

**Chris Kenny – remarks at AvMA Annual Clinical Negligence Conference,
Brighton 25 June**

I am very grateful to AvMA for the invitation to speak at their conference. Although I am a first time attendee here, I worked very productively with the Association many years ago in my days as Head of Consumer Affairs in the Department of Health. In particular, I valued working with Arnold Simanowitz in the work I did on reviewing the NHS complaints system in the aftermath of the Wilson Report. Arnold always emphasised the need for candour in early discussion with those concerned about their clinical treatment and I am pleased to see that AvMA continue to actively pursue this aim today. More than ever, a culture of candour needs to be embedded in the NHS.

Linda Lee asked me to speak about the LSB's vision for the Legal Services market over next year and in about 5 years time. Relying on a regulator for a commercial forecast is about as productive as relying on Mystic Meg to pick your lottery numbers, but I do think that some things are clear.

If we look over the next year, we start from a position in which times are hard, and will continue to be hard. Other speakers have already referred to constraints on the legal aid budget. These will continue and, being realistic, will tighten further. Other restrictions on public expenditure are also likely to have an impact on the profession. So is the general state of the economy, where recovery will be slow and steady rather than spectacular and you do not need me to tell you that the professional indemnity insurance market will continue to be tight as well.

In this kind of world, saying that "I am from the regulator and I am here to help" may sound as believable as "the cheque is in the post". But I do believe that regulation offers some hope of long-term relief in at least 3 ways.

First, the development of Alternative Business Structures and move towards outcome based regulation both give new flexibility and freedom to existing firms, quite as much as new entrants, to find new and more imaginative ways of responding to market pressures by removing restrictions on ownership, investment and partnerships.

Second, effective regulation means that, while that process happens, there is no reason why there should be a "race to the bottom" or any diminution of public confidence in the legal services market as a whole or individual firms' services in particular. The role of regulators as guarantors of standards is more, rather than less, important in a turbulent market.

Third, you should increasingly find that dealing with regulation is less of a hassle. Some argue that outcome focussed regulation is dangerous because of its perceived

failure in the financial services sector. I think that it is a mistake. There was nothing wrong with the FSA attempting to move to what it called “principles-based regulation”. What commentators have highlighted is that the FSA did not always match a simplified rule book with more effective risk management and tough enforcement action. Those three legs hang together to form a very strong tripod – but you need all of them.

If you meet the outcome specified, you will find yourself having less contact with the regulator. If on the other hand, you stray too close to the line, you will find you have rather more. If you cross the line in an important area, you may well find the regulator biting your ankle – and biting it hard. But, for the good firm - and the vast majority are good and many very good indeed – outcome focussed regulation should mean less rather than more.

I also want to comment on access to justice. For many of us at the LSB, access to justice is one of our reasons for taking the job. There is a real problem in the market, not simply as a result of current financial pressures on legal aid, but with the affordability of legal services for those on average incomes or just above for whom advice – and the ability to follow through an act on that advice - may well simply be unaffordable. To the extent that ABS and other commercial pressures ensure more diversity and better value for money within the market, we see them as a positive enhancement to access to justice, rather than a threat to it.

But we are mindful of some of the concerns expressed. That is why every applicant for an ABS licence will be asked to spell out how their work contributes to access to justice and why we expect all licensing authorities to report annually on the overall impact of their activities in this area. We also expect the debate to continue and look forward to the Law Society’s publication of the very interesting sounding work it has commissioned from Oxera in this area.

I should also comment on referral fees, an issue of perhaps a little less concern in the medical negligence field than some others, but a live issue nonetheless. My Board will be deciding its next steps on referral fees over the next 2 or 3 months. We have interesting advice from our Consumer Panel, which recommends the retention of fees provided there is full transparency. We have Sir Rupert Jackson’s magnum opus, which sees the abolition of referral fees as one building block of his overall proposals, which we know are being studied carefully by the new Government. We also have impressive analytical research from Charles River Associates, which seems to indicate that the current system does not contain any significant detrimental customers. We are not closed to any further evidence people wish to offer on these issues, but do want to focus the regulatory elements of this debate down to a decision in the relatively near future.

Let me now turn to the second part of Linda's commission, the world in 5 years' time. Here, I set out not a prediction, but the vision of the kind of market the Board would like to see and which it believes that regulation might help to achieve, by removing restrictions whilst putting in place the right incentives for strong ethical behaviour.

It is not for us to drive these kinds of developments in detail – they are driven by you and your colleagues in the marketplace, identifying consumer need and responding to it. But, if you do identify that need properly and respond innovatively, we believe that, in 5 years time, the sector will be characterised by:

- Great competition, with more innovation to meet changing patterns of demand;
- Greater access to justice, particularly for that group of consumers I referred to earlier whom legal aid will never help;
- Picking up Michael Napier's important reminder of the Act's word about consumer education, a set of better empowered consumers, who received the right quality of service at the right price with a better customer experience – and effective redress if things go wrong. (The need for candour when things go wrong applies just as much to lawyers in such cases, as it does to health professionals).
- Greater innovation and partnership between lawyers and other professionals – and indeed AvMA's success is perhaps a pre-cursor to wider developments in the market as a whole.

Effective proportionate regulation needs to be there as well, of course, but not as an end in itself, merely as the means to enable you all to help achieve those aims of professional and consumer responsive service which I am sure that we all share.

Thank you.