

From the Ombudsman **Robert Behrens CBE**

William Wragg MP

Chair, Public Administration and Constitutional Affairs Committee

Sent by email only



12 November 2021

Dear William,

I am writing to share with the Committee my Office's views on Alternative Legal Remedy (ALR) following recent correspondence the Committee has received on this issue.

On 27 August, Peter Walsh, Chief Executive of Action against Medical Accidents (AvMa), wrote a joint letter to you and Nadine Dorries MP, the then Minister for Patient Safety, Suicide Prevention and Mental Health, to set out his concerns regarding PHSO's interpretation of the ALR legislation. Peter kindly copied that letter to me. I am therefore taking up the implicit invitation to give my perspective on some of the issues Peter raised.

Peter's interest in the area of ALR is welcome. I can confirm that I share Peter's view that the impact of the legislation in this area leads to poor outcomes. As things stand, while I have discretion in relation to cases where no ALR has been exercised, I do not have that discretion once an ALR has been taken up. Peter makes good points about why this position can lead to unsatisfactory outcomes and can impede patients' and families' ability to achieve justice and resolution outside the clinical negligence process. However, I do not share Peter's view that it may be possible to approach things differently without amendment of the current legislative scheme, but I do welcome his support for such amendment.

My approach to ALR is founded on clear legal advice that even with a broad view and with a willingness to risk challenge there is no arguable discretion to investigate matters that have been reasonably brought before a court. The relevant provision is section 4(1) of the Health Service Commissioners Act 1993. Under that provision I have discretion where no ALR has been exercised to consider whether it was reasonable to expect a person to resort to an ALR, but no such discretion is given to me where they have resorted to an ALR.

Peter sets out a number of potential solutions to this problem in his letter:

- 1) Obtain independent specialist legal advice on whether or not PHSO's interpretation of the legislation is correct or if the Ombudsman could investigate these cases in the way he would like to within his existing powers
- 2) A ministerial statement about the intention of the legislation to clarify that clinical negligence claims should not be interpreted as ALR to the remedies being sought from a complaint to PHSO
- 3) Amend the legislation as part of another Bill going through Parliament.

Given my view about the effect of the legislation, I am doubtful that that Peter's second suggestion could materially change matters. Regarding his first suggestion, I will of course consider any legal advice from another source on these issues, as I have previously said to Peter. I wholeheartedly support his third suggestion - in my view, reform of the ALR legislation is now necessary and increasingly urgent, alongside wider fundamental reform of the Ombudsman service.



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I look forward to meeting with the Committee shortly. In the meantime, please do not hesitate to contact my Office should you welcome discussing the issues I have set out in this letter.

Your sincerely,

Rob Behrens

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