Response to Ministry of Justice Key Stakeholder Engagement Exercise on Detailed Proposals Regarding the Practical Application of a Supplementary Legal Aid Scheme

Date to submit evidence: 1st July 2012

1. AvMA

1.1. Action against Medical Accidents (AvMA), established 1982, is a 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 affected by medical accidents and succeeded in bringing about major changes to the way that the legal system deals with clinical negligence cases and in moving patient safety higher up the agenda. AvMA has always supported the widespread provision of Legal Aid funding for claimants. It is AvMA's view that given all the various ways of funding legal aid is best value for money for all parties concerned. The principle of contracting and closely monitoring contractees, together with the implementation of the LSC's cost benefit analysis ensures that cases with little merit or value are not brought. The control operated by the LSC over costs ensures that unnecessary costs are not incurred thus saving funds for the public purse whether paid by the LSC or the National Health Service as the main defender in clinical negligence claims.

2. Introduction

2.1. The proposal for a supplementary legal aid scheme (SLAS) is based on a series of principles. The engagement document states that it is their aim to ensure that legally aided claimants are not better off than those whose claims are funded by conditional fee agreements or damages based agreements (for the sake of brevity referred to as CFAs throughout this document). The second assertion is that

individuals who possess protected characteristics as defined in the Equality Act 2010 will not be adversely affected when compared to those who do not.

2.2. In our response in this document we will refute both the assertion that the implementation of a 25% levy on damages (excluding future care and loss) neither promotes equality between publicly funded claimants and those funded by CFAs nor does it affect those with protected characteristics equally to those who do not have such protection under the Equalities Act 2010**. The deduction of 25% from general damages of legally aided claimants amounts to a tax on some of the very poorest and most vulnerable children in society and creates a gross inequality with claimants awarded damages under a CFA given that the Lord Chancellor has acknowledged that 25% will NOT be deducted on average from CFA client). Furthermore, we believe that the Ministry's impact assessment is ill informed and that if this proposal were to go ahead it would directly affect people with protected characteristics and may therefore be unlawful. We note that whilst this is stated policy, the implementation of a SLAS as proposed is not set out in the Legal Aid Sentencing and Punishment of Offenders Act, and urge ministers to review this policy urgently.**

3. Discrimination

3.1. In the impact assessment, a summary of which has been provided with the Ministry of Justice letter of May 2012, it is recognised that, after April 2013 and the effects of the Legal Aid Sentencing & Punishment of Offenders Bill (LASPO) have come into force the majority of those in receipt of public funding are likely to possess a Protected Characteristic. In particular those individuals with multiple physical and or mental disabilities will be most heavily represented. These are those whose injuries and residual disabilities prevent them from working and place them in a position in where either they earn a very low wage or are wholly or partially dependent upon state benefits. The impact assessment states that merely because such a group of people are over represented in those likely to be receipt of public funding does not mean that they are being discriminated against. However, the overall effect of a SLAS where the levy is a flat rate of 25% (rather than a maximum permissible of up to 25% as in CFAs) do mean that publically funded claimants are likely to be worse off than those who are on a CFA.

3.2. Further claimants having benefits recouped by the Compensation Recovery Unit will be subject to the full levy despite the inequalities when compared to those in work who receive sick pay from their employers which is not recouped.

3.3. Under the proposals for deduction of the SLAS levy and scenario (iv) it is proposed that the SLAS levy should apply in full in cases which conclude with Legal Aid after having started without it. We provide full discussion with our views on this proposal under the levy section below. However, if a case transfers to legal aid towards the end of a case due to inability of the claimant to work and thus an emerging financial eligibility for legal aid this proposal potentially discriminates against those with Protected Characteristics. Claimants could suffer two deductions from the same amount of damages (one for the SLAS levy and a second for their solicitor's success fee). They could also find themselves unable to find a solicitor to act for them on a CFA if there is ever a possibility of a claim transferring to legal aid and there being difficulties in a solicitor recovering their success fee on top of the SLAS levy.

4. The SLAS levy

4.1. The proposal is that the SLAS levy should be a flat rate 25% of all general damages and past losses. This levy runs counter to the principle that the claimant should be put back into the position he or she would have been but for the injury.

4.2. A significant proportion of past losses for individual claimants with serious injury relate to the debts owed to others. Such debts include past care. Past care is in many instances owed to the claimants' parents, partners or other close relatives. In some instances they relate to purchased care (this usually occurs if there has been a substantial interim payment). Because these sums are owed to other people they are not available for satisfying the SLAS levy and thus a disproportionate amount of general damages will fall to be required to pay the levy.

4.3. Care that has been provided gratuitously by family members is often provided at some significant personal cost. In future legally aided claimants, apart from those receiving exceptional funding will be children. Generally speaking the care is provided by one or other parent who has had to give up working in order to provide that care, thus a significant amount of income is lost to the family as a whole and the reimbursement of care costs while going some way towards replacing that loss is going to fall even further short once subject to the levy, assuming that there is insufficient funds in general damages to pay the levy.

4.4. No mention is made in the proposal documents for how an interim payment may be treated with regard to the SLAS levy. It is not at all uncommon for very significant interim payments of between £500,000 and 1 million pounds to be made to brain

damaged children. These interim payments are made to enable to the purchase of a house, the adaptation of a house and the instigation of a care regime. By the time a case settles the majority of an interim payment will have been spent. It is our view that none of these funds should be subject to the SLAS levy as this would be grossly unfair and significantly disproportionate when considered in comparison to cases which settle without interim payment and all special damages are treated as future loss. However, if by regulations it is intended to treat interim payments as past losses it is entirely possible that a levy of 25% will exceed any balance left after calculating past loss and general damages.

4.5. Further general damages are not a bonus to the claimant particularly in catastrophic injury cases. Although they are deemed to be compensation for the less tangible losses of pain, suffering and loss of amenity, in catastrophic injury cases, in particular those where there is a short life expectancy general damages are essential to top up the accommodation where the damages awarded are insufficient to buy a house.

4.6. The ability for a claimant to fund the full capital cost of buying a house from damages, that are discounted for life expectancy pursuant to Roberts –v- Johnston will be impaired by the imposition of levy. A 25% levy on general damages, taken together with the additional call on general damages when much of past losses have already been spent is going to leave the claimant significantly undercompensated and thus an individual possessing protected characteristics is at a significant disadvantage when compared to one who does not.

5. Individual proposals for the SLAS levy

5.1. In this section we look at the eight individual proposals as set out in the Ministry of Justice document.

5.2. *(i) The SLAS levy should not apply where legal help has been provided.* We welcome this proposal and believe that it is sensible. However, legal help is not generally a significant feature in clinical negligence claims.

5.3. *(ii) The SLAS levy should not apply to counter claims in possession proceedings.* This proposal is not relevant to AvMA clients.

5.4. *(iii) The SLAS levy should apply in full to cases which settle early.* This proposal runs counter to every stated principle that litigants should be encouraged to settle

cases as early as possible and incur as little costs as possible. Although it would appear that this proposal reveals that the SLAS nothing more than a revenue generating exercise, we would also argue that in terms of the overall cost to the public purse the proposal is significantly counter-productive. Any case that settles saves court time and a considerable amount of costs to claimant and defendant which of course all falls to be paid by the defendant. In addition no account is to be taken of the human cost to an individual with significant disability and considerable care needs in a case which can take 4 or 5 years to come to trial, as opposed to 2 years if the case settles without the need to issue proceedings (for more than an infant approval hearing).

5.5. If there is no incentive to the defendants to settle early then the practise that we already see demonstrated by our members of defendants not really seriously getting to grips with the case until close to trial will continue. If it is known by all parties that the SLAS levy will be lower if a case settles before issue of proceedings or soon after defendants will be encouraged to get to grips with their defence earlier and if appropriate settle earlier in order to reduce their outlay in respect of costs. Current average cost figures paid by defendants in successful clinical negligence claims are unlikely to be a sensible guide to future costs. In future legally aided cases will be those that are currently on the upper end of costs and damages with costs when a claim goes to trial measured in hundreds of thousands. Financial incentives to settle early which apply to both claimants and defendants would have a significant effect on the overall costs of litigation and in particular the cost to the public purse. It is not right simply to consider the costs payable by the Legal Services Commission (or its successor) but it is behoves governments to consider costs in the round and thus all costs payable by the public purse.

5.6. *(iv) The SLAS levy should apply in full to cases which conclude with legal aid having started without it.* This may seem a reasonable proposal if it is considered that a case started on a conditional fee agreement is dropped on the solicitor's assessment of risk later on. Arguable in a case completed by public funding it is reasonable to apply the levy in full, given that the costs risks increase significantly as the case proceeds and thus the LSC takes the greater risk. However, it is highly unlikely that this situation will pertain. If a firm of solicitors acting under a conditional fee agreement consider that the risk is too great we cannot see how the LSC (or its successor) will not be of the same view. Therefore how likely is that the claimant who loses the benefit of a CFA will obtain public funding? Much more likely is the

situation where a badly injured claimant who previously was able to afford a CFA (bearing in mind that a CFA is not without costs to a claimant who very often has to fund disbursements) finds that he or she is now on benefits and is thus advised by his solicitor that an application for public funding is appropriate. If in these circumstances public funding is granted it is granted on the basis of the claimant's means and not on the merits of the case which we would assume remain reasonable otherwise no claimant of modest means is likely to continue with the case. Thus the effect will be that an individual with increasing disability and thus possessing certain protective characteristics is less fairly treated than one who does not possess those characteristics. This is because either they will still owe success fees to their solicitors for the period of time for the work done under the CFA. Alternatively solicitors who at the outset of the case see the possibility of a claim moving to being publicly funded may not offer a CFA to the claimant. Thus these claimants are likely to fall into this category will be unfairly treated either by excessive deduction from damages (in the form of success fee and SLAS levy) or denied access to justice at all.

5.7. *(v) In cases which conclude without legal aid after having started it, the SLAS should apply only in proportion to the amount funded by legal aid.* Subject to our concerns to the totally of the SLAS levy overall we believe that this is reasonable, and also note that it is inconsistent with (iv) above.

5.8. *(vi) Payment of any residual debt in respect of the SLAS levy if the funds awarded to the legally aided person are exhausted by application of the statutory charge should not be enforced.* We have no comments to make as this proposal seems reasonable.

5.9. *(vii) The SLAS levy should be calculated on the gross damages in cases where recovery of benefits or lump sums is offset*. While some claimants who were previously employed and received their full salary as sickness benefit from their employers may be required to reimburse this to their employers (much in the way that CRU recoup) could be said to be equally treated there is in an inherent unfairness in that this was money required for the claimant's basic living expenses and likely to be spent already thus the levy will fall to be an additional deduction from the general damages. Further, there are individuals whose companyies pay their salary whilst ill and do not require that this money is reclaimed. Those claimants will

receive a bonus which is not available to those who income is subject to recoupment.

5.10. *(viii) Where an order or settlement does indicate a specific sum in respect of future care and loss the onus will be on the claimant to establish any part of the payment is exempt from the SLAS levy.* While the claimants' schedule of special damages is likely to be an indicator of the balance between future and past losses, many cases are settled as a compromise and proportion of damages in each category is likely to be open to debate. This situation is likely to arise in all cases where despite detailed schedules of special damages the final offer from defendants is likely to be global sum. While we assume that any periodical payment is by its very definition exempt from the SLAS levy it is essential that there should be clear safeguards for the claimant and an independent appeals process to ensure that the claimant is treated fairly.

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