Action against Medical Accidents (AvMA)

Evidence to the Public Administration and Constitutional Affairs Committee: Parliamentary and Health Service Ombudsman Scrutiny 2020 -21

Introduction – About Us

Action against Medical Accidents (AvMA) is the independent charity for patient safety and justice. We provide free specialist independent advice to people who have been affected by medical accidents (patient safety incidents) and work with all stakeholders to make healthcare safer and fairer. Or daily contact with people who have experienced harm in healthcare gives us invaluable insight into their experience and priorities. We advise around 3,000 people each year. We have always taken a keen interest in the PHSO as access to the Ombudsman is a vitally important safety net for people with complaints about the NHS. Our advice work often involves advising people about the option of taking a complaint to the PHSO, helping them to do that, and in some cases advising and helping them challenge decisions by the PHSO when they are considered unjust or irrational. This submission is written by Peter Walsh, the chief executive of AvMA. We have chosen to focus on the issue of the PHSO's approach to "Alternative Legal Remedy" as this is an issue that concerns us greatly and could be denying large numbers of people access to a PHSO investigation unfairly.

Alternative Legal Remedy and clinical negligence claims

We are very concerned that the way that the legislation about Alternative Legal Remedy (ALR) is being interpreted by the PHSO is preventing the PHSO from properly delivering his role; causing injustice to people seeking their complaint to be investigated by the PHSO covering patient safety issues and system failures within the NHS; and is perversely encouraging litigation rather than resolution of concerns through the complaints process. We have dealt with cases ourselves where complainants had been told that they could not have a PHSO investigation because they were taking or had already taken legal action over clinical negligence and this was wrongly interpreted as an 'alternative legal remedy' to the remedy they were seeking from the PHSO. In some cases, we have succeeded in persuading the PHSO to change its decision and to investigate. However, it is likely that we would only see a small fraction of the cases turned down for investigation wrongly due to misinterpretation of ALR.

In order to get a clearer picture of the potential scale of this problem, we made a Freedom of Information request to the PHSO asking how many complaints had been turned down for investigation on the basis that a clinical negligence claim was seen as an alternative legal remedy. **Their response shows that over the five years up to and including 2020-21 1604 cases (an average of 320 a year) were turned down for investigation on the basis of the PHSO believing that an alternative legal remedy had already been achieved, or that they thought that it was reasonable for the complainant to pursue an alternative legal remedy. In 2020-21 the figure was 261.**

AvMA has had several constructive discussions with the PHSO over the years, based on our casework with complainants, which we think has resulted in some improvements in the way that ALR is being interpreted and communicated to complainants. However, there are still problems. Most recently, we have had discussions about the way that the legislation is being interpreted with regard to an individual case, which has wider implications. In this case, the PHSO has concluded that he cannot investigate the complaint fully under his own powers without the prior agreement of the NHS trust concerned. This is because the complainant has taken legal action already to obtain damages in respect of clinical negligence, which resulted in an out of court settlement.

In spite of the fact that the complainant is not seeking damages, compensation or a finding of negligence, the PHSO has concluded that he is prevented from exercising his existing powers to investigate due to ALR. However, the complaint is about the quality and safety of the care provided which has not been dealt with by the clinical negligence claim and settlement; alleged 'cover ups' in how the case has been investigated and

reported; and seeks acknowledgement of failings and learning for patient safety. The PHSO has indicated he would like to investigate these matters but based on internal legal advice feels unable to do so without the permission of the trusts concerned due to ALR. This is in spite of the fact that the remedies being sought by the complaint were not obtained through the clinical negligence claim and that the courts do not have the power to deliver these remedies as a result of a clinical negligence claim. The PHSO's laudable efforts to seek the trusts' agreement to a full investigation, in spite of initial indications to the contrary, have now failed. This means that the PHSO believes he is unable to conduct the investigation he wished to, which we think is unacceptable.

We are calling for action to be taken to rectify this situation and to prevent the same thing happening in other similar cases. Not to do so would damage public confidence in the PHSO and set a dangerous and undesirable precedent. It would mean that the PHSO would not be able to investigate complaints under his own powers in any case where there had already been a clinical negligence claim, even if it is settled out of court. It is unacceptable that the agreement of the trust(s) concerned should be necessary in order for a PHSO investigation to be conducted. The legislation regarding ALR urgently needs clarification and/or amendment. We understand that the PHSO agrees with us on this in principle.

However, we believe that even without the much needed legislation to modernise the PHSO, this problem could be addressed. We firmly believe that the PHSO's interpretation of how ALR as set out in its regulations applies in cases or potential cases of clinical negligence is wrong. ALR even in its current form, could and should be interpreted differently. It is simply a fact that a potential, ongoing or past clinical negligence claim simply is not an alternative legal remedy to a complaint to the PHSO (unless the complaint is solely about seeking financial redress or a finding of 'negligence'). Clinical negligence litigation is only concerned with establishing whether or not there has been negligent care that has caused damage and/ or loss, and if so awarding damages. The vast majority of clinical negligence cases do not go to court, and when an out of court settlement is made this may not even establish whether the care was negligent. The PHSO has accepted that our interpretation of ALR and whether it applies in clinical negligence cases is arguable, but has so far declined our requests that he obtain independent legal advice about this. This leaves complainants who fall foul of the current interpretation of ALR with no option but to challenge the PHSO by way of a judicial review, which is neither desirable nor realistic in most cases for an individual. We can not understand why the PHSO would not want to have an independent legal opinion about this. We are worried that the PHSO's current position is influenced by the fear of being legally challenged by the well-resourced organisations involved if he did choose to investigate, in the knowledge that it is very difficult and unlikely for an individual member of the public to be able to mount a legal challenge.

Conclusion

Hundreds of people may being unfairly denied PHSO investigations each year because of a misinterpretation of ALR and whether or not clinical negligence litigation is an alternative legal remedy to that which can be achieved through a complaint investigation by the PHSO. The PHSO himself would like the freedom to investigate these cases but lacks the confidence to do so. It is clearly in the public interest for him to be able to do so. We would also suggest it is against the public interest to encourage litigation against the NHS rather than resolution of concerns through a complaint to the PHSO, as the current approach does.

Obtaining independent specialist legal advice may give the PHSO the confidence to operate in the way we know he would like to in these cases. However, we think there are other potential solutions which the Committee may wish to consider. For example, a ministerial statement about the intention of the legislation, making it clear that clinical negligence claims should not be interpreted as an alternative legal remedy to the remedies being sought from a complaint to the PHSO (unless the remedy being sought is compensation for negligent treatment). Although this would not represent a change to the legislation itself, it is hard to see how any NHS body would seek to challenge a PHSO decision to investigate in the knowledge of such a clarification. Additionally, it may be possible to amend the legislation covering the PHSO as part of another Bill going through Parliament. We agree that wider reform of legislation regarding the PHSO is needed but understand that this will not happen in the near future. We suggest that urgent action on this matter is required rather than waiting for that.