# Civil Procedure Rule Committee
# Consultation on Revised Pre-action Protocol for Clinical Disputes

## A response by the Association of Personal Injury Lawyers

## July 2014

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain access to justice they need and deserve. We have over 3,600 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which 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.

Any enquiries in respect of this response should be addressed, in the first instance, to:

Alice Warren, Legal Policy Officer
APIL
3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX
Tel: 0115 9435428; Fax: 0115 958 0885
e-mail: alice.warren@apil.org.uk

## Introduction

APIL welcomes the opportunity to respond to the Civil Procedure Rule Committee consultation on a revised protocol for clinical negligence claims. The proposed updating of the Protocol is welcomed, and we note that the proposed revisions build on the draft Protocol agreed by claimant and defendant representatives in 2010. We are disappointed, however, that a number of the important revisions and recommendations made in 2010, agreed by claimant and defendant representatives, have simply been ignored. This draft was the result of a constructive series of meetings, involving all relevant parties. This achieved a remarkable degree of consensus and it is regrettable that some important parts of the draft have not been included in the revised version.

## General comments

The revised version of the protocol is much more slim-lined than the current version, with much of the preamble and background information having been removed. This may make the document easier to use for those who are already familiar with the process, but the emphasis on patient safety and good practice has been lost. Whilst the bare bones approach fits in very much more with the hard litigation process that is running through the courts, it is in stark contrast to the culture and to the ideas that are being put forward by the government in relation to clinical negligence claims. Jeremy Hunt recently spoke at a conference for healthcare providers, emphasising the need for a climate of openness and awareness throughout the NHS. How does this revised protocol, devoid of all mentions of openness, apologies and candour, fit with the government's aims?

We suggest that the protocol links to the Practice Direction for Pre-action Conduct. There should be provision for sanctions for non-compliance with the protocol, and this should include reference to the Practice Direction, to ensure clarity and consistency with the other protocols, including the Pre-action Protocol for Personal Injury Claims.

Throughout the document, the phrase "letter of claim" is used. This should be changed to "letter before claim", to reflect current terminology, and to ensure consistency with the Practice Direction for Pre-action Conduct.

## Why this Protocol

We question the removal of this section. The revised protocol could have been the ideal opportunity to reiterate the importance of openness, candour and transparency, but all references have been removed.

### *Aims of the protocol*

*Openness*

The removal of reference to apologies, and the lack of reference to the duty of candour in the aims of the revised protocol, is again at odds with the increase emphasis on openness and candour as mentioned by the Health Secretary.

*Timeliness*

We are unhappy with the removal of the reference to timeliness in the aims of the revised protocol. Anecdotal evidence suggests that even under the current protocol, medical records are not being dealt with in a timely and appropriate manner, and this will only worsen if all references to timeliness are removed from the protocol. Instead, the protocol should reinforce this aim, including a provision requiring defendants to provide medical records at the earliest opportunity, and certainly within a set time period.

*Adverse outcome reporting*

We are concerned with the removal of this section, and believe that it helps reinforce the purposes behind the protocol. The current and 2010 versions of the protocol, though wordy, emphasise the need for parties to come together to try and resolve the issues that are in dispute and to have an on-going relationship so that matters can be dealt with. There is no particular reason why this should have been removed.

**Enforcement of the protocols and sanctions**

We are pleased with the inclusion of the section on enforcement of the protocols and sanctions. It is extremely important that there is some form of sanction for non-compliance with the provision of medical records. Litigation teams in hospitals in particular are very under-staffed and overwhelmed with work. It is often difficult to get medical records, particularly if a number of different hospital departments are involved. At the same time, claimants only have three years in which to bring a claim, and for a number of those claimants, a year or 18 months will have passed since the incident because they have already been through the NHS complaints process. Because of this obvious time pressure, it is important that there is some form of sanction for non-compliance with the provision of medical records.

**The Protocol**

*Good practice*

We are disappointed with the removal of the dedicated section on good practice from the current and 2010 versions of the protocol. This is a useful section, particularly for health care providers in ensuring that key staff and adverse outcome reporting systems are available. Adverse outcome reporting often provides important information that can assist with a claim very early on, helping to resolve a variety of issues. Claimants should also be able to report back to defendants when records have not been kept in an appropriate manner, and adverse incidents have not been reported accordingly. It is unclear why this section has been removed from the revised protocol, and as above, there is value in including sections that are not part of the specific litigation process. Reinstating this section will help to harmonise the protocol with the aims to improve openness and candour in the NHS.

*Obtaining health records*

It should be made clear, as in the 2010 draft protocol, that disclosable documents include “those created by the healthcare provider in relation to any relevant adverse incident or complaint made by or on behalf of the claimant. They also include any relevant guidelines, protocols or policies”. The onus should be on the defendant however, to outline at the outset

what they have that should be disclosed, and the documents that are missing. There should be sanctions for failing to do so.

*Rehabilitation*

We are pleased with the inclusion of the section on rehabilitation. Rehabilitation is key in helping the injured person to recover, and we welcome that the protocol has a renewed emphasis on this. There should, however, be teeth attached to the Rehabilitation Code, which would increase compliance.

***Letter of Notification***

We welcome the inclusion of the letter of notification stage, as this will allow the NHSLA and Medical Defence Organisations to prioritise their resources by flagging up which cases can be allocated resources pre-letter of claim. Currently, most claimants spend at least 12 to 18 months investigating before sending a letter of claim. The NHSLA does not have the resources to investigate potential cases before receipt of a letter of claim because they receive thousands of requests for records. The letter of notification stage would speed up the process in the more complex cases, because the NHSLA would be able to identify which cases where the records have been requested have at least one supportive report and are likely to proceed. The NHSLA would then be put on notice that this was a case where a letter of claim was very likely to be sent at some point, and could start their investigations earlier.

This would be extremely useful in cases such as those involving cerebral palsy. These cases tend to require reports from a number of different experts, and the letter of claim can be sent typically up to 18 months after receiving the initial report on breach of duty. Once the defendants receive this, they are expected to respond within four months, but this is usually extended up to 12 months. The letter of notification stage will allow the claimant, on receipt of the supportive breach report, to notify the NHSLA that this particular case is on track for a formal letter of claim and the NHSLA can then start their investigations – some 12 to 18 months earlier than they can do at present. There is then no need for any extension of time for the letter of response and the whole process is streamlined and more efficient.

***Letter of Claim***

***The Response***

The 2010 version of the protocol, agreed by claimant and defendant representatives, included a paragraph which read: “If the healthcare provider wishes to explore settlement without any admission of liability, then this should be conveyed to the claimant and/or his/her representatives, who should consider agreeing a reasonable request for a period of time in order to try to resolve the claim without the need for legal proceedings to be issued.” This should be reinstated into the revised protocol, as it would be helpful to the parties to allow them to resolve matters without an admission of liability.

***Stocktake***

We welcome the inclusion of the stocktake section, which mirrors the personal injury protocol. This is designed to give defendants who have denied liability an opportunity to

consider whether a “commercial” settlement of the claim without admission of liability may be warranted, and can be useful to claimants in difficult cases.

***Limitation of actions***

This section of the 2010 revised protocol should be reinstated. Extending the time for the rest of the timetable to allow for the defendant to deal with investigation of the case is a sensible measure. We cannot see any reason for this to be neglected from the protocol.

- Ends -


## Association of Personal Injury Lawyers

3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX

● T: 0115 958 0585 ● W: www.apil.org.uk● E: mail@apil.org.uk