Department of Health & Social Care

Equality duty analysis

Applying fixed recoverable costs to lower damages clinical negligence claims

Published August 2023

Contents

Introduction

The general equality duty that is set out in the Equality Act 2010 requires public authorities, in the exercise of their functions, to have due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act
- advance equality of opportunity between people who share a protected characteristic and those who do not
- foster good relations between people who share a protected characteristic and those who do not

The general equality duty does not specify how public authorities should analyse the effect of their existing and new policies and practices on equality but doing so is an important part of complying with the general equality duty.

Equality duty analysis

Analysis of equalities for applying fixed recoverable costs to lower damages clinical negligence claims

Summary of the proposed scheme

The Department for Health and Social Care's (DHSC) fixed recoverable costs (FRC) scheme proposals aim to create a fast, fair, and cost-effective system that benefits claimants and defendants and reduces costs to the NHS. The scheme is intended to streamline the legal process for clinical negligence claims with damages between £1,501 and £25,000 at settlement or following judgment (lower damages claims) and would 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 parties, without affecting patients' access to justice.

The proposed scheme is built around two claims tracks, a standard track and a light track, each with dedicated processes and timetables that take place entirely prior to litigation in the courts. The purpose of the light track is to enable swifter resolution of more straightforward cases, especially where liability is not in dispute. The standard track is for any other claims, typically where there is likely to be dispute on liability.

Each track has stages in respect of which specified fixed costs for legal work can be recovered by claimant solicitors. Each track also has multiple points at which parties are encouraged to resolve the claim early, including a stocktake stage and a neutral evaluation stage. Any claim not resolved in the process can proceed to litigation.

Access to justice is an important feature of the proposals. Compared to the current system, we do not envisage that fixed costs will affect the damages that claimants receive in successful claims. The costs themselves have been carefully calibrated to ensure they reflect the required claimant solicitor work at each stage and adequately remunerate solicitors for that work.

We have also ensured that the most complex claims within the damages value bracket covered by the scheme are excluded under specific categories. Also, for claims involving protected parties (people who do not have mental capacity) or children, which include specific items of work not required in other claims, we have made special provision to protect the financial viability of claims for claimant solicitors and access to justice for these claimants by including an extra 'bolt-on' amount. Claimants will be able to recover the bolt-on over and above base fixed costs. We have considered carefully the responses to the consultation and increased these amounts from the fixed costs originally proposed to provide greater assurance that access to justice is protected and harmed people receive adequate legal representation to pursue their lower damages claim.

Consultation respondents also highlighted concerns that the bolt-on amount may not be adequate to cover necessary legal disbursements for these claims, with potential negative impacts on protected party or child claimants. We propose increasing that amount substantially from £650 to £1,800. We also intend to hold a short consultation clarifying arrangements for disbursements in the proposed scheme.

Consultation respondents also raised concerns that solicitor costs could be passed on to protected party claimants, however we do not expect that claimants themselves will be financially disadvantaged by the fixed costs scheme, due to the adjustments to costs we propose and market adjustments we expect to occur.

We intend to review the efficacy of the scheme, post-implementation, and this will include whether it has met the stated policy objectives, impacts on groups with protected characteristics under the Equality Act 2010 and whether the safeguards we have put in place have sufficiently protected people's access to justice. We will also review whether the scheme should be updated to take into account inflationary effects.

What are the intended outcomes of this work?

The intended outcome of this equality duty analysis (EDA) is to assess if the introduction of the FRC scheme for lower damages[1] clinical negligence claims would have a

disproportionate impact on those with protected characteristics and whether those impacts would be negative and constitute direct or indirect discrimination.

This EDA will draw on a range of evidence, including that provided to subsequent consultations on the fixed recoverable costs (FRC) scheme for clinical negligence cases in 2017 and 2022. In particular, responses to the 2022 consultation highlighted, as a potential risk, that the scheme may prevent those with a lower income from accessing justice compared to those earning more. This would be due to those with a lower income receiving lower compensation for loss of earnings, meaning their claims would be more likely to come under the FRC remit compared to those on higher incomes, all else being equal. This scheme could therefore disproportionately affect those with lower incomes.

Respondents also provided details of a number of groups which they thought fell into the lower income bracket. These were as follows: older people, women, ethnic minorities, people with a disability, and people with long term conditions. Characteristics identified in the responses are protected characteristics listed in the Equality Act.

In contrast, 2022 consultation respondents identified no equality issues having arisen from the FRC regimes in place for other personal injury claims.

In line with the equality duty, we also assess whether there is unlawful discrimination towards those with protected characteristics. These protected characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. We consider two main types of discrimination, direct discrimination and indirect discrimination, as defined within the Equality Act 2010. Direct discrimination is defined as ‘treating one person less favourably than another person because of a protected characteristic’. Indirect discrimination is defined as ‘when a provision, criterion or practice is applied by an organisation which is discriminatory in relation to a protected characteristic'. The analysis of protected characteristics will focus on whether any population will be discriminated against at all, either directly or indirectly. We also consider discrimination arising from disability, as defined within the Equality Act 2010 as 'treating one person less favourably than another person because of something arising in consequence of a disability, with this treatment not shown to be a proportionate means of achieving a legitimate aim'.

Accurate statistical analysis, to test for statistical significance, cannot be carried out on the data sources available, as they are not within a suitable format for significance testing. Any conclusions drawn from this analysis should take into account the limitations of the sample sizes available.

Responses to this consultation highlighted that there are parties with certain protected characteristics who may incur additional costs when bringing a civil claim. This may include protected parties and children.

Who could be affected?

The primary group that could be affected by FRC reform are the claimants namely those who bring legal action against a healthcare provider. Our analysis therefore focusses on how claimants with protected characteristics could be impacted and whether this impact is direct discrimination, indirect discrimination or neither. In some cases, a group with a protected characteristic may be more likely to be impacted by the policy namely there is a disproportionate impact on that group, but the impact itself is no worse due to the characteristic or indeed is a benefit and therefore there is no direct or indirect discrimination.

Monitoring and evaluation

The main body of this paper considers the potential impact on claimants with protected characteristics. Government is committed to monitoring and evaluating the policies it implements as part of a Post Implementation review (PIR) not less than three years following implementation. We are considering how best to undertake a PIR and the appropriate metrics to evaluate the impacts and effectiveness of FRC reform with specific reference to groups with protected characteristics under the Equality Act 2010. This will be particularly important for those protected characteristics where it has not been possible at this stage to draw inferences or conclusions on the impact on those with protected characteristics due to limited or unavailable data. We will work closely with NHS Resolution and others to monitor routine data on relevant claims and demographic data relating to protected characteristics and will consider where qualitative methods may add value. We will prepare a monitoring and evaluation plan, prior to implementation.

Is this equalities analysis compliant with UN Convention on the Rights of the Child?

In undertaking the analysis that underpins this document, where applicable, the department has also taken into account the United Nations Convention on the Rights of the Child, in particular Article 3.

Article 3 states the following:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

The introduction of the FRC scheme is unlikely to directly discriminate against any protected characteristics as it focuses on fixing recoverable legal costs rather than any changes to compensation for clinical negligence claims. For instance, children in general are less likely to be admitted for an inpatient stay, meaning they may have less frequent contact with the healthcare system, as shown in Table 3 below; children account for approximately 12% of the inpatient population but 8% of clinical negligence claims in the NHS Resolution Claims Management System (CMS) dataset (described below), suggesting they may not be disproportionately impacted. Additionally, claims involving children, specifically obstetrics claims[2], are likely to settle for higher amounts, and so fall outside of the FRC remit. The department will take effective and appropriate measures to ensure that the best interests of the child will be a primary consideration.

Is this equalities analysis compliant with UN Convention on the Rights of Persons with Disabilities?

In undertaking the analysis that underpins this EDA, where applicable, the department has also taken into account the United Nations Convention on the Rights of Persons with Disabilities (CRPD), in particular Articles 5, 12 and 13.

Article 5 – Equality and non-discrimination – states the following:

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Article 12 – Equal recognition before the law – states the following:

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 13 – Access to Justice – states the following:

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

The introduction of the FRC scheme will not directly discriminate against any protected characteristic as it focuses on fixing recoverable legal costs rather than any changes to compensation for clinical negligence claims. Claimant legal costs are generally funded on a conditional fee arrangement ('no win, no fee') basis between claimants and their legal representatives and recovered from defendants if a claim is successful. We do not expect claimants themselves to be financially disadvantaged as a consequence of these reforms.

There is a possible disproportionate impact because certain groups are likely to be in more frequent contact with the healthcare system and therefore have a greater likelihood of

experiencing an incident. Table 3 below shows that those in the '65 and over' age bracket are more likely to be admitted to hospital as an inpatient than those in other age groups.

The department also recognises that certain individuals, such as those with a disability in particular, people who are lacking mental capacity, are likely to require additional support as part of the legal process (including work undertaken by their solicitor to prepare documents, attend court, and obtain advice from counsel), and so will incur increased costs. Effective and appropriate measures will be taken by the department to ensure that the best interests of disabled people will be a primary consideration.

Some responses to the consultation highlighted that as a result of increased costs for certain parties due to the potential additional work required, claims from these individuals under this scheme may become too expensive and therefore unviable for solicitors, or may be under-investigated and claimants therefore under-compensated as a result. In order to prevent individuals being disproportionately financially impacted by the claims process or their access to justice being limited by these additional costs, our original proposals were calculated to adequately remunerate solicitors for their work across a wide variety of claims in the scheme, and to exclude from the scheme altogether claims identified as likely to be more complex. To increase these safeguards, in our consultation response we set out a higher cost level for all claims in the scheme. In addition, our original proposals set out a separate, ‘bolt-on’ fee of £650 recoverable by the claimant for claims involving protected parties and children, some of whom may fall into groups with protected characteristics. Our consultation response sets out that this bolt-on fee has been raised to £1,800 per claim, to ensure that protected party and child claims are not negatively affected by inclusion within the scheme and that there is a greater recognition of the extra time and work, claimant solicitors may need to put into these claims. This takes into account the responses to the consultation calling for a higher rate - and ensures more protection against access to justice risks.

Consultation respondents also highlighted concerns that the bolt-on amount may not be adequate to cover necessary disbursements for these claims, with potential negative impacts on protected party or child claimants. We intend to hold an additional short consultation clarifying arrangements for disbursements in the proposed scheme, which will address this issue.

Analysis of protected characteristics

Data sources

- Claims Management System (CMS) dataset (2021 to 2022)
- Ipsos MORI population survey (2013)
- Hospital Episode Statistics (HES) admitted patient data (2021 to 2022)
- Office for National Statistics (ONS)

CMS dataset (2021 to 2022)

NHS Resolution provided the department with an anonymised sample of successful claims from their CMS (Claims Management System) dataset for 2021 to 2022. This claims dataset was used in our analysis for protected characteristics; where the data was not available in this sample, other sources were used. For the purpose of our analysis, successful claims with total damages settled between £1,500-£25,000 were used to reflect the updated small claims track limit, of which there were approx. 3,300 claims for 2021 to 2022. This is an unpublished anonymised claims level dataset which draws from NHS Resolution's central claims database of open and closed claims (containing sensitive information relating to clinical negligence claims).

Ipsos MORI population survey (2013)

The analysis also considered an Ipsos MORI 2013 population survey which contained population data relevant to certain protected characteristics under the Equality Act 2010, especially where data relating to particular characteristics were not available in the CMS dataset. This was a population survey administered by Ipsos MORI in 2013, to provide data on the proportion of people in the population who believed they had been harmed by their treatment, incidence of adverse events in healthcare and whether a legal claim was pursued or not. The results of the survey were reported in research by Fenn & Gray et al (2016) and Gray & Fenn et al (2017). However, this is the most recent published evidence of this kind and the sample size of the survey is very small. Consequently, a demographic breakdown of the survey is presented for information only, where no other information is available. The Department has commissioned further research of a similar nature and this is likely to be concluded and published in 2024.

HES admitted patient data (2021 to 2022)

Hospital episode statistics (HES) for admitted patient care in 2021 to 2022 were used to characterise users of the NHS and to identify potential disproportionate representation for certain groups with protected characteristics among the inpatient population. Higher representation within the inpatient data indicates more frequent contact with healthcare, suggesting a greater chance of experiencing an adverse event and therefore submitting a claim, all else equal. The NHS adult inpatient survey was used within the previously published EDA to characterise NHS users, however the HES admitted patient data contains over 19 million episodes of admitted patient care, making it a significantly larger data source. This source also includes episodes of care for those aged under 16, unlike the NHS adult inpatient survey. The HES admitted patient data therefore provides a more accurate and complete reflection of the inpatient population within England.

This HES data is also available broken down by deprivation level, with episodes divided into 10 deciles according to the Index of Multiple Deprivation. Analysing this data with respect to deprivation was considered, however it was concluded the data is not suitable to indicate potential impacts on those who are more or less deprived[3]

Office for National Statistics (ONS)

The Office for National Statistics website was used to gather statistics about the general population of England and when statistics on England were not available the UK general population was looked at. The UK population was only used for statistics on employment and disability. The data used from ONS is publicly available.

Methodology

Using the data above we have relied on a comparison with one other data source for our analysis. We have relied on the assumption that, relative to the general population, those who engage with the healthcare system more frequently are more likely to be subject to an adverse incident and are therefore more likely to be subject to FRC reforms. Although not explicitly accounted for, we would expect lower severity incidents to be more likely to be in the scope of FRC. Where we have been able to, we have tried to consider the impact of severity of harm on likelihood of engagement with FRC. Where this has not been possible, we have relied on frequency of healthcare contact as a measure of FRC engagement and assumed the severity of incidents is consistent across protected characteristics and sub-groups.

Consequently, where the data are available for the protected characteristics, we compare claims data with inpatient data to analyse differences in representation between each source, which could indicate potential disproportionate impacts of the scheme for those

overrepresented within claims data. Where there are less data, we instead compare inpatient data with general population data, and assume that greater representation within inpatient data could indicate greater likelihood of being subject to FRC reforms, for the reasoning explained above. For some protected characteristics there are no data and so it has not been possible to draw these comparisons. However, there are plans to monitor the impact on those with protected characteristics, post implementation and these are set out above.

Disability

In this analysis, we have considered discrimination arising from disability, as defined above. There are two aspects to disability to be considered in this analysis: 1. disability prior to the adverse event and 2. disability following the adverse event. The CMS dataset does not contain sufficient information on claimant characteristics relating to disability. However, research from Baines et al. (2015) and Hogan et al. (2015) provide information in relation to the first aspect, on pre-existing condition.

Pre-existing condition

Although not directly comparable to disability, we might expect a positive correlation between those identifying as having a pre-existing condition and those that would identify as disabled. We know from various research (Baines et al, 2015 & Hogan et al, 2015) that those who experience an incident in healthcare often have a complex condition or an illness where treatment may take place over a long period of time. In those circumstances, complications may be more likely to arise. Therefore, we expect those with a pre-existing condition to come into contact with the healthcare system more often than those without these conditions, increasing the possibility of an adverse event. This means that there could be an element of disproportionate impact or discrimination arising from disability prior to the adverse event.

Disability following an adverse event (Ipsos Mori population survey)

Representative data on disability following an adverse event is not available. The Ipsos MORI survey details the self-reported severity of an injury following a clinical negligence incident in an NHS setting, however the sample size is very small (n:53), and so the data is included for completeness only.

Table 1 – reported severity of consequences to health in Ipsos Mori survey

Severity of consequence to health	Ipsos MORI survey 2013: pursued legal claim, n=53 (%)
Insignificant	5
Emotional	12
Temporary minor disability	16
Temporary major disability	19
Permanent minor disability	19
Permanent major disability	25
Don't know	4
Refused (to provide answer on injury severity)	0

Whilst it is possible that those who pursue a legal claim due to negligence will experience disability of varying severity following the negligence, there is a low likelihood that a very high-severity incident, resulting in disability as defined by the Equality Act 2010[4], would fall within the lower damage band. It is likely that the amount awarded as a material care package, for supporting the claimant's day-to-day life, would bring the total compensation awarded outside of the FRC remit. This means those who are most severely disabled due to negligence would not be affected by the introduction of an FRC scheme, and discrimination arising from disability is therefore unlikely to occur in this instance. Plans to monitor the impact on those with protected characteristics, post implementation are set out above.

The department recognises, more generally, that there are some cases which incur known extra costs, particularly those involving protected parties or children. As well as additional time that may be required attending these clients during the lifetime of their claim, extra costs will also include the legal work involved in preparing for and attending a settlement approval hearing. Consultation respondents also noted the potential disproportionate financial impact on these claimants, some of whom may fall under the disability protected characteristic, raising concerns of discrimination arising from disability.

An additional ‘bolt-on’ amount of £1,800, increased from £650 in our original consultation proposals, that claimants can recover on top of base fixed costs is included in our proposals in order to ensure the costs are appropriate to the work undertaken by claimant lawyers in these claims. The increased bolt-on amount functions as a safeguard for protected party and child claimants against disproportionate impacts and access to justice risks caused by the additional costs involved in their claims.

Sex

Analysis of this characteristic was undertaken using the CMS dataset. Within claims settled between £1,500-£25,000 in 2021 to 2022, 57% were from women and 43% came from men. This was compared to HES admitted patient data: for 2021 to 2022, the demographic breakdown of the completed survey was 55% women and 45% men. There is some difference between users of the NHS and those who pursued a legal claim, however, given the difference is not large, the evidence suggests claimants might not be disproportionately impacted by implementation of the scheme on the basis of sex. Plans to monitor the impact on those with protected characteristics, post implementation are set out above. Analysis considering the impacts on women of childbearing age has been included below.

Sexual orientation

We do not currently hold any data on this claimant characteristic. The consultation requested evidence of impacts on groups with this characteristic and no responses directly mentioned sexual orientation. Plans to monitor the impact on those with protected characteristics, post implementation, are set out above.

Race

Data for race is not available in the CMS dataset. Instead, the HES admitted patient data and population 2021 census have been compared, as these were the most accurate and recent data sources available.

Higher representation within the admitted patient data, when compared to the wider census population, may indicate greater use of the NHS, suggesting the likelihood of experiencing an adverse event and therefore making a clinical negligence claim could be greater, all else being equal. Existing data and research indicate increased risk of patient safety events and poorer health outcomes among ethnic minority populations, which evidences the potential for clinical negligence claims to disproportionately occur within these groups.

A proportion of HES data does not contain ethnicity data, with ethnicity recorded for 87% of admitted patient episodes in 2021 to 2022. The table below presents ethnicity as recorded, and also contains a column in which the HES ethnicity data is rescaled to sum to 100%. This rescaling assumes that the omitted and present ethnicity information have the same distribution.

Table 2 – Breakdown of race across HES admitted inpatient and Census data

Race	HES admitted patients 2021 to 2022 (%)	HES admitted patients 2021 to 2022 (scaled) (%)	Population census 2021 (%)
White	75	86	82
Asian/Asian British	6	7	9
Black/African/Black British	3	3	4
Mixed	1	1	3
Other	2	2	2

Comparison of the HES admitted patient data and the population census shows there is some difference between these data sources. No ethnicities in Table 2 are overrepresented in the inpatient data compared to the 2021 census, meaning the likelihood of experiencing an adverse event and therefore submitting a claim, as explained above, does not appear greater for any particular ethnic minority. This suggests that claimants might not be disproportionately impacted by implementation of the scheme on the basis of ethnicity. Whilst ethnic minorities may not be overrepresented within the data, it is important to note that these groups are NHS users who may face poorer health outcomes and higher safety risks. Plans to monitor the impact on those with protected characteristics, post implementation are set out above.

Age

The CMS dataset of successful claims against NHS trusts in 2021/22 was used to analyse this characteristic as at settlement of the claim and compared to population census data

for 2021. The HES admitted patient data was also included to provide a comparison with the inpatient population.

Table 3 – Breakdown of age across CMS dataset and HES admitted patient data

Age	CMS dataset 2021 to 2022 (%)	HES admitted patients 2021 to 2022 (%)	Difference between CMS dataset and HES admitted patients (%)
0-19	8.2	11.7	-3.4
20-34	22.4	12.8	9.5
35-49	20.2	12.7	7.6
50-64	21.6	19.1	2.4
65+	26.9	43.7	-16.8

Positive differences in the table above, highlighted in blue, indicate that there is a higher percentage of individuals within the corresponding age bracket that are submitting claims than there are in the inpatient population.

The youngest age bracket, 0 to 19, is less represented in the claimant data when compared to the proportion within the general and inpatient populations. Those at working age, 20 to 64, appear to be overrepresented within the claims data when compared to both the general and inpatient population. The scheme could therefore have an indirect disproportionate effect on those within this age group.

Those aged 65 and over are the largest age group within the inpatient data (44%). We could therefore expect to see more adverse events within the 65 and over age group, when compared to younger populations, due to their more frequent interactions with healthcare providers and settings. As a result, it could be expected that the scheme would have an indirect disproportionate effect on those aged 65 and over. However, this age group is notably less represented within the claimant data, by 17 percentage points, despite their greater use of healthcare services, meaning disproportionate impacts may not be likely.

Plans to monitor the impact on those with protected characteristics, post implementation are set out above

Pregnancy and maternity

For pregnancy and maternity, and women of childbearing age, we have considered the available HES inpatient data by age and sex, and claims level data for obstetrics related claims. Analysis of HES admitted patient data shows that women aged 20 to 39 have over 2.5 times more patient episodes than men of the same age, with maternity services being responsible for a large proportion of this activity for women of childbearing age. The representation of women of childbearing age within the claims data is not available for analysis, as CMS data is not provided by age and sex. However, women being more frequently in contact with the NHS, largely due to accessing maternity services, could suggest a greater chance of experiencing an adverse event and therefore submitting a claim, all else equal.

Analysis was undertaken on obstetrics claims data within NHS Resolution's CMS dataset. Obstetrics claims fall under two categories: non- cerebral palsy / brain damage and cerebral palsy / brain damage. This analysis has shown that for 2021 to 2022, obstetrics (non- cerebral palsy / brain damage) claims make up approximately 7% of claims within the £1,500-£25,000 damages band, and no claims within this damage band fall under obstetrics (cerebral palsy / brain damage). These groups, some of which may relate to claims involving pregnancy and maternity characteristics, are a small proportion of those within the FRC remit, meaning they are unlikely to be disproportionately impacted by implementation of the scheme. The consultation requested evidence of impacts on groups with this characteristic and pregnancy and maternity was noted by some respondents as a characteristic which may be disproportionately impacted. However, no additional evidence has been found within this consultation to suggest this.

Plans to monitor the impact on those with protected characteristics, post implementation are set out above.

Gender reassignment

We do not currently hold any data on this claimant characteristic. The consultation requested evidence of impacts on groups with this characteristic and no responses directly mentioned gender reassignment.

Plans to monitor the impact on those with protected characteristics, post implementation are set out above.

Religion or belief

We do not currently hold any data on this claimant characteristic. The consultation requested evidence of impacts on groups with this characteristic and no responses directly mentioned religion or belief.

Plans to monitor the impact on those with protected characteristics, post implementation are set out above.

Marriage and civil partnership

We do not currently hold any data on this claimant characteristic. The consultation requested evidence of impacts on groups with this characteristic and no responses directly mentioned marriage and civil partnership.

Plans to monitor the impact on those with protected characteristics, post implementation are set out above.

Other identified groups:

Employment

Although not a protected characteristic, responses to this consultation identified lower income as a possible factor impacted by the new scheme. Concern was raised that lower income groups would be disproportionately impacted since those with lower incomes may be more likely to fall within lower damages bands compared to those with higher incomes, all else equal, as the loss of earnings element of their damages award would be lower.

We do not have a comprehensive data source on employment status of clinical negligence claimants. The Ipsos MORI survey contained information on employment rates of the 53 respondents who had made clinical negligence claims. This is included below, for information only as the sample size is too small to draw inference, and has been compared to 2011 population census data on economic activity[5].

Table 4 – employment status comparison between Ipsos Mori and ONS data

Employment status	Ipsos MORI survey 2013 (%)	Population 2011 (%)
Full-time	40	38
Part-time	8	14
Not working	55	34

Note: these figures do not capture all forms of employment activity.

Overall, people with certain employment status may be disproportionately impacted by the scheme, such as those who are not working, but this is not a protected characteristic set out in the equality duty. The 2022 consultation document response sets out the protected characteristics expected to be linked to lower income, which include older people, women, ethnic minorities, people with a disability, and people with long term conditions. Analysis of many of these protected characteristics has been carried out (as set out in this document) and more accurate conclusions can be drawn from the analysis of these. It would be important to look at income directly after implementation of the scheme, as for now, we can only base assumptions on analysis of other characteristics.

Summary of analysis

We have not found evidence that these proposals for an FRC scheme for lower damages clinical negligence claims would directly or indirectly discriminate against any group with protected characteristics. However, disability (based on pre-existing condition and disability following an adverse event) remains an area where the analysis is inconclusive. Analysis is also inconclusive on employment status. Individuals with these characteristics may be disproportionately impacted by the proposed scheme, however we have not found any evidence to suggest this impact would be negative or therefore cause direct or indirect discrimination. We also do not find evidence to suggest there would be discrimination arising from disability.

As summarised in each subsection, the overall caveat to many of the findings in this document is firstly that the characteristics which may be disproportionately affected are populations which we would expect to be in more frequent contact with healthcare settings and therefore have a higher likelihood of experiencing an incident compared to others. It is not expected that the introduction of the FRC scheme would directly or indirectly cause discrimination against these groups. Secondly, the small sample sizes available for use within this analysis limit the ability for accurate conclusions to be drawn for determining potential disproportionate impacts on certain groups with protected characteristics.

It should also be noted that disproportionate effects could be positive or negative (where a worse negative effect compared to someone without a protected characteristic potentially indicates indirect discrimination). However, the policy intent of the proposed FRC scheme is to ensure claims are processed quickly, fairly, and cost-effectively, via a streamlined process and at a cost that is more proportionate to the value of the claim. If successfully implemented, we would expect these proposals to have a positive impact for claimants, enabling them to reach fair resolution more swiftly, and reducing the stress of drawn-out litigation. As a result, it would not be expected for those with protected characteristics, who may be disproportionately affected, to be indirectly discriminated against.

Analysis of protected characteristics directly related to income showed no notable direct negative impact on any group. This would suggest the impact on equalities of these proposals for clinical negligence claims would be similar to the impact of previous reforms in personal injury litigation. On the evidence examined in this analysis we would not expect there to be a significant impact on equalities.

Government is committed to evaluating this policy as part of a Post Implementation review (PIR) not less than three years following implementation. The evaluation will include consideration of the impacts and effectiveness of these proposals with specific reference to groups with protected characteristics under the Equality Act 2010.

Addressing the impact on equalities

This analysis has not found evidence of a likely direct impact on equalities or direct disproportionate effects on any group with a protected characteristic. As mentioned, impacts on groups with protected characteristics will be assessed as part of the PIR process, following implementation.

Endnotes

1. ‘Lower damages claims’ in this equality duty analysis refers to clinical negligence claims with a value at settlement from £1,501 to £25,000 inclusive.

2. For 2021/22, the average compensation awarded for CNST obstetrics claims was approximately £10.2m for cerebral palsy / brain injury claims and £229,000 for non-cerebral palsy / brain injury claims, compared with an average across all CNST claim specialties of £345,000. Accessed from: Table 10.B, NHS Resolution Supplementary Annual Statistics 2021/22.

3. The analysis of deprivation using HES data is based on the area where the patient receives care rather than the patient's residence, so could be an inaccurate reflection of patient deprivation.

4. The Equality Act defines an individual as having a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

5. 2021 population census data is not currently available for employment.

www.gov.uk/dhsc