

Please complete this section to tell us more about you.

About you

Full name

Job title or capacity in which you are responding (e.g. member of the public etc.)

If 'Other', please specify

Date

Company name/organisation (if applicable)

Address

Postcode

If you would like us to acknowledge receipt of your response please tick this box.

Address to which this acknowledgement should be sent, if different from above

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent

Action against Medical Accidents (AvMA) was established in 1982. It is the leading UK Charity specialising in advice and support for patients and their families affected by medical accidents. Since its inception, AvMA has provided advice and support to over 100,000 people affected by medical accidents. AvMA has in turn used the experiences of patients to successfully campaign to move patient safety higher up the agenda in the UK.

In addition to our work with patients and campaigning on patient safety, AvMA has also succeeded in bringing about significant changes to the way that the legal system deals with clinical negligence and is also responsible for making clinical negligence a specialism within legal practice. AvMA continues to accredit solicitors for its specialist panel and promote good practice through a range of services to claimant solicitors.

Following the Legal Aid, Sentencing and Punishment of Offenders Act 2012, as from 1.4.13 legal aid will only be available in relation to clinical negligence for a claim for damages for neurological injury caused during pregnancy, labour or in the eight weeks after birth; when seeking to judicially review the decision or action of a public body for example a coroner or a regulator and in exceptional cases where failure to grant legal aid would breach the individual's human rights. We limit our responses to the sections of the consultation that impact on those affected by medical accidents (Questions 4, 5 ,6 ,31, 33, 34, & 35).

List of questions for response

We would welcome responses to the following questions set out in this consultation paper. Please email your completed form to legalaidreformmoj@justice.gsi.gov.uk or it fax to 020 3334 4295.

Question 1: Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria?

Yes No

Please give reasons.

N/A

Question 2: Do you agree with the proposal to introduce a financial eligibility threshold on applications for legal aid in the Crown Court?

Yes No

Please give reasons.

N/A

Question 3: Do you agree that the proposed threshold is set an appropriate level?

Yes No

Please give reasons.

N/A

Question 4: Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK?

Yes No

Please give reasons.

All four elements of the residence test must be satisfied:

- lawful
- residence
- continuously
- for more than 12 months

As drafted this would prevent a case being commenced on behalf of a baby with a serious neurological injury until after its first birthday.

Although the child would have until its twenty first birthday to bring a claim there would be an impact in that any delay risks vital evidence being lost. In addition, it is unlikely that interim payments will be made until a strong case for liability and causation have been made out, thus families will be struggling to cope with caring for a disabled child when additional help could and should be provided to give those families respite and to ensure that the child is kept as comfortable as possible in the circumstances.

In respect of the other limited areas where legal aid will impact on patients who have suffered as a result of medical accidents or had their human rights violated by medical treatment, improving patient safety has been a key concern of AvMA since its formation. It is vital to ensure that such failings are brought to light to ensure that no such accident/injury is repeated. This is particularly the case in relation to information elicited at inquests. The country of origin of the patient is irrelevant. In any event, we question the legality of such a clause and its practical application.

Question 5: Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, including a request for reconsideration of the application at a hearing, the renewal hearing, or an onward permission appeal to the Court of Appeal, if permission is granted by the Court (but that reasonable disbursements should be payable in any event)?

Yes No

Please give reasons.

We have seen the use of judicial review as an important safeguard of the rights of patients .

We are a charity of modest means and have sought to use judicial review to obtain justice for patients for example AVMA v GMC [2009] where we sought to challenge the failure of the GMC to investigate a cover up into the death of a ten year old boy and well appreciate the practical difficulties of bringing such an action.

The majority of the work in a judicial review is carried out prior to seeking permission rather than after it is granted and it is this work that is most likely to persuade public bodies to settle or concede the case.

To link the right to payment to the outcome may provide a perverse incentive to those challenged. It is not practical nor fair to expect that the solicitors representing the individual should carry the burden of protecting society in ensuring that public bodies' decision-making is reasonable and lawful.

We challenge the basis on which it is suggested that there is an ill to be addressed. We know that under the present system many cases are settled pre-issue or before the substantive hearing. In the data provided 4075 cases received legal aid and in 2275 cases proceedings were not issued. However there is no explanation as to how many of those 2275 cases were not issued because the proposed defendant conceded or settled the case once legal aid was granted. Similarly there is no explanation as to why permission was refused in the 845 of the 1799 cases which ended after permission was refused, which could have been as a result of the actions of the public body responding to the proceedings by modifying their approach rather than as a result of a weak case being commenced. The data indicates that in 330 of these cases the provider recorded an outcome of 'substantive benefit to the client'.

There is already an inequality of arms between the resources available to public bodies as opposed to the individual; this step would serve only to increase that inequality. As with many recent reforms the impact is likely to be an increase in the number of litigants in person whose opportunity to present an ineffective case is limited but whose power to increase the cost in expensive court time and the cost to public bodies' funding of legal teams, is likely to be greater than the £1million projected saving.

Question 6: Do you agree with the proposal that legal aid should be removed for all cases assessed as having “borderline” prospects of success?

Yes No

Please give reasons.

We note that the Impact Assessment estimates very modest costs savings of £1 million per annum. Given that funding is only granted in cases of significant wider public interest or a case with overwhelming importance to the individual or where the case relates to a breach of convention rights - tests which are already set at a very high standard - and yet protect the fundamental rights of the individual in society this category should be retained. There is already a safeguard in that such applications are determined by the Director of the Legal Aid Agency.

Question 7: Do you agree with the proposed scope of criminal legal aid services to be competed?

Yes No

Please give reasons.

N/A

Question 8: Do you agree that, given the need to deliver further savings, a 17.5% reduction in the rates payable for those classes of work not determined by the price competition is reasonable?

Yes No

Please give reasons.

N/A

Question 9: Do you agree with the proposal under the competition model that three years, with the possibility of extending the contract term by up to two further years and a provision for compensation in certain circumstances for early termination, is an appropriate length of contract?

Yes No

Please give reasons.

N/A

Question 10: Do you agree with the proposal under the competition model that with the exception of London, Warwickshire/West Mercia and Avon and Somerset/Gloucestershire, procurement areas should be set by the current criminal justice system areas?

Yes No

Please give reasons.

N/A

Question 11: Do you agree with the proposal under the competition model to join the following criminal justice system areas: Warwickshire with West Mercia; and Gloucestershire with Avon and Somerset, to form two new procurement areas?

Yes No

Please give reasons.

N/A

Question 12: Do you agree with the proposal under the competition model that London should be divided into three procurement areas, aligned with the area boundaries used by the Crown Prosecution Service?

Yes No

Please give reasons.

N/A

Question 13: Do you agree with the proposal under the competition model that work tendered should be exclusively available to those who have won competitively tendered contracts within the applicable procurement areas?

Yes No

Please give reasons.

N/A

Question 14: Do you agree with the proposal under the competition model to vary the number of contracts in each procurement area?

Yes No

Please give reasons.

N/A

Question 15: Do you agree with the factors that we propose to take into consideration?

Yes No

Are there any other factors that should be taken into consideration in determining the appropriate number of contracts in each procurement area under the competition model?

N/A

Question 16: Do you agree with the proposal under the competition model that work would be shared equally between providers in each procurement area?

Yes No

Please give reasons.

N/A

Question 17: Do you agree with the proposal under the competition model that clients would generally have no choice in the representative allocated to them at the outset?

Yes No

Please give reasons.

N/A

Question 18: Which of the following police station case allocation methods should feature in the competition model?

- Option 1(a) – cases allocated on a case by case basis Yes No
- Option 1(b) – cases allocated based on the client’s day of month of birth Yes No
- Option 1(c) – cases allocated based on the client’s surname initial Yes No
- Option 2 – cases allocated to the provider on duty Yes No
- Other Yes No

Please give reasons.

N/A

Question 19: Do you agree with the proposal under the competition model that for clients who cannot be represented by one of the contracted providers in the procurement area (for a reason agreed by the Legal Aid Agency or the Court), the client should be allocated to the next available nearest provider in a different procurement area?

- Yes No

Please give reasons.

N/A

Question 20: Do you agree with the proposal under the competition model that clients would be required to stay with their allocated provider for the duration of the case, subject to exceptional circumstances?

- Yes No

Please give reasons.

N/A

Question 21: Do you agree with the following proposed remuneration mechanism under the competition model?

- Block payment for all police station attendance work per provider per procurement area based on the historical volume in area and the bid price Yes No
- Fixed fee per provider per procurement area based on their bid price for magistrates' court representation Yes No
- Fixed fee per provider per procurement area based on their bid price for Crown Court litigation (for cases where the pages of prosecution evidence does not exceed 500) Yes No
- Current graduated fee scheme for Crown Court litigation (for cases where the pages of prosecution evidence exceed 500 only) but at discounted rates as proposed by each provider in the procurement area. Yes No

Please give reasons.

N/A

Question 22: Do you agree with the proposal under the competition model that applicants be required to include the cost of any travel and subsistence disbursements under each fixed fee and the graduated fee when submitting their bids?

- Yes No

Please give reasons.

N/A

Question 23: Are there any other factors to be taken into consideration in designing the technical criteria for the Pre Qualification Questionnaire stage of the tendering process under the competition model?

- Yes No

Please give reasons.

N/A

Question 24: Are there any other factors to be taken into consideration in designing the criteria against which to test the Delivery Plan submitted by applicants in response to the Invitation to Tender under the competition model?

Yes No

Please give reasons.

N/A

Question 25: Do you agree with the proposal under the competition model to impose a price cap for each fixed fee and graduated fee and to ask applicants to bid a price for each fixed fee and a discount on the graduated fee below the relevant price cap?

Yes No

Please give reasons.

N/A

Question 26: Do you agree with the proposals to amend the Advocates Graduated Fee Scheme to:

- introduce a single harmonised basic fee, payable in all cases (other than those that attract a fixed fee), based on the current basic fee for a cracked trial; Yes No
- reduce the initial daily attendance fee for trials by between approximately 20 and 30%; and Yes No
- taper rates so that a decreased fee would be payable for every additional day of trial? Yes No

Please give reasons.

N/A

Question 27: Do you agree that Very High Cost Case (Crime) fees should be reduced by 30%?

Yes No

Please give reasons.

N/A

Question 28: Do you agree that the reduction should be applied to future work under current contracts as well as future contracts?

Yes No

Please give reasons.

N/A

Question 29: Do you agree with the proposals:

- to tighten the current criteria which inform the decision on allowing the use of multiple advocates; Yes No
- to develop a clearer requirement in the new litigation contracts that the litigation team must provide appropriate support to advocates in the Crown Court; and Yes No
- to take steps to ensure that they are applied more consistently and robustly in all cases by the Presiding Judges? Yes No

Please give reasons.

N/A

Question 30: Do you agree with the proposal that the public family law representation fee should be reduced by 10%?

Yes No

Please give reasons.

N/A

Question 31: Do you agree with the proposal that fees for self-employed barristers appearing in civil (non-family) proceedings in the County Court and High Court should be harmonised with those for other advocates appearing in those courts?

Yes No

Please give reasons.

In clinical negligence cases it is vital that only expert advocates are used in this specialist area of practice. In our experience, standards are raised and better outcomes produced by a specialist team of solicitors and advocates pooling their knowledge.

Question 32: Do you agree with the proposal that the higher legal aid civil fee rate, incorporating a 35% uplift payable in immigration and asylum Upper Tribunal appeals, should be abolished?

Yes No

Please give reasons.

N/A

Question 33: Do you agree with the proposal that fees paid to experts should be reduced by 20%?

Yes No

Please give reasons.

Unlike other areas such as childcare, housing etc where there are a large number of experts available in the required specialisms, in cases of neurological injury, the number and availability of causation experts, in particular, is limited. For the most part these experts need to remain in NHS practice to retain their credibility and expertise and thus fees generated by giving expert evidence compete with fees experts can obtain from other sources such as private medical work. However the entire success of a patient's case depends on the evidence given by the experts. The experts also have an equally valuable role in ensuring that cases that will not succeed are weeded out at an early stage.

There is an inequality of arms in that the NHS and medical defence insurers not only have the ability to instruct experts of their choice with no restrictions on their fees (or if restrictions are in place there is no transparency) but they also have access to initial 'expert' advice from those involved in the incident and their colleagues.

The proposal to reduce fees by 20% in addition to the existing cap on hourly rates will lead to patients being unable to find suitable experts, or being compelled to instruct experts who are inexperienced or are retired from practice, experts who do not have the correct knowledge and experience. This will undermine the strength of the claimant's case, reducing prospects of success and result in legally aided cases being lost which should have been won. This proposal as it stands will waste public money not make savings.

From our own knowledge and by way of feedback from our member firms we know it is difficult to locate suitable experts. Where experts are willing to assist, some experts' waiting lists are already in excess of 12 months and a reduction in fees may well lead to a further reduction in the availability of such experts, leading to an even greater wait for patients and their families in respect of interim payments and the conclusion of the case. Families usually find the litigation process and the uncertainty of the outcome extremely stressful and further delays can only serve to compound this.

Inequality between individual patients and the NHS and medical defence insurers will significantly impact on

access to justice and is manifestly unfair. We believe that savings can be made to the public purse if fees payable in legal aid and defence cases are harmonised at a realistic level.

We suggest that the Legal Aid Agency meets as a matter of urgency with ourselves, the NHSLA, medical defence insurers and claimant and defendant solicitors, and expert representatives to agree a protocol for the payment of experts and to set rates to ensure that there are experts willing and able to act for either side.

Question 34: Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper?

Yes No

Please give reasons.

Please see answers to questions 33 and 35 in particular.

Question 35: Do you agree that we have correctly identified the extent of impacts under these proposals?

Yes No

Please give reasons.

The proposals as they stand would adversely impact on the ability of patients disabled as a result of clinical negligence to access justice. The proposals would mean that some claims will not be brought at all and the prospects of success will be reduced. If meritorious cases fail the NHS will not recognize when harm has been caused and thus opportunities to improve patient safety will be missed. Also some vulnerable members of society will no longer be able challenge the decisions of public bodies that impact adversely on them, due to the changes to funding judicial review work

The assumption that

"a reduction in the fee paid to experts is considered unlikely to have any negative equality impact on legal aid clientswith the resultant effect ... that clients would receive the same level of expert service"

ignores the likelihood that in neurological injury cases clients face the possibility of not being able to access a suitable expert at all or may face long delays before an experts report is obtained thus impacting on their ability to succeed or obtain an interim payment as early as might otherwise be the case. As stated above we would welcome the opportunity to work with the Legal Aid Agency to ensure that there is a level playing field as between individuals and the NHS and medical defence insurers.

We question the statement that these changes will get 'the best deal for the taxpayer' . The taxpayer will bear the cost of the downstream impact of these changes, for example increased costs of court time, the increased costs on the NHS of avoidable mistakes being repeated, not to mention the human cost of living with the consequences. Whilst we agree that it should be for the NHS to identify and correct mistakes of this nature, we cannot always rely on the NHS to do so and it has been necessary for individuals to do so in pursuit of justice not only for themselves but for others likely to be affected.

Question 36: Are there forms of mitigation in relation to impacts that we have not considered?

Yes No

Please give details.