THE DEPARTMENT OF HEALTH

REFORMING THE NHS COMPLAINTS PROCEDURE
CONSULTATION UPON THE DRAFT REGULATIONS

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS
(APIL07/04)

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The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has over 5,300 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL does not generate business on behalf of its members.

The aims of the Association of Personal Injury Lawyers (APIL) 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 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;
- To promote health and safety.

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REFORMING THE NHS COMPLAINTS PROCEDURE

Introduction

1. APIL welcomes the opportunity to put forward comments on the regulations which will govern the proposed reforms to the National Health Service (NHS) complaints procedure. We fully support the Department of Health's (DOH) intention to *"set out reforms designed to make the NHS complaints system more accessible, responsive, independent and more closely linked to work to improve services".* We are, however, concerned that these laudable goals and ambitions will be compromised due to the haste in which the new reforms are being implemented as the stated implementation date is 1 June 2004. We feel the reforms should not be implemented until Autumn 2004, in order that proper consideration may be given to introducing the scheme effectively and so that replies from this current consultation can be analysed. In APIL's opinion, it would be better to have a well-constructed scheme put into operation at a later date, rather than the immediate introduction of the scheme.

2. In summary, APIL broadly supports the reform of the NHS complaints procedure. We do, however, have some concerns relating to the proposed changes. For example, in order for many of the reforms to be fully realised there will need to be an increase in resources and funding. We therefore feel there needs to be an intrinsic financial commitment by the DOH to ensure that the necessary resources are in place prior to the reforms being implemented. In particular, the need for suitable financial resources for the training of staff is essential. With the assertion that *"complaints may be raised with any members of staff and resolved on the spot"*, staff members will need to be properly trained to recognise when a complaint is being made, and also how to deal with it. In addition, APIL believes there needs to be a 'catch-all' clause (similar in intention to that in regulation 5) for regulation 4, which will allow for the inclusion of services such as counselling and homeopathy

to be covered by the proposed new complaints procedure. Finally, regulation 12 allows for a considerable amount of discretion by the complaints manager as to who is permitted to make a complaint. APIL believes that there should be an appellate provision in regulation 12 allowing for the appeal of such a decision to a committee of lay and senior trust members.

General

The regulations will require complaints to be acknowledged and responded to within given time limits at various points throughout the process. If complaints are to be dealt with positively, these time limits need to be challenging. NHS organisations and practitioners need to be convinced they are realistic, whilst the complainant will need to be satisfied they encourage swift resolution at each stage. Have we got the time limits right?

3. APIL agrees, in principle, with the time-limits proposed within the draft regulations, particularly the need for a complaint to be resolved within six months or else be referred to the Commission for Healthcare Audit and Inspection (CHAI). We do, however, feel that these proposed time-limits should be the ideal, with the initial time limits established at the outset of the scheme being more flexible and achievable. We feel that placing pressure on staff at the beginning of the new scheme, in the form of unrealistic time-limits, would be counter-productive as it would discourage staff and further frustrate patients. We propose that the time-limits should be staggered, so that they relate to the appropriate stage at which the new scheme is at in terms of its implementation. This will mean that as the new scheme 'beds-in' and matures, the time-limits can accordingly be reduced.

4. Also, the gradual and staggered introduction of the new regulations would enable the identification and elimination of many potential teething problems.

5. Alternatively, if the proposed time-limits are introduced in their current form, APIL feels that there needs to be the necessary resources from the NHS and the DOH – both in staffing and funding – to make sure that these time-limits are met. Without the necessary resources we find it difficult to see how the suggested time-targets will be achieved.

Throughout the regulations, we envisage close working between NHS organisations (primary, secondary, ambulance services) and between the NHS and local authorities, so that complainants need contact only one organisation and will get, unless there is good reason, a single response on behalf of them all. The regulations place a general duty to co-operate on each of these bodies. Will the language used be understood to have the same meaning across the different organisations?

6. APIL supports the proposal to have a single organisation take ownership of a patient's complaint. In order to make it work, however, there needs to be effective communication between the various departments, services and authorities involved. We believe that appropriate training would enable the parties to communicate better and have a greater understanding of the needs of the other organisations. This training would also help the different groups to develop language which could be understood across the different administrations.

7. The benefit of having a single organisation co-ordinating the various aspects of the complaint is that there would not be a duplication of time and resources. This will hopefully make the procedure more streamlined and effective, resulting in the fast resolution of complaints and a prompt reply to patients' queries.

To be effective, it is important that all independent providers are covered as if the regulations apply to them. We envisage this will fall to the contracting

authority, whether it be an NHS trust or a Primary Care Trust. Will this prove sufficiently robust?

8. APIL believes that in order for a co-ordinator of central responsibility to be established effectively, there needs to be a recognised 'plan' which applies across the sector, to all organisations, in relation to complaint handling. This plan would detail the time-limits for assigning a lead organisation, and the necessary criteria for the selection of this lead organisation. It would also detail the time-limits for acknowledgement of complaints, length of investigation and when a reply should be produced. Setting these parameters would enable all the organisations involved to know what is expected of them.

9. It should be stressed, however, that the most important factor within any such co-ordination should be the welfare of the complainant. It is essential they are kept informed at all stages of the process, and are provided with a prompt response within the time-limits set.

Specific

Regulation 4 is to do with complaints made about primary care services. Does it adequately cover all services offered by primary care providers?

10. While regulation 4 covers the vast majority of services offered by primary care providers, APIL is slightly concerned that there is not a 'catch-all' provision included to accommodate newly developing primary care services. The term 'newly developing' is used in this instance to refer to services such as aromatherapy, acupuncture, counselling and other alternative medicines which are now being used more in primary care. For example, there are instances where a General Practitioner (GP) may have some form of counselling service on-site. Due to counselling's relatively 'recent' use by the wider medical profession, however, it appears that it is not included as a primary care provider in the provisions detailed in regulation 4 (1). Yet it is essential

that patients have the ability to complain about such services. APIL feels that a 'catch-all' provision, similar to regulation 5 (1) (a) (i) - the use of *"or any other"* - would mean that these services could be identified as primary care providers.

11. There is a further need for the inclusion of newly developing medical services as primary care providers within regulation 4 due to the fact that many of them do not have well-structured and co-ordinated professional bodies which regulate them. This makes it especially difficult to complain. For example, in relation to counselling, there may be a variety of professional qualifications available to practitioners, and these are governed by a variety of different professional bodies. This means that it is essential a 'catch-all' clause be inserted into regulation 4.

Regulation 5 describes matters about which someone may complain. Does it cover all the necessary issues?

12. APIL feels that regulation 5 effectively covers all the necessary issues and we feel no need, at the present time, to comment further.

Regulation 8 lists the types of complaint that are excluded from the scope of the regulations. Is the list sufficiently comprehensive?

13. APIL believes that the list in regulation 8 of the types of complaint which are excluded from the scope of the regulations is sufficiently comprehensive and we feel no need, at the present time, to comment further.

From a patient perspective, are there any situations in which regulation 12 would unreasonably prevent a complaint being made either by a patient, a former patient or their representative?

14. APIL's particular concern in relation to regulation 12 is that a considerable amount of discretion in deciding if a person is eligible to complain lies with a single individual - the complaints manager. Regulation 12 (3) states that whether a person has a sufficient interest in the welfare of a patient in order to make a complaint will be *"in the opinion of the complaints manager"*. We feel that it is inappropriate for a person working on behalf of the agency that the complaint directly relates to, to determine whether the complaint itself should go ahead. APIL is further concerned that the complaint manager's performance will be based on the efficient handling and reduction of complaints. This objective puts him in direct conflict with allowing more people to complain. In addition, the current health system promotes the use of league tables and the reduction of waiting lists. We feel that similar pressure will be put on complaints managers to restrict access to the class of people which can complain.

15. We are encouraged, therefore, that regulation 12 (4) requires the complaint manager to *"notify that person in writing, stating his reasons"* for the refusal. There does not, however, appear to be the possibility of an appeal of this decision. APIL would want there to be an appellate provision inserted into the regulation in order to protect the best interest of the patient. The use of an appeal would allow all the pertinent information to be reviewed and the re-evaluation of the important issues. An acceptable structure for such an appeal would be a small committee, not of complaints managers, but ideally composed of an equal number of lay and senior health authority trust members. The lay representatives would ensure balance, transparency and impartiality within the proceedings, and enable the needs of the patient to be heard.

Our aim was to make it as simple as possible for someone to make a complaint. Have we achieved that aim in regulation 13?

16. APIL is fully supportive of the proposal to enable complaints to be raised with any member of staff and resolved on the spot. Often the most trying and difficult aspect of making a complaint can be attempting to locate the right person to make it to. By allowing complaints to be addressed to all staff, this problem is minimised. There is a subsequent problem, however, in that all staff will now be expected to bear the burden of identifying and dealing with complaints. It should be remembered that the background training of the majority of the staff is in healthcare, and not necessarily dealing with complaints. Therefore there may be an issue of whether care staff will be able to recognise what constitutes a complaint. For example complaints can be expressed in a variety of ways, and it is often difficult to ascertain exactly whether a complaint has been made. In order for the new regulations to be fully effective, there will need to be extensive training of all members of staff in how to recognise and deal with complaints. It is vital that this training is well resourced and on-going; it should not be a one-off lecture.

17. In addition, APIL would like to see the duty currently proposed for complaints manager when dealing with oral complaints - making *"a written record of the complaint which includes the name of the complainant, the subject matter of the complaint and the date on which it was made"* - extended to all members of staff. Many patients who do complain are frustrated that their concerns are not properly noted down or detailed. This lack of recording also makes it difficult for the governing health authority to build up a picture of issues which may be affecting its services.

From an administrative perspective, do you foresee any difficulties under the regulation 17 in identifying a 'lead' in complex cases?

18. As detailed previously (see paragraphs 6 and 7), APIL firmly believes that having a single organisation taking the 'lead' when dealing with a complaint will help maximise resources and provide a single point of contact for the complainant.

19. In terms of the details in regulation 17, we are pleased to see that they contain a lot of detail about identifying the 'lead' in complex cases.

Does regulation 20 get the balance right between protecting a patient's confidentiality and enabling the complaint to be properly investigated?

20. APIL believes that the proposals suggested conform to the current data protection regulations, and the corresponding Data Protection Act 1998. APIL does not want to make any further comments at this time.

It is important that everyone who might have an interest in these procedures is easily able to find out what they cover and, where appropriate, how to make a complaint. Do we need to add anything else to regulation 28 to ensure adequate publicity is given to the new arrangements?

21. APIL is encouraged that people, including patients, are now more aware than ever of their respective rights via documents such as the Citizen's Charter and the Patient's Charter. This awareness of rights has meant that patients are more confident about complaining when there is something wrong with their treatment. This awareness also means that while publicity surrounding the new NHS complaints procedure is necessary, it does not need to be a priority. We are more concerned about the operation of the scheme in practice, rather than the corresponding publicity surrounding its introduction, and would prefer to see resources directed to the implementation of the new procedures.

22. While APIL believes that publicity for the scheme should not be a priority, we do consider that the ability to gain access to the necessary information when needed is vital. The details of the complaints procedure should be available in paper form and be available via the internet. Also, all material should be available in a variety of languages and sizes (for the visually impaired), as well as in a recorded form for the blind.

23. In addition, in order to fully inform patients, initial correspondence with them should include a small leaflet with all the necessary complaint procedure details. This leaflet could be sent out with both hospital and GP appointment letters prior to the scheduled visit. Also, when a patient enters the health system via Accident and Emergency (A&E) they, or their representative, could be handed a leaflet prior to treatment.

24. APIL feels that there needs to be further clarification concerning regulation 28. The regulation stipulates that each NHS and primary care body must *"ensure that there is effective publicity"* and *"must take all reasonable steps"* to promote complaints arrangements to all relevant parties. There is, however, no further indication concerning who should monitor whether the publicity has been effective and if all reasonable steps have been taken. APIL believes there should be further consultation on this issue. This consultation process should be conducted with the relevant consumer groups such as patient organisations.

Will the transitional provisions in regulation 32 properly allow for a seamless shift into the new arrangements?

25. APIL has expressed its concern over the implementation deadline of the new complaints scheme elsewhere in this response. In order to ensure that the replies to this consultation are properly considered, and implemented, APIL strongly believes that it would be premature to attempt to introduce the new scheme on the 1 June 2004. The efforts of the DOH and the NHS could be better spent between now and June 1, 2004 training people in how to receive and deal with complaints. Training such as this would take time to organise and implement, so the start date of the scheme would have to be pushed back for approximately three months.

26. In addition, there is a considerable amount of new information concerning complaints which needs to be absorbed by the various organisations and departments to which the procedures relate. It is a very tight timeframe for all this new, and often novel, information to be properly distributed and understood by the June 2004 deadline.

27. APIL is supportive of any move to improve the NHS complaints system, and is very concerned that undue haste may make the situation worse rather than better. We would like to see the suggestions put forward in this consultation exercise considered fully, with possible implementation of the proposals. Following this there should a period of training and orientation to all members of staff on the new procedures. Finally the new scheme should be rolled out gradually, allowing for feedback and amendments to be made, with a certain amount of fanfare; it should become a central tenet in the NHS's ongoing programme of improvement and development.

Conclusion

28. In conclusion, APIL is supportive of any move to improve the NHS complaints system. We are, however, concerned that undue haste may make the situation worse rather than better.

29. Prior to implementation, we would like to see the suggestions put forward in this consultation exercise considered fully. In particular APIL would endorse:

- The staggered introduction of the scheme, and a gradual reduction of time-limits relating to the complaint process as the scheme 'beds-in'.
- Training for health authorities on how to communicate effectively with other organisations involved in the complaints process.
- The establishment of a structured plan to co-ordinate the assignment of a lead organisation, to set time-limits for the acknowledgment of complaints and to specify when a reply should be produced.
- The inclusion in regulation 4 of a 'catch-all' provision which will allow services such as homeotherapy to be included as a primary care service.
- The establishment of an appellate provision within regulation 12 to ensure that people who have been refused the opportunity to complain can effectively appeal.
- The training of all members of staff, care and otherwise, in how to receive and deal with complaints.
- The inclusion of leaflets, detailing the necessary information needed to complain, with all appointment letters.

30. After full consideration of the above proposals, APIL believes that there should be a period of training and orientation to all members of staff on the new procedures. Finally, the new scheme should be rolled out gradually, allowing for feedback and amendments to be made, with a

certain amount of fanfare; it should be a central tenet in the NHS's ongoing programme of improvement and development.