AvMA's Response to Ministry of Justice Review of Civil Legal Aid - Call for evidence

Closing date for evidence: 21st February 2024

About AvMA

Action against Medical Accidents (AvMA) is the UK charity for patient safety and justice. Established in 1982, AvMA provides specialist support and advice to people who have been affected by lapses in patient safety. AvMA works in partnership with government departments, health professionals, the NHS, regulatory bodies, lawyers and other patients' organisations to improve patient safety and the way injured patients and their families are treated following lapses in patient safety.

AvMA does not provide representation to the public, we do not hold a legal aid franchise for clinical negligence or exceptional funding and we do not engage in any form of litigation. We do routinely advise the public on why their case has been turned down by specialist solicitors, the funding options which may be open to them and the pros and cons of each of those options.

AvMA also offers a pro bono inquest service to members of the public whose loved ones have died as a result of acts and/or omissions in healthcare. That service has enabled us to identify the barriers families typically experience in trying to secure representation at healthcare inquests including the barriers posed by the Exceptional Funding for inquests provisions.

Through AvMA's accreditation of specialist clinical negligence solicitors we routinely ask for case reports to enable us to review how quickly, effectively, and efficiently clinical negligence cases are progressed. We also interview solicitors to further explore issues which commonly arise between solicitor and client to see how they are managed.

AvMA is uniquely well positioned to respond to some aspects of this consultation drawing on its experience from specialist solicitors who are accredited by us. Our experience of arranging pro bono representation for people at healthcare inquests has given us insight into the obstacles typically experienced by families in securing legal aid for inquests. We have confined our responses to those aspects of the review which we feel we can meaningfully contribute.

AvMA's general response to the call for evidence:

1. Up until April 2013, legal aid was available for a range of potential clinical negligence claims. Legal aid was granted where clients were able to show that their claim appeared to have reasonable prospects of success and that they satisfied the legal aid financial means test. However, this all changed in April 2013 and now only certain types of clinical negligence cases may be eligible for legal aid.

2. For the last ten years legal aid has only been available for clinical negligence claims involving babies who have sustained brain injury at birth. The application for legal aid funding still operates for those able to satisfy the two stage test of first meeting the financial eligibility requirements and secondly the merits test which for the small cohort of clinical negligence cases which fall within scope requires that:

    - There is a neurological injury resulting in a physical and/or mental disability.
    - The injury must have been caused by clinical negligence.
    - The negligence must have occurred whilst the individual was in the womb or during their birth or within eight weeks after their birth.
    - The person must show that they were born during or after the 37th week of their mother's pregnancy.

3. The benefits for injured people funding a claim through legal aid include the fact that they do not pay a success fee out of their award of damages.

4. That is an important consideration as it means the damages awarded are preserved and can be applied to the cost of caring and providing for the injured person for the rest of their life.

5. However, lawyers tell us that it is very difficult to run complex birth injury cases on legal aid because the Legal Aid Agency (LAA) has restricted the amount of money the specialist clinical negligence lawyer can spend on expert's fees.

6. In practice, the fees are so low that many medico-legal experts will not undertake medico-legal work at legal aid rates.

7. Given the importance of the expert's opinion and the fact that a clinical negligence claim will largely stand or fall based on the strength and quality of the medical expert opinion this is a significant factor.

8. The issues with experts are compounded by the fact that there are only a small number of experts available who are willing to offer medico legal opinions for the purposes of litigation. The client who is funded through legal aid has no bargaining power with an expert who will otherwise be instructed at commercial and market rates by either the NHS Resolution or another claimant who has the benefit of a Conditional Fee Agreement (CFA) and After the Event (ATE) insurance which will bear the cost of the market rate.

9. It should be noted that despite being a publicly funded organisation the NHS hospital trust/NHS Resolution involved in the claim is not faced with the same restrictions on instructing medico-legal experts. Private hospitals and/or private doctors should have their own insurance and their insurers do not impose the same restrictions on funding expert opinions. This heightens the disadvantage felt by the legally aided claimant and creates an uneven playing field for the injured claimant. This is a significant inequality of arms.

10. Any benefit to the claimant of investigating their clinical negligence claim using legal aid funding option must be weighed against the benefit of having the freedom to choose the best available medico legal experts.

11. The low legal aid rates available for experts has undoubtedly created a two tier system – those who are on legal aid have their choice of expert restricted, while those on alternative funding models are not.

12. Legal Aid Agency's formal position is that solicitors are not allowed to top up the medico legal expert's fees. It is forbids firms from making up the difference between the amount allowed to the expert under legal aid rates and the commercial rate charged.

13. One of the benefits of legal aid for claimant lawyers is that although legal aid rates are low, the lawyer will get paid something for the investigation stage, even if the case is subsequently turned down. Contrast this with the CFA arrangement where lawyers only get paid if they win.

14. The administration process around applying for legal aid and increasing the scope and financial levels on the LAA certs is time consuming and burdensome for firms. This is time which is not recoverable as costs by the lawyer.

15. Legal aid personnel often apply arbitrary criteria such as an MRI scan cannot be taken until the child is at least 2 years of age so the assessment of causation is accurate and the level of damage is easier to assess. This delays the investigation process and means that it takes longer to prove the case which is detrimental to the child and family who need to secure an admission of liability as soon as possible so an application can be made for an interim payment of damages. The interim payment is critical to a family's ability to access funds to pay for necessary therapies, adaptations to property, care and equipment etc.

16. To illustrate the point we point to the time line in a case (anonymised) where an application for Legal Aid for investigative funding was applied and initially rejected. It was subsequently granted on appeal five months later. Following investigation leading counsel wrote an advice supporting the issue of proceedings, the relevant extension of the legal aid certificate was applied for. The solicitor and client were then unable to proceed with the case while the LAA took an ordinate period of time to make a decision. The decision was taken to reject the request. The family moved to a CFA and the case subsequently settled.

17. There are specialist firms who have AvMA accredited lawyers who have taken the decision not to keep their legal aid contract for clinical negligence because it offers few benefits to the client/claimant.

18. Legal aid funding in clinical negligence claims often further delays the already lengthy litigation process, promotes inaction, and creates uncertainty which for family's who are trying to manage disappointment at the medical treatment they have received and cope with a child who is not meeting their milestones and who is thought to be profoundly damaged adds further insult. It results in a family feeling that they have to fight not just one public body, the NHS to secure justice, but they then have to find the strength and energy to fight another publicly funded body (LAA) for the right to prove their case.

19. Exceptional Funding issues:

19.1 In the Justice Committee's report on the coroner's service published in May 2021 there was a recommendation that: ***"The Ministry of Justice should by 1 October 2021, for all inquests where public authorities are legally represented, make sure that non means tested legal aid or other public funding for legal representation is also available for the people who have been bereaved".***

19.2 On 06.12.23, The Rt Hon Alex Chalk KC MP and Justice Secretary gave a statement in response to Bishop James' 2017 report "The patronising disposition of unaccountable power" – a report on the Hillsborough disaster and the inquest process in which he said: "***that proper involvement in an inquest will in appropriate cases mean that bereaved families should get legal representation, especially when the state is represented".***
https://www.gov.uk/government/speeches/hillsborough-charter-is-legacy-of-victims-families.

19.3 Despite those representations no meaningful change has been implemented which would alter or improve a family's ability to secure legal aid, Exceptional Case Funding (ECF) in a healthcare related inquest.

19.4 While it would appear to be the case that the financial eligibility considerations for Legal Help and ECF have been made easier, the applicant must still discharge the merits test. The financial means test for Legal Aid's Exceptional Funding rules was removed in January 2022 and in September it was removed for legal advice.

19.5 Eligibility for legal aid requires families to satisfy not only a means test, but a merits test too. The merits test is satisfied only if at least one of two available grounds are shown to exist. They are either there is to be an Article 2 inquest and/or where the Legal Aid Director finds there is a "wider public interest determination" in relation to the individual and the inquest.

19.6 To satisfy the public interest determination the bereaved applicant must be able to show that the inquest into their loved one's death ***"is likely to***

produce significant benefits for a class of person, other than the applicant and members of the applicant's family".

19.7 Satisfying the merits test in a healthcare inquest is difficult because Coroners are often unable to declare the inquest investigation falls under Article 2 until they have heard some or all of the evidence. The coroner's finding on Article 2 is frequently delivered at the time they give their conclusion.

19.8 The fact that legal aid is not retrospective means that a declaration at the end of the inquest hearing will not assist the properly interested person because they cannot show that legal aid funding is available for the advocacy at the outset.

19.9 LAA offers no guidance or support in defining what amounts to public interest for the purposes of the Exceptional Funding determination.

19.10 While it might be thought that securing a Prevention of Future Death (PFD) report could reasonably be considered to produce benefits for a wider class of person, it is not clear that this will meet the legal aid requirements of public interest. In any event, coroners will invariably hear all of the evidence before they consider whether a PFD is required or not. A PFD is usually made following the coroner's conclusion, as legal aid is not retrospective it would be difficult to demonstrate the merits test in advance of the coroners making the PFD report.

19.11 Exceptional Funding is exceptionally difficult to secure for families wishing to have their voice heard at healthcare inquests. It should also be remembered that legal aid is not retrospective and therefore must be secured before the inquest hearing commences.

19.12 There needs to be at the very least a focus on ensuring a level playing field by making public funding available for families faced with an inquest "***where public authorities are legally represented".*** It is clear that a legally represented public authority is not part of the ECF merits test, it does not feature as part of the eligibility requirements for securing legal aid.

19.13 AvMA refers to the case of the *Inquest touching the death of baby Harry Richford*. This inquest was heard by the Assistant Coroner in Kent in 2020, Derek Richford (Harry's grandfather) was an Interested Party. The inquest was heard over about three weeks, legal aid was not available and but for pro bono representation from counsel the family would have been unrepresented.

19.14 The importance of that inquest cannot be overstated, the effect and impact of the inquest was such that it was the catalyst for the public inquiry into East Kent Maternity NHS Maternity Services, that became apparent as the Coroner heard the evidence. It was not enough to secure legal aid before the inquest.

19.15 Mr Richford would likely be faced with the same difficulties regarding representation today as he was in 2019 and 2020, that in itself is shameful.

Questions

Qn (your Qn 8): Do you have any suggestions of changes that could improve civil legal aid – both short-term and longer-term changes?

Clinical negligence firms which have gone through the rigour of securing a legal aid contract and in the case of clinical negligence have an accredited solicitor working there should be trusted by the LAA to make reasoned judgements for the benefit of their clients and with respect to the use of public funds.

The administrative burdens imposed on securing legal aid certificates and then subsequent increases to the financial limits and scope of the certificates should be reduced to make legal aid more accessible and user friendly. Where leading counsel provides an advice, it is difficult to see how the LAA can justify rejecting that advice especially when it does not secure its own like evidence in support of their decision.

LAA needs to move away from taking the authoritarian stance it has developed in rejecting funding applications and extending the scope of certificates without at the very least producing evidence in support of their position.

LAA should ensure that either the rates for medical expert fees properly reflect the market rate or that a top up arrangement can be legitimately entered into. The failure to promote equality between parties simply creates a two-tier system which is unfair.

The approach currently employed by the LAA serves to only drive the public away from their right to use this source of funding.

Qn (your Qn 10): What do you think are the changes in the administration of civil legal aid that would be most beneficial to providers?

- Less administration for lawyers applying on behalf of their badly injured clients.

- For reasoned and expedited decisions to be made by the LAA in the granting of certificates and in applications to vary the scope or financial limits on certificates. Alternatively, the reasons for rejecting applications are fully supported by independent evidence obtained by LAA.

- That some of the questions on the APP1 application form are removed. This form asks if there is a complaints process or ombudsman's procedure which can be used by the applicant. If the process has not been followed, then it asks "why not". However, there is clear evidence that the Parliamentary Health Service Ombudsman (PHSO) is struggling to cope with the current levels of referrals to them about the NHS Complaints process. Going through the PHSO should not be a prerequisite to making an application for legal aid when the PHSO is unable to cope with the current level of enquiry.

- For the merits criteria on exceptional funding to clearly indicate what sort of evidence might be considered public interest.

- That the Exceptional funding rules for representation at inquest expands the qualifying criteria for the merits test to include circumstances where a public body is represented at inquest.

- That the Exceptional funding rules for representation at inquest provides guidelines for what might qualify as a public interest for the purposes of meeting the merit test.

Qn (your Qn 11): What potential risks and opportunities do you foresee in the future for civil legal aid: i) in general; and ii) if no changes are made to the current system?

- If changes are not made to the current system, the current lack of accessibility to funding will continue. Specialist firms have already moved away from offering their clients the option of legal aid. Firms will continue to move away from being able to use legal aid as it is not in their injured client's best interest to delay resolution or if needs be litigation any longer than is necessary.

- The reduction in the number of specialist firms offering legal aid is supported by the figures provided in the consultation on "Licensed work certificates completed" (defined as *"where providers have to obtain a legal aid certificate usually issued by the Legal Aid Agency to get permission to start work (for instance legal representation)*)– there were 754 licenced work certificates completed for clinical negligence in 2018/19 and 368 in 2022/23. There were 100 civil legal aid providers for clinical negligence work in 2018/19 and only 86 in 2022/23.

- There will be a loss of public confidence in the LAA system and in government. Legal aid will be seen to exist in name only but not in practical terms. That will result in people losing faith in parliament and government bodies.

- The public will see a system where government seek to cover its own tracks and the loss of public confidence will not be confined to the Legal Aid Agency (LAA) but will extend to all public bodies.

- In September 2023, the government announced plans to introduce a scheme of Fixed Recoverable Costs (FRC) for low value clinical negligence claims to be effective in April 2024. Cases where the death was caused or substantially contributed to by failings in healthcare (fatal claims) will be caught by this regime.

- The levels of remuneration under the FRC scheme are so low that AvMA's own survey from October 2023 confirms that some 30% of firms will cease to represent claimants with low value claims. LD-CN-Claims-Questionnaire-External-Use The survey also shows that 89% of the firms currently providing

representation at inquest while investigating a clinical negligence claim will cease to do so.

- AvMA encourages the LAA to consider the impact that FRC will have on low value clinical negligence claims, especially claims involving death. The LAA should consider providing an opportunity for families to exercise their right to redress through legal aid funding as a means of mitigating the impact of FRC on access to justice. This would require a review of the financial eligibility test to ensure that funding is available to all those who need it not just those who qualify by being in receipt of benefits or who are in very low incomes. This would require a thorough review of the current capital and income requirements.

- The LAA should consider that just because an individual is unable to secure representation in a low value clinical negligence claim, does not mean the claim is unimportant. There is no correlation between the value of a claim and its importance. There is no worse outcome than death. Public health services have particular challenges for example, in managing and treating patients with learning disabilities, mental health problems and elderly care – the outcomes for people with these conditions are often very poor. Nonetheless, these issues are important not least as they are a gauge of how we as a society value and treat vulnerable people. Legal aid should be made available to ensure the public can invoke their rights, to ensure there is accountability, answers given to the grieving families and changes made by care providers to ensure they learn lessons and make necessary changes.

  It is also worth pointing out that £25,000 is a great deal of money to many people and can be life changing. For some injured people it is the difference between being able to pay their rent or mortgage arrears which have arisen as a result of a medical injury and not.

- It is AvMA's view that with earlier support and intervention and better management of the NHS and private healthcare providers complaints process individuals would be able to secure the answers they are seeking at this early stage. This will require a complete review of the complaints process and the access to LAA funding is part of that discussion.

- AvMA appreciates that this is a radical recommendation, but the opportunity does exist to improve the current complaints system, public funding will need to be available to make any new scheme fit for purpose and that means that LAA funding is a key part of the conversation.

- By providing the public with what they want early on, namely, to understand what went wrong, lessons learned and an assurance (so far as is possible) that the same incident will not happen again, recourse to litigation will be avoided in many cases.

- A reduction in clinical negligence litigation will provide considerable savings to the public purse, it will take the pressure off of the NHS and in due course restore some public confidence. Increasing the availability of legal aid to support the public in fully accessing the complaints process in a meaningful way at the earliest stage will be cost effective if it staves off or reduces the need for clinical negligence litigation.

Qn (your Qn 12): What do you think are the possible downstream benefits of civil legal aid? The term 'downstream benefits' is used to describe the cost savings, other benefits to government and wider societal benefits when eligible individuals have access to legally aided advice and representation.

- Please see our answer to the above question in particular AvMA's suggestion that there is a complete review of the NHS and private care complaints processes supported by public funding (legal aid).

- Such a scheme should offer access to justice, reduce the need for clinical negligence litigation and provide an opportunity for early resolution of problems. This will save costs in the long run.

- A scheme of this nature may be of particular benefit to people from disadvantaged or marginalised backgrounds who may find it more difficult to either secure representation because of the way they present their case to their lawyer. Or, who may be reluctant to seek advice from a lawyer in the first instance.

- By enabling a grieving family to be represented at inquest there is an opportunity to direct the coroner to relevant evidence so that lessons for health care can be learned and disseminated, not just locally but nationally.

- Where the family is represented, the coroner will be in a position to hear issues not just from the NHS healthcare provider (who is invariably represented at healthcare inquests) but from the family too. This will help the coroner to be fully informed by hearing a balanced view of the issues and of the factors contributing to the death and for lessons to be learned.

Qn (your Qn 18): What barriers/obstacles do you think individuals encounter when attempting to access civil legal aid?

- The limited scope of the availability of legal aid for clinical negligence claims.

- The reduction in specialist lawyers investing in a legal aid fcontract because the benefits of offering legal aid are not sufficient for the firm's commercial interests

or the client's personal interests especially when considering the issue on expert fees referred to above.

- The administrative burden of applying for legal aid and changing the scope.

- That legal aid staff reject applications without substantiating their reasons for doing so with independent evidence of their own.

- That the existing legal aid restrictions on expert fees has created a two-tier system which is prejudicial to the public's ability to have equal access to experienced medico-legal experts.

- The fact that legal aid is only available to those on low incomes. The thresholds are low such that many families who are struggling financially but who are not in receipt of benefits are not eligible for legal aid. That needs to be reviewed.

Qn (your Qn 22): How do you think that the Exceptional Case Funding scheme is currently working, and are there any ways in which it could be improved?

Please see our comments at paragraph 20 and above in answers given to your other questions identified in this response.

Lisa O'Dwyer
Director Medico-Legal Services
Action against Medical Accidents (AvMA)
AvMA, Freedman House, Christopher Wren Yard, 117 High Street, Croydon, CR0 1QG

21st February 2024