action against medical accidents
Registered charity Number 299123

44 High Street
Croydon
CR0 1YB

DX 144267 Croydon 24

Mr Robert Wright
Head of Civil Litigation & Funding Costs
The Ministry of Justice
102 Petty France
London SW1H 9AJ

Our Ref: CH/NP
Your Ref: send to Tajinder Bhamra
tajinder.bhamra1@justice.gsi.gov.uk

24 October 2012

Dear Mr Wright

Part 2 of the Legal Aid, Sentencing & Punishment of Offenders Act 2012: Regulations

Thank you for asking us to comment on the draft regulations produced following enactment of the Legal Aid Sentencing & Punishment of Offenders Act 2012.

As a charity that exists to represent patients and to campaign for patient safety and justice, the comments that we make on the draft regulations relate only to the areas in which we have an interest. However, where we feel generally the regulations are unclear we have said so.

Draft Regulation A: The conditional fee agreements order 2012
Our main concern in relation to the damages that are to be made available for deduction of the success fee is the inclusion of past care. We appreciate that the regulations reflect

Section 58 of the Act but repeat our on-going concerns that with regard to Section 6.(ii)(b) in the draft order, included in this category are damages for past care. These damages are generally not money due to the claimant but a debt owed by the claimant to another. Deductions from this head of damage will have the effect, once the debt is repaid to the carer or caring organisation, of increasing the deduction from the other heads of damage including general damages beyond the intended 25%.

We also note that in all proceedings apart from first instance the cap can be as high as 100%. We appreciate that this will be subject to agreement between the lawyer and client but given that the client is in a more vulnerable position than the lawyer in our view there should be more protection. When initially instructing solicitors a potential client is able to 'shop around', but may not so easily do so when there is to be an appeal. In that case, a client may feel tied in with their original solicitor and therefore will feel has no choice but to proceed with that solicitor risking 100% of general damages and past losses. We appreciate that it is the department's intention to monitor this situation closely but we wish it to be on record that we have concerns that the clients may be unfairly affected by this provision.

Draft Regulation B: The Conditional Fee Agreements Regulations 2012

With regard to the information to be given before a conditional fee agreement is made, we agree that the client must be provided with clear information in writing but the solicitor should also be required to meet the client face to face and give an oral explanation. While at paragraph 2(i)(b) there is provision for such further explanation, at the client's request, this does not go far enough. The client may not have sufficient knowledge regarding conditional fee agreements to know what questions to ask. It is essential that solicitors meet and go through the details in their written explanation and ensure for themselves that the client fully understands the explanation that they have been given.

It is long been solicitors' practise to meet with client and explain conditional fee agreements. This has been so since conditional fee agreements have been operating within civil litigation. Now that the client faces a significant deduction from general damages and past losses it is more important than ever that before they embark on litigation they are fully aware of this deduction.

Draft Regulation C: The damages based agreements regulations 2012

Paragraph 4(2) Is ambiguous. At 4(2)(a) n respect of claims for personal injuries there are no details on what explanation needs to be given, while at 4(2)(b) considerably more detail is given in relation to an employment matter of which some would also relate to personal injuries as much as to employment claims. In our view, Section 2 a should read as follows:-

2. Those matters are: -

a In a claim for personal injury –

(i) The circumstances in which the client may seek a review of costs and expenses of the representative and the procedure for doing so

(ii) Whether other methods of pursuing the claim or financing the proceedings including –
(aa) Advice or representation under the Community Legal Service
(bb) Legal expenses insurance
are available and if so how they apply to the client and the claim or proceedings in question.

At paragraph 6 (1) (b) we repeat our concerns (expressed at A above) regarding the inclusion of the past care claim in the damages available for calculation of the amount to be paid by the client.

At sub-paragraph (c) we note that the payment due to the solicitor in a DBA is equal to 25% of the sums stated in paragraph 6. It would appear that this paragraph does not allow for flexibility. We would suggest that rather than the flat rate of 25%, this figure is calculated in the same way as for conditional fee agreements, and that 25% is a cap rather than a standard rate.

Draft regulation D: The offer to settle in Civil Proceedings Order 2012

At paragraph 3 sub-section (ii) the drafting is unclear. In particular sub-section (b). we cannot see from this sub-section what the drafting was intended to achieve. A better way of expressing the sub section might be

3 (1) —the court may only order a defendant to pay an additional amount subject to the limits set out below

For the purposes of section 55(3) of the Act, the prescribed percentage shall be—

Amount awarded by the court	*Prescribed percentage*
Up to £500,000	10% of the amount awarded.
Above £500,000	a) 10% of the first £500,000 plus b) a further 5% of the amount awarded above £500,000 up to a maximum of 5% of £500,000

An explanatory note might spell out that the additional amount awarded is subject to a ceiling of 10% of the first £500,000 i.e. £50,000 plus 5% of a further £500,000 i.e. £25,000 with the effect that maximum additional award is £75,000 if £1,000,000 or more is awarded by the court. This is set out in the regulations at para 4 (4)

General Comment

In the main our view is that the draft regulations are what we would expect in accordance with regulations drafted under the Legal Aid Sentencing and Punishment of Offenders Act 2012 and, except where referred to above, we believe these regulations make the procedures clear.

However, we continue to object to the inclusion of past care in the sum available for payment of the success fee (subject to the 25% cap). We appreciate that this issue has been debated before but we believe that such a provision will lead to discrimination against those who possess protected characteristics, as defined in the Equalities Act 2010. Such discrimination would arise from the significant and disproportionate deductions from the awards of those who are the most severely injured and with the largest past care claims.

A possible example would be an individual injured as a child or young person (but not within the categories of claimants still eligible for legal aid) where a claim is not made (or settled) for several years. In that instance, a highly complex case with complicated injury taking many years to settle will have a very large past care claim. This will have a greater adverse effect

upon a disabled claimant as opposed to a non-disabled claimant. This policy could be open to challenge under the Equalities Act 2010.

Should you or your colleagues wish to discuss these points further, I or one of my colleagues will be happy to do so.

Yours sincerely

Catherine Hopkins
Legal Director

legaldirector@avma.org.uk