Title: Extending fixed recoverable costs to lower value clinical negligence claims
IA No: 9559

RPC Reference No: RPC-DHSC-5028(1)

Lead department or agency:
Department of Health and Social Care

Other departments or agencies: Ministry of Justice, NHS Resolution, Cabinet Office, HMT

Summary: Intervention and Options

Cost of Preferred (or more likely) Option (in 2020/21 prices)		
Total Net Present Social Value	**Business Net Present Value**	**Net cost to business per year**
£143m to £392m	-£400m to -£151m	-£67m to -£25m

What is the problem under consideration? Why is government action or intervention necessary?

Claimant legal costs that can be recovered from a losing defendant in clinical negligence claims are considered to be disproportionate, particularly for lower value claims, to the damages awarded and associated defence costs.

"Lower value claims", as referred to in this document and within the definition for claims included in this FRC scheme, are clinical negligence claims where the value is estimated to be in excess of the small claims limit for non-road traffic accident (RTA) personal injury claims, up to £25,000. The current small claims limit for personal injury claims (non-RTA) is £1,000. This is set to rise to £1,500 in April 2022. However, a small number of unusually complex claims with an estimated value below the small claims limit may also be included in the FRC scheme, as set out in chapter 6 of the consultation document.

For lower value claims valued between £1,001 and £25,000, legal costs recovered by successful claimants stand, on average, at double the value of compensation to claimants for matters settled in 2021[1].

Clinical negligence is one of the last remaining areas of lower value personal injury claims in which recoverable legal costs are not currently fixed; government intervention is necessary to streamline the legal process and bring proportionality to the clinical negligence market.

What are the policy objectives of the action or intervention and the intended effects?

The policy objective is to create a fast, fair, and cost-effective system that benefits claimants and defendants and reduces the costs to the NHS. Intervention would streamline the legal process for "lower value" clinical negligence claims (as per the above definition) and fix the amount of legal costs that a successful claimant can recover from a losing defendant for pre-action costs. This would make recoverable legal costs more proportionate to the value of damages awarded and rebalance the cost liabilities of claimants and defendants. The intended effects are to promote and enable quicker, more proportionate, and more cost-effective resolution to all.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 1: Do nothing – the process for handling lower value clinical negligence claims (as defined above) will remain unchanged

In 2018, following an initial 2017 consultation on FRC proposals, DHSC and MoJ jointly commissioned the creation of a Civil Justice Council (CJC) working group. Following its recommendations, we consider implementing fixed recoverable costs (FRC) according to two variants with a preferred option to be determined following the consultation process.

Option 2A: Implementing fixed recoverable costs based on claimant proposals to the CJC working group.

Option 2B: Implementing fixed recoverable costs based on defendant proposals to the CJC working group.

Does implementation go beyond minimum EU requirements?	N/A
Is this measure likely to impact on international trade and investment?	No

[1] NHS Resolution (2021). Annual Statistics (Supplementary Annual Statistics, Tables 9 A and 11.A.1). London, NHSR. Accessed online at: https://resolution.nhs.uk/wp-content/uploads/2021/11/NHS-Resolution-Supplementary-Annual-Statistics-2020-21.xlsx

Are any of these organisations in scope?	**Micro** Yes	**Small** Yes	**Medium** Yes	**Large** Yes
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)		**Traded:** N/A	**Non-traded:** N/A	
Will the policy be reviewed? Yes, this policy will be reviewed in light of consultation responses				

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible
SELECT SIGNATORY: ---------- Date: ----------

Summary: Analysis & Evidence

Policy Option 2A

Description:

FULL ECONOMIC ASSESSMENT

PriceBase Year: 2020/21	PV Base Year: 2021/22	Time Period Years: 20	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	**High:** Optional	**Best Estimate:** £143m

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant	Total Cost (Present Value)
Low	Optional	2	Optional	**Optional**
High	Optional		Optional	**Optional**
Best Estimate	£0		£14m	**£159m**

Description and scale of key monetised costs by 'main affected groups'

The streamlined framework increases costs to claimant solicitors (£151m) which would then be either absorbed by the businesses or passed on to individual claimants. Claimant and defendant solicitors will face administrative costs to navigate the new streamlined process. New administrative costs for NHS Resolution, public defendants acting on behalf of NHS hospitals in England, have been quantified as £8m.

Other key non-monetised costs by 'main affected groups'

Claimant and defendant solicitors will face administrative costs to navigate the new streamlined process – with the exception of NHS Resolution, these costs have not been quantified. Both groups will also face transitional set-up and familiarisation costs. Any additional costs faced by claimant solicitors would be either absorbed by the businesses (potentially reducing their revenue) or passed on to individual claimants. A faster process could disadvantage defendants as they would have to reimburse claimants earlier.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	2	Optional	**Optional**
High	Optional		Optional	**Optional**
Best Estimate	£0		£25m	**£301m**

Description and scale of key monetised benefits by 'main affected groups'.

The streamlined framework reduces legal costs reimbursed by public defendants: £301m savings for NHS hospitals in England.

Other key non-monetised benefits by 'main affected groups'

Claimants and defendants, and their representatives will benefit from improved predictability of cash flows. A faster process could benefit claimant solicitors and individual claimants as they would be reimbursed earlier.

Key assumptions/sensitivities/risks	Discount rate	3.5

We assume there are no significant changes from present volume of new claims (successful and unsuccessful), and present caseload composition both specifically for cases where compensation is valued between £1,001 and £25,000, and for all other claims. This approach might be disregarding meaningful impacts from: 1. a temporary spike of new cases before implementation, followed by a transitional reduction in claims volume; 2. a change in willingness from individuals to bring forward a claim, or for solicitors to take on a claim which could lead to either an increase or decrease in volume; 3) any changes to the likelihood of claims being awarded damages.

We assume detailed policy design will ensure enough safeguards are in place to discourage unintended behaviours.

BUSINESS ASSESSMENT (Option 2A)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m: N/A
Costs: £9m	**Benefits:** £0m	**Net: -**£9m	Not a regulatory provision

Summary: Analysis & Evidence

Policy Option 2B

Description:

FULL ECONOMIC ASSESSMENT

Price Base Year: 2020/21	PV Base Year: 2021/22	Time Period Years: 20	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	**High:** Optional	**Best Estimate:** £392m

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant	Total Cost (Present Value)
Low	Optional		Optional	**Optional**
High	Optional	2	Optional	**Optional**
Best Estimate	£0		£35m	**£408m**

Description and scale of key monetised costs by 'main affected groups'

The streamlined framework increases costs to claimant solicitors (£400m) which would then be either absorbed by the businesses or passed on to individual claimants. Claimant and defendant solicitors will face administrative costs to navigate the new streamlined process. New administrative costs for NHS Resolution, public defendants acting on behalf of NHS hospitals in England, have been quantified in the range as £8m.

Other key non-monetised costs by 'main affected groups'

Claimant and defendant solicitors will face administrative costs to navigate the new streamlined process – with the exception of NHS Resolution, these costs have not been quantified. Both groups will also face transitional set-up and familiarisation costs. Any additional costs faced by claimant solicitors would be either absorbed by the businesses (potentially reducing their revenue) or passed on to individual claimants. A faster process could disadvantage defendants as they would have to reimburse claimants earlier.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant	Total Benefit (Present Value)
Low	Optional		Optional	**Optional**
High	Optional	2	Optional	**Optional**
Best Estimate	£0		£67m	**£799m**

Description and scale of key monetised benefits by 'main affected groups'.

The streamlined framework reduces legal costs reimbursed by public defendants: £799m savings for NHS hospitals in England.

Other key non-monetised benefits by 'main affected groups'

Claimants and defendants, and their representatives will benefit from improved predictability of cash flows. A faster process could benefit claimant solicitors and individual claimants as they would be reimbursed earlier.

Key assumptions/sensitivities/risks	Discount rate	3.5

We assume there are no significant changes from present volume of new claims (successful and unsuccessful), and present caseload composition both specifically for cases where compensation is valued between £1,001 and £25,000, and for all other claims. This approach might be disregarding meaningful impacts from: 1. a temporary spike of new cases before implementation, followed by a transitional reduction in claims volume; 2. a change in willingness from individuals to bring forward a claim, or for solicitors to take on a claim which could lead to either an increase or decrease in volume; 3) any changes to the likelihood of claims being awarded damages.

We assume detailed policy design will ensure enough safeguards are in place to discourage unintended behaviours.

BUSINESS ASSESSMENT (Option 2B)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m: N/A
Costs: £25m	**Benefits:** £0m	**Net: -**£25m	Not a regulatory provision

Evidence Base

Policy Background

Section 46 (1)(5) of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 defines clinical negligence as: “a breach of a duty of care or trespass to the person committed in the course of the provision of clinical or medical services (including dental or nursing services)”.

In clinical negligence claims, the person harmed (or their agents – referred to as the ‘claimant’) may seek compensation (also referred to as ‘damages’) through the courts against those who are seen as being responsible for causing that harm (referred to as the ‘defendant’). If the claimant is successful in being awarded damages, the defendant must pay these damages and the reasonable legal costs incurred by the claimant (referred to as ‘claimant legal costs’), as well as their own legal costs (referred to as ‘defence costs’). In contrast if the claimant is unsuccessful, the defendant cannot recover their legal costs from the claimant (referred to as ‘qualified one-way cost-shifting’), except in a selection of very specific circumstances; the claimant, or the claimant solicitors, will be required to cover their own costs.

Conditional fee arrangements (CFAs, more commonly known as ‘no win no fee’), where the claimant’s lawyer does not seek payment of his fees from the claimant if the case is lost, is the most common arrangement for seeking clinical negligence compensation (in 2013 NHS Resolution, which handles the vast majority of clinical negligence claims in England, recorded 80% of cases as CFA[1]). Under this arrangement, lawyers are entitled to set a percentage mark-up on the fees incurred on a successful case (a ‘success fee’). Following LASPO Act 2012, a losing defendant is no longer liable for paying the successful claimant lawyer’s success fee; the liability now rests with individual claimants (and a success fee cannot exceed 25% of the damages awarded).

DHSC previously consulted on fixed recoverable cost (FRC) proposals for lower value clinical negligence claims in 2017[2]. The responses to this consultation broadly showed that claimant solicitors were opposed to FRC, and defendant solicitors were in favour. DHSC also published an illustrative draft of the Civil Procedure Rules which would apply to its proposal and sought views on several key elements. Overall, there was little agreement between different groupings of respondents.

FRC has been in place for most personal injury matters valued at up to £25,000 since 2013, following the Sir Rupert Jackson’s 2010 report on reforming legal costs. Clinical negligence claims were excluded from these initial changes. In July 2017, Lord Justice Jackson made recommendations for extending FRC for personal injury claims to claims values at up to £100,000. He concluded that clinical negligence claims should continue not to be included in his proposals. Instead, he recommended a way forward for addressing clinical negligence claims up to £25,000, proposing that a Civil Justice Council (CJC)[3] working party be formed, with both claimant and defendant representatives, to develop a bespoke process for handling clinical negligence claims valued between £1,000 (the small claims track threshold) and £25,000 with a grid of FRC.

DHSC agreed with this recommendation and jointly with the MoJ commissioned the CJC to undertake this work. This consultation is based on the proposals of the CJC working group which were published in October 2019[4].

DHSC’s position is to stay as closely as possible to the agreed positions arrived at by the CJC working group. However, we recognise there were areas where the CJC working group did not reach consensus, particularly around the grid of costs to be used in the scheme and the list of exclusions from the scheme.

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[1] Nuffield Foundation, Fenn et al, *Funding clinical negligence cases* https://www.nuffieldfoundation.org/sites/default/files/files/Funding_clinical_negligence_cases_Fenn_v_FINAL.pdf

[2] DHSC FRC consultation and consultation response: https://www.gov.uk/government/consultations/fixed-recoverable-costs-for-clinical-negligence-claims

[3] The CJC are an advisory, non-departmental public body, sponsored by MoJ, that are responsible for overseeing and co-ordinating the modernisation of the civil justice system.

[4] CJC’s full report on FRC recommendations: https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/working-parties/fixed-recoverable-costs-in-lower-value-clinical-negligence-claims/

The evidence base for this impact assessment is structured as follows:

Section A: Problem identification and rationale for government intervention
Section B: Policy objectives and intended effects
Section C: Description of options
Section D: Cost and benefits summary
Section E: Overview of modelling for monetised defendants' benefits and costs
Section F: Summary of specific impact tests
Annex A: Data sources
Annex B: Sensitivity analysis
Annex C: Constant prices detailed results
Annex D: Estimating the Equivalent Annual Net Direct Cost to Business (EANDCB)

Section A: Problem identification and rationale for government intervention

Problem identification

The annual cost of clinical negligence claims against the NHS is rising at a faster rate year-on-year than NHS funding – rising from £0.6 billion in 2006/07 to £2.2 billion in 2020/21 for NHS services in England[5] (in cash terms). Recoverable claimant legal costs are a significant proportion of the annual bill (£433m, or 20% of the total in 2020/21). These have increased by 343% since 2006/07, compared to a 214% increase in damages and a 174% increase in defence costs[6].

According to data provided by NHS Resolution (who indemnify and handle clinical negligence claims against the NHS on behalf of NHS trusts and, since 2019, GPs in England), total and average claimant legal costs appear to have stabilised since 2015/16[7]. However, particularly for claims between £1,001 and £25,000, these costs are disproportionate to the level of compensation awarded with average claimant legal costs (£22,124 in 2020/21) double the average damages awarded (£11,198 in 2020/21)[8].

We recognise claimant and defence solicitors have fundamentally different tasks. However, with the average recoverable claimant legal costs (£22,124 in 20/21) standing at more than four times the defence costs incurred (£4,903) for claims valued between £1,001 and £25,000[9], we support the CJC view that there is scope for improving the current process.

Claims settled between £1,001 and £25,000 represent an important segment of the clinical negligence legal market. For instance, 51% of all claims relating to NHS England trusts and settled with damages are within this segment, and it is reasonable to believe a similar proportion of unsuccessful claims would also be handled by a new fixed recoverable costs process. This means c6,100 of the c12,000 claims NHS Resolution settles every year could benefit from the proposed reforms[10].

Fixed recoverable costs will apply to healthcare in England and Wales, including privately and NHS-funded hospital care but also non-secondary healthcare services such as GPs and dentists.

[5] NHS Resolution (2021). Annual Statistics (Annual Supplementary Statistics, Table 1.A). Accessed online at: https://resolution.nhs.uk/wp-content/uploads/2021/11/NHS-Resolution-Supplementary-Annual-Statistics-2020-21.xlsx

[6] NHS Resolution (2021). Annual Statistics (Annual Supplementary Statistics, Table 1.A, Table 3.A). Accessed online at: https://resolution.nhs.uk/wp-content/uploads/2021/11/NHS-Resolution-Supplementary-Annual-Statistics-2020-21.xlsx

[7] NHS Resolution (2021). Annual Statistics (Annual Supplementary Statistics, Table 5.A, Table 11.A.1). Accessed online at: https://resolution.nhs.uk/wp-content/uploads/2021/11/NHS-Resolution-Supplementary-Annual-Statistics-2020-21.xlsx

[8] NHS Resolution (2021). Annual Statistics (Annual Supplementary Statistics, Table 9.A and Table 11.A.1). Accessed online at: https://resolution.nhs.uk/wp-content/uploads/2021/11/NHS-Resolution-Supplementary-Annual-Statistics-2020-21.xlsx

[9] NHS Resolution (2021). Annual Statistics (Annual Supplementary Statistics, Table 11.A.1 and Table 13.A.1). Accessed online at: https://resolution.nhs.uk/wp-content/uploads/2021/11/NHS-Resolution-Supplementary-Annual-Statistics-2020-21.xlsx

[10] NHS Resolution (2021). Annual Statistics (Annual Report Statistics, Table C.1). Accessed online at: https://resolution.nhs.uk/wp-content/uploads/2021/11/NHS-Resolution-Annual-Report-Statistics-2020-21.xlsx, we assume 51% of the currently unsuccessful 4985 claims would be handled by a new FRC process in addition to the 3578 claims settled in the £1,001-£25,000 damages band.

Rationale for intervention

The current regime enables claimant solicitors to recover their fees on an hourly basis. Clinical negligence is one of the last remaining areas of personal injury where claimant solicitors can recover costs on this basis. Most other areas are now all managed through fast-track portals with low fixed recoverable costs. Guideline hourly rates exist as a guide for judges awarding costs but are not definitive. These were uprated in October 2021.

Currently, claimants will contract with solicitors, and the solicitors' fees are recovered from a third party (defendant) for payment, if the claim is successful. For solicitors operating under a conditional fee agreement (CFAs, used in the vast majority of clinical negligence cases), a success fee is also recoverable directly from the claimant.

The third party (defendant) from whom damages are recoverable in case of a successful claim is unable to control the size of the fee claimed (though it should be noted that legal costs can of course be assessed by the Courts). For cases likely to succeed neither claimant solicitors nor their clients have an appropriate incentive to drive down inefficient costs, as neither party to the contract will be affected (a cost-shifting externality).

Whilst, as described, claimant solicitors are able to charge an hourly rate within clinical negligence claims, defendant solicitors work to fixed rates. As previously highlighted, average recoverable claimant legal costs (£22,124 in 2020/21) stand at more than four times the defence costs incurred (£4,903) for claims against NHS trusts in England and valued between £1,001 and £25,000[11].

The current regime does not incentivise efficient transaction costs and could contribute to a misallocation of time and resources. Using less resource to secure the same outcome would result in improved efficiency.

Government has previously explored a voluntary option – in 2011/12 NHS Litigation Authority (now NHS Resolution) held discussions with claimant representatives to scope a voluntary lower value claims scheme but no consensus was reached. However, the department takes the view that FRC should be introduced on a mandatory basis in order to avoid the potential for an uneven playing field which a voluntary scheme might create between claimant lawyers who sign up to it and those who do not[12].

Section B: Policy objectives and intended effects

The policy objective is to create a fast, fair and cost-effective system that benefits claimants and defendants and reduces the costs to the NHS. Intervention would streamline the legal process for "lower-value clinical negligence claims" as defined on page one of this impact assessment and restrict the amount of legal costs that a successful claimant can recover from a losing defendant. This would make recoverable legal costs more proportionate to the value of damages awarded and rebalance the cost liabilities of claimants and defendants.

The intended effects are to promote and enable quicker, more proportionate and more cost-effective resolution to all parties without affecting patients' access to justice. More lower value cases resolved pre-issue would also have the effect of freeing up Court time and resources.

The introduction of fixed recoverable costs is part of a wider set of linked objectives relevant to clinical negligence: improving patient safety and system learning, thereby reducing harm incidents, improving patient experience and response to harm by NHS organisations and improving the cost efficiency and user experience around clinical negligence litigation for all parties.

This proposal is focused on the objective to improve clinical negligence litigation. Clinical negligence claims are funded from the core NHS budget; recoverable claimant legal costs use resources that could otherwise have been spent on patient care. The NHS, as one of the primary defendants in clinical negligence cases, could therefore benefit from fixing recoverable claimant costs and making the process more efficient for lower value clinical negligence claims.

[11] NHS Resolution (2021). Annual Statistics (Annual Supplementary Statistics, Table 9.A and Table 11.A.1). Accessed online at: https://resolution.nhs.uk/wp-content/uploads/2021/11/NHS-Resolution-Supplementary-Annual-Statistics-2020-21.xlsx

[12] DHSC FRC consultation and consultation response: https://www.gov.uk/government/consultations/fixed-recoverable-costs-for-clinical-negligence-claims

Section C: Description of the options

Option 1: Do nothing

The ‘Do nothing’ option assumes there is no change in the process for handling clinical negligence claims, and that current arrangements determining how much claimants can recover in respect of legal costs remain in place. Within this, it is assumed that average claimant legal costs per claim continue to rise in-line with historical growth and that claims volume remains broadly stable. The impacts of all other options are assessed relative to the ‘Do nothing’ option.

Options 2A-B: Implementing fixed recoverable costs for lower value clinical negligence claims following defendant and claimant proposals

Options 2A-B have two elements. One, introducing a streamlined claims handling process for lower value clinical negligence claims as defined on page one of this impact assessment, which is identical for both options. Two, introducing fixed recoverable costs (FRC) for the same claims: option 2A is based on claimant grid cost proposals to the CJC working group; option 2B is based on defendant grid cost proposals to the CJC working group.

The CJC working group was clear their remit was to consider and propose a fixed recoverable cost scheme for *lower value* clinical negligence claims, with a value of no more than £25,000. The lower limit considered for reform is tied to the small claims track limit, currently set to claims valued at £1,000. A very small number of these sub-£1,000 claims, however, could be subject to FRC if they are considered too complex for the small claims track. We have not quantified the impact of claims valued at less than £1,000 in our modelling.

The CJC report resulted in two proposals for grids of fixed costs following disagreement with the two solicitor groups: the claimant proposal (Option 2A) and the defendant proposal (Option 2B), both included in this impact assessment.

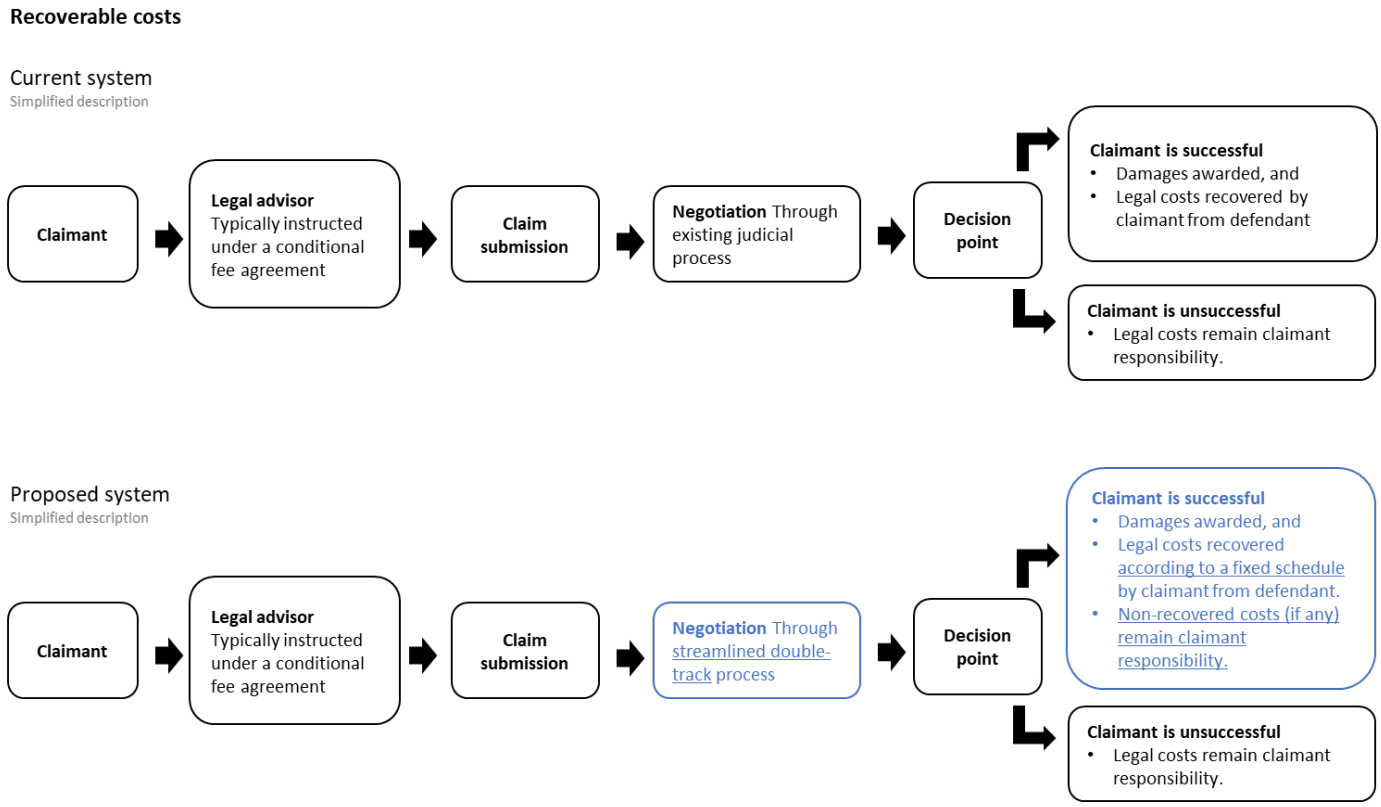
Clinical Negligence

Clinical negligence occurs when a healthcare provider breaches their legal duty of care to a patient, which directly causes harm to the patient. Negligence is determined in the courts if each of the following elements of a legal test is demonstrated:

- Duty: that the defendant owed the claimant a duty of care in law. It is generally straightforward for claimants to establish that their healthcare provider owed them a duty of care given the nature of the relationship.
- Breach: that the defendant breached the duty of care. In order to prove whether the healthcare provider breached their duty of care, a claimant will need to show that what the healthcare provider did or failed to do was not supported by a responsible body of clinicians at the time and / or was not logical.
- Causation: that the defendant's breach of duty caused an injury. Having established a breach of duty, the claimant must also demonstrate that the breach caused some injury or damage. This is done by reference to the balance of probabilities test – i.e. was it more likely than not.

If clinical negligence liability has been resolved using the test summarised above, or the claimant continues the claim without liability being resolved, lawyers for the parties will enlist medical experts to provide evidence on the claimant's condition and prognosis. This, along with other evidence of past and future loss, will be used to draw up a schedule of past and future losses incurred by the claimant. This forms the basis on which compensation (damages) is awarded either by the court or through discussion between parties involved.

Figure 1: Current and proposed system for "lower value" clinical negligence claims



Streamlined claims handling process

The proposed scheme is built around two claims tracks.

For **standard track** claims

- An FRC letter of claim which discloses the claimant's case and is accompanied by an offer to settle;
- A letter of response which discloses the defendant's case and responds to the offer within 6 months;
- The claimant's right to reply within 6 weeks of the response;

- A mandatory stocktake and discussion if the case cannot be settled after the reply (within 4 or 6 weeks of the response or reply respectively);
- A mandatory neutral (but non-binding) evaluation if the claim is not settled at stocktake (within 2 weeks of stocktake).

For **light track** claims

- An FRC claim notification letter (light track) which contains more information on alleged liability and on quantum;
- Response admitting full liability (breach of duty of care and causation) within 8 weeks (if longer, claim moves to standard track);
- Stocktake within 4 weeks of response if unresolved;
- A mandatory neutral (but non-binding) evaluation if the claim is not settled at stocktake (within 2 weeks of stocktake).

For a small number of claims that do not resolve at stocktake and are found to require further evidence, the proposals include a "further evidence phase" in the light track. It is anticipated that only a very small percentage of claims would require a further evidence phase.

The mandatory neutral evaluation (MNE) would involve an evaluation of the claim to be carried out by a specialist barrister of a minimum level of experience selected from a pre-agreed panel. This would be a paper-based process, where the evaluator would then provide an opinion on likely outcome on liability, quantum or both. The aim would be to encourage and result in more claims settling earlier, reducing costs and use of Court time and resources, and achieving faster resolution for parties.

MNE would be a mandatory step, but the outcome would not be binding on either party. Evaluator's fees would be shared equally at the outset but met by the defendant if the claimant succeeds under certain specified conditions.

Fixed recoverable costs (FRC)

Grid costs

The CJC report proposes that the following grids of FRC are applied to claims that have been handled through this streamlined process. It should be noted that the fixed recoverable costs suggested as part of the proposed scheme apply only to costs up to the point of a decision to issue proceedings. The table below describes the original claimant group and defendant group proposals. Claimant group proposed cost levels are higher than or equal to defendant group proposed cost levels.

FRC for **standard track**:

Stage	Description	2A: Claimant	2B: Defendant
1	All steps up to and including stocktake	£6,000 plus 40% of damages agreed	£5,500 plus 20% of damages agreed
2	From stocktake up to and including neutral evaluation	£2,000 in addition to stage 1	£500 in addition to stage 1

FRC for **light track**:

Stage	Description	2A: Claimant	2B: Defendant
1	All steps up to 21 days after letter of response is due	£2,500 plus 25% of damages agreed	£1,000 plus 10% of damages agreed
2a	From 21 days after letter of response up to and including stocktake	£1,500 plus further 5% of damages agreed, in addition to stage 1	£500 in addition to stage 1
2b	From stocktake up to and including neutral evaluation	£500 in addition to stages 1 and 2a	£500 in addition to stages 1 and 2a

Exclusions

Certain cases are excluded from the FRC scheme due to their complexity and sensitivity. More claims excluded would result in fewer savings as fewer claims would be subject to FRC. The original claimant proposal would result in more claims being excluded compared to the defendant position.

The following table sets out the respective solicitor group positions on exclusions.

2A: Claimant	2B: Defendant
Claims allocated to small claims track.	Claims allocated to small claims track
Claims valued above £25,000	Damages above £25,000
Claims where limitation has been raised as an issue and agreed by both parties Limitation refers to a claim being launched after time limits for bringing the claim have expired.	Limitation raised by defendant as an issue
Cases involving more than one defendant.	Genuine multiple defendants (where allegations against each defendant are different)
Cases involving more than one claimant.	
Cases involving more than 2 medical expert disciplines across all medical reporting	Claims requiring more than 2 liability experts
All fatal cases	Still birth and neonatal deaths
Protected parties – those lacking in capacity to stay out of FRC. Children to remain in the scheme with a 'bolt-on' for the additional work undertaken and Infant Approval Hearing	Protected parties to remain in with an additional fee.

Protected parties would be included within the scheme under both options with an additional fee to cover the extra work that is expected of these claims. We have not quantified the impact of this additional fee in our current modelling and intend to further develop the evidence to include in a final impact assessment.

Evaluator Fees

At Mandatory Neutral Evaluation (MNE), a specialist barrister will establish liability in terms of breach of duty of care and causation and/or to what extent, as well as establishing the level of damages (quantum).

Evaluator's fees would be shared equally at the outset and met by the defendant if the claimant succeeds. A fixed fee would be paid to the evaluator for an MNE, with different fees for evaluation on liability only or liability and quantum.

Below are the evaluator fees for claims that proceed to MNE as proposed by the claimant and defendant parties.

Type of evaluation	2A - Claimant	2B - Defendant
Liability and quantum	£2,000	£1,750
Liability only	£1,500	£1,250
Quantum only	£1,500	£750

Sanctions

The FRC scheme proposals include a number of proposed sanctions: measures intended to incentivise all parties to act in good faith, exchange required documents/evidence, participate and meaningfully engage in negotiation and discussions, and meet process deadlines. We have not modelled the specific effects of this sanctions regime as there is limited data on the prevalence of sanctions for each stage of the streamlined process. The modelling assumes that proposed safeguards incentivise good behaviours as intended. More details on proposed sanctions can be found in section 13 of the consultation document.

Section D: Costs and Benefits Summary

Main affected groups

Costs and benefits have been identified for three main affected groups: individual claimants (members of the public who bring forward a claim for compensation), claimant solicitors (private businesses which provide legal representation to claimants), and defendants (public and private sector indemnity providers for healthcare). Unless otherwise stated all monetised costs and benefits in this impact assessment are estimated in real 2020/21 prices. The implementation year is assumed to be 2023/24 and the net present value all consider 2021/22 as the base year (year 1).

Overview of monetised and non-monetised benefits and costs for Options 2A-B

Fixed recoverable cost proposals are expected to have two main, and inter-related, impacts: one, an efficiency gain (see below) in the allocation of resources currently used to settle lower value clinical negligence claims; two, a transfer of wealth from claimant solicitors and individual claimants (cost) to public and private sector defendants (benefit).

Firstly, efficiency gain: A more efficient process is expected to arise from the introduction of a new, streamlined double-track process to handle lower value clinical negligence claims as detailed in Section C.

On a low scenario no efficiency gains are made; claimant legal costs over and above those recoverable from the defence are recovered by claimant solicitors from individual claimants (e.g. in the form of higher success fees for Conditional Fee Agreements).

On a high efficiency scenario, a simplified process leads to less legal work – fixed recoverable costs are then assumed to be an accurate reflection of true claimant legal costs. No additional costs would need to be recovered from individual claimants.

Our central scenario assumes behaviour in the legal market will be mixed; for monetisation purposes in this analysis, we assumed an even split (50:50) between non-recoverable costs that will genuinely disappear and those which will be simply transferred to claimants.

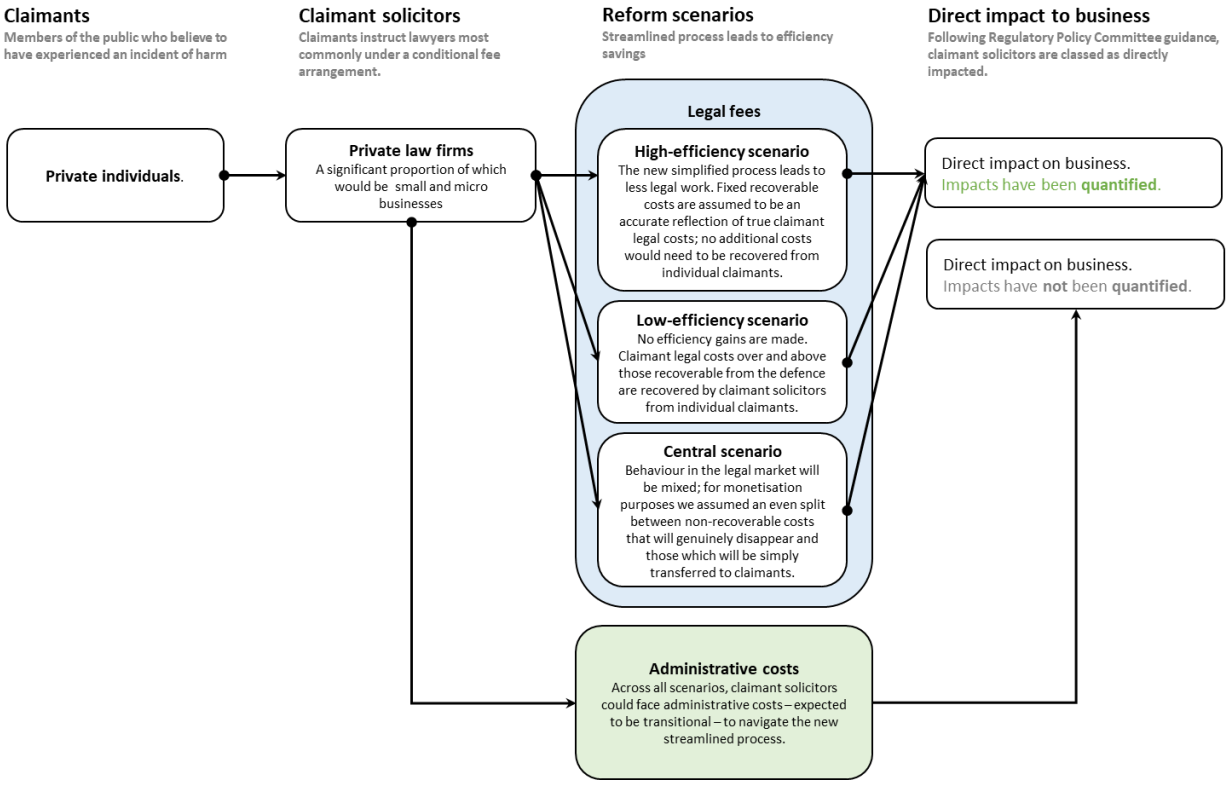
Within this impact assessment, we have assumed that an efficiency gain, where less solicitors' time/resources are required to deliver the same outcome for their clients, delivers a benefit to society. We are implicitly assuming that any legal time/resource that is no longer required through streamlining would be used to deliver work of similar value to that required prior to reform. It could be equally valid to assume that:

- work that is no longer required would lead to job losses and therefore, not create a benefit to society;
- work that has been stopped could free up time for legal firms to deliver higher-value work, and therefore deliver a higher societal benefit.

In the absence of specific evidence regarding the value of work no longer required, we considered a middling position (such that work that is no longer required will be replaced with work of similar value) to be appropriate.

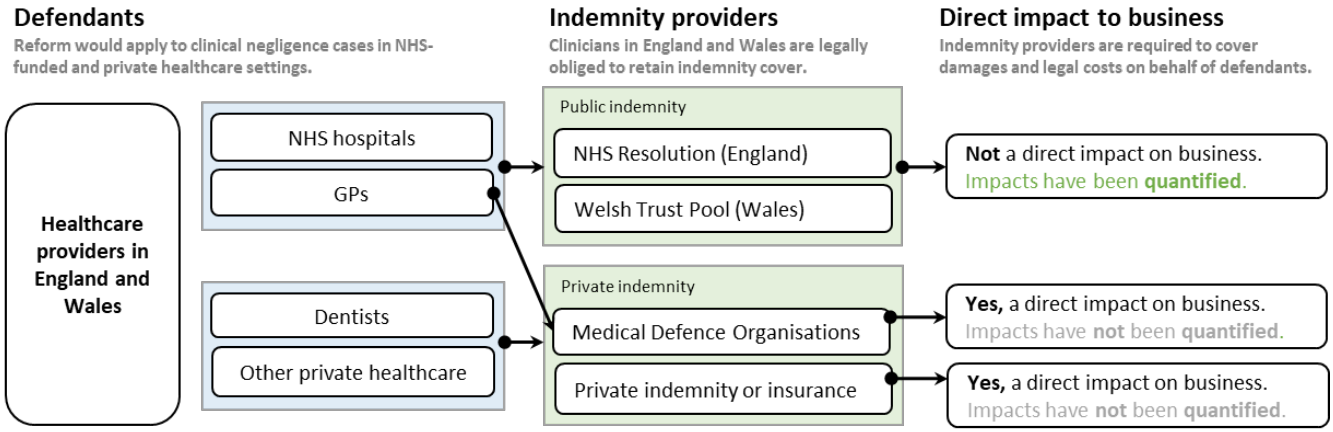
Secondly, a transfer of wealth: For claimant solicitors, the policy will reduce the amount of costs that can be recovered from defendants, and therefore affect their revenue when claims are brought under conditional fee agreements ('no-win no-fee'). For individual claimants, the key impact would be increased legal costs, typically in the form of higher success fees, if firms pass on their unrecovered costs. How claimant solicitor and individual claimants are affected is summarised in Figure 2.

Figure 2: Effects on claimants and claimant solicitors, under three scenarios



For defendants, the key net impact is a cost saving from reduced recoverable legal costs. Savings are most significant for the public sector defendants against whom the majority of claims are made. How defendants are affected is summarised in Figure 3.

Figure 3: Effects on defendants



Costs

Monetised costs

A key impact of proposals is to transfer costs from defendants to individual claimants and claimant solicitors, to ensure proportionality of legal costs recovered. It is assumed that the proposals will not impact on the overall willingness of an individual to bring about a claim since they are based on the principle of removing distortions in recoverable legal fees rather than access to justice. Following Regulatory Policy Committee guidance, this transfer of costs is classed as a direct impact on businesses.

Indicative estimates of the impact using 2018/19 settlement volumes and legal costs[13] suggest net costs to claimant solicitors of up to £799m, depending on the fixed rates applied (discounted, over 20

[13] 2018/19 volumes have been used following a one-off exercise assessment by a specialist legal firm of which claims would typically follow the standard or light track under FRC – see Annex A.

years). These estimates are based on bottom-up analysis of claims data from public sector defendants (NHS Resolution).

Legal costs unrecovered from defendants and passed on to individual claimants (typically in the form of higher success fees) will lead to individuals keeping less of their awarded compensation. If higher success fees were focussed on claimants where compensation is below £25,000 alone, this would mean less funds available for affected individuals, normally relating to pain and suffering compensation and covering limited past costs. However, individuals will have a choice of solicitor firm, and will still be protected by the cap on CFAs that limits success fees to a maximum 25% of damages.

Claimant and defendant solicitors could face administrative costs (expected to be transitional) to navigate the new streamlined process; with the exception of NHS Resolution, these costs have not been monetised (see 'Projecting the recoverable claimant costs for NHS Resolution-handled claims' in Section E). New operational costs for NHS Resolution, a public body acting on behalf of NHS defendants (NHS hospitals in England, and since 2019/20, GPs providing NHS care), have been quantified as £8m (discounted, over 20 years) based on additional staff and an add-on costs per claim.

Policy Option 2B (the defendant proposal) generates higher costs for solicitors than option 2A (the claimant proposal). This is because the defendant proposal's cost caps are lower at each stage of the standard and light track claims handling process (see FRC grid costs under the 'Clinical Negligence' subsection in Section C) and the defendant proposal excludes less cases compared to the claimant proposal (see 'Average reduction in claimant legal costs handled by NHS Resolution' in Section E).

See Section E for a full modelling overview of monetised indemnifier's costs and benefits.

Non-Monetised costs

A more streamlined process as a result of FRC could result in claims settling more quickly than they would have otherwise and it could also result in more detailed medical reports being obtained or obtained earlier by NHSR relative to current projections. Both these scenarios would generate cash flow costs for public and private sector defendants which may take the form of medical report disbursement costs and reduced investment income.

For claimant solicitors and public and private sector insurers, there may be some set-up and familiarisations costs. However, these are considered to be limited since operating fixed recoverable costs is standard practice in other areas of personal injury.

Claimant and defendant solicitor costs for administrating the new system (other than those that might be incurred by NHS Resolution) have not been quantified. As demonstrated by the cost estimate for NHS Resolution, we expect these costs to be small.

Benefits

Monetised benefits

The main quantified benefits of reform mirror the main costs of the proposals. They fall on public defendants and private indemnity providers. The NHS, as one of the primary defendants in clinical negligence cases, would benefit by freeing up resources currently allocated to recoverable claimant costs - these have been assessed in the £301m to £799m range (excluding opportunity benefits from additional NHS expenditure, which are monetised in Annex B).

Defendant benefits arise from a more proportional system of recoverable fees: average recoverable claimant costs for "lower value" claims as defined in this assessment, are expected to decrease by c11% to c30%, depending on the particular option.

Policy Option 2B (the defendant proposal) generates larger benefits (in terms of higher savings) for defendants than option 2A (the claimant proposal). This is because the defendant proposal's cost caps are lower at each stage of the standard and light track claims handling process (see FRC grid costs under the 'Clinical Negligence' subsection in Section C) and the defendant proposal excludes less cases compared to the defendant proposal (see 'Average reduction in claimant legal costs handled by NHS Resolution' in Section E).

See Section E for a full modelling overview of monetised defendants' costs and benefits.

Non-Monetised benefits

It is expected that the proposals should result in claims settling more quickly than they would have otherwise. This would mean that claimants will see their cases resolved earlier (a benefit in itself) and will have access to damages awards earlier, which could be invested creating increased wealth. Lower costs on unsuccessful cases (not directly recoverable from individual claimants under conditional fee arrangements) might also increase income for claimant solicitors.

We expect a streamlined, faster process to also lead to lower defence costs which, in turn, would offset any new administrative costs for defendants. However, it has not been possible to quantify these benefits. For both claimant solicitors and public and private sector defendants, there will also be a benefit of having more predictable cash flows.

Net impact of monetised benefits and costs

Overall, we estimate there to be a positive NPV in the £143m to £392m range. The table below summarises the monetised benefits and costs described in the previous sections. Costs to individual claimants are presented under a central efficiency scenario, with the full range under a low or high scenario presented in brackets. The same approach is used to present total costs and net impacts.

Affected group	Monetised costs/benefits	Direct impact on business?	2A Claimant	2B Defendant	2A Claimant	2B Defendant
	Costs		**Present Value (2020/21 prices)**		**Annual impact (2020/21 prices)**	
Defendants	Administrative cost of handling streamlined process on behalf of NHS hospitals in England	No	£8m	£8m	£1m	£1m
Solicitors representing individual claimants	Legal costs not recoverable in claims against NHS hospitals in England	**Yes**	£151m (£0m to £301m)	£400m (£0m to £799m)	£13m (£0m to £25m)	£34 (£0m to £67m)
	Total costs		**£159m** (£8m to £309m)	**£408m** (£8m to £807m)	**£14** (£1m to £26m)	**£35** (£1m to £68m)
	Benefits		**Present Value (2020/21 prices)**		**Annual impact (2020/21 prices)**	
Defendants	Reduction in legal costs recovered against NHS hospitals in England	No	£301m	£799m	£25m	£67m
	Total benefits		**£301m**	**£799m**	**£25m**	**£67m**
Net total (=Total benefits – Total costs)			**£143m (-£8m to £293m)**	**£392m (-£8m to £791m)**	**£12m (-£1m to £24m)**	**£33m (-£1m to £66m)**
Net impact on business			**-£151m** (-£301m to £0m)	**-£400m** (-£799m to £0m)	**-£13m** (-£25m to £0m)	**-£34m** (-£67m to £0m)

Risks

The costs and benefits presented above assume that there is no change in volume or caseload characteristics from 2018/19 levels. However, since FRC will be applicable to claims that are submitted after reform implementation (assumed to be 2023/24 in this assessment) there could be an incentive for claimants to bring claims earlier than they would have done otherwise in order to avoid being subject to FRC. This could result in an increase in the volume of claims before implementation, then followed by a reduction due to displacement.

No significant volume changes mean that it is also assumed that there is no change in the underlying willingness to bring a claim from claimants or to take on a claim from claimant solicitors. There is a risk reform could affect the number of claims valued up to £25,000 coming forward: either volume could decrease as claimants and solicitors are more reluctant to incur the risk of unrecoverable legal costs, or volume could increase driven by firms taking advantage of a more efficient system to process more cases.

HMG's post-implementation review of the more extensive personal injury law reform presented in Part 2 of LASPO[14] – which, in particular, eliminated the recoverability of after-the-event insurance and success fees from the losing side in the majority of cases – states that "*the high-level available data on the volumes of court claims suggest that the number of claims has reduced slightly and in a manner consistent with the Government's objective of reducing unmeritorious claims, and not to an extent that would indicate a negative effect on access to justice*". However, the outcomes of personal injury law reform do not necessarily translate into the outcomes expected for clinical negligence claims which attract lower case numbers (c14,000 new clinical negligence cases in England, Scotland and Wales compared to c560,000 new personal injury cases in total for 2020/21[15]) and the need for medical expert testimony.

We assume the proposed sanctions measures will successfully incentivise good behaviours and deter or minimise counterproductive behaviours. However, there is currently no certainty on what definition will be used to determine whether a claim is valued below £25,000 – in other areas of personal injury law actual damages awarded are used as the definition but it has been proposed the initial claim valuation could be used as a definition instead. If the latter, there could be an incentive for claimants to overstate their damages to above £25,000 in order to avoid being subject to FRC.

Claimant solicitors will likely seek to maximise their return from the new process. This would mean that they will have an incentive to settle each claim at whichever stage of the process is most beneficial to them: in such circumstances, we would not be able to predict the number of claims that will be settled at each stage under the new process.

[14] Post-Implementation Review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777039/post-implementation-review-of-part-2-of-laspo.pdf

[15] Transparency data – Compensation Recovery Unit performance data – Updated 2 July 2021 https://www.gov.uk/government/publications/compensation-recovery-unit-performance-data/compensation-recovery-unit-performance-data

Section E: Overview of modelling for monetised defendants' costs and benefits

Main results

The table below summarises defendants' monetised benefits and costs arising from the introduction of fixed recoverable costs. It also highlights the expected reduction in recovered claimant legal costs (c11% to c30%) that is expected to bring more proportionality between legal costs and damages awarded to lower value clinical negligence claims.

Option	Average Reduction in recovered Claimant Legal Costs (£1,000 to £25,000)	NPV net savings (£m)	NPV Increase (-) in admin costs (£m)
2A – Claimant	11%	£301	-£8
2B – Defendant	30%	£799	-£8

Data sources

Extending fixed recoverable costs to lower value clinical negligence claims will affect all lower value healthcare claims in England and Wales both from NHS-funded and private providers. DWP's Compensation Recovery Unit publishes statistics for all clinical negligence claims registered in England, Scotland and Wales (14,485 new claims in 2020/21)[16] – although the majority of clinical negligence claims are handled by NHS Resolution (12,629 new claims in 2020/21)[17], a significant minority are attributable to claims relating to Scotland and Wales, as well as non-NHS hospital care in England. We have, therefore, relied on a broader number of sources to complete our analysis. Annex A describes the data sources available in detail.

Remit of claims subject to FRC: Incident vs notification year definition

Throughout our modelling we have assumed reform would be implemented from April 2023 onwards (i.e. from the start of the financial year 2023/24). From this date onwards new lower value clinical negligence claims would be subject to FRC. However, there are two possible standard definitions for what constitutes a new claim either based on the claim's incident year or the claim's notification year.

If a claim is defined as new based on its incident date, then FRC would only apply to claims where incidents of harm occur beyond April 2023. This means any claim not yet brought forward by April 2023 but that relates to harm prior to this date will not be subject to FRC. If a claim is defined as new based on its notification date, then FRC would apply to all claims brought forward from April 2023 onwards, without exception.

For our central scenario we have modelled the consultation proposed option of defining new claims on a notification year basis. Reform implementation by notification year results in (transitionally) more claims subject to FRC and consequently more savings – these are, however, limited.

The impact of defining new claims according to incident year is presented in the sensitivity analysis section (Annex B). This distinction is only meaningful for our analysis of NHS Resolution-handled claims. Benefits of £301m-£799m (NPV) to England NHS hospitals could be reduced to £226m-£600m (NPV) under this sensitivity.

[16] Compensation Recovery Unit performance data, updated 2 July 2021 https://www.gov.uk/government/publications/compensation-recovery-unit-performance-data/compensation-recovery-unit-performance-data#number-of-cases-registered-to-cru

[17] NHS Resolution (2021). Annual Statistics (Annual Report Statistics, Table A.1). London, NHSR. Accessed online at: https://resolution.nhs.uk/wp-content/uploads/2021/11/NHS-Resolution-Annual-Report-Statistics-2020-21.xlsx

Remit of claims subject to FRC: Uprating the value band upper limit (£25,000) over time

The consultation proposes the FRC value band upper limit should be reviewed post implementation and at regular intervals thereafter, specifically to take into account the effects of claims inflation, using observed levels (or projections) of inflation.

For modelling purposes, we have implemented a simplified approach that we expect to be a reasonable approximation: all else being equal the same number of claims would be subject to FRC in the year of implementation (2023/24) and all subsequent years.

For NHS Resolution handled claims, we have considered sensitivity analysis (see Annex B) where the FRC upper limit is not uprated. Benefits of £301m-£799m (NPV) to England NHS hospitals could be reduced to £229m-£607m (NPV) under this sensitivity.

Average reduction in claimant legal costs handled by NHS Resolution

Using *NHS Resolution's Extract I* (see Annex A), where each claim is assigned either to standard or light track, we calculate the claimant legal cost of each claim valued between £1,000 and £25,000 for FRC options 2A-B. We then calculate the average (mean) claimant legal cost per lower value claim separately for standard and light track claims. We then calculate the overall percentage reduction in claimant legal costs between the counterfactual (actual claim costs) and each specific FRC option.

Separately, using the *Data Extract with exclusion assessment* (see Annex A), we determine what proportion of claims should be included under each of the FRC options 2A-B. We then multiply this inclusion percentage with the associated overall percentage reduction in claimant legal costs.

For creating projections over time (see Top-Down Model section), the claimant legal cost percentage reduction needs to be expressed in terms of all claims settled via lump sum[18] as opposed to only those valued between £1,000 and £25,000. To do so we first express claims valued between £1,000 and £25,000 as a proportion of all claims paid through a lump sum, using *NHS Resolution's Extract II*; we then apply this proportion to the previous average claimant legal cost reduction.

Our discussion is summarised in the table below.

Option	Average percentage reduction in claimant legal costs for claims valued between £1,000 and £25,000, without exclusions (A)	Proportion of claims to be included within the FRC remit (B)	Proportion of claims valued between £1,000 to £25,000 as a proportion of all lump sum claims (C)	Average percentage reduction in claimant legal costs for claims valued between £1,000 and £25,000, with exclusions (D=A.B)	Average percentage reduction in claimant legal costs for all claims (E=A.B.C)
2A – Claimant	15%	75%	42%	11%	5%
2B – Defendant	33%	88%	42%	30%	12%

Projecting the recoverable claimant costs for NHS Resolution-handled claims – Top Down Model

We project clinical negligence costs over time, under different policy options, using the DHSC clinical negligence top-down model. This tool is based on a financial model from the Government Actuary's Department (GAD). GAD and NHS Resolution revise model inputs yearly and, for this work, we have used the 2020/21 input version.

[18] When damages are awarded, claims can settle through a single lump sum or, in the most serious cases, via a combination of a lump sum and periodical payments (generally annually). The latter are out of scope for our analysis.

We assume no changes in damages or legal costs inflation and no changes in claim volume inflation, as well as no change in development (incident to notification) and payment (notification to settlement) patterns.

The model uses claim development patterns to account for both the time-lag between an incident of harm occurring and a claim being notified to NHS Resolution, and the time-lag between claim notification and settlement. Claim development patterns allow us to model each year's worth of incidents and how these are paid out over time in a staggered way. This applies to all costs: claimant legal costs, damages, and defence cost. The staggered pay-outs are combined to create an expense profile over time. (Claims are modelled separately depending on whether they settle solely as a lump sum or, in the most serious cases, via a combination of a lump sum and structured settlements. The latter are out of scope for our analysis.)

Reduced claimant costs from policy options 2A-B are calculated by multiplying the staggered claimant legal cost payments by the average claimant legal cost percentage reduction for all claims notified from April 2023 onwards.

To get the final annual savings profile, we take the difference between the counterfactual expense profile and that of each option 2A-B. Results are then presented on a real basis (adjusted for inflation using a GDP deflator: 5 years of inflation are forecasted by the Office for Budget Responsibility), then we assume a flat 2% for the remaining years. The net present value of real cumulative cashflow savings are calculated using the standard HMT Green book discount of 3.5%.

Additional administrative costs of handling the new streamlined process – NHS Resolution

Introduction of FRC is expected to marginally increase NHS Resolution's operational costs. NHS Resolution have provided potential operational costs which we have quantified where possible. For example, extra risk management costs and front-loading of resources are highly uncertain and therefore not possible to quantify. Further, for some claims there may be a requirement for a detailed medical report(s) to be commissioned under FRC where under the counterfactual these reports were either not required or would have been required further along in the process.

Note that we expect a streamlined process to reduce costs overall. Even if there is a marginal increase in administrative costs, and other costs are greater or brought forward e.g., medical reports, we'd expect a faster process to lead to lower defence costs. However, it has not been possible to quantify defence cost benefits.

To the extent where it has been possible to quantify them, operational costs have been assessed as follows. Under FRC, a total of c.1500 claims annually were estimated by NHS Resolution as involving additional investigation over and above the current investigation required. NHS Resolution estimated that 3-4 extra staff at band 7 will be required. The number of staff required was multiplied by the average band 7 salary (including employer pension and NI contributions) and adjusted for a London weighting and NHS band 7 staff inflation to arrive at the spread of total annual cost over time. Separately, a highly uncertain add-on to legal panel firm defence costs per claim was estimated by NHS Resolution to be £200-£300. This figure is multiplied by the 1500 claims to arrive at a spread of costs over time.

Detailed results

Full 20-year projections in present value terms can be found below. Alternatively, results in constant prices can be found in Annex C.

Proposal		PV of yearly projected cashflow (£m)																				NPV total (£m)
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	
Change in legal costs recovered from the defendant (savings are positive)	2A			3	7	12	16	18	19	19	19	19	19	19	19	19	19	19	19	18	18	£301
	2B			7	19	33	43	48	50	51	51	51	51	50	50	50	50	49	49	49	49	£799
Change in admin costs	2A -2B			-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	**-£6**
				-1	**-1**	**-1**	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	**-£8**
				-1	**-1**	**-1**	**-1**	**-1**	**-1**	-	-	-	-	-	-	-	-	-	-	-	-	**-£8**

1) Figures in red denote extra expenses, i.e. costs more under FRC.
2) Dash signs (-) denote sub £500k savings/expenses.
3) There are no cashflow savings for the year before implementation year (2023, year 3)
4) Admin costs explore 3 staff and add-on legal costs scenarios: 1)3 staff, £200 add-on; 2)4 staff, £250 add-on; and 3)4 staff, £300 add-on.

Section F: Summary of specific impact tests

Small and Micro Business Assessment

DHSC conducted a manual census of data available through the Law Society website to understand the composition of the clinical negligence market[19]. We do not have access to employee numbers but have considered the number of solicitors in each firm as an appropriate proxy. If the manual census results are representative, 20% of small firms active on the clinical negligence market might rely on clinical negligence work as a key revenue source when represented by the proportion of solicitors in the firm working on clinical negligence.

Total number of solicitors in firm	**Proportion of solicitors working in clinical negligence**			
	Up to 25%	**25% to 50%**	**50% to 75%**	**More than 75%**
1 to 9	14%	16%	3%	16%
1 to 19	13%	3%	1%	0%
20 to 49	18%	1%	0%	0%
50 or more	14%	0%	0%	0%

The proposals could make small legal firms less able to compete with larger firms that have greater economies of scale and can provide services ‘en-masse’ more cheaply. We have considered whether it would be possible to exempt small legal firms from these proposals. However, we have concluded that this would be impossible both from a practical point of view (as claimants, not businesses, are the ones directly affected by reform) and because it would reduce the efficacy of the proposals and distort the market. It would also reduce claimant choice.

Equalities Statement

Please see the separate consultation equalities statement for more information.

Monitoring and evaluation

Consultation responses will be used to evaluate different options for reform. Data gathered will be used to inform post-implementation review plans that will accompany the final stage impact assessment.

[19]The Law Society. Find a solicitor, updated 2022. Accessed online at: https://solicitors.lawsociety.org.uk/?Pro=True

Evaluation of Impacts to the Courts and Tribunals

We have submitted a Justice Impact Test (JIT) which describes the policy's impact on caseload to the courts and tribunals system. This was submitted to the Ministry of Justice on the 15th December 2020 with a response received on the 23rd March 2021.

The below is based on 2019/20 data as this was the latest available when the JIT was completed. Updating the JIT using 2020/21 data is unlikely to materially change the order of magnitude of current estimates and the below is therefore still relevant for the purpose of this impact assessment.

The paragraphs below are Ministry of Justice's response to our submitted JIT:

> Based on the information in the JIT, MoJ consider that the impact of your proposal on the justice system is likely to be minimal. We are consequently content to clear the JIT on the basis that DHSC meets any downstream costs to the justice system should these arise.

The Justice Impact Test requires us to describe changes to courts and tribunal process and to estimate the increase/decrease to applications/cases due to fixed recoverable costs. The paragraphs below are our description of the impacts:

> We expect there could be a decrease in applications/cases to HMCTS. We estimate up to 15% of clinical negligence claims – or up to 3,000 claims per year from 2022/23 onwards – may no longer start court proceedings. The exact volume is uncertain and depends on policy decisions that will be subject to consultation.
>
> Approximately 11,000 new clinical negligence claims are brought against NHS trusts and other providers of NHS services under the Clinical Negligence Scheme for Trusts in England and handled by NHS Resolution. Claims settled below £25,000 represent an important segment of the clinical negligence legal market: 55% to 60% of all claims relating to NHS England trusts and settled with damages are within this segment, and it is reasonable to believe a similar proportion of unsuccessful claims would also be handled by a new fixed recoverable costs process. This means 6,000 to 7,000 of the c11,000 claims NHS Resolution settles every year could benefit from the introduction of a fixed recoverable costs scheme. However, some 12% to 20% of cases are expected to be excluded from the scheme on the grounds of case complexity.
>
> In addition, of all clinical claims lodged with NHS Resolution a majority of c70% settle without court proceedings (71% in 2019/20, 69% in 2018/19). We therefore estimate only 30% of claims subject to the new fixed recoverable costs Scheme might have continued to court in the absence of reform; this is likely to still be an overestimate as lower value claims are more likely to settle earlier than claims overall, and the new scheme does not prevent parties from taking their claim to court if they still wish to do so.
>
> Overall, of the 11,000 clinical negligence cases handled by NHS Resolution, up to 1700 [=11,000 x 60% x (100% - 12%) x 30%] are expected to no longer start court proceedings. Extrapolating to all clinical negligence claims in England and Wales, approximately 18,000 according to the Compensation Recovery Unit, leads us to an estimate of up to 3,000 cases fewer cases launching court proceedings.

References:

NHS Resolution, Annual Report and Accounts 2019,

https://resolution.nhs.uk/wp-content/uploads/2020/07/NHS-Resolution-2019_20-Annual-report-and-accounts-WEB.pdf

NHS Resolution, Annual Statistics Report

https://resolution.nhs.uk/resources/annual-report-statistics/

Compensation Recovery Unit, Performance data updated July 2020

https://www.gov.uk/government/publications/compensation-recovery-unit-performance-data/compensation-recovery-unit-performance-data

Annex A: Data sources

NHS Resolution's Extract I – with track assessment by a specialist firm on legal spend management

Dataset at the individual claim level covering claims handled by NHS Resolution (i.e., filed against NHS trusts and other service providers under CNST) for 2018/19 and containing c2,500 individual claims. Each relevant claim was flagged to reflect whether it would be expected to proceed to standard or light track under FRC. This flag was provided by experts from a specialist firm on legal spend management with historic coverage of NHS Resolution's cost work. 2018/19 data was used as the latest available at the point the track assessment exercise was undertaken by the specialist firm.

This dataset is primarily used to calculate what average reduction in claimant legal costs should be expected under options 2A-B. This average reduction (in percentage terms) is then applied to claimant legal costs in the main projection model further outlined below.

Separately, this specialist firm has also provided us with their assessment of how many claims (in both standard and light track) would proceed to a mandatory neutral evaluation (MNE) – 10% for standard track, and 5% for light track. The assumed further MNE breakdown of costs is summarised in the table below.

Type of evaluation	2A - Claimant	2B - Defendant	Proportion within MNE
Liability and quantum	£2,000	£1,750	60%
Liability only	£1,500	£1,250	30%
Quantum only	£1,500	£750	10%

NHS Resolution's Extract II – Historic

Dataset at the individual claim level covering historical claims handled by NHS Resolution; it contains approximately 160,000 claims spanning from 1995/96 to 2018/19. This version does not include the track assessment flag and is primarily used to model the volume of claims that could fall outside the fixed recoverable costs scope over time.

Data extract with exclusion assessment

Dataset at the individual claim level flagging whether certain exclusions would apply; it contains approximately 2,500 claims for 2018/19. Specific exclusions considered include whether a claimant is a protected party, if a case had multiple defendants, whether more than two medical experts were needed, or whether a claim relates to a neonatal death.

We use this dataset to estimate the proportion of claims to be excluded from FRC. A collection of NHS Resolution's panel firms had given their evaluation of the exclusion percentage, and we have assumed these exclusion proportions are likely to be representative of all NHS Resolution claims.

Annex B: Sensitivity Analysis

Sensitivity I - Remit of claims subject to FRC: Incident year definition (England's NHS trusts and other service providers under CNST)

As mentioned in the previous sections, some incidents of harm that occur before the implementation year would be subject to FRC under the notification model. Under an incident model, for the years of incidents that occur in the two years leading up to implementation year, the staggered pay-outs are adjusted with the legal cost percentage reduction as usual, but only for claims that are projected to notify from April 2022 onwards. A small percentage of incidents that occurred during those two years would have been notified and processed under the current legal process and hence do not require adjusting with the legal cost percentage reduction. This results in marginally lower savings. A summary of how savings for England trusts' claims (and other service providers under CNST) would be affected is found in the table below.

Model	Proposal	PV of yearly projected cashflow savings (millions)																				NPV (£m)
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	
Central estimate	Claimant			3	7	12	16	18	19	19	19	19	19	19	19	19	19	19	19	18	18	301
	Defendant			7	19	33	43	48	50	51	51	51	51	50	50	50	50	49	49	49	49	799
Incident sensitivity	Claimant			-	-	1	4	7	10	13	15	16	17	17	18	18	18	18	18	18	18	226
	Defendant			-	1	4	10	18	28	35	40	43	45	46	47	47	47	47	47	47	47	600
Dash signs (-) denote sub £500k savings. There are no cashflow savings for the year before implementation year (2023, year 3)																						

Sensitivity II - Remit of claims subject to FRC: Uprating the upper bound (England's NHS trusts and other service providers under CNST)

Under our central scenario, the volume of lower value negligence claims is kept for the entire projection, whereas under no uprating it would become smaller over time. To account for claims falling out to the FRC remit, i.e., claims with damages over £25,000, we effectively reduce the volume of claims is would apply to over time. This results in reduced savings over time if the FRC cap is fixed at £25,000. The following methodology allows us to model how the volume of claims under a non-uprated FRC remit would change over time: 1. using *NHS Resolution's Extract II*, individual claim damages were inflated by 4.3% per year (the current counterfactual level of growth based on historical trends) to cover 20 years of projections; 2. we counted the number of claims subject to FRC, i.e. lower value claims with damages within £1,001-£25,000, and how this number reduced over the 20 year period, creating a proportion reduction time-series; 3. in the top-down model, we multiplied this proportion reduction time-series with the claimant legal cost percentage reduction. This results in lower savings over time. A summary of how savings for England NHS trusts' claims (and other service providers under CNST) would be affected is found in the table below.

Model	Proposal	PV of yearly projected cashflow savings (£m)																				NPV (£m)
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	
Central estimate	Claimant			3	7	12	16	18	19	19	19	19	19	19	19	19	19	19	19	18	18	301
	Defendant			7	19	33	43	48	50	51	51	51	51	50	50	50	50	49	49	49	49	799
Non-uprating	Claimant			2	6	10	13	15	16	16	16	16	15	15	14	14	13	13	12	11	11	229
	Defendant			6	17	28	36	40	42	43	42	41	40	39	37	36	35	33	32	30	29	607
Dash signs (-) denote sub £500k savings. There are no cashflow savings for the year before implementation year (2023, year 3)																						

Sensitivity III – Financial assessment on the basis of annual expense (England's NHS trusts and other service providers under CNST)

Our analysis has focussed on budget impacts. However, because clinical negligence claims take several years after an incident of harm occurs to be settled, we can alternatively make a financial assessment on the basis of the annual cost of harm: the estimated total liabilities associated with known and potential claims relating to a specific year of incidents. The annual cost of harm is typically much higher than annual budgets (for NHS Resolution, the annual cost of harm in 2020/21

amounted to £8.3 billion whilst expenditure was £2.2 billion)[20]; liability savings arising from FRC are, therefore, also higher than direct budget savings. A summary of annual cost of harm savings for England trusts' claims (and other service providers under CNST) is found in the table below.

Model	Proposal	PV of yearly projected cashflow savings (£m)																				NPV (£m)
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	
Central estimate	Claimant			3	7	12	16	18	19	19	19	19	19	19	19	19	19	19	19	18	18	301
	Defendant			7	19	33	43	48	50	51	51	51	51	50	50	50	50	49	49	49	49	799
Non-uprating	Claimant	19	26	28	27	27	27	26	26	26	26	26	25	25	25	25	25	24	24	24	24	505
	Defendant	51	69	74	72	71	70	70	69	69	68	68	67	67	66	66	66	65	65	64	64	1342

Dash signs (-) denote sub £500k savings. There are no cashflow savings for the year before implementation year (2023, year 3)
Annual cost of harm figures are discounted using April 2021 published HMT PES Discount Rates[21].

Sensitivity IV – Simplified modelling of annual cost of harm (England's NHS trusts and other service providers under CNST)

The top-down model was used for the England NHS trusts (and other service providers under CNST) costing and its methodology involves multiplying the claim volume by the various costs to derive the total annual expense. As a result, we assume cashflow is the same as annual expense and no adjustments can be made for a notification model and uprating of the £25,000 cap.

Model	Proposal	PV of yearly projected savings (£m)																				NPV (£m)
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	
Annual cost of harm simplified	Claimant	19	26	28	27	27	27	26	26	26	26	26	25	25	25	25	25	24	24	24	24	514
	Defendant	51	69	74	72	71	70	70	69	69	68	68	67	67	66	66	66	65	65	64	64	1365
Annual cost of harm simplified	Claimant			21	21	20	20	20	20	20	20	19	19	19	19	19	19	19	18	18	18	337
	Defendant			55	54	54	54	53	53	52	52	52	51	51	51	50	50	49	49	49	48	896

Sensitivity V – NHS costs monetised at their social value

In the main body of the impact assessment, savings have been presented according to their financial value. If the financial savings for NHS-funded health providers were reallocated to frontline healthcare, these could be used to generate additional quality of life benefits for patients. In England, state-backed indemnity schemes are recovered directly from NHS trust and other service providers.

The standard unit for measuring health benefits is the Quality-Adjusted Life Year (QALY[22]). While it is not possible to know the specific use to which any individual amount of additional funding provided to the NHS will be put, evidence is available of the average number of QALYs expected to be gained for any given amount of additional NHS funding – by whatever means these gains are achieved. This evidence is expressed as an estimate of the cost per QALY gained "at the margin" in the NHS of £15,000. In other words, the best available evidence indicates that additional health benefits of 1 QALY are generated for every £15,000 of additional funding provided to the NHS[23].The cost savings of £25m-£67m pa are therefore expected to lead to the provision of an additional 1,700-4500 QALYs pa.

Standard impact assessment methodology entails monetising impacts in order to represent their value to society. It is important to note that the value society puts on a QALY is not necessarily the same as the cost at which the NHS can generate additional QALYs. DHSC estimates that society values a QALY at £60,000. The corresponding social value of benefits from NHS cost savings for our

[20] NHS Resolution (2021). Annual Statistics (Supplementary Annual Statistics, Table 1.A). London, NHSR. Accessed online at: https://resolution.nhs.uk/wp-content/uploads/2021/11/NHS-Resolution-Supplementary-Annual-Statistics-2020-21.xlsx, NHS Resolution, (2021) Annual Report and Accounts 2020/21. London. NHSR. accessed online at NHS Resolution, (2021) Annual Report and Accounts 2020/21. London. NHSR. accessed online at https://resolution.nhs.uk/wp-content/uploads/2021/07/Annual-report-and-accounts-2020-2021-WEB-1.pdf page 73

[21] Department of Health and Social Care group accounting manual 2020 to 2021: additional guidance, version 3. Accessed online at: https://www.gov.uk/government/publications/dhsc-group-accounting-manual-2020-to-2021/department-of-health-and-social-care-group-accounting-manual-2020-to-2021-additional-guidance

[22] A unit of health which combines length and quality of life in a single measure.

[23] See http://www.york.ac.uk/che/research/teehta/thresholds/ and links therein.

reform options is £100m-£268m pa. The present value of these benefits over the twenty-year period evaluated is £1,1510m-£4,010m. The table below provides additional detail; savings associated with dental claims have been excluded as these are not directly funded by the NHS but by private indemnity schemes.

Model	Proposal	PV (3.5% discount rate) of yearly projected cashflow savings (£m)																				NPV (£m)
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	
England hospitals	Claimant			3	7	12	16	18	19	19	19	19	19	19	19	19	19	19	19	18	18	301
	Defendant			7	19	33	43	48	50	51	51	51	51	50	50	50	50	49	49	49	49	799
PV (1.5% discount rate) of yearly projected savings, monetised using their social value (£m)																						
England hospitals	Claimant			11	31	53	71	81	87	89	91	93	95	96	98	99	100	102	103	105	106	1510
	Defendant			30	81	141	188	216	230	238	243	247	251	255	259	263	266	270	274	278	281	4010
Dash signs (-) denote sub £500k savings. There are no cashflow savings for the year before implementation year (2023, year)																						

Annex C: Constant prices detailed results

Results in this section represent the in-year impact in 2020/21 real prices. The average impact across years 3 to 20 estimates the annual impact excluding the reform transition years.

	Proposal	FRC Remit	Real yearly cashflow savings (£m)																				Avg. of 19yr (£m)
			1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	
Change in legal costs recovered from the defendant (savings are positive)	2A	England. hospitals			3	8	14	19	22	24	25	26	27	28	29	30	30	31	32	33	34	35	25
	2B	England. hospitals			8	21	37	51	59	64	67	69	72	74	76	79	81	83	86	88	91	93	67
Change in admin costs	2A - 2B	England. hospitals			-	-	-	-	-	-	-	-	-	-	-	-1	-1	-1	-1	-1	-1	-1	-
					-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1
					-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1	-1

Annex D: Estimating the Equivalent Annual Net Direct Cost to Business (EANDCB)

Estimates for the EANDCB were produced using the Business Impact Target (BIT) Assessment Calculator[24] for Option 2A and 2B. The table below presents estimates for the 'Direct cost to business' presented in this impact assessment (see para 59), the relevant annuity factor as provided in the BIT Calculator and the subsequent estimate for the EANDCB.

The direct costs to business presented below relate to the reduction in recoverable legal costs for solicitors representing individual claimants in claims against NHS trusts and other service providers under CNST in England, as discussed earlier in this impact assessment.

Option	Direct cost to business	20-year annuity factor	Annualised EANDCB
	A	B	C = A / B
Option 2A – Claimant	£151m	14.71	£9m
Option 2B – Defendant	£400m	14.71	£25m

Estimates presented above are in real 2020/21 prices and assume a 2021 base-year.

[24] Business Impact Target: EANDCB calculator available online at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793100/EANDCB_Impact_Assessment_Calculator_2019_April.xlsx