

**NATIONAL ASSEMBLY FOR WALES**

**NHS COMPLAINTS PROCEDURE EVALUATION REPORT**

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS**

**OCTOBER 2001**

The executive committee would like to acknowledge the assistance of David Marshall, APIL Treasurer in contributing to the preparation of this response.

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## NHS COMPLAINTS PROCEDURE EVALUATION REPORT

1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and represents more than 4900 solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. We currently have 218 members in Wales. The aims of the association are:
  - To promote full and prompt compensation for all types of personal injury;
  - To improve access to our legal system by all means including education, the exchange of information and the enhancement of law reform;
  - To alert the public to dangers in society such as harmful products and dangerous drugs;
  - To provide a communication network exchanging views formally and informally.
2. APIL welcomes the opportunity to respond to this consultation regarding the NHS complaints system. The system has been heavily criticised in recent years and we are extremely pleased to see that the Welsh Assembly is considering taking action to reform it as a result.
3. We do not wish in this response, however, to put forward comprehensive proposals for reform. We wish, alternatively, to highlight the connection between the NHS complaints system and the number of clinical negligence claims pursued against the NHS. The clinical negligence system is also being reviewed by the Department of Health. The Chief Medical Officer is currently chairing a committee which has been charged with looking into the issues and options for reform of the clinical negligence system. It is expected that a White Paper will be issued in early 2002 and we understand that any reforms will affect clinical negligence claims against the NHS in both England and Wales.

4. In view of this, we urge the Welsh Assembly to consider the connection between the two systems when deciding on the reforms that should be made to the NHS complaints system. We have already made submissions to the Chief Medical Officer's committee on how the number of clinical negligence claims could be reduced through improvements to the complaints system to. These submissions are reproduced below.
  
5. The complaints system has been studied and criticised by many groups including the Public Law Project<sup>1</sup>, Health Which?<sup>2</sup>, the Consumer's Association<sup>3</sup>, the House of Commons Health Committee<sup>4</sup>, the House of Commons Select Committee on Public Administration<sup>5</sup> and most recently the "national evaluation" has been conducted by the York Health Economics Consortium<sup>6</sup>.
  
6. The common findings from the several studies were as follows:
  - Many complainants are generally unhappy with the overall way in which their claims are handled (40% of respondents to the Consumer's Association survey; 51% of respondents in the Health Which survey and in the national evaluation only one-third believed that their complaint had been handled well<sup>7</sup>);
  
  - Initial investigations into complaints are often poor. The House of Commons Health Committee recommended that initial investigations of a complaint needed to be much more thorough<sup>8</sup>;

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<sup>1</sup> 'Cause for Complaint? An Evaluation of the Effectiveness of the NHS Complaints Procedure, H Wallace & L Mulcahy, The Public Law Project, 1999.

<sup>2</sup> 11 April 2000

<sup>3</sup> Survey conducted in 1997, the results of which were given in evidence to the House of Commons Health Committee in 1999

<sup>4</sup> Sixth Report of the Health Committee: Procedures Related to Adverse Clinical Incidents and Outcomes in Medical Care, 23 November 1999

<sup>5</sup> Second Report of the Select Committee on Public Administration, session 1998-1999

<sup>6</sup> 'NHS Complaints Procedure National Evaluation', March 2001

<sup>7</sup> Ibid, paragraph 5

<sup>8</sup> Second Report, op cit, paragraph 79

- Complainants often experience difficulty accessing information, including their own health records;
  - The complaints system is often perceived as biased and unfair (in the national evaluation 75% of complainants who requested an independent review thought that the system was biased<sup>9</sup>);
  - There is often poor communication between staff and patients (in the national evaluation over 25% thought communication between patients and staff was the most important area for reform<sup>10</sup>);
  - Complaints handlers would benefit from improved training
  - Complainants often feel that appropriate action has not been taken to prevent the same problems happening again.
7. The above problems within the complaints system do not only cause distress for those pursuing a complaint but can also lead patients to litigate their claims where they may otherwise have not done so. This has been recognised by several bodies. Linda Mulcahy conducted research into the mediation of clinical negligence claims and in doing so conducted a survey of injured patients pursuing claims. In her report she noted:

“A recurrent theme during the telephone survey of claimants was respondents’ assertion that the attitude of staff towards their claim had fuelled their pursuit of compensation.”<sup>11</sup>

8. The Association of Community Health Councils for England and Wales (ACHCEW) in giving evidence to the House of Commons Select Committee on Public Administration “pointed to the connection between the effectiveness of the complaints procedure and the volume of litigation in the National

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<sup>9</sup> (2001) op cit, paragraph 5

<sup>10</sup> Ibid, paragraph 6

Health Service”.<sup>12</sup> The ACHCEW argued that “the alternatives to the complaints procedure (taking legal action or taking a complaint to the relevant professional body) are often more daunting, more time consuming and, in the case of legal action, more expensive for people to pursue. An improved NHS complaints procedure could prevent complainants taking inappropriate legal action or taking the complaint inappropriately to a professional regulatory body.”<sup>13</sup>

9. The link has also been recognised by the House of Commons Health Committee which noted:

“One of the main problems we came across was the lack of information which is forthcoming from the hospital or medical authorities to the families. As we have already stressed, patients want a full and frank explanation but this is rarely given. This lack of information, and other problems with the initial complaints stage, means that families become suspicious and feel they are forced to consult solicitors to obtain information. Also many patients and relatives are encouraged to go down the litigation route as they see it as the only way that doctors are held to account...”<sup>14</sup>

10. In addition to problems within both the complaints and legal system, problems are also caused by the relationship between them. Even if an injured patient only wants a small amount of financial compensation, he must pursue a legal claim, as compensation is not available through the complaints system. The system, therefore, actively encourages low value claims that are often disproportionately expensive to litigate to be litigated. For those who neither qualify for public funding to pursue a claim nor are able to obtain affordable after-the-event insurance, compensation is simply not available.

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<sup>11</sup> ‘Mediating Medical Negligence Claims: An Option for the Future?’, Linda Mulcahy, Marie Selwood, Ann Netten (1999), paragraph 2.4

<sup>12</sup> Sixth Report, op cit, paragraph 27

<sup>13</sup> Ibid

<sup>14</sup> Second Report, op cit, paragraph 119

11. Having noted the above, in submissions to the Chief Medical Officer's committee we have made two suggestions in relation to the NHS complaints system. The first is that the complaints system should be designed to ensure that:

- Complaints are handled in an independent manner
- Complaints are thoroughly investigated and the "truth" discovered
- Full explanations are given
- Apologies are given where appropriate
- Steps are taken to prevent the same mistakes or problems arising again.

The second is that financial compensation of up to £10,000 should be awarded to injured patients through the complaints system where appropriate.

12. Injured patients often want a wide range of remedies following an adverse clinical outcome in addition or alternatively to compensation – to obtain an apology where appropriate, an explanation and/or to prevent a recurrence. We believe it is highly likely that fewer people would resort to litigation if the NHS handled complaints effectively and allowed some compensation to be paid through it. Reducing the number of people who resort to litigation by improving the NHS complaints system would benefit all involved – patients, NHS staff and NHS Trusts. Concerns could be aired, and lower value claims pursued, much more quickly and at less cost.

13. The virtues of allowing patients to access financial compensation where appropriate through the complaints system has been recognised by many, including the Clinical Disputes Forum. The Select Committee on Public Administration has noted:

“[The Association of Community Health Councils of England and Wales] told us that they would welcome a more explicit mechanism in the NHS complaints procedure for financial

compensation to be awarded. There is nothing in the statutory directions on the NHS complaints procedure to preclude a Trust or a panel from recommending financial redress, but there is a widespread belief that it is not considered appropriate...The Ombudsman has said that it should be made easier for financial redress to be paid under the complaints procedure.”<sup>15</sup>

The Committee recommended as follows:

“We accept Sir Alan Langlands’ warning against turning the NHS into a small claims court but we think the best hope for avoiding an ever increasing resort to litigation is the creation of a proper code of practice for the payment of financial redress in the NHS, as there is in other Government departments and we recommend that the Government should introduce such a code.”<sup>16</sup>

The Health Committee later supported that recommendation.<sup>17</sup>

14. In conclusion, we believe the time is right to consider the interface between the NHS complaints system and the clinical negligence system and to reform them both so that, instead of working against each other, they can operate in tandem to the benefit of injured patients, NHS staff and the NHS generally.

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<sup>15</sup> Sixth Report, op cit, paragraph 28

<sup>16</sup> Ibid.

<sup>17</sup> Second Report, op cit, paragraph 133