SUPPLEMENTARY SUBMISSIONS TO CIVIL JUSTICE COUNCIL ON ADR AND CIVIL JUSTICE FOLLOWING CJC ADR WORKSHOP ON TUESDAY 6TH MARCH 2018

14TH MARCH 2018

Brief Introduction to AvMA

1.1. Action against Medical Accidents (AvMA) was originally established in 1982. It is the UK patient safety 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.

1.2. AvMA offers specialist services to the public, free of charge. AvMA's specialist services are its Helpline, pro bono inquest service and advice and information services.

1.3. Through our work we have observed how the public are driven by the need for the truth about what has happened in relation to an incident or a death and to ensure that lessons are learned so that future mistakes are prevented.

1.4. The demand for our services invariably outstrips what we can supply and has generally increased, not diminished in recent years.

2. Executive Summary

2.1. These are supplementary comments to AvMA's paper dated 15th December 2017. These comments are made following the CJC ADR workshop held on 6th March 2018.

2.2. First we would like to commend the CJC for the workshop which was well structured and informative. However, we would suggest that if there are future workshops on ADR that they are focused on specific areas such as clinical negligence.

2.3. We agree with the comment made from a member of the audience that one size does not fit all when it comes to ADR. There are nuances and complexities which are unique to clinical negligence litigation. Each potential claim is unique and this does do not make it conducive to prescribing how and when ADR should be introduced. That said, AvMA remain of the view that ADR and in particular mediation remains a powerful tool which should be used where appropriate as an alternative to litigation.

2.4. We also reiterate our previous observation that the term ADR is too broad and nothing we heard during the course of the workshop has caused us to alter that view, if anything it has reinforced it.

2.5. We also remain of the view that it is culturally normal in clinical negligence litigation to try and resolve cases without recourse to litigation. The pre action protocol encourages and expects this approach. Additionally, clinical negligence is fairly unique in that there are other processes which could and should be facilitating early investigation and settlement of potential claims without recourse to litigation. In particular, the complaints

process and the pledge made under the NHS Constitution that when mistakes happen and harm has been caused the patient will receive an appropriate explanation and know that lessons will be learned. The constitution also clearly states there is a right to compensation where harm has been caused by negligent treatment.

2.6. Our additional comments are centred on concerns about access to justice in particular the treatment of Litigants in Person (LiP); evidence that the NHS has learned from mistakes; the use of confidentiality clauses governing at least some NHSR mediation agreements; parity; transparency and the need for Mediators to be regulated. We have elaborated on these more fully below.

3. Litigants in Person (LiP)

3.1. It is our understanding that LiPs in clinical negligence claims are still in the minority however, it is important to be alive to the very real possibility that the clinical negligence market may change in the future. It is quite possible that those changes will result in an increase in the number of LiPs in clinical negligence cases.

3.2. We are supportive of the National Health Service Resolution (NHSR) aims to increase the availability of mediation for patients who have suffered injury.

3.3. In order to facilitate the possibility of earlier resolution by way of mediation, NHSR following a public tender appointed two panels, Centre Effective Dispute Resolution (CEDR) and Trust Mediation, both panels will mediate claims for LiPs.

3.4. AvMA believe it is crucial that LiPs and patients who have been injured but who have not sought legal advice should have access to information about all the options open to them. It is imperative that this information should be made available to them before any mediation process can be entered into.

3.5. AvMA's core services provide high quality, independent and impartial advice to the public on all the options open to an individual. Educating the public is at the centre of what AvMA does, this objective is clearly set out in our Memorandum and Articles of Association. AvMA has been providing and refining its services to the public since its inception over 35 years ago.

3.6. We have not seen any evidence that the NHSR or any of the mediation panel routinely insist as a pre requisite to mediating a claim an assurance that the LiP has been notified of all their options. Those options should include the opportunity to seek independent advice from AvMA or any other organisation that may be in a position to offer relevant advice on the individuals rights prior to the mediation taking place.

3.7. AvMA holds the view that in circumstances where an individual may enter into a binding agreement through the mediation process – an agreement that is in full and final settlement and which is unlikely to be put aside by a

court – that it is imperative that the individual is aware of their options at the outset and that mediation is not the only forum open to them.

3.8. By contrast a claimant or potential claimant who is represented by a lawyer will or can reasonably be expected to have received advice on their options as well as the likely value of their claim and the merits and or weaknesses of their case.

3.9. The failure to afford LiP's parity in the process is a real failing in the NHSR mediation scheme. A Mediators job is to facilitate communication between parties with a view to enabling them to resolve their issues of conflict. It is not the Mediators job to advise one party or another of their rights.

3.10. The nature of a LiP in these circumstances is that they will either be an injured patient or a person who has been bereaved and that the injury or death is the consequence of alleged substandard care provided in a medical setting. The legal and medical issues in particular can be extremely complex. Either way, it follows that the LiP in these circumstances will be hugely disadvantaged and vulnerable.

3.11. AvMA are also mindful of comments made by Robin Knowles during the course of the workshop that the problem with ADR is not that there are gaps in ADR provision but there is a lack of legal education among the public. He argues that the public cannot be expected to recognise the benefits of mediation if they do not first understand the risks and complexities of the litigation process.

3.12. This sentiment was echoed by another of the panel when they said the mantra is "process" but the "process" cannot be contra to understanding. It is understanding that leads to settlements.

3.13. AvMA agrees with these observations and considers that educating the public of their rights and options is the key to successful outcomes. Information and education are synonymous in this context.

4. The need for parity between the parties

4.1. In our experience many patients, or would be claimants want to know what happened to their loved ones and what went wrong with the treatment provided to them. LiPs want the truth; invariably members of the public who are not represented will not have access to independent medical expert evidence.

4.2. AvMA draws on its experiences from the services it offers to the public and notes that unrepresented members of the public are usually also uninformed. Many interested persons including family members seeking assistance from our pro bono inquest service come to us without having had access to relevant medical notes, internal investigation reports or witness statements. Many, if not most of those people don't know they can ask for copies of those documents. The experience from our Advice and Information department suggests that LiPs are in an analogous position.

4.3. In order to ensure parity between the parties it is important that LiPs are not only advised of all of their options but the NHSR should disclose such documents as it has in its possession to the LiP. In particular any internal or externally commissioned investigative reports, relevant witness statements or other similar documents in their possession.

4.4. Access to justice is a broad term which means different things to different people. However, there can be little doubt that pre mediation disclosure would make the process fairer and enable the LiP to seek independent legal advice or additional information if they so choose. It is worth noting that it is likely that a number of the documents to be disclosed in any pre mediation disclosure would be available to the LiP on request if they were in the coroner's court and the coroner was intending to rely on them.

4.5. Access to relevant disclosure pre mediation will not only serve to make the process fairer to LiPs but it may also help them understand the gravity of the failings which resulted in their injury or their loved ones injury/death.

4.6. Disclosure may also help the LiP to obtain answers to some or all of their questions. This is particularly important given that members of the public will experience difficulties in obtaining their own independent medical expert reports. Medical experts are reluctant to accept instructions from members of the public; in any event, the cost of obtaining independent medical reports is prohibitive for most individuals.

5. Confidentiality agreements in mediation

5.1. The following wording is found at Clause 8 of one of the NHSR panel's standard mediation agreements, it reads: ***"The mediation agreement provides that what happens at the mediation is to be treated as confidential between the parties, the mediator, all individuals attending the mediation and [Name of relevant panel omitted] including the fact and terms of settlement"***. **[my underlining].**

5.2. Note, AvMA does recognise the need for the mediation to be treated as confidential so that parties are not prejudiced in the event that the matter does proceed to litigation. However, it occurs to AvMA that the parties having agreed to resolve the matter, the fact and terms of settlement should not be considered to be confidential as a matter of routine.

5.3. Confidentiality clauses of this nature are not only unnecessary but prevent a proper and full evaluation of the success or otherwise of any mediation scheme.

5.4. Confidentiality agreements are now thankfully rare in litigation; it is therefore difficult to see how the standard clause can be justified in mediation unless a LiP or legal representative for the claimant has specifically requested that it be included.

5.5. AvMA does not accept that it would be open to a LiP to ask to have the confidentiality element removed. The fact is, there is an inequality of bargaining power between a LiP and a trust before the mediation process has even begun. We would suggest that it would be more appropriate for such clauses to be removed and only included at the request of the family or patient.

6. Learning from mistakes

6.1. In clinical negligence claims special consideration needs to be given to how the NHSR and other healthcare providers can demonstrate that they have learned lessons. The Healthcare Provider needs to clearly set out what those lessons are and how they are going to do to address those failings.

6.2. Learning from mistakes is a one of the corner stones for how the NHSR intends to change the way the NHS operates in the future. There needs to be clear and prescribed pathways for how this is going to be done and these need to be set out in the Mediation agreements.

6.3. Mediation is potentially an excellent tool for healthcare providers to consolidate their thinking on what they have learned about the failings in the care provided and how they might be rectified. Assuming that the mediation process is used to its full advantage any weaknesses can, potentially, be identified much more quickly through mediation than through litigation. This means that the healthcare provider has the opportunity to remedy the defect as soon as possible thereby preventing the defect from causing further harm to other members of the public.

6.4. If this recommendation is accepted it is another reason for removing standard clauses in mediation agreement that pertain to terms of settlement being confidential.

7. The need for Mediators to be regulated

7.1. Whilst the comments during the workshop around lack of funding for regulation are noted AvMA considers that this is an important issue that cannot be parked simply because funding is not available.

7.2. As was noted during the workshop there are more mediators than there are mediations; the market is full of mediators with varying degrees of experience and suitability. However, it is also clear that mediators are dealing with highly complex and sensitive issues which often involve badly injured and or vulnerable people.

7.3. The mediators job is to remain neutral but in a scheme where the NHSR has tendered for the mediators, have appointed the panel and are paying for the mediation it is not difficult to see how a conflict, whether actual or perceived might arise.

7.4. AvMA considers allowing a Mediator to be responsible for assessing how vulnerable an individual participating in the process is puts them in an invidious position; it de-neutralises the Mediator before the process has even begun.

7.5. It is also the case that the Mediator is not necessarily in a position to properly judge whether a person is vulnerable or not; they may not have access to relevant documents and/or information to enable them to make that assessment but more pertinently they are not trained to make that decision alone.

7.6. For the system to be both actually fair and transparent and to be seen as such, it is very important that members of the public are assured of at least a minimum set of standards.

7.7. It is equally important for the protection of Mediators that there is regulation or at the very least a commonly agreed set of minimum standards which Mediators sign up to.

7.8. The minimum standards should identify and clarify the integrity and independence expected of the Mediator. It should also set out a complaints process and explain how complaints will be handled. It is important for members of the public to be aware of their rights in the event that they are dissatisfied with the mediation process.

8. Transparency

8.1. The issues we have drawn attention to in this paper, particularly those relating to rights to access information before entering into mediation. The need for parity between parties and the removal of standard confidentiality agreements on issues relating to settlement are key to demonstrating openness and honesty.

8.2. In the following paragraph we have dealt in more detail with concerns around confidence in the ADR process. We believe that transparency and openness are inextricably linked with confidence in the process. Not only does this mean that there should be proper evaluation of the strengths of NHSR mediation scheme but it also requires openness about how the process if funded.

8.3. During the course of the workshop an NHSR representative stated that the NHSR clinical negligence scheme was an example of a pro bono scheme. AvMA do not accept this interpretation of the scheme. The NHSR mediation scheme is not undertaken without charge.

8.4. The NHSR mediation scheme is funded by the NHSR. The panel of mediators have been chosen by the NHSR. The NHSR pays the mediators; the mediators are not providing their services to the public free of charge. The fact a LiP does not pay for mediation does not make the scheme pro bono.

8.5. The irony is that the NHSR also stands to gain the most by ushering LiP into mediation without advising them of their rights, giving them access to key documents or ensuring they have support before, during and after the mediation process. It also stands to gain the most from confidentiality agreements as it is an opportunity to hide any under-settlement that has taken place.

8.6. It must be remembered that not only are the NHSR funding the mediation and the mediators, they are the only party to the process that has had access to all relevant documents pre mediation; this gives them an advantage over the LiP. The NHS is also the public body responsible for causing the harm. In civil proceedings the trusts the NHSR represent would be the tortfeasors.

8.7. Without a commitment to transparency and clarity around the NHSR's interest in the process, it would be open to a patient or family to take the view that the NHSR has motives of its own for promoting mediation.

8.8. A LiP who has not been advised of their options at the outset and is not aware of the full extent of the NHSR involvement in the scheme and who subsequently becomes dissatisfied with the terms of settlement may feel duped by the process if and when they discover the truth.

8.9. In those circumstances, the LiP may take the view that the purpose of the NHSR Mediation scheme goes beyond potential cost and stress saving opportunities. Rather, it is a forum which enables the NHSR to hide their mistakes and potentially reduce their liability to pay proper compensation when it is due. This would create an adverse and negative impression of the NHSR Mediation scheme which could create substantial reputational damage.

8.10. The NHSR should declare their involvement and interest to all parties involved in the mediation process including and especially LiPs; this should be set out in writing and given to the parties at the point when they are first invited to consider use of the mediation process. This information should be given alongside information about how the LiP can access independent advice on their legal rights and other potential forums to resolve their claim.

8.11. When providing details of the NHSR involvement it should be pointed out that despite the fact the Mediators are paid by the NHSR, they are not employed by the NHSR and are independent of it.

8.12. Furthermore the analysis and evaluation of the NHSR Mediation process should be carried out in a transparent way that includes independent evaluation. AvMA would be ideally placed to provide assistance with this.

9. Confidence in the process

9.1. The workshop session on "ADR deficit/hearts and minds" highlighted a view that there were sufficient structures in place to encourage ADR what was missing was a lack of confidence and knowledge in the process. Andy

Knowles commented that a lack of confidence made legal advisers nervous of the process which in turn meant they avoided it.

9.2. AvMA does not believe this is the case in clinical negligence cases. Experienced clinical negligence lawyers do routinely look at ways to resolve claims without recourse to litigation; this is evident by the fact that most clinical negligence claims settle without the need for a trial.

9.3. AvMA does agree that for ADR to be fully effective the public do need to understand first, what their options are, including the right to litigate; second, to identify what they want from the process and third, to understand the pros and cons of their preferred option. This resonates with AvMA's concern that for ADR to work properly, it is crucially important that patients/LiPs understand what their options are at the outset and before mediation has been entered into.

9.4. The public need access to information which is offered in an impartial and independent way and through a route that is unconnected with NHSR or any other organisation that is associated with the Healthcare Provider. As Robin Knowles of the panel said, the public need to understand what litigation demands and how it operates before they can appreciate the benefits of ADR.

9.5. AvMA would agree with the above views and would go one step further and say that an individual does not know and cannot be expected to know what they want from the process until they are in possession of all of the facts; informing the public of their rights and educating them are synonymous, the two issues go together.

10. The cost of Mediation

10.1. We previously set out our concerns about the cost of mediation in our response in December 2017. AvMA has not altered its view that in the standard course of clinical negligence litigation, experienced practitioners will give careful consideration to the costs to be incurred on mediation particularly within the context of proportionality.

10.2. One of the suggestions during the course of the workshop was that cases should be referred to mediation automatically at the time proceedings are issued. There was a suggestion that the issue fee should be staged or reduced in circumstances where mediation was accepted as an option.

10.3. AvMA is concerned that imposing mediation in this way will go against the core strength of the process which is, that parties come to mediation willingly and of their own volition. Once you start imposing mediation (either directly or indirectly), the power of the process will be lost and risks simply becoming absorbed so that it is just another step in the litigation process.

10.4. This approach is also unfair on the claimant. During the workshop it became clear that such an approach was likely to compromise a claimant's

entitlement to an issue fee remission. It also clearly pushes the cost of the mediation onto the claimant and this situation will only encourage poor conduct between parties.

10.5. AvMA notes that there may be scope for introducing mediation in low value clinical negligence claims at the pre issue stage. If such a step were to be taken then parties would need to exchange expert reports before the mediation took place. However, this does need to be considered carefully; expert reports should be exchanged simultaneously. Particular consideration needs to be given to how those reports will be treated and in particular what status they have in the event that the pre issue mediation is unsuccessful and the parties proceed to litigation.

10.6. It is AvMA's view that if there is support for the mediation process and a determination to introduce it to civil litigation then this needs to be funded directly by the Ministry of Justice. The burden should not be thrown onto practitioners and should certainly not be thrown on to the claimant/patient.

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