Legal Claims Policy

Clinical Negligence, Liabilities to Third Parties and Property Expenses Scheme Claims

Reporting, Management & Investigation

Version: 4

Executive Lead: Executive Director, Quality & Safety
Lead Author: Legal Services Lead

Approved Date: 1st August 2013
Approved By: Quality & Risk Management Committee

Ratified Date: 13th August 2013
Ratified By: Policy Panel

Issue Date: 20th August 2013
Review Date: 20th August 2016

Target Audience: This Policy must be understood by all HPFT staff.
P1 - Version Control History: Below notes the current and previous Version details

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<th>Status</th>
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<td>V3</td>
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<td>Legal Services Lead</td>
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P2 - Relevant Standards:

a) **NHSLA Risk Management Standards 2012 – 2013 - Standard 2, Learning From Experience**
   - Standard 2 Criterion 4 - Claims Management
   - Standard 2 Criterion 5 - Investigations
   - Standard 2 Criterion 6 - Analysis & Improvement
   - Standard 2 Criterion 7 - Learning Lessons from Claims

b) **Equality and RESPECT:** The Trust operates a policy of fairness and RESPECT in relation to the treatment and care of service users and carers; and support for staff.

P3 - The 2012 Policy Management System and the Policy Format:
The PMS requires all Policy documents to follow the relevant Template.

- **Policy Template** is the essential format for most Policies. It contains all that staff need to know to carry out their duties in the area covered by the Policy.
- **Operational Policies Template** provides the format to describe our services, how they work and who can access them.
- **Care Pathways Template** is at the moment in draft and only for the use of the Pathways Team as they are adapting the design on a working basis.
- **Guidance Template** is a sub-section of the Policy to guide Staff and provide specific details of a particular area. An over-arching Policy can contain several Guidance’s which will need to go back to the Approval Group annually.

Symbols used in Policies:

- **RULE** = internally agreed, that this is a rule & must be done the way described
- **STANDARD** = a national standard which we must comply with, so must be followed

Managers must bring all relevant policies to the attention of their staff, where possible, viewing and discussing the contents so that the team is aware of what they need to do.

Individual staff/students/learners are responsible for implementing the requirements appropriate to their role, through reading the Policy and demonstrating to their manager that they understand the key points.

All Trust Policies will change to these formats as Policies are reviewed every 3 years, or when national Policy or legislation or other change prompts a review. All expired & superseded documents are retained & archived and are accessible through the Compliance and Risk Facilitator Policies@hpft.nhs.uk

All current Policies can be found on the Trust Policy Website via the Green Button or http://trustspace/InformationCentre/TrustPolicies/default.aspx
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1.1 Introduction

Claims monitoring is a fundamental tool of risk management for the Trust, the aim of which is to collect information about claims to help facilitate wider organisational learning.

Hertfordshire Partnership University NHS Foundation Trust (HPFT) follows the requirement of the National Health Service Litigation Authority (NHSLA) in the management of all claims arising from the Trust’s activities, and the Trust Board is committed to ensuring effective and timely management of claims.

The Trust Board is also committed to ensuring that Trust staff are supported during the investigation of a claim and that claims are investigated thoroughly and effectively for speedy resolution.

The Trust recognises that occasions will arise when claims may be made against the Trust and when this occurs the underlying causes need to be identified and lessons learnt to minimise or prevent recurrence and so improve the quality of patient care.

This policy outlines the claims management policy and procedures followed by the Trust, which comply with the requirements of the NHSLA for the management of claims, and are based on current guidance issued by them. Any future changes in guidance will be followed, and may supersede the procedures laid down in this document.

1.2 Purpose

This policy is to guide staff on legal claims management and legal requirements in relation to claims. It provides general information about claims and also protocols for the reporting, management and investigation of the following types of claim:

- Clinical Negligence
- Employer’s Liability
- Public Liability
- Claims in respect of loss or damage to Trust property

It is important for all involved that reported claims are resolved as quickly as possible. The purpose of this policy is to reflect the requirements of the justice reforms of claims handling in the following ways:

- Encouraging more pre-action contact with claimants
- Better and earlier exchange of information
- Improved investigation
- Earlier settlement without the need for expensive litigation; and
- Court proceedings to run smoothly where there is a need for litigation
The Trust has documented claims management procedures for clinical negligence, employer/public liability and property expenses claims. These additional protocols contain detailed guidance on how claims are to be dealt with within the organisation in order to comply with the requirements for membership of the NHSLA schemes and also with the requirements of the Pre-action Protocol for the Resolution of Clinical Disputes and the Pre-action Protocol for Personal Injury, so avoiding the cost penalties associated with non-compliance. These protocols also provide guidance on involving third parties such as the NHSLA, solicitors, claimants and the Coroner.

1.3 Definition of terms used

1. **Claim** - The NHSLA defines a claim as “an allegation of clinical negligence and/or a demand for compensation however made following an adverse incident resulting in a personal injury or any clinical incident which carries a significant litigation risk for the Trust”.

Claims can be categorised into clinical or non-clinical claims:
- **Clinical claims: Clinical Negligence** - Injury to a patient as a result of clinical treatment
- **Non-clinical claims: Employer Liability** - Injury to staff during working hours
- **Non-clinical claims: Public liability** - Injury to a patient or any member of the public by virtue of that individual being on Trust premises
- **Non-clinical claims: Property** - Damage to or loss of NHS property

2. **Clinical Negligence Scheme for Trusts (CNST)** - This is a voluntary membership scheme, to which all NHS Trusts, Foundation Trusts and Primary Care Trusts in England currently belong. Covers liabilities for alleged clinical negligence where the original incident occurred on or after 1 April 1995.

3. **Liabilities to Third Parties (LTPS) and the Property Expenses Scheme (PES)** - These schemes are known collectively as the **Risk Pooling Schemes for Trusts (RPST)**. The schemes are two voluntary membership schemes covering non-clinical claims where the incident occurred on or after 1 April 1999. Costs are met through members’ contributions.

4. **Potential claims** - These include but are not limited to complaints/incidents/inquests that present a significant litigation risk. These may require investigation and reporting to the NHSLA. If you are unsure if something is a potential claim, please contact the Legal Services Lead.

5. **NHSLA** - The National Health Service Litigation Authority (NHSLA) is a special health authority (part of the NHS) responsible for handling negligence claims against NHS bodies in England.
1.4 Duties and Responsibilities

RULE

1.4.1 Duties within the Organisation

i) Trust Board

The Trust Board member with responsibility for clinical negligence claims and Liabilities to Third Parties is the Executive Director Quality & Safety who will keep the Board informed of major developments on claims related issues twice yearly. The Trust Board member with responsibility for and Property Expenses is the Director of Finance, who will do the same.

ii) Chief Executive

The Chief Executive of the Trust has ultimate responsibility for ensuring that all claims are dealt with effectively and efficiently.

iii) Managing Directors and Service Line Leaders

The Managing Directors and Service Line Leaders within each Strategic Business Unit are responsible for ensuring that any remedial action required is actioned, or planned for action, and reported to the Patient Safety Department. Furthermore, the Managing Directors are responsible for ensuring that the Practice Governance structures are in place and operating effectively in identifying and implementing learning throughout the claims process.

iv) Investigating Manager

Investigations will be undertaken into claims which have not already been investigated in line with the Learning From Incidents Policy, February 2013. An Investigating Manager will be appointed by Service Line Leaders.

Members of the Senior Management Team in each Strategic Business Unit are, however, primarily responsible for ensuring that all claims are notified to the Legal Services Lead and investigated. Service Line Leaders play a key role in ‘commissioning’ investigations. They must ensure that investigations are comprehensive and action is taken to learn lessons and implement improvements to minimise the risk of recurrence.

The investigation process is very fully described in:

- Learning From Incidents Policy, February 2013, Part 3, and will inform the Investigating Manager of:

  1. Their role in the investigation of a claim
  2. The investigation process
  3. The gathering of information and statements
4. Record keeping
5. The drafting of letters; and
6. The production of action plans

v) Legal Services Lead

The Legal Services Lead’s role is to manage the handling of claims, support Trust staff and liaise with the NHSLA, Panel Solicitors, Claimant’s Solicitors and others as necessary.

The Legal Services Lead will carry out such preliminary action, investigation and analysis of reportable claims as is required by the NHSLA and will liaise with the NHSLA as necessary over the conduct of claims.

The Legal Services Lead is responsible for:

- Managing the day to day activity of all claims
- Notifying and liaising with the NHSLA in accordance with the NHSLA’s reporting requirements
- Liaising with Trust staff, solicitors and any other relevant person, in relation to claims and potential claims
- The conduct and control of all claims and claims documentation
- Undertaking the initial preliminary analysis of clinical negligence claims on facts, liability, causation and quantum
- Ensuring staff involved in claims are adequately supported
- Ensuring that information obtained during claims investigations is shared with senior managers as appropriate for risk management purposes, and that lessons learned in the process of claims investigations are used for risk management purposes in the context of future service provision, as well as liaising closely with the Complaints Department
- Keeping the appropriate members of staff aware and informed of progress on claims and potential claim
- Providing 6-monthly reports to the Quality & Risk Management Committee as set out in Part 2.13

vi) Role of Clinicians

In the defence of a claim the role of staff is crucial. The Trust needs their views about all the relevant factual issues, without which the Trust and its legal advisors cannot accurately work out the chances of the claim succeeding. That would increase the risk of paying too much to settle the claim or going to trial and losing.

The Trust will need to know:
- what you did;
- the reasoning behind any decision you made;
- what the clinical records say.
Lawyers are very conscious that the time taken to resolve claims must seem particularly odd to clinicians who have to deal with major problems in minutes or hours. The reasons for the time taken include:

- the need for the prognosis to stabilise before an accurate valuation can be made. This can take years where the claim is on behalf of a young child with a brain injury
- other calls on the time of medical experts. There are frequently issues which cannot be resolved without both parties having had independent expert advice and it is not unusual for respected experts to have an eight – twelve month waiting list
- it may also take time before a trial date can be allocated

Very few claims go to trial. Most claims are either settled by negotiation or mediation for whatever proportion of their full value matches the chances of success of trial.

vii) Role of Trust staff

All Trust staff have a responsibility to notify the Legal Services Lead, in accordance with the attached procedures, of likely or actual claims received and to co-operate fully with the Legal Services Lead in the investigation of claims and preservation of evidence.

1.4.2 Committees and Groups with Overarching Responsibilities

A sub-group of the Board known as the Quality & Risk Management Committee will receive regular reports on individual and aggregated claims. The Committee will meet not less frequently than quarterly and deputies will attend when required.

The Quality & Risk Management Committee links to the Integrated Governance Committee and they link to the Trust Board; in addition they link to other committees within the Trust that have responsibility for risk management e.g. Health and Safety Committee.

The Quality & Risk Management Committee have responsibility for the analysis of claims and will receive reports to assist them in that purpose, from the Legal Services Lead.

There are agreed communication links to the Trust Board through the Integrated Governance Committee and have a responsibility via their membership and governance systems to communicate down to local management and in doing so facilitate organisational learning and improvement as a result of effective claim management.

The Quality & Risk Management Committee have terms of reference which include accountability, responsibility, authority and membership. They meet bi-monthly and have an annual meeting schedule.
1.5 Training

Training for staff in relation to the investigation of claims and/or investigation of incidents which may lead to claims is governed by the Trust’s Learning From Incidents Policy, section 1.6.

1.6 Monitoring Compliance with this Document

1.6.1 Monitoring Compliance With and the Effectiveness of Procedural Documents

- Quarterly reports to the Quality & Risk Management Committee and Integrated Governance Committee on incident and claims data and trends.

- Information and support for staff and managers available in written form and advice to implement the key objectives of the policy.

- Annual assessment of improvements in practice and/or systems and policies as a result and compliance with practice and corporate governance requirements as part of the risk reduction programme.

- Claims and linked Policies & Guidelines are up-to-date.

- Annually review the services we offer in counselling/support to service users and families/carers and staff involved.

1.6.2 Process for Monitoring Compliance with and the effectiveness of the Legal Claims Policy

Compliance with this policy will be monitored as indicated below:

<table>
<thead>
<tr>
<th>Action:</th>
<th>Lead</th>
<th>Method</th>
<th>Frequency</th>
<th>Report to:</th>
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<tbody>
<tr>
<td>Review of compliance with NHSLA Standard 2 Learning From Experience at Level 2 &amp; 3</td>
<td>Compliance and Risk Manager</td>
<td>Review policy against NHSLA standards</td>
<td>Policy checked annually</td>
<td>Quality and Risk Management Group</td>
</tr>
<tr>
<td>Audit compliance with this policy re processes for reporting all claims, management of claims and implementation of Action Plans</td>
<td>Patient Safety Manager</td>
<td>Audit via PACE team</td>
<td>Annual</td>
<td>Quality and Risk Management Group</td>
</tr>
<tr>
<td>Audit compliance with this policy re processes for reporting to external agencies, communication and</td>
<td>Patient Safety Manager</td>
<td>Audit via PACE team</td>
<td>Annual</td>
<td>Quality and Risk Management Group</td>
</tr>
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</table>
support for staff and relatives

| Ensure compliance with reporting to internal committee of quantitative and qualitative data | Legal Services Lead | Review of minutes of Quality & Risk Group meetings | 6 monthly | Quality and Risk Management Group |
| Ensure compliance with annual policy update | Legal Services Lead | Review of minutes of Quality & Risk Group meetings | Annual | Quality and Risk Management Group |

1.7 Dissemination, implementation and access to this Policy

Systems within the Patient Safety Department are in place to monitor implementation of the Policy in relation to all incidents and Service Line Leaders are required to comply with requests for information. All information and implementation requests are followed up and monitored by the Patient Safety Department to comply with all aspects of the policy.

1.8 Embedding a culture of Equality & RESPECT

The Trust promotes fairness and RESPECT in relation to the treatment, care & support of service users, carers and staff.

RESPECT means ensuring that the particular needs of ‘protected groups’ are upheld at all times and individually assessed on entry to the service. This includes the needs of people based on their age, disability, ethnicity, gender, gender reassignment status, relationship status, religion or belief, sexual orientation and in some instances, pregnancy and maternity.

Working in this way builds a culture where service users can flourish and be fully involved in their care and where staff and carers receive appropriate support. Where discrimination, inappropriate behaviour or some other barrier occurs, the Trust expects the full cooperation of staff in addressing and recording these issues through appropriate Trust processes.

**RULE:** Access to and provision of services must therefore take full account of needs relating to all protected groups listed above and care and support for service users, carers and staff should be planned that takes into account individual needs. Where staff need further information regarding these groups, they should speak to their manager or a member of the Trust Inclusion & Engagement team.

Where service users and carers experience barriers to accessing services, the Trust is required to take appropriate remedial action.
2.1 Definition of a Claim and the NHSLA Schemes Relevant to the Organisation

Claims, under English law, mean an individual may be entitled to compensation if they have been injured as a result of the negligence of another person. In order for a service user to obtain financial compensation when something goes wrong in the Trust, the following criteria must be met:

- The doctor (or other health professional caring for them) must have acted in a way which fell short of acceptable professional standards. The test is whether the actions of the health professional in question could be supported by a “responsible body of clinical opinion”. It will not be enough to show that other health professionals might have done something differently if a “responsible body” of health professionals would support the action taken.

- The harm suffered by the service user must be shown, on the balance of probabilities, to be directly linked with the failure of the health professional to meet appropriate standards. If, for example, there was a good chance that they would have suffered the harm even if the health professional had acted differently, then the claim is unlikely to succeed.

The role of the NHS Litigation Authority is to act on behalf of NHS bodies when claims of negligence by service users and staff are made against them. The NHSLA administer ‘schemes’ to help NHS bodies pool the costs of any loss of or damage to property and liabilities to third parties for loss, damage or injury arising out of the carrying out of their functions. There are three schemes the Trust subscribe to are:

- Clinical Negligence Scheme for Trusts (CNST) is administered by the NHS Litigation Authority (NHSLA) and provides an indemnity to Trusts and their employees in respect of clinical negligence claims arising from events which occurred on or after 1st April 1995. It is funded by contributions paid by member trusts and is often equated to an in-house mutual insurer. **Further information on this scheme is given at Part 2.8**

- The Liabilities to Third Parties Scheme (LTPS) covers non-clinical ‘third party’ liabilities such as employers’ liability claims (from straightforward slips and trips in the workplace to serious manual handling, bullying and stress claims), public and products liability claims (from personal injury sustained by visitors to NHS premises to claims arising from breaches of the Human Rights Act, the Data Protection Act and the Defective Premises Act) and there is also cover for defamation, professional negligence by employees and liabilities of directors. Like CNST, it is a voluntary scheme funded through members’ contributions. **Further information on this scheme is given at Part 2.9**
• The Property Expenses Scheme (PES) covers ‘first-party’ losses by NHS bodies, such as theft or damage to property. Again it is a voluntary scheme, funded through members’ contributions. Further information on this scheme is given at Part 2.10

2.2 Who may make a claim

Any service user (or their representative) may make a claim who believes they have been injured as a result of the negligence of a health professional who was/is caring for them.

Any member of staff or member of the public who believe they have been injured as a result of negligence of the organisation

2.3 Trigger for invoking the claims procedure

The following events are regarded as identifying a potential claim against the Trust:

• Receipt of legal proceedings, a letter of claim or a letter indicating a likely claim from a patient, member of the public or employee or from a solicitor - this should be passed to the Legal Services Lead immediately.

• Receipt of a request for disclosure of records:
  ➢ made by a solicitor and the request for disclosure states that they are investigating a potential claim against the Trust; or
  ➢ made by a patient/relative who states that they are making a complaint or claim against the Trust.

Such requests should be copied to the Legal Services Lead.

• Receipt of a complaint seeking compensation - the Complaints & Customer Relations Manager should notify and liaise with the Legal Services Lead.

• A serious incident which may generate substantial compensation - the Patient Safety Manager will liaise with the Legal Services Lead.
  ➢ Appendix F: External/Internal Contacts

2.4 Delegation Limits

With effect from 1 April 2002, the NHSLA meets all/any demands for compensation as a result of Clinical Negligence. The Legal Services Lead will work in conjunction with the NHSLA to determine the conduct of individual cases, reporting appropriate cases at an appropriate stage, in line with the CNST Reporting Guidelines.
Similarly, LTPS claims will be reported to the NHSLA in line with the LTPS Reporting Guidelines, with the Legal Services Lead having responsibility to agree settlements in conjunction with the NHSLA.

**2.5 Timescales and Procedures for the exchange of information with other parties**

The timescales for actions to be taken and the exchange of relevant information with claimants should be in accordance with the Civil Procedure Rules, which will need immediate attention and these will be advised by the Trust’s Legal Services Lead and the NHSLA solicitors allocated to the claim.

It is important for all involved that reported claims are resolved as quickly as possible. The Legal Claims Policy reflects the requirements of the Civil Procedure Rules by:

- encouraging more pre-action contact with claimants;
- better and earlier exchange of information;
- improved investigation;
- earlier settlement without the need for expensive litigation;
- court proceedings to run smoothly where there is a need for litigation.

**2.5.1 Limitation**

There are timescales relating to the period within which a claim should be brought - the ‘limitation period’. For personal injury and clinical negligence claims, the Claimant should issue their Claim Form through the Court within a period of three years of the date of incident which allegedly caused them harm or within three years of their ‘date of knowledge’ if this can be proven to be later. The three main exceptions to this are:

- children (their three year period does not commence until they reach the age of 18)
- people who have a mental disorder within the meaning of the Mental Health Act 1983 so as to be incapable of managing his/her own affairs, when the three year period is suspended
- people with a learning disability, when the limitation period does not apply.

Claims outside the three year limitation period may be allowed by the Court if it is persuaded that it is fair overall to allow a longer period.

**2.5.2 Timescales for actions**

The following provides an overview of the actions required when dealing with claims, by whom and the timescale targets which apply when a Letter of Claim is received:
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<th>BY WHOM</th>
<th>TIMESCALES</th>
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<tr>
<td></td>
<td></td>
<td><strong>CNST</strong></td>
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<tr>
<td>Forward Letter of Claim to Legal Services Lead</td>
<td>Staff receiving</td>
<td>Immediately</td>
</tr>
<tr>
<td>Acknowledge Letter of Claim</td>
<td>Trust Legal Services Lead</td>
<td>Within 14 calendar days</td>
</tr>
<tr>
<td>Report claim to NHSLA</td>
<td>Trust Legal Services Lead</td>
<td>Within 24 hours of receipt</td>
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<tr>
<td>• Electronically via NHSLA Extranet Claims portal</td>
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<tr>
<td>• For CNST, enclose Preliminary Analysis</td>
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<tr>
<td>• For LTPS, enclose relevant documents as per NHSLA Disclosure List</td>
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<tr>
<td>Disclosure of Medical Records</td>
<td>Access to Records department</td>
<td>Within 40 days</td>
</tr>
<tr>
<td>Respond to allegations in Letter of Claim</td>
<td>NHSLA</td>
<td>Within 3 months of acknowledgment</td>
</tr>
<tr>
<td>• Admit or deny liability</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• If liability is denied, enclose documents</td>
<td></td>
<td></td>
</tr>
<tr>
<td>If formal legal proceedings have been issued by the Claimant or their representative, the following timescale targets apply:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Forward Claim Form to Legal Services Lead</td>
<td>Staff receiving</td>
<td>Immediately</td>
</tr>
<tr>
<td>Notify NHSLA of Legal Proceedings by telephone and forward documents via NHSLA Extranet DTS</td>
<td>Trust Legal Services Lead</td>
<td>Immediately</td>
</tr>
<tr>
<td>File Acknowledgment of Service</td>
<td>NHSLA Panel Solicitors</td>
<td>Within 14 days</td>
</tr>
<tr>
<td>File Defence</td>
<td>NHSLA Panel Solicitors</td>
<td>• Within 14 days of service of Particulars of Claim if Acknowledgment is not filed</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Within 28 days of service of Particulars of Claim if Acknowledgment is filed</td>
</tr>
</tbody>
</table>
2.5.3 Panel Solicitors

The NHSLA has a panel of specialist solicitors and allocates practices to trusts. Once a panel firm has been instructed, it will represent the interests of the Litigation Authority, the member trust, and the trust’s employees.

One of the objectives set for the NHSLA by Parliament is “to minimise the overall costs of clinical negligence…to the NHS and thus maximise the resources available for patient care by defending unjustified actions robustly [and] settling justified actions efficiently”. It is for the panel firms, in conjunction with the Litigation Authority, to work out the chances of a claim succeeding at trial, and the damages likely to be awarded, and then to advise on whether the claim should be defended or settled.

2.6 Confidentiality

A duty of confidentiality will be owed to services users and staff during the process of claims and the legal principles regarding obtaining consent should be adhered to very strictly, as per the Trust’s Records & Information Governance Policies.

Information shall only be disclosed without consent when an application has been made by solicitors to a Court for disclosure of medical records or staff related records and this has been granted.

It is important to comply with timescales attached to court applications, as a failure to supply within the time-scale provided by the pre-action protocol will almost inevitably result in the court ordering disclosure and awarding costs to the party bringing the application. In this case the Trust will also have to bear defence costs. The NHSLA will not usually regard such costs a part of the claim, and costs will be met out of the Trust’s own budget.

2.7 Support mechanisms for service users, carers and staff

2.7.1 Service Users

Both clinicians and Managers must consider the needs of service users and their families who will have been adversely affected and are subsequently making a claim. Levels of support required and the degree of information to be shared should be reviewed, and all communication with service users and families will meet the individual’s communication needs. The Service Line Leader must ensure that the service users and their families are kept informed and offered appropriate support and counselling. For additional guidance refer to:

- Learning From Incidents Policy, February 2013

Where service users or relatives are affected it is important that their needs and those of other significant people are addressed and that each person’s individual
communication needs are met. Contact should be made at the earliest appropriate opportunity and appropriate support should be offered. During the process of a claim, the Service Line Leader responsible can offer to meet with the family or arrange for the family to meet with key staff (appropriately supported). Guidance for these meetings is provided by the National Patient Safety Agency principles of Being Open.

Being Open involves apologising and explaining what happened to service users and/or their families when a serious event has occurred. It ensures communication is open, honest and occurs as soon as possible. In situations such as this, it is best practice that more than one person should be present at meetings with families. If there is likely to be interest from the media, the family should be asked their wishes in relation to the Trust’s response to any media contact, and this should be recorded and the Head of Communications should be informed. For further guidance refer to:

- Being Open Policy

The organisation Action against Medical Accidents (AvMA) can help service users to consider the various options that may be open to them after suffering a medical accident and can, if they wish, be put in contact with a specialist solicitor. AvMA also offers support to patients in coming to terms with the effect that a medical accident may have had on them, whether or not clinical negligence is possibly involved.

This policy emphasises that equality and diversity considerations are taken into account for service users and their families in line with legislation and good practice during the process of managing claims against the Trust and particularly in relation to providing support.

2.7.2 Staff

Following a claim or any other challenging situation at work, the line manager, if necessary in consultation with their Service Line Leader, must consider the need for information and support for affected staff. In liaison with the Legal Services Lead, the manager should take steps to manage and support the staff who are affected by a claim and to ensure they have sufficient information about the Trust’s procedures and sufficient individual support, for example:

- Providing an informal or formal post incident support session as soon as possible.
- Arranging a formal Critical Incident Debriefing session for staff
  - Contact 07659 1000 89
- Giving advice concerning the availability of Counselling
  - Contact the Staff Confidential Counselling Service on 0870 240 4208, or the HR Dept
- Arranging a session with the Harassment & Bullying Adviser Service
o **Contact on 0870 240 4208**

- Providing access to Trade Union advice
- **Contact the Staff Side Secretary on 01923 427379**
- Referring an individual to Occupational Health or seeking their advice
- If relevant, explaining the Trust’s internal investigation procedure and guiding individuals on how they will be expected to contribute to the process, such as preparing a statement and/or being interviewed in the event of their being called as a witness.
- Giving staff the opportunity to access professional advice from their relevant Professional Body/Union

For additional guidance refer to:

- Learning From Incidents Policy, February 2013

### 2.8 Clinical Negligence Schemes for Trusts

All claims for compensation arising from allegations of clinical negligence will be dealt with by the NHSLA under the [Clinical Negligence Scheme for Trusts](#) (CNST). The Trust must comply with the CNST Reporting Guidelines (Fifth Edition) which form part of this protocol.

The CNST is a voluntary membership scheme, administered by the NHS Litigation Authority (NHSLA), which provides an indemnity to members and their employees in respect of clinical negligence claims arising from events which occurred on or after 1st April 1995. It is funded by contributions paid by member trusts and is often equated to an in-house mutual insurer.

The Scheme relates to incidents occurring in the context of NHS trust employment, and clinicians’ own medical defence organisations (MDOs) continue to provide an indemnity in respect of private practice and independent GP and dental practice.

In all cases, major or minor, it will be alleged that clinicians have failed to work to a suitably professional standard (the Bolam/Bolitho test) and that, in consequence, the service user has suffered injury and/or loss.

All clinical claims must be reported to the NHSLA electronically via the Claims portal on the NHSLA’s extranet site. For a step by step guide to the reporting and managing of Clinical Negligence Claims please see:

- Appendix B: Clinical Negligence Reporting Guidelines

### 2.9 Employers and Public Liability Scheme and Property Expenses Scheme

The Liabilities to Third Parties Scheme (LTPS) and the Property Expenses Scheme (PES), known collectively as the [Risk Pooling Schemes for Trusts](#) (RPST), are two voluntary membership schemes covering non-clinical claims where the incident occurred on or after 1 April 1999. Costs are met through members’ contributions.
All Employer and Public Liability claims must be reported to the NHSLA electronically via the Claims portal on the NHSLA’s extranet site, and must include the following documentation:

- Letter of Claim
- All documents relating to the type of claim being reported. Sample lists taken from the Pre-Action Protocol for Personal Injury Claims are enclosed in the form of a new ‘NHSLA Disclosure List’. A completed ‘NHSLA Disclosure List’ must accompany all reported claims, indicating which documents are enclosed by means of a tick in the appropriate box. The declaration must be signed by an officer of the Trust.

Upon receipt of a letter of claim the Trust, via the Legal Services Lead, should promptly identify the type of claim and complete the ‘NHSLA Disclosure List’ having identified the relevant documents. For every workplace claim the first page of the ‘NHSLA Disclosure List’ must be completed together with the appropriate page relating to the specific type of workplace claim.

There should not be a delay in reporting a Claim to the NHSLA if some documents are not immediately available. The NHSLA will accept the Letter of Claim without supporting documents until they become available.

The Capital Accountant must be notified of all instances of loss of or damage to Trust property and buildings, who will in turn notify the NHSLA of any loss under the Property Expenses Scheme (PES) before considering reimbursement. However, the scheme excess for buildings and contents is £20,000. Claims below the excess will be assessed by the Director of Finance following completion of a Losses & Compensation Form.

For a step by step guide on the reporting and managing of non-clinical claims please see:

- Appendix C: Liabilities to Third Parties Claims Protocol
- Appendix D: NHSLA Disclosure List

2.10 Link between the Management of Claims, Incidents and Complaints

The Trust has in place, robust communication chains between incidents, complaints and claims. Most claims will arise from incidents, which have been reported under the incident reporting procedure, and a complaint may also have been made. Close liaison between all three are enabled through the Datix Electronic System.

The Legal Services Lead is part of the Patient Safety Department, and is therefore automatically notified of all serious incidents. The Legal Services Lead will report any serious incident considered to be a litigation risk to the NHSLA and liaise appropriately with the Patient Safety Manager and the incident investigator.
Where, during the course of a claim, any risk management issues are identified, the Legal Services Manager will report these immediately to the Patient Safety Manager and the appropriate Service Line Leader.

The Legal Services Lead will share the NHSLA liability experts’ feedback reports on CNST claims with the Patient Safety Manager and the Executive Director for Quality & Safety. For more information regarding the expert feedback reports, please refer to Part 2.14.2 of this Policy and:

- **Appendix E**: Letter from NHSLA Director of Safety, Learning & People, Apr 2013

The Trust’s Complaints & Service Experience Manager notifies the Legal Services Lead directly of any complaints which may give rise to a claim.

### 2.11 Liaison with Stakeholders

During the claims process the Trust, through the Legal Services Lead, will routinely communicate with third parties such as:

- NHS Litigation Authority
- Claimant’s Solicitors
- NHSLA Panel Solicitors
- HM Coroner
- Staff/Managers/Clinicians

It may become necessary and appropriate to involve other external agencies for information or to be involved in the investigation of a claim, and if so this will be undertaken by the Legal Services Lead after consultation with the relevant Managing and/or Clinical Director. Examples of external agencies are:

- Third Party Experts
- The Police
- Witness Care Team, Crown Prosecution Service (in the event of a criminal trial)
- Other NHS Trusts
- Professional Regulatory Bodies (in consultation with the Trust’s Medical Director)
- Health & Safety Executive (in consultation with the Trust’s Head of Health, Safety & Security)

These communication links will usually be established by letter and telephone, ensuring that all written communication from the above will be acknowledged within two working days. As appropriate, the Legal Services Lead would arrange face to face contact with staff, for example when offering support or to obtain witness evidence in defence of the claim. For contact details see:

- **Appendix F**: Internal and External Contact Details
It is important to emphasise that equality and diversity considerations are taken into account in line with legislation and good practice when managing claims and communication with all third parties, including Claimants. Assessment of their specific needs and sourcing support to meet them should be considered and implemented.

2.12 Investigation and Root Cause Analysis

The primary purpose of investigating a claim is to ascertain:

- What happened?
- How did it happen?
- Why did it happen?

so that, if it was found to be predictable and preventable, appropriate action can be taken to prevent future occurrences of the same type.

To achieve this, the investigation process must be:

- Fair and equitable.
- Focused on learning and change.
- Focused on identifying contributory factors and root causes.

This should mean that it will be a rare occurrence for a claim to lead to Disciplinary action being taken and the Disciplinary process will only be used where it is clear that the actions of those involved included an intention to harm, a criminal act, serious professional misconduct or continued professional misconduct.

The Root Cause Analysis investigation process for claims should be followed as set out in the Trust’s Learning From Incidents Policy, February 2013, Part 3.

2.13 Claims Data Collection and Analysis

2.13.1 Claims reports to board and relevant committee(s)

Valuable learning can also be achieved through the analysis of aggregated data about claims over a period of time.

The Legal Services Lead maintains a log of all claims against the Trust on the Datix database. From this, the Legal Services Lead will prepare bi-annual reports analysing claims data to identify trends using both qualitative and quantitative data, linking with services to provide analysis of the information, for the purpose of reporting to the Quality & Risk Management Committee.

The report will provide:
• the number and aggregate value of clinical and non-clinical claims, showing trends across the Strategic Business Units,
• a systematic quarter by quarter, and annual trend analysis for claims, which will cover all Strategic Business Units
• the outcome of claims and the financial implications
• any risk management issues arising out of a particular claim, as well as actions to address these issues

The annual report will give information and analysis on claims trends for the whole year, including serious and high value claims. The yearly analysis will take into account a 3-year time span, which will highlight the most notable trends and represent areas of significant risk.

The aim of the Claims Report is to inform Trust management, clinicians and governance of the main themes in claims reporting and to meet the requirements of the NHS Litigation Authority Risk Management Standards.

The Quality & Risk Management Committee monitors the trends emerging through aggregated data about all claims, and can make recommendations to the relevant service or Committees if there are areas of concern requiring action.

2.14 Learning From experience

2.14.1 Internal Learning

Analysis of the root causes of individual claims will result in the identification of issues from which the service can learn. These must be translated into recommendations for change and action plans. These must then be monitored and reviewed to ensure that the service does learn the lessons and make improvements for the future.

Lessons to be learned will also be communicated across the Trust through a variety of channels such as Learning Notes, Learning Lessons Newsletter, Screen Savers, seminars for staff and the Practice Governance Framework, so that the valuable intelligence gained from the in-depth analysis of individual claims is shared and benefits all future services and service users.

Reports and action plans will be shared routinely with Joint Heads of Service and Practice Governance Groups across the Trust irrespective of their involvement in the claim. These will be shared with colleagues as appropriate for further dissemination and discussion with team/units involved.

Each Strategic Business Unit produces a newsletter, which aims to share lessons and good practice across the Trust. It provides staff with up to date information on Learning from Claims as well as Serious Incidents, Complaints, Infection Control and Medication incidents and to update staff generally regarding incident reporting and Datix developments. This is an internal newsletter dedicated to learning which
is published monthly. The aim of this newsletter is to inform staff of learning points and the wider trend analysis picture around incidents.

All reports and subsequent action plans will be considered by Practice Governance Groups with a view to taking actions on behalf of the Trust or Directorate i.e. review policies, develop training programmes, change practice.

The Quality & Risk Management Committee, which reports to the Integrated Governance Committee (IGC), will also play a key role in developing this communication and learning across the Trust.

2.14.2 External Learning

The NHSLA have discontinued their Risk Management Initiative and are piloting the use of liability experts to provide separate feedback reports instead, dealing solely with learning when providing their expert opinion in response to the allegations of negligence. The NHSLA will be testing this new approach and have decided to discontinue the solicitors risk management reports from 1 April 2013.

In addition a revised version of the NHSLA extranet is being developed, which will produce real time access to data for Trusts and develop over time to become a useful learning resource.

Further details on the NHSLA’s learning initiatives can be found in:

- Appendix E: Letter from NHSLA Director of Safety, Learning & People, Apr 2013
PART 3 – Associated Issues

3.1 Version Control

STANDARD

<table>
<thead>
<tr>
<th>Version</th>
<th>Date of Issue</th>
<th>Author</th>
<th>Status</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>V2</td>
<td>Oct 2008</td>
<td>Patient Safety Manager</td>
<td>Archived</td>
<td>Superseded</td>
</tr>
<tr>
<td>V3</td>
<td>Aug 2011</td>
<td>Legal Services Lead</td>
<td>Archived</td>
<td>Superseded</td>
</tr>
<tr>
<td>V4</td>
<td>20th August 2013</td>
<td>Legal Services Lead</td>
<td>Current</td>
<td>Fully reviewed – new Trust format.</td>
</tr>
</tbody>
</table>

3.2 Archiving Arrangements

STANDARD: All policy documents when no longer in use must be retained for a period of 10 years from the date the document is superseded as set out in the Trust Business and Corporate (Non-Health) Records Retention Schedule available on the Trust Extranet.

A database of archived policies is kept as an electronic archive administered by the Compliance and Risk Facilitator. This archive is held on a central server and copies of these archived documents can be obtained from the Compliance and Risk Facilitator on request.

This document will be reviewed annually or when changes occur to national policy, guideline or the NHSLA standards, or in response to changes in legislation, NHS Directives, or any other relevant event (whichever occurs first), by the Legal Services Lead, following which it will be subject to re-ratification by the Quality & Risk Management Committee. Feedback will also be actively sought from staff and other stakeholders as to this policy’s usefulness and applicability.

3.3 Associated Documents

STANDARD

This procedural document should be used in conjunction with the following HPFT policies, all of which are available on the HPFT staff website:

- Learning From Incidents Policy, February
- Being Open Policy, June
- Compliments, Concerns & Complaints Policy & Procedure, December
3.4 Supporting References

**STANDARD**

5. Non-clinical claims reporting guidelines Available from www.nhsla.com (Resolving Claims - Non-Clinical Claims)

3.5 Comments and Feedback – List people/groups involved in developing the Policy.

**STANDARD**

The Legal Services Lead will seek the views of service users and carers, as appropriate, operational staff, other service managers and Trust departments, to ensure requirements of other services are addressed.

The Quality & Risk Management Committee will approve the final version of the document and this will be noted in the minutes of that meeting.

**Example list of people/groups involved in the consultation**

<table>
<thead>
<tr>
<th>Executive Director for Quality &amp; Safety</th>
<th>Quality &amp; Standards Facilitator</th>
</tr>
</thead>
<tbody>
<tr>
<td>Quality &amp; Standards Manager</td>
<td>Head of Facilities &amp; Maintenance</td>
</tr>
<tr>
<td>Compliance and Risk Facilitator</td>
<td>Complaints &amp; Customer Relations Manager</td>
</tr>
</tbody>
</table>
## Appendices

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<tr>
<th>Appendices</th>
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</tr>
</tbody>
</table>
Clinical Negligence Claims Flowchart

How will the Claim unfold?
The diagram below illustrates the typical progress of a claim, but there is a good deal of variation from case to case.

<table>
<thead>
<tr>
<th>Service User/Relative “Claimant”</th>
<th>Timeline</th>
<th>NHSLA/Trust “Defendant”</th>
</tr>
</thead>
<tbody>
<tr>
<td>May or may not pursue hospital complaints procedure or may apply to Health Service Ombudsman</td>
<td>Very variable but a three year time limit applies in some cases</td>
<td>Obtains clinicians’ comments</td>
</tr>
<tr>
<td>Instructs solicitors</td>
<td></td>
<td>Instructs solicitors</td>
</tr>
<tr>
<td>Requests records</td>
<td></td>
<td>Commissions Independent Investigation</td>
</tr>
<tr>
<td>Commissions independent expert advice on: - The standard of management - Any preventable injury caused sub-standard management</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

FORMAL LEGAL PROCEEDINGS
Claim Form Issued at Court (additionally mediation or formal negotiations may be appropriate at any of above stages)

(Claim Form issued at Court)
| **PARTICULARS OF CLAIM**  
(Formalises the Letter of Claim) | Typically nine – twelve months | **DEFENCE**  
(Formalises the Letter of Response) |
|---|---|---|
| **EXCHANGE OF WITNESS STATEMENTS**  
The parties do not what the witnesses of fact would say on oath | Typically three months | **EXCHANGE OF WITNESS STATEMENTS**  
The parties do not what the witnesses of fact would say on oath |
| **EXCHANGE OF EXPERT ADVICE**  
The parties now know what the independent medical experts would say on oath | **SCHEDULE**  
(of financial losses and expenses associated with the injury) | Typically six-nine months |
| **COUNTERSCHEDULE**  
(May challenge fact/extent of financial loss) |
| **TRIAL**  
Usually avoided if proper information is available from the factual and expert witnesses |
1. Introduction

1.1 This guidance has been developed jointly by the NHSLA and the Association of Litigation and Risk Management (ALARM) to provide a framework within which claims managers working at Trust level will report new claims as they arise. The guidance becomes effective as from the 1st October 2008. It will be the subject of further review periodically.

1.2 These recommendations are aimed at securing best professional practice at local level. Through the provision of reliable and complete information from the start of any claim, Trusts will be able to ensure that any healthcare governance issues which may emerge are addressed promptly. In addition, that the cost of further investigation, if and when handled by Panel Solicitors, is minimised.

1.3 The guidance therefore makes a number of key assumptions:

- That Trusts have in place effective and integrated processes for risk management and for healthcare governance which operate across the entire range of services. For the purposes of this document, clinical governance is subsumed within the wider term.

- That a proportion of complaints will continue to contain demands for compensation.

- That there may continue to be variations in the abilities of different Trusts to process claims at a local level.

1.4 For these reasons this guidance describes a standard of professional practice which is most likely to be attained in Trusts offering acute services, as these give rise to the greatest numbers of claims. Other organisations which generate fewer claims may not feel able to justify the retention of dedicated expertise at the level that is advocated. This is a matter for individual trusts to decide. In these situations, the appropriate expertise could be bought in from another Trust by way of either a cost per case arrangement, or a service level agreement. This guidance incorporates a minimum standard which will be expected of all Trusts including those generating a small volume of relatively low value claims.

1.5 Trusts buying in claims services in the manner suggested above should ensure that appropriate contractual indemnities are in place. At present, all claims for compensation arising from allegations of clinical negligence will pass through the NHSLA via a nominated representative at Trust level, who will be expected to have a general understanding of the claims management process. Trust claims handlers should be aware that NHSLA authorisation is required before any admissions may be made and/or monetary compensation offered, subject to the
provisions of the Authority’s *Apologies and Explanations Circulars (Appendix 1).*

In the absence of such authorisation, the NHSLA will not reimburse Trusts either for the compensation awarded or for any of the costs generated. Such payments, if made by a Trust, will fall outside the scheme and could possibly result in criticism from auditors.

There are no longer any excesses applicable to any of the clinical negligence schemes.

Trusts may apply for **Delegated Authority (Appendix 2).**

1.6 This guidance is now split into sections dealing with:

- The initial response to a request for records and/or notification of a claim for compensation [2]
- The preliminary analysis [3]
- Reporting claims [4]
- Large value claims [5]
- Lower value claims [6]
- Independent Sector Treatment Centres [7]
- PCT Prison Healthcare Claims [8]
- Potential Group Actions or “Serial Offender” claims [9]
- Miscellaneous [10]
2. **The Response to a request for Disclosure of Records**

2.1 **The Request**

2.1.1 Requests for disclosure of records are usually made under the subject access provisions of the Data Protection Act 1998. There are three usual routes for these requests:

- By a patient or his representative directly (Personal Disclosure)
- By a solicitor requesting records in respect of a claim against another party (Third Party Disclosure)
- By a solicitor acting either to investigate or notify a claim against the Trust (Pre-Action Disclosure)

2.1.2 The volume of Third Party Disclosure is by far the greatest. However for both this and Personal Disclosure, Trusts must have in place a procedure for reviewing the records requested to ensure that the provisions of the Act are complied with, and to note if the record contains information which might possibly cause the requestor to commence a claim against the Trust.

2.1.3 This initial review should be carried out by a member of staff who is familiar with the content of medical records, and has a **broad**, but not necessarily detailed, understanding of the healthcare process. Where a potential problem is identified, the conduct of disclosure should pass directly to the Claims Manager at the trust.

2.1.4 It is possible that a request for Pre-Action Disclosure may be the first indication that an incident has occurred. Increasingly though, the incident reporting system may have alerted the Trust to the event at an earlier time. This will be particularly true where high value cases are concerned. Indeed the proportion of serious events that are notified initially as claims is a key indicator of the efficiency of the local incident reporting system. A significant proportion initially notified as claims should be regarded as a warning sign.

2.1.5 Where a claim has not previously been reported as an incident, but it is now considered that it should have been, it should immediately be so reported in accordance with local procedures. The investigation as a claim, and as an incident, should then proceed as a single process. Note, however, that if any investigation has such a dual purpose the documents arising from it are likely to be discloseable in subsequent litigation – see 4.2.2.

2.1.6 When a request for disclosure has been made without a claim, the opportunity to ask for the reasons which lie behind the request must be taken. Most Trusts incorporate this question into the documentation relating to the request when this is made by individuals or by solicitors seeking “third party” access. Of course, the records themselves may well contain sufficient information to enable an educated guess to be made as to the substance of a likely complaint or claim. It must,
however, be remembered that the data subject has an absolute right to disclosure under s.7 of the 1998 Act, albeit with certain exceptions [see 2.2.4 and 2.2.5].

2.1.7 Trusts should ask the patient or representative to be as specific as possible. It is reasonable to seek clarification as to which records are required and whether the requestor is content to dispense with the copying of records which do not relate or appear to relate to the matter under investigation. Once the nature of the request is reasonably clear, the Trust can consider whether to suggest that alternative means of resolving the issues might be appropriate, for example using the complaints procedure.

2.1.8 The Pre-Action Protocol for the Resolution of Clinical Disputes states that "sufficient information" should be provided to enable the Trust to determine which records are relevant and to identify whether further investigation is necessary. The Trust’s obligations to disclose under the 1998 Act do not prevent requests under the Protocol by the Trust for further details, if insufficient information has been supplied in the application.

2.1.9 The Records of Deceased Patients are still governed by the Access to Health Records Act of 1990. Applications for copies should only be granted to the personal representatives of the estate or to someone having a claim arising out of the death. There are additional provisions for withholding disclosure, e.g. where the deceased specifically prohibited this or when information was provided in the expectation that it would not be disclosed to the applicant.

2.2 Making the disclosure

2.2.1 The Claims Manager must ensure that all relevant originals of medical records, supplementary documents, specimens, recordings, charts etc are collated and retained until the conclusion of the claim. Of course, the files may be required for clinical purposes at any time so copies must be made. The Claims Manager’s copy must be kept up to date in parallel with the original where continuing treatment is occurring.

2.2.2 Copying records in the course of a claim is not a trivial task. It requires skill and patience to ensure that all copies are clear, legible, and of good quality. Copies should be filed into an indexed and paginated bundle, not run off and kept as an undifferentiated pile. Good practice is to use a new medical records case file to create an exact replica of the original, but this should be clearly marked as such to avoid the possibility of it becoming confused with the original. Further indexation may be required where files are large and a patient has had many admissions. Time taken at this stage will avoid wasted effort later on, and reduce the scope for claimant solicitors to generate further queries and requests for clarification. Additional work arising from poor or incomplete copying will certainly rebound in increased costs if the case is lost. Trusts with a significant workload should therefore ensure that the arrangements for copying are properly resourced so that adequate time is available to complete the task. Smaller trusts should consider an arrangement with a larger trust for complex cases.
2.2.3 To comply with the Data Protection Act, and the Pre-Action Protocol for the Resolution of Clinical Disputes, records must be provided within 40 days of the request and payment of the fee, at a cost not greater than that specified by the Data Protection Act (a maximum of £50, inclusive of copying, but plus postage, at present).

2.2.4 The Data Protection Act also specifies a duty to consider if disclosure would:-

- Reveal information likely to cause serious harm to the physical or mental health of a patient or any other individual.
- Reveal information relating to or provided by an individual other than the patient (or health professional involved in the care of the patient) who could be identified, and has not given consent to the disclosure [e.g. in paediatric and psychiatric cases].

2.2.5 Arrangements to assess records in accordance with this duty prior to disclosure should be in place. The Data Protection (Subject Access Modification) (Health) Order 2000 gives healthcare providers an exemption from s.7 disclosure obligations (data subject has absolute right to disclosure) provided that the criteria laid down in the Order are met. The Trust has a duty to take advice from “the appropriate healthcare professional” as defined in the Order before forming an opinion as to what, if anything, should be excluded from disclosure. It is essential that such a step is taken because harm can be caused if there is inappropriate disclosure.

2.2.6 At the same time clinicians should be asked for as much additional information as possible, including an analysis of the facts and an opinion as to allegations that may have been made, any adverse outcome or other irregular feature of the case.

2.2.7 Requests for disclosure of medical records may also be received under the Freedom of Information Act (FOIA). However, an individual’s “personal data” are exempt from disclosure under this Act and requests for the subject’s own data should be treated as approaches under the Data Protection Act. Requests for someone else’s data under FOIA should be rejected if such disclosure would contravene any of the Data Protection Principles, which will almost invariably be the case.

3. The Preliminary Analysis

3.1 It is not necessary or desirable to investigate in detail every case in which records are requested. However in every case a preliminary analysis should be undertaken. This is a brief examination of the immediately available evidence which needs to be tested against the legal criteria of breach of duty and causation, to see if there is a realistic prospect of a claim being made.
3.2 Preliminary analysis should normally be completed within **forty days** of receipt of the request for disclosure, although it is recognised that, in some more complex cases, this target may prove difficult to meet.

3.3 Where an incident report or a complaint exists, the results of the investigation and, in the case of the latter, a formal response, will be available. These will usually furnish sufficient information to form a judgement as to the likelihood of a claim being made.

3.4 Where an incident report does not exist, the medical records should be scrutinised carefully. Discharge letters and summaries are particularly useful, as are notes relating to consent procedures. They may often allude to complications that may represent untoward events, and the steps already taken to remedy them. It is important to obtain the views of the clinician in overall charge of the patient, and anyone else who, on the face of it, may have made an error. The information gathered should be measured against the Trust’s risk rating or severity measurement criteria used for incident reporting.

3.5 Rating criteria are particularly useful where they have been designed to determine the depth, level, and scope of investigation and reporting within the Trust. As a minimum, the NHSLA expects Trusts to have in place a policy on investigation of incidents which will be used to determine the extent of any investigation which may be necessary.

3.6 A claim is defined as:-

> Allegations of clinical negligence and/or a demand for compensation made following an adverse clinical incident resulting in personal injury, or any clinical incident which carries significant litigation risk for the Trust. (See 4.1)

This includes complaints leading to claims, notification of serious adverse events, incident reports generated by risk management processes any of which represent a significant litigation risk, requests for the disclosure of medical records. Defining an incident as a “claim” in the absence of a demand for compensation does NOT of itself imply that the NHSLA accepts that compensation will ultimately be paid. It simply means that a preliminary analysis should be carried out and the matter may need to be reported.

3.7 Trusts should investigate in detail where “claims” arise from or involve:-

- An incident or outcome likely to generate substantial compensation
- Actual or potential publicity or media involvement
- Obstetrics and Paediatrics
- Fatal incidents (including suicides of psychiatric patients and unexplained deaths)
- Misdiagnosis of life-threatening illness
- Actual or potential Group Actions (see Section 9)
- Serious professional misconduct/potential "serial offenders" (see Section 9)

This list is neither prescriptive nor exhaustive, and should include any cases where there are issues that directly affect the governance of the Trust.

### 3.8

The preliminary analysis should be structured and contain the following sub-headings:

<table>
<thead>
<tr>
<th>Sub-heading</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Synopsis and Chronology</strong></td>
<td>Brief outline of main events including details of the main parties involved.</td>
</tr>
<tr>
<td><strong>Care Management Problems</strong></td>
<td>All events where care deviated beyond acceptable limits.</td>
</tr>
<tr>
<td><strong>Breach of Duty</strong></td>
<td>Record those case management problems leading to harm, and make a direct response to specific allegations made in the request for records.</td>
</tr>
<tr>
<td><strong>Causation</strong></td>
<td>Relates to harm that has directly led to loss of amenity pain and suffering. This may be difficult to determine in many cases without further investigation.</td>
</tr>
<tr>
<td><strong>Quantum</strong></td>
<td>This should be estimated by the claims manager on the basis of information known at the time, using the Judicial Studies Board Guidelines supplemented by advice from the NHSLA. It should represent a best guess of the probable cost to the defendant at the time of resolution of the case and should incorporate figures for both claimant and defence legal costs see <strong>Notes on Reserving (Appendix 3)</strong>. Claims staff at the NHSLA will be pleased to advise by telephone.</td>
</tr>
<tr>
<td><strong>Claimant’s Funding</strong></td>
<td>Public private, CFA [see 8.2] etc.?</td>
</tr>
<tr>
<td><strong>Risk Management Implications</strong></td>
<td>What can be learned for the future from the events in question? Who has been charged with this responsibility?</td>
</tr>
</tbody>
</table>
Action plan

The next steps recommended, e.g. obtaining witness evidence, expert opinion on causation, obtaining a condition and prognosis report etc. This section should include assessment of litigation risk as:

**Low** where there is no liability on the part of any party to the claim or the allegations of negligence are not causative of the outcome alleged (nominal 25% liability)

**Medium** where the likelihood of the claimant’s success is equivocal and there is a need for further investigation (nominal 50% liability)

**High** where the claim is viewed as a likely settler or where there has already been an adverse expert opinion, for example in an incident investigation (nominal 75% liability)

3.9 In order to achieve this process, Trusts should have in place a structure which allows the Claims and Litigation Manager or person carrying out these functions to take the following steps:

- Collection and collation of records including medical records, ancillary records if these are separated, incident reports, complaints files and any data held on computer files which are not routinely printed and stored in hard copy format.

- Discussions with lead clinicians who should be asked to provide reports on the clinical care received and to give an opinion on whether the care fell below an acceptable standard, leading to harm, and to respond in detail to all allegations made. The report should state clearly that it is made in response to actual or contemplated legal action.

- Identification of all relevant staff and their contact addresses, telephone numbers and GMC or other professional reference numbers.

- Following up of requests for information/assistance from the NHSLA.

- Any adverse incident reports should be filed separately from the clinical records. These reports are discloseable but only following a specific request. If they are filed within the body of the clinical records they become discloseable at the time of the initial request for records and will need to be disclosed at that stage. Please pass them to NHSLA with your preliminary assessment once a claim is intimated.

3.10 It must be borne carefully in mind that reports which do NOT have as their sole or dominant purpose actual or prospective litigation are likely to be
**discloseable** in law. Consequently, care must be taken by Claims Managers and others when compiling such reports to **restrict themselves to facts and not express opinions** which could rebound upon the Trust if litigation is commenced, so far as practically possible.

4. **Reporting to the NHSLA**

4.1 When a significant litigation risk has been established, and a realistic valuation of a possible claim has been made, the matter becomes reportable to the NHSLA. One of six possible situations may arise:-

- (a) Incidents reported (e.g. a major obstetric mishap), graded red/serious and investigated under the healthcare governance arrangements. Those revealing a possible breach of duty leading to a potential large value claim (i.e. damages of over £250,000) must be reported as soon as possible, usually before a claim is made. [4.2.1]

- (b) Incidents which have the potential to become a group action involving a number of patients (e.g. there has been a failure of a screening service such as cytoscreening or breast screening).

- (c) Claims arising from the alleged negligence or serious professional misconduct of a clinician or team which has affected a cohort of patients. (“Serial Offenders”).

- (d) Claims arising from a complaints investigation where the response, on the facts, indicates that an admission of liability has been implied. [4.3.1]

- (e) Requests for disclosure of records where the preliminary analysis indicates the possibility of a claim with a significant litigation risk, regardless of value. [4.4.1]

- (f) Letters of claim as the first indication of any action. [4.5.1]

4.2.1 **In the first three group of incidents (a b & c) the requirements of healthcare governance are of primary importance in order to ensure the safety of patients.** Such incidents should be thoroughly investigated, and will be reportable to the NPSA. Many are already reportable under other regionally managed channels. Investigations must be thorough, open and subject to scrutiny.

4.2.2 These requirements pre-empt action in contemplation of a claim. **Documents in relation to such investigations will normally be disclosable because their primary purpose relates to governance, not the contemplation of legal action. This means that their content must be factual and avoid opinion and supposition as far as practically possible.**

4.2.3 Insofar as the facts speak for themselves, their interpretation may amount to an admission of liability but this should not inhibit Trusts from dealing properly and
effectively with the remedial action which may be indicated. **It should not inhibit frank or open discussion with patients.** The NHSLA advocates the giving of apologies and explanations where appropriate (see Circulars 97/C10, 02/02 and 15 August 2007 (NHSLA gateway reference 0058), as well as s.2 Compensation Act 2006).

4.2.4 These groups of claims should be reported in the same way as the fifth group [for format of reporting see 4.4.2].

4.3.1 In the fourth group of claims (d) it is essential to send the NHSLA the letter of complaint and any formal correspondence in response. Where the Independent Review procedure has been used, the report of the panel, and particularly any expert opinions that may have been given at the convening stage or during the review, will be required.

4.4.1 In the fifth group (e), where a significant litigation risk has been identified, the matter becomes reportable. First notification/reporting of the case must occur as soon as the preliminary analysis has been completed **but not later than 2 months after the request for disclosure.**

4.4.2 The following basic documentation should be sent in with all such cases: -

- Covering letter supported by the preliminary analysis
- A completed CNST claim report form
- Copies of the correspondence from the claimant’s solicitor or the patient
- Copies of comments from clinical staff obtained as part of the preliminary analysis
- Where relevant, the report of investigation of any adverse incident, or the formal response by the Chief Executive to a letter of complaint
- Any relevant Trust policy or protocols

4.4.3 The NHSLA will liaise with the Trust regarding further investigations. The NHSLA may conclude that panel solicitors should be instructed and will do so direct.

4.5.1 In the sixth group of cases (f) the first notification of a claim may arrive as the formal letter of claim. This may happen where for example the claimant has obtained sufficient medical records from a source beyond the Trust’s control, e.g. the patient’s General Practitioner, or by means of the patient’s own approach to the Trust.

4.5.2 Under the terms of the Pre-Action Protocol for the Resolution of Clinical Disputes, a claimant is required to send a letter of claim containing a clear summary of the facts upon which the claim is based including the main allegations of negligence,
the patient’s injuries, present condition and prognosis, and financial loss. This can be sent at any time after the records have been disclosed, and may arrive before the preliminary analysis is complete. Letters of claim should be reported to the NHSLA within 24 hours of receipt.

4.5.3 The Letter of Claim indicates that the formal legal process has commenced and there will be three months to respond formally, provided that the letter is Protocol-compliant. Do not give any indication that you regard it as such, thereby enabling the NHSLA or panel solicitors to seek further time if need be. The Trust should acknowledge the letter, and identify that the NHSLA will be dealing with it. The NHSLA may in turn instruct a panel solicitor, if necessary, who will then contact the claimant’s solicitor. Time taken by the Trust to investigate is of the essence. NHSLA & the Trust will be criticised for delay and, as a minimum, can incur costs sanctions for any unjustified delay.

4.5.4 The NHSLA or panel solicitor will, where necessary, seek an extension of time especially when there has been no previous indication that a claim is being made. Insofar as the available evidence can be obtained, a formal response will be provided within the timescale.

5. Large Value Claims

5.1 Large value claims are those where the possible damages liability exceeds £250,000. By definition they will arise from serious clinical incidents which fall within the normal reporting guidelines in any Trust. The size of claim will usually result from the need for continuing care provisions to be made. There may also be dependent family members and loss of future income contributing to the size of the eventual settlement.

5.2. Thus most of these incidents will be graded at the most severe end of any rating spectrum. This means that they will be the subject of detailed investigation. The use of a structured approach to conduct the investigation, determine the root causes of the incident and make recommendations to the Trust Board, is highly recommended good practice.

5.3 Purpose

5.3.1 This level of investigation may well take place before a claim is made, and can therefore either replace the preliminary analysis or, in summary form, provide it. Because the investigation process is systematic, comprehensive and based upon human factors, the documentation, report and recommendations will usually provide a complete record of the event. Inevitably it will form the evidence base for the Defence in any subsequent proceedings.

5.3.2 The primary or dominant purpose of such an investigation relates to matters of governance and patient safety. Trust Boards now have a clear duty to investigate serious incidents and satisfy themselves that all reasonable steps have been
taken to prevent a recurrence. This has to be done openly, and within a culture that seeks to learn from the event.

5.3.3 This philosophy runs directly counter to the adversarial principles which underpin the conduct of litigation. Thus, a traditional approach to adverse incidents which safeguards future prospects for litigation is no longer possible. It is therefore vital to ensure that investigations are factual, and that both the recommendations and further action are based on evidence rather than supposition and anecdote.

5.4 **Conduct of Investigations**

5.4.1 The conduct of investigations at this level is a skilled task which in addition to the use of a structured approach should be undertaken by senior members of staff.

5.4.2. Whilst the dominant purpose of investigations is governance, the possibility of litigation needs to be constantly kept in mind. Thus it is recommended good practice to collect information by way of formal statements that can be used by the Defence later on. However, such statements will be discloseable in any subsequent litigation (see 4.2.2) and therefore it is essential that they are both accurate and complete, that they are signed by the clinician, and that only persons trained in statement-taking should prepare them. In problematical cases Trusts may wish to take legal advice in the preparation of this evidence. This will be a matter for individual Trusts to consider as the cost of such advice will not be reimbursed in the course of defending a claim. However, where legal advice is taken, Trusts should instruct one of the NHSLA Panel firms who will be aware of the standards required for defence.

5.4.3 This further follow-up is essential for the purposes of governance, as any identified weaknesses in technique or performance will need to be addressed with clinical staff and appropriate action agreed. It is clearly in the interests of patients that such steps are taken rapidly where expert opinion identifies practice that may not be acceptable.

5.5. **Reporting**

5.5.1 This type of incident is already reportable to the Department of Health via existing channels and to the NPSA.

6. **Lower Value Claims**

6.1 These will form the bulk of claims, with damages valued up to £250,000.

6.2 **Local conduct after reporting.**

6.2.1. Once the preliminary analysis has been carried out and the case reported to the NHSLA, it will be either handled in house, or assigned to a Panel Firm of solicitors for further conduct. Where a case is referred to a solicitor by way of direct instruction, this will normally be the firm designated to that Trust. Exceptions may
arise where the case forms part of a series or group action, which are clearly best handled by dedicated teams, or if it is novel, contentious or repercussive in a manner which indicates the use of a specialist defence practice.

6.2.2 Further conduct of this group of cases will be by liaison between the NHSLA and the Trust. Claims managers will need to collect detailed statements, either in concert with panel solicitors or the NHSLA or on their behalf.

6.2.3 This further follow up is essential for the purposes of governance as any identified weaknesses in technique or performance will need to be addressed with clinical staff and appropriate action agreed. It is clearly in the interests of patients that such steps are taken rapidly where expert opinion identifies practice that may not be acceptable.

6.2.4 **NHSLA will always liaise with trusts before making admissions whether on breach of duty or causation.** When a claim reaches other key stages such as when an offer is to be made or if we have had to talk to the media, for example, the NHSLA claims manager will use best endeavours to inform the trust claims manager in sufficient time to enable him/her to inform the clinicians involved in the treatment. This may not always be possible.

6.2.5 Any “ex-gratia” settlements offered by a Trust, whether as a consequence of a case passing through the complaints procedure or otherwise are, by definition, not payments based upon legal liability and are therefore not reimbursable under the CNST by the NHSLA.

6.2.6 Trusts are encouraged to offer non-pecuniary solutions to patients, where appropriate. Examples include a meeting with the relevant clinician(s), fast-tracking of treatment etc.

7. **Independent Sector Treatment Centres (ISTCs)**

7.1 These are a group of clinics and surgeries, both static and mobile, owned by the private sector but providing treatment free of charge to NHS patients. They are specifically designated by the Department of Health: the title does not apply to one-off waiting-list initiatives involving the private sector.

7.2 CNST cover extends to the work of ISTCs via the Primary Care Trust which refers the relevant patient.

7.3 ISTC owners are expected to comply with these reporting guidelines. If claims are reported direct to the NHSLA, the owners must simultaneously advise the PCT involved. Alternatively, ISTC owners should report fully to the PCT, which will in turn notify the NHSLA promptly.

7.4 Whether claims are reported to the NHSLA by the ISTC owners or by the PCT, it should be made clear to the NHSLA at the start that the case concerns an ISTC. Failure to do so may lead to confusion and delay.
8. **PCT Prison Healthcare claims**

8.1 The commissioning of health services in prisons in England is now the responsibility of the relevant PCTs. It does not necessarily follow however that the PCT is the correct defendant where allegations of negligence are made because healthcare services are commissioned from a range of providers, including GPs, community health units and drug agencies. In addition, access to healthcare may involve a prison employee.

8.2 The following information should be provided when reporting a claim in this category:

(a) When was the PCT first formally involved in the provision of healthcare services?
(b) Has the PCT been a commissioner and/or provider of services? Please specify the date when each role commenced and provide copy contracts where available.

(c) Please confirm the employment status of each individual involved in the care of the claimant at the relevant time e.g. PCT employee, prison employee, GP contractor. If the employment status of the individual changed, please confirm the date when this change became effective.

(d) Please confirm how prisoners access healthcare services in the particular prison.

(e) Please provide the name and contact details of the manager in your organisation with key responsibility for the PCT’s relationship with the prison.

9. **Group Actions/“Serial Offenders”**

9.1 The circumstances which give rise to these types of potential claims have often come to light as a result of a Trust’s own internal audit procedures which have identified a failure, as a result of which some patients will already have been recalled and either treated or reassured. Incidents of this nature should be reported to the NHSLA as soon as possible, and certainly if any affected patient makes a request for disclosure of records.

10. **Miscellaneous**

10.1 **Compensation Recovery Unit (CRU)**

In all cases the requirements of the Compensation Recovery Unit for reporting cases and obtaining certificates of benefits recoverable remain. This task will be handled centrally by the NHSLA, unless the trust has delegated authority, so local claims managers will need to obtain the National Insurance numbers of all claimants at the earliest opportunity. Where a request for records is made using
the Law Society/DH protocol forms this information will be available, otherwise it should be sought promptly.

10.2 Conditional Fee Agreements

10.2.1 A Conditional Fee Agreement is an agreement between a person providing advocacy or litigation services and a claimant. This is commonly referred to as a “no win no fee” agreement.

10.2.2 Claimants entering into Conditional Fee Agreements on or after 1st April 2000 may be able to recover the success fee charged by their solicitors. This can be as high as 100% of the solicitors’ standard charges. They may, in addition, be able to recover the reasonable premium for any insurance they may take out to cover defendants’ costs and unrecovered disbursements.

10.2.3 Pre-action there is no obligation on claimants to reveal the existence of a Conditional Fee Agreement, but the Defendant should nonetheless enquire at the earliest possible stage as to the funding arrangements in force. The claimant must however disclose that a Conditional Fee Agreement exists upon service of proceedings.

10.2.4 The level of success fee and insurance premium will not normally be disclosed until damages have been paid. Therefore Defendants will not be able to challenge these details until the claimant’s costs are submitted for payment.

10.3 Mediation/Alternative Dispute Resolution (ADR)

Mediation involves a trained mediator acting as go-between to facilitate settlement. ADR can take one of a number of different forms, e.g. a time-limited discussion. Consider always the potential cost of such a step against the benefits which might be achieved. As a general guide, claims of relatively limited financial value, but possessing major emotional elements, e.g. the death of a child, might be suitable candidates. All cases, however, may potentially benefit from mediation or ADR at any stage.

10.4 Claimant’s Part 36 Offers

10.4.1 It is possible that these may be made at an early stage, even where the first notification is a letter of claim. In all cases they should be supported by a medical report and a schedule of losses. Punitive consequences may flow from offers made under CPR Part 36 which are either rejected or fall out of time, which ultimately prove to be successful.

10.4.2 Any such offer, even one unsupported by medical evidence and/or a schedule, requires immediate notification to the NHSLA by telephone followed up by fax. This must happen as soon as the documents are received as it is extremely important to avoid delay.
10.4.3 The Trust should not give any indication to the claimant’s solicitors that any such offer is valid, or that time runs from a particular date.

10.4.4 Where such letters are received in other parts of the Trust, e.g. the Chief Executive’s office, it is worth training staff working in these areas to recognise solicitors’ letters and develop a fast track to process them.

10.5 Indemnity

10.5.1. The NHSLA are aware that there is anxiety among members surrounding possible reservation of the Authority’s rights under the scheme.

10.5.2 There have been occasions when that course of action has proved necessary although it is only in the rarest of circumstances that the NHSLA have declined to indemnify.

10.5.3 The NHSLA recognise that a judgment has to be made when deciding whether or not to report circumstances which might give rise to a claim. We suspect that opportunities for not doing so will reduce given the NPSA reporting mechanism. If a claim for compensation is made, the decision is straightforward: the case needs to be reported to the Authority.

10.5.4 In instances where it appears that there has been a delay in reporting, the NHSLA will usually only raise the issue if it appears that the prospects of defending the claim have been prejudiced and/or a liability for increased damages and/or costs has arisen as a result of the delay.

10.5.5 It is not possible to be prescriptive as to every circumstance which may give rise to prejudice and the NHSLA will consider each set of facts individually.

10.5.6 Members are encouraged to speak to the NHSLA if there is any doubt about particular circumstances and whether they should be reported or not.

10.6 Applications for Standard Disclosure

Where Trusts have failed to provide solicitors with standard disclosure under the 1998 Act (other than under one of the statutory exceptions), or otherwise, and those solicitors issue a court application to force disclosure, the NHSLA will not reimburse the legal costs involved in any such application.

10.7 Liaison Between NHSLA and Trusts

10.7.1 The NHSLA or solicitors instructed will continue to advise Trusts in advance of conferences with Counsel and court hearings. Trust officers will continue to sign Defences and other relevant pleadings because Trusts, and not the NHSLA, will remain the legal Defendants.

10.7.2 Where court hearings are likely to generate media interest, the NHSLA will agree with the Trust beforehand a press release or position to be adopted.
10.7.3 The NHSLA will issue a closure document to Trusts at the end of each claim, which will include inter alia a breakdown between damages, claimant costs and defence costs. Risk management lessons to be learned will be advised as and when such issues are identified during the course of a claim.

10.7.4 The NHSLA will liaise with Trusts throughout each claim. See NHSLA feedback to Trusts (Appendix 4).

Summary of Clinical Negligence Reporting Requirements

- Requests for disclosure of medical records to be processed within 40 days;
- Check that sufficient initial information has been provided by patient or adviser and request more if necessary;
- Collect, retain, paginate and index relevant records;
- Undertake preliminary analysis;
- Have system in place for identifying adverse incidents, significant litigation risks etc;
- Report relevant cases to the NHSLA within 2 months of request for records or sooner if event is serious;
- All letters of claim and Part 36 offers to be notified to the NHSLA immediately;
- Acknowledge letters of claim within 14 days;
- Detailed response due within 3 months;
- All legal proceedings to be notified immediately.
THE NHS LITIGATION AUTHORITY NON-CLINICAL CLAIMS REPORTING GUIDELINES

For use by all Members of the Liabilities to Third Parties Scheme [LTPS]

1 Introduction

1.1 These guidelines are intended to assist Members in processing all categories of claim under LTPS, but predominantly EL and PL claims.

Members should be familiar with the LTPS Rules and nothing in these guidelines is intended to override the Rules.

The LTPS Rules can be downloaded from our website at www.nhsla.com

1.2 These guidelines provide a framework within which Members should report new claims to NHSLA.

1.3 Receipt by a Member of an EL or PL claim involving personal injury will usually trigger the Pre-Action Protocol for Personal Injury Claims.

The ‘Protocol’ sets in train a timetable that requires responses within specific timescales.

1.4 Claims should be reported using the standard LTPS Incident Report Form which can be found on our website at www.nhsla.com.

If a Member wishes to claim under the Scheme it is imperative that there is reliable and complete information sent to the NHSLA at the first opportunity.

1.5 Where delays occur and the required information is incomplete or not readily available, delivery of the specific responses required by the Protocol timetable may be compromised. Increases in costs that arise from delays attributable to the Member are not covered by the Scheme.

1.6 Members should have effective and integrated processes in place for complying with relevant Health & Safety legislation, together with proper measures through line management to ensure the earliest recording, investigation and assessment of incidents, irrespective of the likelihood of a formal claim.

1.7 Claims should pass to NHSLA via a nominated representative, who should have a thorough understanding of the claims management process.

1.8 Where a claim is being made under the Scheme, NHSLA authorisation is required before admissions are made and/or any compensation offered.
There is no obligation under the Scheme for Members to be granted assistance where admissions and offers have been made by the Member in the absence of NHSLA authorisation.

2 **Contact with NHSLA**

Members may contact the non-clinical claims team at:

The NHS Litigation Authority  
2nd Floor  
151 Buckingham Palace Road  
London  
SW1W 9SZ

DX 6611000 London 91 SW  
Tel: 020 7811 2700  
Fax: 020 7821 1461

The current Team Leaders are:

Members A to M - Susan Georgiades (Tel: 020 7811 2724)  
Members N to Z - Vacant

The Head of Non-Clinical Claims is Steve Chahla (Tel: 020 7811 2704)

More local contact is via the Member’s allocated Claims Inspector, where that person has been instructed to conduct investigations on site.

A more detailed NHSLA contact sheet circulated to all Members on a quarterly basis.

3 **When should a claim be notified to NHSLA?**

3.1 Members are required to report claims upon receipt of a formal Letter of Claim, where the total cost will approach or exceed the applicable ‘excess’.

Members must report all matters that are the subject of a formal Letter of Claim at the earliest opportunity.

The standard ‘excesses’ applying under LTPS are:

<table>
<thead>
<tr>
<th>Amount</th>
<th>Type of Claim</th>
</tr>
</thead>
<tbody>
<tr>
<td>£10,000</td>
<td>Employers Liability claims</td>
</tr>
<tr>
<td>£3,000</td>
<td>Public Liability claims</td>
</tr>
</tbody>
</table>

Members should bear in mind the ‘excess’ applies to the total value of the claim; that is, damages, plus any Claimant and Defence solicitors’ costs.
3.2 All reportable EL claims should be accompanied by the documents on the standard disclosure list applicable to the particular type of claim.

Members must not delay reporting matters if some documents are not immediately available - send the Letter of Claim alone in the meantime.

There is a link to the ‘NHSLA Disclosure List’ on our website - please see Claims/Schemes/RPST/NHSLADisclosureList.doc.

3.3 NHSLA offers a handling service for claims falling within the ‘excess’, subject to a handling fee which currently stands at £200.

The handling of such claims by NHSLA remains subject to the Scheme Rules.

The handling fee itself is subject to revision from time to time.

3.4 NHSLA also encourages Members to report serious adverse incidents and/or serious adverse outcomes representing a significant litigation risk prior to an actual demand for compensation being made.

These may come to light through:

- Normal in-house Incident recording/investigation
- Complaints which look highly likely to lead to claims
- Other matters identified through Risk Management processes

3.5 NHSLA seeks early notification particularly where the following features arise:

- Fatal incidents
- MP involvement
- Media attention
- Human Rights issues
- Multi-party actions
- Multiple claims from a single cause
- Novel, contentious or repercussive claims

3.7 Once the claim has been notified under LTPS, the Scheme Rules require that the following also be notified to NHSLA immediately upon receipt:

- Any further correspondence from or on behalf of the Claimant (particularly any letters triggering time limits under the Pre Action Protocol for Personal Injury Claims – for example, Part 36 Offers to settle or nomination of medical experts)

- Any proceedings or written notice thereof
4 **Action in response to a notification of a claim for compensation**

4.1 The Protocol requires Claimants to send a formal 'Letter of Claim' containing a clear summary of the facts upon which the claim is based, including the main allegations of negligence, the nature of the injuries, present condition and prognosis, and any financial loss.

4.2 The Letter of Claim triggers specific time limits, indicating that the legal process has commenced, and there will be 3 months to respond formally. The Letter of Claim should, as far as possible, be acknowledged on the 20th day after the date on the Letter. Members should do that, indicating that the matter has been reported to NHSLA.

4.3 There are also incidents, not necessarily the subject of a formal Letter of Claim, that require Members to commence immediate investigation and the collation of documentation. These are generally of a more serious nature, for example:

- Health & Safety Executive investigations
- Fatalities
- Other serious injuries.

This list is not exhaustive and if Members are in doubt as to whether an incident is ‘serious’ they should seek advice from the NHSLA.

4.4 Members should try as far as possible to carry out the following steps immediately upon receipt of a Letter of Claim:-

4.4.1 Collect and collate records and any other information relating to the incident and the person(s) involved, including incident reports, complaint files and any data held on computer files which are not routinely printed and stored in hard copy format.

4.4.2 Identify all relevant personnel and their contact addresses and telephone numbers.

4.5 Members should be aware that reports which do not have as their sole or dominant purpose actual or prospective litigation are likely to be discloseable.

This means that their content ought to be factual and avoid opinion and supposition as far as practically possible.

The interpretation of such reports may amount to an admission of liability but this should not inhibit Members from dealing properly and effectively with any remedial action that may be indicated.

4.6 Matters with no prior record or incident investigation
Where a Letter of Claim relates to an incident not previously recorded and/or not previously internally investigated by the Member immediate action should be taken to implement the appropriate investigations.

The urgency arises because of the Protocol timescales (see Sections 1.3 and 4.2) for delivering a reasoned response to the Letter of Claim.

The usual investigations in respect of a previously unrecorded incident and any additional investigations arising directly from the Letter of Claim should proceed urgently as a single process.

Note: documents arising from investigations with such a dual purpose are likely to be discloseable in subsequent litigation (see Section 4.5)

4.7 The following basic documentation should be sent in with all such cases: -

- Covering letter clearly indicating a new notification is attached
- Completed LTPS Incident Report Form
- Copies of the correspondence from the claimant’s solicitor
- Any prior correspondence, e.g. initial letter/s of complaint
- All reports of investigations into the incident
- Copies of comments from supervisors and/or managers obtained as part of the initial incident investigation
- Unless the Member is already satisfied that liability attaches for the incident, the documents on the standard disclosure list applicable to the particular type of claim.

4.8 NHSLA will liaise with the Trust regarding the information submitted and any further investigations required.

5 Miscellaneous

5.1 Ex-gratia payments

‘Ex-gratia’ settlements offered by Members are by definition not payments based upon legal liability and are therefore not recoverable under LTPS.

5.2 Compensation Recovery Unit (CRU)

The requirements of the Compensation Recovery Unit for reporting cases and obtaining certificates of benefits recoverable remain in place.

For all claims made under the Scheme this task will be handled centrally by the NHSLA.

Members should as far as possible try to identify and provide the National Insurance numbers of all employee or patient Claimants.
5.3 Mediation/Alternative Dispute Resolution (ADR)

ADR can take one of a number of different forms, for example, a time-limited discussion.

Mediation is a specific form of ADR and involves a trained mediator to facilitate settlement.

The NHSLA is committed to ADR and Mediation in appropriate circumstances as a means of resolving disputed claims. Claims of relatively limited financial value, but possessing major emotional elements, for example, the death of a child, might be suitable candidates. All cases, however, may potentially benefit from mediation or ADR at any stage.

5.4 Claimant Part 36 Offers

It is possible that these may be made at an early stage, even where the first notification is a Letter of Claim.

Punitive consequences may flow from offers made under CPR Part 36 which are either rejected or fall out of time.

Therefore any such offer, whether or not the Member believes the terms of the offer to be valid, should be immediately reported to NHSLA by telephone and fax. This must happen as soon as the documents are received as it is extremely important to avoid delay.

Members should not give any indication to the Claimant’s solicitors that any such offer is valid, or that time runs from a particular date.

Where such offer letters may be received in other parts of the Members operation (for example, the Chief Executive’s office) staff working in these areas should be trained to recognise such offers and Members should develop a fast track to process them.

6 Scheme Indemnity

6.1 NHSLA is aware that there is anxiety among Members surrounding possible reservation of the Authority’s rights under the Scheme.

6.2Whilst occasionally that course of action has proved necessary, it is only in the rarest of circumstances that NHSLA would decline to indemnify.

6.3 NHSLA recognises that a judgment has to be made when deciding whether or not to report a case in accordance with section 3 of these guidelines.

6.4 Where there have been delays in reporting NHSLA will only raise the issue where there has been prejudice caused by identifiable additional case cost.
6.5 It is not possible to be prescriptive as to every circumstance which may give rise to prejudice and NHSLA will consider each set of facts individually.

6.6 Members are encouraged to speak to the Authority if there is any doubt about particular circumstances and whether they should be reported or not.

7 **Liaison between NHSLA and Trusts**

7.1 NHSLA will discuss and consult with Members on the defensibility or otherwise of claims before implementing the decision reached.

7.2 Risk Management issues not identified by Members in their initial incident investigation will be raised and discussed with the Trust contact as the claim investigation progresses.

7.3 NHSLA or its solicitors will notify Members of Court Hearings.

7.4 Where required Defences and other relevant pleadings will continue to be signed by Member representatives as the legal Defendants to litigation.

7.5 Where claims are likely to generate media interest, NHSLA will liaise with the Trust to agree a press release or the position to be adopted.

7.6 NHSLA will send a closure document to Trusts at the end of each claim, giving a breakdown between damages, Claimant costs and Defence costs.

7.7 Upon conclusion of the claim NHSLA will raise an invoice in respect of any unpaid Member Liability under the Scheme.

**Summary of LTPS Reporting Requirements**

- Have a system in place for identifying and appropriately investigating and documenting adverse incidents as soon as they are discovered.

- Report all Letters of Claim to NHSLA immediately with a completed LTPS Report Form and all existing records, reports, and related documents.

  But do not delay reporting matters if some documents are not immediately available - send the Letter of Claim alone in the meantime.

- Acknowledge all Letters of Claim within 21 days, on the 20\textsuperscript{th} day after the date on the letter.

- All subsequent letters and in particular all Part 36 offers to be notified to NHSLA immediately.
▪ Ensure priority is given to identifying, creating and sending further documents and information requested by NHSLA on any claim.

▪ Priority assistance to NHSLA or others acting as their agents in identifying and making available the personnel relevant to issues arising in any claim.

▪ All legal proceedings to be notified immediately.

NHSLA
Non-Clinical Team
[revised January 2011]
NHSLA Disclosure List for Third Party Claims

WORKPLACE CLAIMS

1. Accident Book Entry.
2. First Aider report.
4. Foreman/supervisor accident report.
5. Safety representative’s accident report.
6. RIDDOR (Reporting of Injuries, Diseases and Dangerous Occurrences Regulations) report to HSE.
7. Other Communications between defendants and HSE.
8. Minutes of Health and Safety Committee meetings(s) where accident/matter considered.
9. Report to DSS.
10. Documents listed above relative to any previous accident/matter identified by the claimant and relied upon as proof of negligence.
11. Earnings information where defendant is employer.

Documents produced to comply with requires of the Management of health and Safety at Work Regulations 1992-

1. Pre-accident Risk Assessment required by Regulation 3.
2. Post-accident Re-Assessment required by Regulation 3.
3. Accident Investigation Report prepared in implementing the requirements of Regulations 4, 6 and 9.
4. Health Surveillance Records in appropriate cases required by Regulation 5.
5. Documents relating to the employees health and safety training required by Regulation 11.
SECTION A – WORKPLACE (HEALTH SAFETY AND WELFARE) REGULATIONS 1992

1. Repair and maintenance records required by Regulation 5.

2. Housekeeping records to comply with the requirements of Regulation 9.

3. Hazard warning signs or notices to comply with Regulation 17 (Traffic Routes).
WORKPLACE CLAIMS – DISCLOSURE WHERE SPECIFIC REGULATIONS APPLY

SECTION B – PROVISION AND USE OF WORK EQUIPMENT
REGULATIONS 1998

1. Manufacturers’ specifications and instructions in respect of relevant work equipment establishing its suitability to comply with Regulation 5.


3. Documents providing information and instructions to employees to comply with Regulation 8.

4. Documents provided to the employee in respect of training for use to comply with Regulation 9.

5. Any notice, sign or document relied upon as a defence to alleged breaches of Regulations 14 to 18 dealing with controls and control systems.

6. Instruction/training documents issued to comply with the requirements of regulation 22 insofar as it deals with maintenance operations where the machinery is not shut down.

7. Copies of marking required to comply with Regulation 23.

1. Documents relating to the assessment of the Personal Protective Equipment to comply with Regulation 6.

2. Documents relating to the maintenance and replacement of Personal Protective Equipment to comply with Regulation 7.

3. Record of maintenance procedures for Personal Protective Equipment of comply with Regulation 7.

4. Records of tests and examinations of Personal Protective Equipment to comply with Regulation 7.

5. Documents providing information, instruction and training in relation to the Personal Protective Equipment to comply with Regulation 9.

6. Instructions for use of Personal Protective Equipment to include the manufacturers’ instructions to comply with Regulation 10.
1. Manual Handling Risk Assessment carried out to comply with the requirements of Regulation 4(1)(b)(i).

2. Re-assessment carried out post-accident to comply with requirements of Regulation 4(1)(b)(i).

3. Documents showing the information provided to the employee to give general indications related to the load and precise indications on the weight of the load and the heaviest side of the load if the centre of gravity was not positioned centrally to comply with Regulation 4(1)(b)(iii).

4. Documents relating to training in respect of manual handling operations and training records.
WORKPLACE CLAIMS – DISCLOSURE WHERE SPECIFIC REGULATIONS APPLY

SECTION E – HEALTH AND SAFETY (DISPLAY SCREEN EQUIPMENT) REGULATIONS 1992

1. Analysis of work stations to assess and reduce risks carried out to comply with the requirements of Regulation 2.

2. Re-assessment of analysis of work stations to assess and reduce risks following development of symptoms by the claimant.

3. Documents detailing the provision of training including training records to comply with the requirements of Regulation 6.

4. Documents providing information to employees to comply with the requirements of Regulation 7.
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<tr>
<td>1</td>
<td>Risk assessment carried out to comply with the requirements of Regulation 6.</td>
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<td>Reviewed risk assessment carried out to comply with the requirements of Regulation 6.</td>
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<td>3</td>
<td>Copy labels from containers used for storage handling and disposal of carcinogens to comply with the requirements of Regulation 7(2A)(1).</td>
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<td>Warnings signs identifying designation of areas and installations, which may be contaminated by carcinogens to comply with the requirements of Regulation 7(2A)(h).</td>
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<td>Documents relating to the assessment of the Personal Protective Equipment to comply with Regulation 7(3A).</td>
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<td>Record of maintenance procedures for Personal Protective Equipment to comply with Regulation 7(3A).</td>
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<td>Records of tests and examinations of Personal Protective Equipment to comply with Regulation 7(3A).</td>
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<td>Documents providing information, instruction and training in relation to the Personal Protective Equipment to comply with Regulation 7(3A).</td>
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<td>Instructions for use of Personal Protective Equipment to include the manufacturers’ instructions to comply with Regulation 7(3A).</td>
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<td>10</td>
<td>Air monitoring records for substances assigned a maximum exposure limit or occupational exposure standard to comply with the requirements of Regulation 7.</td>
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<td>Maintenance examination and test of control measures records to comply with Regulation 9.</td>
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<td>12</td>
<td>Monitoring surveillance records to comply with the requirements of Regulation 11.</td>
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<td>13</td>
<td>Documents detailing information, instruction and training including training records for employees to comply with the requirements of Regulation 12.</td>
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14. Labels and Health & Safety data sheets supplied to the employers to comply with the CHIP Regulations.
WORKPLACE CLAIMS – DISCLOSURE WHERE SPECIFIC REGULATIONS APPLY

SECTION G – CONSTRUCTION (DESIGN MANAGEMENT)(AMENDMENT) REGULATIONS 2000

1. Notification of a project form HSE F10) to comply with the requirements of Regulation 7.

2. Health and Safety Plan to comply with requirements of Regulation 15.

3. Health and Safety file to comply with the requirements of Regulations 12 and 14.

4. Information and training records provided to comply with the requirements of Regulation 17.

5. Records of advice from and views of persons at work to comply with the requirements of Regulation 18.

Enclosed
WORKPLACE CLAIMS – DISCLOSURE WHERE SPECIFIC REGULATIONS APPLY

SECTION H – PRESSURE SYSTEMS AND TRANSPORTABLE GAS CONTAINER REGULATIONS 1989

1. Information and specimen markings provided to comply with the requirements of Regulation 5.

2. Written statements specifying the safe operating limits of a system to comply with the requirements of Regulation 7.

3. Copy of the written scheme of examination required to comply with the requirements of Regulation 8.

4. Examination records required to comply with the requirements of Regulation 9.

5. Instructions provided for the use of operator to comply with Regulation 11.

6. Records kept to comply with the requirements of Regulation 12.

7. Records kept to comply with the requirements of Regulation 22.

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WORKPLACE CLAIMS – DISCLOSURE WHERE SPECIFIC REGULATIONS APPLY

SECTION I – LIFTING OPERATIONS AND LIFTING EQUIPMENT
REGULATION 1998

1. Record kept to comply with the requirements of Regulation 6.
SECTION J – THE NOISE AT WORK
REGULATION 1989

1. Any risk assessment records required to comply with the requirements of Regulations 4 and 5.

2. Manufacturers’ literature in respect of all ear protection made available to claimant to comply with the requirements of Regulation 8.

3. All documents provided to the employee for the provision of information to comply with Regulation 11.
1. Pre-accident assessment of head protections required to comply with Regulation 3(4).

2. Post-accident re-assessment required to comply with Regulation 3(5).

Enclosed
1. Report prepared following the inspections and examinations of excavations etc. to comply with the requirements of Regulation 9.
 SECTION M – GAS CONTAINERS
REGULATIONS 1989

1. Information and specimen markings provided to comply with the requirements of Regulation 5.

2. Written statements specifying the safe operating limits of a system to comply with the requirements of Regulation 7.

3. Copy of written scheme of examination required to comply with the requirements of Regulation 8.

4. Examination records required to comply with the requirements of Regulation 9.

5. Instructions provided for the use of operator to comply with Regulation 11.

I __________________________________________ state that I have carried out a reasonable and proportionate search to locate all of the documents which I am required to disclose.

I certify that I understand the duty of disclosure and to the best of my knowledge I have carried out that duty.

Signed _______________________________ Date ____________________________

Position ________________________________
2 February 2010

Dear Chief Executive

**Solicitors’ Risk Management Reports on Claims**

The NHSLA’s role to contribute to improvements in NHS risk management and thereby the safety of patients and staff has been met historically via a programme of standards and assessments supported by education. Direct links between the claims management and risk management functions of the NHSLA have, however, always been limited. For example, claims data is used to determine the risk areas addressed in the NHSLA standards and provided to other organisations to inform their work to improve safety, but there is currently no action taken in relation to individual claims.

The 2008/09 financial year saw an increase of more than 11% in the number of clinical claims received by the NHSLA, a trend which is continuing in 2009/10. Furthermore, payments made on claims under the Clinical Negligence Scheme for Trusts (CNST) rose to more than £600 million in 2008/09, an increase of 34% on the previous year, and again the trend in 2009/10 is upward. The money to pay these claims is collected from contributions (premiums) paid by Scheme members to the NHSLA and could otherwise be spent on providing patient care.

In response to the increase in claim numbers and payments, the NHSLA has decided to introduce a new risk management initiative. The initiative aims to ensure that organisations are learning from their own claims and, where appropriate, the knowledge gained is shared with the wider NHS with the objective of reducing the number and severity of incidents giving rise to claims.

All healthcare organisations are currently required to report clinical incidents to the National Patient Safety Agency (NPSA) which in turn publishes alerts, guidance, tools and reports aimed at improving safety. However, the claims management process may add still further to the safety agenda by: providing a more thorough investigation of an incident than would otherwise be possible; being more definitive because of the time delay as more is known about what happened; having the benefit of external input and opinion; offering more thorough arguments from both sides; and providing an opportunity to follow up on recommendations made at the time of the incident to see if they have been implemented and made a difference.

With immediate effect, solicitors on the NHSLA’s clinical panel have been asked to prepare a risk management report (which will be anonymised to ensure compliance with data protection and other pertinent legislation) on all new CNST claims. This is in addition to the claims report which they currently provide, and will be updated when further relevant information becomes available, with a final report being issued when the claim is resolved.

The risk management report will be sent by the solicitor to the Claims Manager at the Trust with a request that it is shared with the Risk Manager and other appropriate colleagues for action. A copy of the report will also be sent to the NHSLA who will use the information in two ways:
Individual Trusts

a) In most instances, no further action will be taken immediately on receipt of a new or updated report. However, in a small number of cases, the NHSLA will write to the organisation to seek confirmation that suitable action has been taken as a consequence of the incident, together with details of the action taken.

b) At the beginning of each financial year, the NHSLA will send a risk management report on all the organisation’s new and outstanding claims, and those resolved during the previous year, asking what action has been taken in relation to the claims listed.

c) The responses received will be reviewed and evaluated. Poor responses which fail to indicate that the lessons have been/are being learned, or the absence of a response by the required date will be followed up by a telephone call or visit. In addition, a few organisations that have provided an apparently good response may be selected and followed up too.

d) Where the outcome of the follow up is not satisfactory, the NHSLA will pursue the matter direct with the Chief Executive of the organisation.

e) If the Chief Executive is unable to assure the NHSLA that the organisation is addressing the issues, further action will be taken. This may include, for example, an additional full assessment against the NHSLA standards, or referral to the Care Quality Commission or other relevant body.

f) Both the annual risk management report on claims and response provided by the organisation will be shared with Det Norske Veritas (DNV), our risk management services provider, to inform the assessment of the organisation.

Sharing Lessons

a) The NHSLA will publish an annual report on the lessons to be learned from claims.

b) The information gathered will be used to generate summary sheets for publication via the NHSLA website and may be provided in such a way as to allow organisations to benchmark their claims and risk management actions in relation to similar organisations.

c) Where information is of particular relevance to another body e.g. a Royal College, this will be identified by the NHSLA during periodic reviews of the information collected, and shared directly by making contact with that body.

d) Where any significant trends are identified, the NHSLA will either undertake further study into the area or share the information with another body that is in a position to properly consider the merits for research and take this forward as appropriate.

e) The summary information will be used to inform the future development of the NHSLA risk management standards and assessments.

f) Selected individual claims will be used to produce case studies to illustrate the lessons to be learned, linked to the NHSLA risk management standards where appropriate.

g) Organisations will be encouraged to discuss their risk management report on claims and the action taken with other healthcare organisations at local risk management forums, possibly through a session facilitated by the NHSLA or DNV.
h) Summary information and selected claims will be used by the NHSLA, DNV and panel solicitors to inform training sessions, presentations and written articles for publication to facilitate wider learning and encourage research.

It is hoped that by ensuring healthcare organisations are informed about the lessons to be learned from incidents giving rise to their own claims and have acted on them, and by sharing these lessons more widely, the NHSLA will contribute still further to a safer NHS.

If you or your colleagues would like to ask any questions or make comments about this initiative, please email riskmanagement@nhsla.com.

Yours faithfully
Steve Walker
Chief Executive

Cc: All Trust Claims Managers
    All Trust Risk Managers
    All NHSLA clinical panel solicitors
## Liability to Third Parties and Property Expenses

**Legal Services Lead**

Hertfordshire Partnership NHS Foundation Trust, 99 Waverley Road, St Albans, Herts AL3 5TL

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Fax: 01727 804306

## Accountable Executive Director

Keith Loveman
Executive Financial Director

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Fax: 01727 897364

## Clinical Negligence Claims

**Legal Services Lead**

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### NHSLA Contact for Third Parties and Property Expenses Claims

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### NHSLA Contact for Clinical Negligence Claims

**Suzy Cramer**
Team Leader

CNST Scheme
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Telephone: 020 7811 2780

### Earnings and Payroll

**Laura Joannides**
Payroll Department
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Level 2
Hillfield Road
Hemel Hempstead
HP2 4AD

### Occupational Health Records

Occupational Health
QE2 Block
Hemel Hempstead General Hospital
Hillfield Road
Hemel Hempstead
Hertfordshire
HP2 4AD

Tel: 01442 287486

Joyce Wong
Occupational Health Manager
Mount Vernon Hospital
Rickmansworth Road
Northwood
Middx HA6 2RN
Our vision

‘to be the leading provider of mental health and specialist learning disability services in the country’

To be a leading provider, we must offer high quality care with excellent treatment outcomes, within a safe environment which meets the needs of service users.

Our vision is underpinned by eight goals which inform our entire strategy.

- To deliver high quality integrated health and social care services in accordance with recovery principles
- To be the provider of choice for service users, carers, the community and commissioners
- To work in partnership with the community to promote the wellbeing of others, whilst making a positive contribution to the environment
- To be the employer of choice where staff are highly valued, well supported and rewarded
- To create a dynamic and flexible working environment where staff are motivated and committed to providing high quality care
- To embed a learning culture where staff develop their full potential and deliver excellent care
- To ensure a sustainable future through income growth and efficient use of resources
- To be an innovative and learning organisation that embraces new and modern approaches to health and social care