

To: Chairs and Chief Executives

Important: Complaints cases subject to litigation, inquests and other serious investigations– renewed clarification of position

The Local Authority Social Services and National Health Service Complaints (England) Regulations 2009, referred to as the Complaints Regulations 2009, removed a specific exclusion included in the 2004 Complaints Regulations which prevented a complaint from being considered where the complainant had stated in writing that they intended to take legal proceedings.

The default position since 1 April 2009 is where a complainant expresses an intention to take legal proceedings, an NHS body should continue to try to resolve the complaint quickly unless there are compelling legal reasons not to do so. The Department of Health issued a clarification note in January 2010 to remind NHS bodies of this revision.

The charity Action against Medical Accidents (AvMA) has brought to our attention that some NHS bodies are still routinely putting the investigation of a complaint on hold where a complainant has stated they intend to take legal proceedings or have started legal proceedings. Also, some NHS bodies' websites still suggest that the complaints procedure cannot be followed whilst litigation is in train. This is not acceptable.

To help avoid any doubt or possible confusion, the clarification note issued by the Department of Health in 2010 is revoked and superseded by this note, which clarifies the policy on handling complaints cases that are subject to litigation:

- the underlying requirement is that the Complaints Regulations 2009 must be followed when handling any complaint.
- all complaints should be investigated properly and responded to as soon as possible.
- where the complainant is taking, or plans to take, legal proceedings, a complaint may only be put on hold where there are exceptional reasons to justify it, or the complainant has requested that investigation be delayed
- exceptional circumstances for putting a complaint on hold may include formal requests to do so by the police, a coroner or a judge.
- any concerns about continuing with the investigation of a complaint should be raised during the discussion with the complainant of how the complaint is to be handled in order to allow the complainant's views to be heard.
- if, exceptionally, an NHS body decides to put a complaint on hold against the wishes of the complainant, the complainant should be informed of this as soon as is practicable and provided with a full explanation (in writing, unless requested not to) of the reasons for this. Any decision to put the

complaint on hold in these circumstances would be expected to be made with the involvement of the NHS body's 'responsible person'.

NHS bodies should inform all staff involved in complaints of this note, and review (and if necessary, update) their policies, literature and web information on complaints.

NHS bodies should make clear to people who are concerned it is taking an unreasonable amount of time to investigate and respond to their complaint that they may complain to the Parliamentary and Health Service Ombudsman about the delay. The Ombudsman generally expects a complaint about delay to have been responded to by the NHS body first, before she will investigate. However, in some circumstances, the Ombudsman will investigate complaints before the NHS body has responded.

This note seeks neither to list the exceptional circumstances in which a complaint may be put on hold (although it is expected the reasons or circumstances will be of a serious nature), nor to set out good practice case handling for litigated complaints. Both situations would be guided by the unique circumstances of the complaint, the specific needs of the complainant, as well as the professional advice of any relevant bodies (for example the NHS Litigation Authority).

As the NHS structure has changed, this clarification note is being issued by NHS England directly to Clinical Commissioning Groups, and by Monitor and the NHS Trust Development Authority to NHS Foundation Trusts and NHS Trusts respectively. Providers will be encouraged to take action to comply. The note is also being shared with the CQC to help it in its assessment of complaints handling by registered NHS bodies in England. The Department of Health endorses the contents of this note.

From: Department of Health