

## Editorial

**Peter Walsh, Chief Executive**

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February will see the end of formal public consultation on two sets of legal reforms which together have the potential to have the most devastating impact on access to justice for people affected by clinical negligence in living memory. Consultation by the Ministry of Justice proposed reforms of civil litigation funding (based on Lord Jackson's report), and even more controversial proposals on reform of legal aid close on 14 February.

Lord Jackson's review of civil litigation costs was prompted by an understandable desire to reduce legal costs associated with civil litigation. AvMA already had some serious concerns about some of his proposals. In themselves they amount to unfair treatment of people affected by clinical negligence in that, for example, they propose taking money from people's much needed damages to pay for legal costs, and because taking away the option of after the event insurance will effectively deny access to justice for them at all. However, the shock announcement of the intention to remove public funding (legal aid) for clinical negligence cases, especially when seen in the context of Lord Jackson's reforms, amount to a removal of access to justice of gigantic proportions. The reforms would also affect the most needy in society disproportionately.

Whatever one thinks of Lord Jackson's proposals around conditional fee agreements ('no-win no-fee'), he has to be given credit for recognizing that they could only make sense in terms of access to justice, if legal aid were to remain. In his final report he said:

'I do not make any recommendation in this chapter for the expansion or restoration of legal aid. I do however, stress the vital necessity of making no further cutbacks in Legal Aid availability of eligibility... the maintenance of legal aid at no less than the present levels makes sound sense and is in the public interest.' (page 70, paragraph 4.2)

It is inexplicable, indeed inexcusable, that anyone who truly values the notion of access to justice for people injured as a result of others' professional negligence to simultaneously be intending to both implement Lord Jackson's proposals and to take away the option of legal aid for clinical negligence cases. Legal aid has been the safety net which has allowed access to justice for the poorest in society. The combined effect of both sets of proposals will be that many of those people, in particular, will not be able

to take a claim for clinical negligence forward, simply because they do not have the means to pay for disbursements such as medical expert reports, or to run the risk of having to pay the other side's costs if they lose. The exceptions might be where there is such a water tight case that solicitors are prepared to carry that risk themselves. While cutting back on legal costs is an understandable objective, the Government can not be allowed to get away with suggesting that these proposals are just about that. They mean a real and serious rolling back of a long-held, proud tradition in this country of making access to justice available to all.

Of course it is not just clinical negligence litigation which is affected by the proposals, but that is where our main interests lie. There are also credible reasons why clinical negligence should be treated as a special case:

- First, the fact is that the Government could achieve its objective of cutting the cost to the State of clinical negligence litigation whilst preserving access to justice, by increasing rather than taking away access to legal aid. Legally aided cases are much less costly to settle than those on 'no-win no-fee'. While the Ministry of Justice might save millions of pounds by scrapping access to legal aid, it simply passes the cost, multiplied many times over, to the NHS. This is not joined-up thinking or joined-up government;
- Second, clinical negligence litigation does have a positive spin-off in terms of incentivizing improvements to patient safety. It is unlikely that we would have such priority given to patient safety if it had not been for the threat of litigation in the back of health provider and policymakers' minds;
- Third, access to justice is already notoriously difficult to achieve in clinical negligence. Out of an estimated 1 million medical accidents in English hospitals alone each year, only around 6000 claims are made. Many of these have to give up because the odds are so stacked against them, or they are worn down by drawn out defence tactics.

Now is the time for all those who believe in access to justice to make their voices heard.