RESPONSE TO MINISTRY OF JUSTICE

Transforming our justice system: Consultation

RESPONSE DUE:

24th November 2016

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AvMA Response to Transforming our justice system: Consultation

Introduction

1. Action against Medical Accidents (AvMA) was 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 throughout the United Kingdom.

2. AvMA offers specialist services to the public, free of charge across the United Kingdom. This includes a helpline and an individual casework service staffed by legal and medical professionals.

3. The pro bono inquest service was set up in September 2009 and launched in July 2010. The project aims to find representation for people who have been affected by the death of a loved one where the death occurred in a medical setting. Currently, the service provides advice and in some cases representation to in excess of 100 inquest cases per annum. Through our work, we have developed considerable expertise in providing assistance and representation to members of the public at inquests.

4. AvMA provides specialist support services for legal professionals through our Lawyers Resource Service including the recommendation of expert witnesses. We organise specialist training courses and conferences for health and legal professionals, advice agencies and members of the public.

5. AvMA operates a specialist accreditation scheme and assesses solicitors for eligibility to the panel based on their experience and expertise in clinical negligence. The AvMA panel has been running since the late 1980's and is the longest running clinical negligence accreditation scheme as well as being the first accreditation scheme of its kind. We reaccredit our panel solicitors after 5 years to ensure that they are maintaining standards, both the original application for accreditation and reaccreditation process require solicitors to submit case reports. As a result we have access to over 200 case reports annually.

6. The case reports ask for a number of pieces of key information, for example: when the solicitor first had contact with the client; when the letter of claim was sent; when the letter of response was received; when proceedings were issued; when the case settled. The information is collected as a means of identifying how quickly a solicitor progresses claims. Where there is delay, the solicitor has the opportunity to explain reasons why delay occurred. The information not only enables us to assess a candidate but also provides us with a keen sense of the difficulties commonly encountered by Claimant solicitors in progressing cases.

AvMA's Comments to the Consultation

7. AvMA has confined its responses to questions where we feel able to comment based on our experience and information available to us through our services and panel accreditations.

8. Our expertise and experience relates to clinical negligence issues.

Executive Summary of AvMA Recommendations

9. Any reforms to the court system must ensure that there is an equal playing field between claimant and defendant parties. This means ensuring disclosure, access to independent and impartial expert evidence where required and the opportunity for claimants to appear in person if they so choose to.

10. Help and support provided by an independent third party which has requisite specialist knowledge must be available to claimants/appellants.

11. In the MoJ's Impact Assessment, it makes clear the intention to save circa £16 million by reducing non legal tribunal panel member involvement by 75%. The additional money will be spent training non specialist judges. This approach is likely to give rise to grave miscarriages of justice which are likely to affect the most vulnerable in society. If specialist non legal panel members are removed then it is imperative that as a minimum the judge has specialist knowledge of the issues being adjudicated on.

12. AvMA supports the general principle of introducing greater use of information technology in the court system for those who are confident and able to use it. However, the majority of the population (70%) would struggle to access proceedings in this way and they must retain the right to attend before the judge in person; this may be their only opportunity to communicate on important issues in a way that they are best able to express themselves.

AvMA's Response

Re: Assisted Digital

1. **Question 1: Do you agree that the channels outlined (telephone, webchat, face-to-face and paper) are the right ones to enable people to interact with HMCTS in a meaningful and effective manner?**
   Please state your reasons.

   1.1. AvMA are pleased to note that the Ministry of Justice (MoJ) are committed to providing the public with a justice system that is just, proportionate and accessible. The consultation paper acknowledges that a just system is one that provides fair outcomes and decisions and that all like cases are treated alike. A proportionate system recognises proportionate cost, speed and complexity that make sense to the case and that an accessible system is one which is affordable, intelligible and available for use by all.

1.2. While AvMA broadly supports these aims we do have serious concerns about how this will play out in practice particularly where so much emphasis is placed on being able to access technology.

Webchat:

1.3. The figures quoted in the consultation itself (para 7.1.3) state that currently 52% of the UK population can be “digital with assistance” and 18% are “digitally excluded”, that equates to a total of 70% of the entire UK population who are either only able to access technology with assistance or are not able to access it at all. Those figures on their own do not support the suggestion that web chat would be an effective way of guiding people through the online process.

Telephone Service:

1.4. Whilst a telephone help service offering advice might be suitable for some, any such helpline service has to be readily available to the public. This demands that there are sufficient telephone operators to provide assistance. Those operators need to be patient and able to guide the public through the electronic forms and documents. Given that 70% of the public have been identified as likely to experience problems with this, telephone assistance is unlikely to be an effective means of communication.

1.5. Drawing on AvMA’s experience of running a helpline for some 20 years we are also aware of the need to have ways of identifying that the public’s demand for a telephone service is being met. For example any telephone service should have a means by which members of the public who are unable to get through on the telephone can leave a message and arrange for a member of staff to call them back. The telephone service should be free and the caller should not incur any charge, or at worst charges should be minimal, this is to ensure that low income groups are not prevented from accessing the help they need because of cost. Unless these measures are put in place there is a likelihood that many people will be unable to access the information they require.

1.6. We welcome the suggestion that a third party organisation might provide assistance in completing an online form. Indeed AvMA has experience of both a helpline and staff who routinely provide assistance to the public in enabling them to access online information such as NHS complaints procedure. AvMA has also worked for in excess of two years with the CQC on a project to enable members of the public to complete web forms that enable them to share their experience of treatment received by NHS trusts with the CQC.

1.7. However, drawing on those experiences we would comment that being comfortable and able to use technology is only one part of the picture. Of equal, if not greater importance is the need to provide assistance to help the public communicate their concerns. AvMA observes that in a complex area such as a potential clinical negligence claim the public often, instinctively know that something has gone wrong with their treatment; however they struggle with finding the confidence and the skills to relay those concerns in a relevant and succinct manner. These problems resonate with people who have recourse to social security applications.

Meaningful and Effective Interaction:

1.8. While for many people using information technology is common place as acknowledged by the consultation paper, that is not the case for everyone. For many people the thought of interacting with either a court or tribunal in any way other than in person will simply add to the stress they will already experience going through a court process. The use of webcams, webchat and other similar digital technology is very foreign to many people; given this, there should be the option for the public to attend a court or tribunal in person, if they choose.

1.9. In many instances a tribunal or court will be the only opportunity for the individuals to be heard and to put their point across. Access to justice has to recognise that many people have difficulty in expressing their needs and difficulties in writing; a personal attendance is the only opportunity they will have to communicate. Many of the applications made to the tribunal are for much needed benefits and may be of critical importance to living standards and in some cases will affect an individual's ability to exist in a way that enables them to receive the basics in life such as food and sustenance.

1.10. Patients who have experienced injury as a result of clinical negligence frequently need to claim social security. If their original application is rejected they may have recourse to the Social Security and Child Support Tribunal (SSCB). This tribunal deals with applications for various benefits which have been rejected, the benefits of particular concern to a clinical negligence claimant are likely to include: applications for attendance allowance; carer's allowance; compensation recovery scheme; disability living allowance (now Personal Independence Payments (PIP)) and employment support allowance. Clinical negligence clients also often have frequent recourse to the Special Educational Needs (SEN) tribunal.

1.11. Currently, an appeal to the SSCB tribunal is not considered until the applicant had lodged a Mandatory Reconsideration Notice (MRN). Only once the MRN is rejected does the applicant have recourse to a tribunal hearing. The MRN has been introduced in stages since April 2013 and this has had a demonstrable effect on the number of applications being made. In 2013/14 there were 401,896 tribunal receipts, by comparison in the year following the introduction of the MRN, (2014/15) the number had dropped considerably to 112,082.

1.12. Contrary to the drop in numbers being a mark of the success of the MRN, there is evidence to support that the drop in numbers simply reflects the complexity of the process. This view is supported by the fact that in the period April to June 2016, **58%** of the SSCS tribunal appeals disposed of were revised in favour of the claimant (for details see page 31 MoJ Statistics Bulletin dated 08.09.2016 – see link below).

1.13. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/550952/tribunal-and-gpc-stats.pdf

1.14. The Department Work Pensions (DWP) own research confirms that there are concerns from stakeholders that the introduction of MRN has simply deterred some claimants from pursuing disputes. Some of those people who have been put off making an application would have been successful at tribunal. The reasons for failing to make the application are due to the appeals system being overly complex to follow, daunting and the need for assistance. The complexity is acting as a deterrent to those who may have legitimate grievances.

1.15. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/538836/decision-making-and-mandatory-reconsideration-ssac-op18.pdf

1.16. The fact that the majority of applications to the tribunal are successful is likely to be testament to applicants who have difficulties communicating their points in writing, have a better chance of doing so in person. The fact that a judge or tribunal chairman is able to see and hear from an appellant in person is likely to be a significant factor in this high success rate.

1.17. As the figures from the MoJ Statistics Bulletin show, if there is a commitment to meaningful interaction, it is important that the applicant retains the option to attend a hearing in person.

2. Question 2: Do you believe that any channels are particularly well suited to certain types of HMCTS service? Please state your reasons

2.1. We agree that increasingly the public are becoming more aware and confident in their ability to use information technology systems. We refer to the consultations own figures which show that currently some 70% of the population struggle with IT and need assistance. We do not object to an increased use of IT for those who are comfortable with this forum and are confident and able to access it. However, AvMA believes that if this option is introduced it is vital that:

(a) The option to attend a court hearing or tribunal in person is retained – see reasons given above.

(b) Funding is made available to ensure that general help, support and assistance can be given to enable the public to access the IT systems necessary to access justice

(c) That funding is made available to ensure that the public are given the help and assistance they need to enable them to express in writing, their grievance; that there is assistance to help them understand the legal requirements and tests and fully participate in the proceedings.

(d) There being parity between parties. This is particularly relevant in healthcare cases where the NHS will be supported by lawyers either employed by the NHS LA or the NHS LA panel firms. The NHS will understand the litigation process, the legal test for clinical negligence and has access to funds to enable them to instruct medical experts to

provide evidence in support. Claimant's should have access to legal advice, be entitled to disclosure of all relevant documents that exist and be able to obtain their own medico legal evidence to enable them to participate in the proceedings.

(e) The process must be simple and easy to follow

(f) Where hearings are to be held through the use of IT as opposed to in person, the judge must be a specialist in the area of law he/she is adjudicating on.

3. **Questions 3 concerns online convictions and statutory fixed fines, this has not been answered as it is outside of our area of expertise.**

4. **Questions 4 concerns online convictions and statutory fixed fines, this has not been answered as it is outside of our area of expertise.**

5. **Questions 5 concerns online convictions and statutory fixed fines, this has not been answered as it is outside of our area of expertise.**

6. **Questions 6 concerns online convictions and statutory fixed fines, this has not been answered as it is outside of our area of expertise.**

Panel composition in tribunals

7. **Question 7: Do you agree that the SPT should be able to determine panel composition based on the changing needs of people using the tribunal system?**
Please state your reasons.

7.1. AvMA is not entirely clear of the extent to which the tribunal is to be reformed. On one hand the consultation expresses an intention to ***"create one system, one judiciary…"*** and says that ***"By 2020, tribunals will be part of a single justice system with a single judiciary"*** yet going forward the question envisages the Senior President Tribunals (SPT) potentially being able to determine panel composition.

7.2. AvMA considers it critically important that specialism and expert knowledge is available to help judges and/or tribunal chairs reach the correct decisions. Judges should only hear and decide matters on issues where they have specialist knowledge in the areas of law being adjudicated on. We have concerns that the intention to alter the composition of the panel is focusing on savings up to £16m in payments made to non-legal panel members. The fact the impact assessment envisages supplementary costs being required to train judges ***"due to a lack of expertise on the panel"*** is of considerable concern to AvMA.

7.3. A single justice system is likely to be faced with many challenges particularly given the wide range of issues people seek clarification and recourse on. As referred to above, the current Social Security and Child Support Tribunal (SSCB) has considerable jurisdiction in that it deals with applications for various benefits which have been rejected including: applications for attendance allowance; carer's allowance; compensation

recovery scheme; disability living allowance (now Personal Independence Payments (PIP)) and employment support allowance. Other issues may include recourse to the Special Educational Needs (SEN) tribunal.

7.4. It must be remembered that many of these applications are being made by the most vulnerable in our society. For example, PIPs are for people aged 16 – 64 who need assistance with personal care or mobility as a result of a physical and or mental handicap, it is crucial that decisions concerning vulnerable people are made with the benefit of advice from relevant, independent, impartial experts, this necessitates calling upon non legal panel members. The nature of the expert advice will vary according to the different needs of the individual coming before the court/tribunal and can be important in informing the tribunal so the correct decision can be reached.

7.5. The reduction in multi member panels and the relegating of tribunal applications to single judges who do not have expertise in the areas being decided on will almost inevitably lead to unnecessary hardship and travesties of justice to those in society who require protection. It may achieve the government's aim of dealing with appeals more quickly but you cannot achieve access to justice simply by speeding up a process.

8. Question 8: In order to assist the SPT to make sure that appropriate expertise is provided following the proposed reform, which factors do you think should be considered to determine whether multiple specialists are needed to hear individual cases?
Please state your reasons and specify the jurisdictions and/or types of case to which these factors refer

8.1. Nature of the individual: Factors such as does the individual have learning difficulty or a statement of needs? Are they represented? Do they have access to general help and advice? Do they have mental health issues which may impair their ability to engage in the process? Are just a few examples of the type of issues that ought to be considered at the outset of the case.

8.2. Specialist nature of the application: To determine the specialism required, regard needs to be had to the facts of the case. If there are particular issues around specialist areas such as medicine, eg proving the extent of a disability or the effect of a particular type of illness then independent and impartial medical expertise should be engaged.

8.3. In applications to reconsider benefits such as carers allowance or Personal Independence Payments (PIP) attention needs to be paid to the specific nature of the injury giving rise to the need for these benefits. Consideration to relevant factors that may give rise to issues relating to medical or therapeutic need, such as occupational therapy or physiotherapy, these factors should underpin the decision to engage appropriate expertise.

8.4. Similarly in issues traditionally dealt with by the Special Educational Needs tribunal consideration should be given to the evidence produced by the

parents or guardian; the local authority's evidence, as well as how much time the experts producing the reports spent with the child. The court should be able to consider their own independent expert evidence and any other relevant evidence such as the views and opinions of the school being attended by the child as well as the school being proposed for the child in the future.

8.5. Advice: We consider access to independent, good quality, accurate information and advice to be critical in order to enable the applicant to make choices. Managing expectations is an important part of the litigation process as is an applicant's ability to properly engage in proceedings. An applicant must be able to access the process and to put their best case forward; this requires an applicant to have access to advice and information which will enable him/her to make written representations to this effect, it may also require that they have access to independent expert evidence. The tribunal should be able to recommend independent legal advice and or representation where necessary and where it is in the interests of justice to do so.

About You

Please use this section to tell us about yourself

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If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Please see details set out at the beginning of this response paper under the heading "Introduction"