clause 25 – Redress – financial compensation

In addition to the cap on pain, suffering and loss of amenity set out in sub-section (1) of this clause, thought needs to be given to the way awards for special damages are approached. In a bereavement case, for example, damages awarded under sub-section (1) may be within the £20,000 limit, but loss of earnings and loss of financial support may be considerably higher. It will, of course, be impossible to know an accurate figure for these damages without detailed investigations, which will inevitably take time. We believe that the system as currently proposed would not be suitable for cases with high levels of special damages. In cases where special damages are to be awarded, there will, as a matter of necessity, need to be an ongoing dialogue between the NHS and the patient's legal representative, to ensure that the final offer accurately reflects the losses incurred.

## Clause 27 – Suspension of the limitation period

We suggest that sub-clause (2) is amended as follows:

> '(2) For the purposes of these regulations, a liability is to be considered as being the subject of an application for redress –
>
> (a) beginning with the date which was noted by;
>
> (i) the NHS body; or
>
> (ii) the complainant, or a legal representative active on the complainants behalf'

The 'limitation holiday' proposed in clause 27 is welcome, but is impractical, as set out here. The limitation period should be suspended from the date a concern is raised until the claim has been satisfactorily concluded. It is not fair that the limitation period should start to run after no later than three months after the NHS has made an offer of compensation, as this offer may be wholly inappropriate, and the injured person, or his representative, may wish to enter further discussions regarding the offer. Clause 22 (4) allows the NHS Trust a maximum of 12 months to respond to a concern being raised. In cases where the Trust takes 12 months to respond, complainants may be in a position where the limitation period has nearly expired, even before this clause comes into effect.

The date on which the application for redress commenced should be determined not just by the NHS, but also the complainant or his representative. In nearly all cases these dates will, of course, be the same, but the fact that the complainant is involved will increase confidence in the process, and remove the idea that the NHS is taking control of every aspect of the investigation.

### Clause 28 – Investigation report

Sub-clause (3) should be deleted, and sub-clause (2) amended to read:

> '(2) The NHS body must provide the person who is seeking redress under these regulations with a copy of the investigation report.'

It is important that an offer of compensation is always accompanied by an incident report. This will enable the complainant to take both to a legal professional, if one has not already been involved in the case, who will be able to determine if the offer is appropriate.

It is also fair that the complainant should see the report as soon as possible, and therefore we would suggest removing sub-clause (3). If there are occasions when the report may cause the complainant significant harm or distress, then the report should be given to his legal representative, who will be able to study the contents of the report, and advise of the next action to take.

### Clause 29 – Legal advice

We submit that sub-clauses (2) and (3) of this clause should be amended as follows.

> '(2) An NHS body **must** specify that such legal advice is sought only from a solicitor who is included in a recognised panel of experts in the field of clinical negligence.
> (3) An NHS body **must** specify that legal advice will be available in relation to the following matters –
> (a) any offer that is made in accordance with this Part;
> (b) any refusal to make such an offer; and
> (c) any settlement agreement that is proposed.'

The change from 'may' to 'must' in the sub-clause above will compel the NHS to specify that legal advice is available in relation to the matters set out in sub-clauses (a) - (c). This will help people obtain access to justice, as a legal professional will be able to give invaluable assistance, as outlined above. The fact that the NHS must specify that any advice is taken from a specialist lawyer will also ensure that the best possible advice is given to the complainant.

The legal advice provided under this clause must be properly funded, and should, as currently stated in sub-clause (4) be borne in its entirety by the NHS Trust. If the NHS Trusts are unable to fund such independent legal advice from current budgets, we recommend scraping the proposed new level of staffing mentioned in clause seven and eight, and redistributing the savings.

Further, detailed comments about legal advice within the scheme have already been made above.

### Clause 30 – Redress – making an offer of compensation

We are concerned that this clause does not include any right to legal advice for the complainant at this stage of the process. Although many complainants may have already taken legal advice prior to receiving an offer of redress, it is vital that a specialist legal professional is available to give advice on any offer of compensation, to ensure that it is appropriate.