



Department  
of Health &  
Social Care

# **Fixed recoverable costs in lower damages clinical negligence claims**

**Government response**

September 2023

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# 1. Ministerial foreword

Making the best possible use of NHS resources is vital. While spending on healthcare services has increased, supporting improvements in quality and safety, in recent years more of this money has been diverted for the purpose of addressing clinical negligence claims. Our analysis suggests that this is because the overall cost components of claims, including damages, have been growing at rates far higher than inflation and continue to rise rapidly.

Between financial years 2006 to 2007 and 2022 to 2023, the annual expenditure on clinical negligence claims more than quadrupled from £0.6 billion to £2.6 billion, with legal costs comprising a notable proportion of this rise. These costs are funded from the core NHS budget and use resources that could otherwise have been spent on patient care.

For lower damages claims<sup>1</sup>, claimant legal costs have risen more over the period than other claims and are often disproportionate to the value of those claims, with average legal costs recovered by the NHS twice the average amount paid out in damages to claimants<sup>2</sup>. The length and complexity of the legal process can also be disproportionate given the relative straightforwardness of many claims at this level, meaning that people who have been harmed are experiencing the stress of a drawn-out process and waiting longer to receive compensation.

The determination to deliver 'access to justice at proportionate cost' has been a priority for the government since Sir Rupert Jackson's 2010 report<sup>3</sup>. In April 2013, substantial changes were made to the civil costs and funding regime in England and Wales, including through provisions in Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Following Sir Rupert's Supplemental Report on Fixed Recoverable Costs (FRC) in July 2017, further progress has been made.<sup>4</sup> From October 2023, as recommended by Sir Rupert, FRC will be extended generally across the fast track (cases up to £25,000 damages) and for simpler cases in the new intermediate track (up to £100,000 damages)<sup>5</sup>.

However, the question of FRC for lower damages clinical negligence claims has not yet been resolved. In his 2017 report, Sir Rupert recognised the challenges of clinical negligence claims and recommended that the Civil Justice Council (CJC) should develop a bespoke, streamlined system of FRC for claims up to £25,000 to address them.

In 2019, the CJC published their proposals for an FRC scheme, covering the pre issue period only,<sup>6</sup> and in 2022 we consulted on FRC proposals for this group of clinical negligence claims. Our proposals were closely aligned with the CJC work and developed with extensive input from claimant and defendant representatives.

We are very grateful for the responses to that consultation, which engaged constructively with the proposals and made a range of helpful suggestions. Those responses have been vital in helping us shape the way forward for these reforms and informed some changes to the original proposals, in particular around strengthening the safeguards we have in place to protect claimants' access to justice.

Our aim throughout this process has been to implement a scheme that is straightforward, workable and fair for both claimants and defendants, tailored to suit the cohort of claims it will cover, and ensures access to justice is protected.

We believe that the streamlined process we have arrived at, taking on board consultation responses, will be an important step forward. It should facilitate quicker resolution so harmed people get compensation more quickly, make legal costs more proportionate and predictable, and make an important contribution to controlling rising clinical negligence costs for the NHS.

## 2. Introduction

This document sets out a summary of the views provided on key policy issues and conclusions in response to the consultation paper, [Fixed recoverable costs in lower value clinical negligence claims](#). The consultation ran from 31 January to 22 April 2022.

It covers:

- the background to the consultation
- a summary of the responses to the consultation
- a detailed response to specific questions raised in the consultation
- conclusions on key policy issues and next steps

### **Definition of the proposed FRC scheme, pre action protocol and cohort of claims**

FRC refers to the legal costs which can be recovered by the successful party from the losing party at a fixed sum and can relate to different stages of the civil litigation process, including the pre-issue stage.<sup>7</sup> Introducing FRC provides for certainty and proportionality of costs as parties have advance knowledge of the scale of recoverable costs. FRC are already established in England and Wales and have expanded to include most low-value personal injury cases over the last 15 years. The government's policy intention over recent years has been to incrementally extend the categories of civil cases covered by FRC.

### **Key terms**

**FRC scheme:** The FRC scheme described in these proposals is the Lower Damages Clinical Negligence Claim FRC scheme (the LDFRC scheme). The LDFRC scheme refers to all elements of the scheme – the fixed costs, cost recovery, the pre-action protocol, sanctions and other arrangements.

**LVCD protocol:** We also refer in this document to a new proposed pre-action protocol that will, alongside proposed amendments to the Civil Procedure Rules (CPR), describe how claims should be conducted in the LDFRC scheme, the process requirements. This is the 'Pre-Action Protocol for the Resolution of (low value) Clinical Disputes', (the 'LVCD protocol').

'Low value' in the protocol and 'lower damages claims' in the LDFRC scheme refer to the same group of claims: clinical negligence claims with a value at settlement or judgment

from £1,501 to £25,000, inclusive. The lower limit of the LDFRC scheme and the LVCD protocol is equivalent to the maximum value of any claim for damages for personal injuries for non-road traffic accident personal injury claims in the small claims track (as set out in CPR Rule 26.9(1)(a)(ii)(cc)). This maximum value was increased from £1,000 to £1,500 in April 2022.

## **Other claim cohorts**

Two other claim cohorts are also discussed in this response:

- small claims (clinical negligence claims with a value at settlement or judgment from £1 to £1,500): the LDFRC scheme proposals do not include these claims, which would normally be allocated to the small claims track
- 'medium damages' claims (claims with a value at settlement or judgment from £25,001 to £100,000, including clinical negligence claims): the LDFRC scheme proposals do not include these claims. The Ministry of Justice has recently set out new rules for this cohort of claims in a number of areas of civil law, including certain clinical negligence claims

## **Note on standard and light tracks in the LDFRC scheme**

The LDFRC scheme includes 2 'tracks' for eligible clinical negligence claims. We have retained this terminology for this response for consistency, but we are mindful that the term 'track' may be confusing in the context of existing terminology around case management tracks. We will consider with the CPRC whether alternative wording may be more helpful, and confirm any terminology changes once the proposed pre-action protocol and changes to the CPR are finalised.

## **Consultation details**

The 2022 consultation paper sought views on the government's proposal to introduce a system of FRC in 'lower value' clinical negligence claims (valued at £1,001 to £25,000).

A total of 98 responses were submitted, with respondents using the online response tool and email ([FRCconsultation@dhsc.gov.uk](mailto:FRCconsultation@dhsc.gov.uk)) to give their views on the proposals. A summary of those responses is set out at Chapter 4 of this document.

These proposals interact with broader proposals to extend FRC in civil cases consulted on by the Ministry of Justice in 2019<sup>8</sup>. The government response to that consultation was published in 2021<sup>9</sup> and will be implemented in October 2023<sup>10</sup>. The nature of this interaction, its significance and implications for these proposals are explained in more detail in Chapter 3.

An updated Impact Assessment and Equality Impact Assessment have been published alongside this response and are available at [INSERT GOV.UK LANDING PAGE LINK].

A Glossary of terms is included at Annex D.

Further copies of this report and the consultation paper can be obtained by contacting:

Clinical Negligence FRC Consultation  
NHS Policy and Performance  
Department of Health and Social Care  
39 Victoria Street  
London SW1H 0EU  
Email: [FRCconsultation@dhsc.gov.uk](mailto:FRCconsultation@dhsc.gov.uk)

Alternative format versions of this publication can be requested from the above address.

## **Complaints or comments**

If you have any complaints or comments about the consultation process you should contact the Department of Health and Social Care at the above address.

# 3. Background

## Policy background

The 2022 consultation paper sought views on the government's proposal to introduce a system of FRC in 'lower value' clinical negligence claims (valued at £1,001 to £25,000). Alongside the document, the Department of Health and Social Care (DHSC) also published an Impact Assessment and an Equality Duty Analysis.

The Department previously consulted on introducing FRC for lower damages clinical negligence claims in 2017.<sup>11</sup> A number of respondents to that consultation said that the success of any FRC scheme would require the development of an appropriate streamlined process to resolve claims quickly and fairly. Sir Rupert Jackson subsequently considered the suitability of an FRC regime for clinical negligence claims in his 2017 report.<sup>12</sup> He noted that, although clinical negligence claims are "more demanding than other forms of personal injury litigation and require more complex pre-issue investigation", there was scope for an FRC scheme for claims up to £25,000 in damages if accompanied by a process detailing the conduct of those claims.

On claims up to £25,000, the Jackson report recommended that the CJC should set up a working party, including both claimant and defendant representatives, to develop a bespoke process for clinical negligence claims initially up to £25,000 together with a grid of FRC for such cases. The Department and the Ministry of Justice jointly commissioned the CJC to look at lower damages clinical negligence claims in detail and design a bespoke streamlined process and grid of fixed costs for these claims. The CJC's report was published in October 2019.<sup>13</sup> The Department's 2022 consultation invited views on proposals which closely followed the conclusions of that report.

## The case for change

As noted by the National Audit Office in 2017, the overall annual expenditure on clinical negligence claims has risen substantially and is continuing to rise. Between financial years 2006 to 2007 and 2022 to 2023, this cost rose more than fourfold from £0.6 billion to £2.6 billion. Most of these costs are borne by the NHS, with the increases placing significant strain on NHS budgets and using resources which could otherwise have been spent on frontline healthcare services.

Legal costs represent a sizeable proportion of this rise. The total legal costs (claimant and defendant) of bringing and processing clinical negligence claims have grown dramatically from £152 million in 2006 to 2007 to £650 million in 2022 to 2023, making up 25% of total clinical negligence costs. Since 2013 to 2014, the volume of claims has remained broadly



stable, but despite this, in the period from 2013 to 2014 to 2022 to 2023, legal costs nearly doubled (from £333 million to £650 million)<sup>14</sup>.

For lower damages clinical negligence claims (valued at £1,001 to £25,000), the average claimant legal cost per claim doubled from around £10,100 in 2006 to 2007 to around £23,200 in 2021 to 2022 and the average claimant legal costs per claim in 2021 to 2022 were more than 4 times those of average defendant legal costs per claim. Claimant legal costs are also disproportionate to levels of compensation: the average claimant legal costs per claim for the £1,001 to £25,000 value band was twice the average amount paid out in damages to claimants, in 2021 to 2022.

The rise in claimant legal costs for these lower damages claims has levelled out in recent years: there are indications that there may have been a cost levelling effect from financial years 2016 to 2017 to 2019 to 2020 when average claimant legal costs remained broadly stable. However, most recently, between 2019 to 2020 and 2021 to 2022, we have seen average claimant legal costs increase again, by approximately 11% (£20,900 to £23,200). Despite these more recent fluctuations in the trend, clinical negligence claimant legal costs remain historically high, especially for lower damages claims, and disproportionately high relative to both defendant costs and compensation levels.

We also know that lower damages clinical negligence claims can take too long to resolve and would benefit from a streamlined process to speed fair resolution. Over the last 10 years, average claim duration has increased by 46% to 1.3 years for lower damages clinical negligence claims, which have, along with claims in the lowest damage band (£1-£1,000), seen the greatest rise. The proposals would seek to reduce this to a maximum of 44 weeks for lower damages claims resolved within the new protocol.

Our policy intent in proposing implementation of this LDFRC scheme is to facilitate faster resolution of claims at a cost that is proportionate to the value of the claim. We are also committed to ensuring that access to justice for claimants is protected and any risks to access to justice mitigated. These aims have not changed since we consulted on these proposals in 2022. However, we have taken steps, set out in this response, to improve the proposals to better meet these aims, especially in safeguarding access to justice. We believe that these proposals would represent an important contribution towards addressing the overall rise in clinical negligence costs, increasing predictability around costs and facilitating faster resolution for claimants and defendants in lower damages claims.

## **Interaction with Ministry of Justice reforms**

In parallel with this work, the Ministry of Justice developed proposals for a broad extension of FRC to more civil claims<sup>15</sup> in line with Sir Rupert Jackson's 2017 recommendations (the Jackson recommendations). These proposals will now be implemented in October 2023. This will result in the extension of FRC to most categories of civil law in the fast track. This

extension also includes the creation of a new intermediate claims track and corresponding FRC, for less complex claims between £25,001 and £100,000 damages.

The proposals from the Ministry of Justice did not include an FRC scheme on lower damages clinical negligence claims, so as not to interfere with the separate Jackson recommendation on those claims and the work of the CJC. Indeed, the Ministry of Justice's FRC reforms explicitly exclude clinical negligence claims generally, following the reasoning in the Jackson recommendations that: "The complexity of such cases means that they are usually unsuited to either the fast track or my proposed intermediate track".<sup>16</sup>

However, Sir Rupert Jackson did make one exception to this exclusion: that a subset of claims in the higher value bracket between £25,001 and £100,000 might be included in the proposed fixed costs intermediate track where the defendant had admitted breach of duty of care and causation and only quantum of damages issues remained.

As such, the Ministry of Justice's 2023 FRC extension recognises the suitability to FRC of a small number of less complex claims in the £25,001-£100,000 value band, where liability has been admitted and those claims otherwise meet the criteria for the intermediate track. The extension accordingly allows for these cases to be allocated to the intermediate track where they will be subject to FRC.

Our LDFRC scheme is intended to operate with these reforms. However, our scheme relates to the pre-issue part of the process only, and parties are not restricted from proceeding to litigation if the claim is not settled once the pre-issue process is completed. As a result, we expect there will be a small number of litigated clinical negligence claims which will be allocated to a case management track, where they may interact with the Ministry of Justice's FRC reforms due to come into force in October 2023. Details of those types of claim and potential scenarios for addressing the costs of claims in the scheme are set out at Annex C. Our intent is to ensure that the respective FRC schemes work smoothly together and that there is clarity, fairness and predictability for these claims.

The government will work with the Civil Procedure Rule Committee (CPRC) to ensure the smooth delivery of these reforms. The next formal step in the process of implementation will be for the government to submit draft rules for consideration by the CPRC. As outlined throughout this government response, we are clear in our objectives as to what we want to achieve through FRC for lower damages clinical negligence claims, but there are a number of issues which will require further consideration, by the government with the CPRC, before these rules are finalised.

## Consultation scope

Our January 2022 consultation sought views on the following proposals and issues:

- scope and structure of proposed FRC scheme
- a streamlined, 2-track process for claims in scope
- a fixed costs framework based on the CJC Working Group 'defendant group' costs proposals and a bolt-on amount for protected party and child claims
- arrangements for neutral evaluation
- exclusions from the scheme
- sanctions
- implementation arrangements and post-implementation review
- impacts on businesses, including small and micro businesses
- impacts on groups with protected characteristics as defined under the Equality Act 2010, health disparities or vulnerable groups

This document summarises the responses to the consultation and sets out conclusions on certain key policy issues. It provides:

- a summary of consultation responses
- an overview and analysis of responses to specific questions in the consultation
- the way forward on FRC for lower damages clinical negligence claims

A list of respondents is included at Annex A.

## 4. Overview of consultation responses

### Demographics

The Department would like to thank those individuals and organisations who took the time to respond to the consultation.

The consultation ran between 31 January and 22 April 2022. A total of 98 responses were submitted, with 47 of these submitted through the online response tool and 51 by email.

We received a varied set of responses from those with an interest in lower damages clinical negligence claims. 93 responses were from England and 5 were from Wales. Overall, around 50% of responses were from claimant law firms (including generalist firms and specialist clinical negligence firms), or claimant representative bodies like SCIL, the Society of Clinical Injury Lawyers, or APIL, the Association of Personal Injury Lawyers. Around 20% of responses were from Defendant law firms, indemnifiers, insurers or other defendant representative bodies. Around 30% of responses were from other sources, including general legal representative bodies such as the Law Society, legal services organisations, NHS or medical sector organisations, such as the BMA, or from individuals.

Not all respondents answered every question, and some provided select responses based on their interest and/or individual competency on a given subject.

All the responses have been carefully analysed, and this has informed the next steps for these reforms. While not every single point raised by respondents has been referenced or addressed in this response, the following sections document the main points and themes. More detailed analysis of the responses to each question is provided in Section 5 below.

### Summary of responses

The majority of responses provided were from individuals and organisations from a legal background (for example individuals or organisations such as solicitors, barristers, law firms, legal representative bodies, professional bodies etc.).

The results show a clear split in views between different stakeholder groups on the proposals for the introduction of FRC and a streamlined process.

Claimant legal respondents were broadly not in favour of reforms – significant majorities of claimant legal respondents disagreed with almost all proposals - for example: on definitions for claims falling within a FRC scheme (78%), a twin track approach (70%), proposed streamlined process in the standard track (89%), evidentiary requirements

(78%), a fixed costs framework (100%), mandatory neutral evaluation arrangements (75%), claims to be excluded (89%) and sanctions (89%).

By contrast, the majority of defendant legal respondents generally agreed with most proposals, including significant majorities on, for example: sanctions (75%), definitions for claims falling within scheme (100%), a twin track approach (100%). A majority also agreed with the proposed fixed costs framework (75%).

The majority of claimant legal respondents disagreed with proposals to use date of letter of claim to determine if a claim is in scope (75%), and proposed criteria for claims to be allocated to the light track. In contrast, a majority of defendant legal respondents agreed with this (75%).

Concerns were raised by respondents both in relation to the introduction of a scheme in general and to specific elements of the proposals. Arguments were also made in favour of various proposals. These are set out below in responses to specific questions.

## **Overarching themes**

**Access to justice:** Concerns were raised around the implications of the proposals on access to justice for claimants with lower damages claims. Claimant legal respondents objected in principle to an FRC scheme for clinical negligence claims, stating that this would be financially unviable for claimant legal firms and would cause them not to take up lower damages claims – hence their view is the proposals would restrict access to justice (and that this would disproportionately affect lower income claimants).

This included concerns expressed by claimant legal respondents about the proposals for the level of the fixed costs themselves, how disbursements would be taken into account, proposals on which types of claims would be included or excluded from the scheme, and proposals for the bolt-on amount for claims involving protected party and child claimants. Defendant legal respondents did not identify these risks to access to justice and were generally content that the proposals adequately took into account and protected claimants' access to justice. Responses on these specific points are addressed in the relevant sections below.

**Complexity of clinical negligence claims, regardless of value:** Concerns were expressed by claimant legal respondents that clinical negligence claims of any value are too complex, and therefore unsuitable in principle for FRC. Claimant legal respondents argued that regardless of value of damages sought, the complexity of proving liability means that clinical negligence claims are different to other types of claims and should not be subject to a fixed costs regime. Other respondents, including defendant legal respondents, felt that an FRC scheme with an appropriate bespoke process for conducting claims could be

workable for clinical negligence claims and agreed that the proposals were in principle a sensible way forward.

Equalities impacts: Claimant legal respondents raised concerns about negative effects on particular groups with protected characteristics under the Equality Act 2010 or other groups identified as being vulnerable. This assertion depended on views that either access to justice would be affected for those groups, or that the scheme would have the effect of reducing damages or other disadvantages for claimants affected by it. The greatest concerns were for claimants who are older, or with lower incomes, disabilities or long-term conditions. Other respondents, including defendant lawyers, did not express these concerns and welcomed the potential benefits for claimants. They therefore did not identify these risks to groups with protected characteristics.

The level of the fixed costs: overwhelmingly claimant legal respondents thought these were too low and raised access to justice concerns based on the view that claimant legal representatives would not agree to take on these claims. Defendant legal respondents tended to agree with the proposed cost levels. Certain other respondents, such as medical expert report providers, also suggested that the costs were too low.

Claim valuation: Claimant and defendant legal respondents raised concerns about the definition of scheme claims being determined by the value of the claim at settlement, which is known only at the end of the process and called for more clarity on this point.

Exclusions: Claimant legal respondents disagreed with the list of exclusions from the scheme. They argued that the scheme should exclude certain claims that they deem more complex, time-consuming and sensitive, in particular:

- protected party and child claimants – our consultation proposals include these in the scheme with a bolt on amount in recognition of extra work required. Claimant legal respondents suggested that the bolt-on amount was not sufficient to protect these claimants from access to justice risks or suggested that these claim groups should be excluded from the FRC scheme altogether
- all fatal claims – our proposals excluded stillbirths and neonatal deaths on grounds of complexity and sensitivity but included other fatal claims. Claimant legal respondents suggested that all fatal claims should be excluded from the scheme
- defendant legal respondents were concerned that claims would routinely require more than 2 liability experts and that the proposals would wrongly exclude these claims. Claimant legal respondents asserted that the proposals would keep too many complex claims within the scheme and suggested the exclusion criteria be changed to ‘2 experts of any kind’

Sanctions: Claimant legal respondents objected that the sanctions regime on defendants was insufficient and penalised claimants too harshly.

Neutral evaluation: Claimant legal respondents objected to the level of cost risk to claimants of the evaluation, suggested that the role of evaluator should be expanded beyond barristers to solicitors and other legal professionals, and that a paper-only approach would be unsuitable to clinical negligence claims. Some claimant legal respondents suggested that evaluation would be unworkable in practice. Concerns were also expressed that the evaluation costs were too low. There were also concerns that evaluation costs may represent an access to justice risk for claimants. Defendants were broadly in favour of neutral evaluation as a pragmatic means of reducing the number of claims which would need to progress to court. Respondents requested more detail on arrangements for selecting evaluators and conducting the evaluation.

Disbursements: Claimant and defendant legal respondents requested greater clarification on arrangements for disbursements in the scheme – particularly whether different disbursement categories would be separately recoverable and, in particular, whether disbursements relating to Part 8 approval hearings in protected party and child claims would be separately recoverable.

Definitions: Respondents asked for greater clarification on the status of any human rights claims in the scheme and for a definition of clinical negligence to be included.

Patient safety: Claimant legal respondents objected that the process makes no provision for safety learning and improving patient safety. Other respondents, including defendants, did not raise this issue. We would note that NHS Resolution, which is responsible for handling clinical negligence claims against the NHS, has established programmes for identifying trends, learning from claims and disseminating learning to the NHS, working closely with system partners to deliver a coordinated approach to safety and learning. NHSR's extensive commitment to safety improvement and learning from claims remains a strategic objective and will not be affected by our proposals for FRC.

## **The way forward**

The proposed LDFRC scheme will be set out in a new Protocol, ('the LVCD Protocol'), amendments to CPR and practice directions.

The aim of the LVCD Protocol is to facilitate resolution, by requiring parties to exchange expert evidence in the pre-action phase and to participate in resolution stages. The LVCD Protocol will describe the behaviour the court expects of the parties prior to the start of proceedings.

The CPR and associated practice directions will set out the fixed costs themselves, sanctions for non-adherence to the LVCD Protocol and certain other details of the scheme. The CPR enables the court to impose sanctions where the Protocol is not followed.

The proposals for an LDFRC scheme for clinical negligence claims set out in our 2022 consultation proposals and in this consultation response document will be submitted to the CPRC, during the latter half of 2023.

The intention is that the new rules will come into force on the common commencement date for secondary legislation in April 2024.

We are also launching a further consultation focusing on the specific issue of disbursements under the proposed LDFRC scheme, inviting views on a proposed way forward on disbursements for all claims in the LDFRC scheme.



## 5. Responses to specific questions

Each section below presents analysis of responses to the specific proposals and questions outlined in the government's consultation on introducing FRC in lower damages clinical negligence claims. This section sets out in relation to each consultation question a summary of overall support for, or disagreement with, a given proposal, specific issues raised by respondents that are relevant to each question, any changes to the consultation proposals with rationale, and a summary of the government's position.

Due to small sample sizes for some response types, the percentages within each table below are calculated by rounding the underlying count of responses to the nearest 5 to prevent potentially identifying individual respondents. Rows and columns in the tables below may not add up to the total shown due to rounding. Not all respondents answered every question. Each table in the sections below provides a percentage breakdown of the total number of responses to the question concerned.

### 5.1. The definition of claims within the LDFRC scheme

#### Proposals as consulted on

The position in the consultation was as follows:

Our FRC proposals would apply to all clinical negligence claims in England and Wales where the value is in excess of the small claims limit for non-road traffic accident personal injury claims (£1,001, rising to £1,501 from April 2022), up to £25,000, based on a final settlement or judgment value. The scheme would exclude those claims set out under the list of exclusions (see Question 10 below). The proposals also allowed for a small number of claims under £1,001 that would normally be allocated to the small track to be included in the scheme, if it could be shown that they were unusually complex and therefore unsuitable for the small claims track.

#### Consultation question:

Do you agree or disagree with the proposed definitions for claims falling within the fixed recoverable costs (FRC) scheme?

Total responses to question: 90

Responses	Claimant	Defendant	Unknown	Other	All responses
Agree	6%	17%	6%	11%	39%
Disagree	39%	0%	6%	11%	56%
Don't know	6%	0%	0%	0%	6%
Total	50%	17%	11%	22%	100%

## The way forward

This section of the response focuses on changes to consultation proposals and addresses concerns about aspects of the proposals in relation to the question, which related specifically to proposed definitions for claims falling within the FRC scheme.

### Definitions

Some consultation respondents asked for more clarity on the definition of claims that would fall within the scheme. While we believe the broad definition of scheme claims as proposed is generally fit for purpose, we do think it appropriate to make some minor changes and clarifications.

**Definition of clinical negligence:** Some respondents felt that the definition of claims within the scheme did not adequately define clinical negligence and should distinguish claims in the scheme from non-clinical negligence claims against the NHS, or wider personal injury claims. Our view is that the concept of clinical negligence claims as distinct from other kinds of claims is well understood and set out in the existing Pre-Action Protocol for the Resolution of Clinical Disputes (PAPRCD). The wording on claims we propose to include in the LVCD protocol will align with the equivalent wording for claims in the PAPRCD.

For further information about what is meant by 'clinical negligence' in our proposals, see the definition in the Glossary section of this response.

**Human rights claims:** Some respondents asked how human rights claims would be treated under the scheme. Our position is that if a clinical negligence claim includes grounds under the Human Rights Act 1998 and otherwise satisfies the general definition for inclusion, it should be included within the scheme. To address this, we will stipulate in the LVCD protocol that if a claim satisfies the criteria for the LVCD protocol but also seeks relief or a remedy in relation to a breach of the Human Rights Act 1998, the LVCD protocol should still be followed.

## **Claim valuation**

Many respondents sought clarity on the proposal that the definition for claims falling within FRC will be based on value at settlement. There was concern that the definition of claims falling within the scheme would be dependent on a pre-issue valuation. Some respondents asked for clarification on the definition of claims that FRC would apply to and how the value of a claim would be worked out (for example at the outset or at settlement of each claim). Some respondents mentioned that it would be difficult to estimate the potential value of the claim at the outset. Others were concerned that valuation may be artificially inflated in order to escape the fixed costs regime. Others suggested that inclusion in an FRC scheme should not be based on the value of claims at all and that value may be difficult to predict accurately at the outset.

Our scheme will work on similar principles of inclusion as other FRC schemes introduced over the last decade for civil claims. All clinical negligence claims with a value at settlement or following judgment between £1,501 and £25,000 will be subject to fixed costs unless they qualify for a specified exclusion. It will be for claimant legal representatives in the first instance to determine whether a claim is likely to have a value at settlement in this range, and if so, to put a reasonable valuation on the claim and manage the claim accordingly, following the LVCD protocol.

The LVCD protocol requires the claimant to have obtained expert evidence on condition and prognosis early on and to include this in the bundle of evidence that accompanies the initial letter of claim. This will mean that claimants following the LVCD protocol should have sufficient information and be in a better position to value the claim and assess risk at the outset of the process than in other similar pre-action processes.

If a claim is overvalued at the outset but subsequently settles in the £1,501-£25,000 range it will be subject to costs under the LDFRC scheme, whether or not the process set out in the LVCD pre-action protocol has been followed for that claim. It will therefore not be advantageous for claimants to unreasonably overvalue a claim at the outset. There may also be cost sanctions if the claim has not followed processes and deadlines set out in the LVCD protocol and the CPR (see Section 5.8 below on sanctions).

Claims should therefore be valued, managed and budgeted prudently and reasonably by claimant legal representatives. Claimant legal representatives should consider whether claims at the margin of the £25,000 limit should be managed from the outset within the parameters and expectations of the LVCD protocol to avoid incurring unrecoverable costs and delays in another process.

While we understand the concerns about predicting the ultimate settlement value of a claim, we believe that the expectations for claimants and defendants are clear. In

particular claimants will need, early on, to obtain relevant information and evidence, assess the risks around valuation of a particular claim, and value the claim accordingly.

### **Small claims**

The definition proposed in the consultation sought to provide for certain complex clinical negligence claims under the small claims track value limit of £1,000 (now £1,500) to be included in the FRC scheme. The policy intent was to avoid those claims defaulting from the small claims track to an inappropriately costly regime of non-fixed costs. While some consultation respondents favoured this approach and the policy intent, others raised concerns that the justification for a given claim may be hard to operate in practice and may cause confusion. On reflection, we agree that including this exception to the definition introduces avoidable complexity for minimal gain. We have removed the exception so that no claims falling under the small claims track ceiling are included in the LDFRC scheme.

### **Exclusions**

Clinical negligence claims with a value at settlement or following judgment within the damages range of the LDFRC scheme but which qualify for one or more of the specified exclusions, will not be limited to the fixed costs in the LDFRC scheme or be required to follow the LVCD protocol. They will follow the existing PAPRCD and will be required to include in the PAPRCD letter of claim reasoning why the claim did not follow the LVCD protocol, including reference to any specified exclusions relied upon. Should the claim be issued, claimants will also need to include this reasoning and any specified exclusions relied upon, within the Particulars of Claim. Further detail on exclusions from the scheme are addressed at Section 5.7 below.

### **Broader objections**

A number of responses to this question also contained broader points on the scheme in general. Those supportive of the proposals said that they felt it was appropriate to apply FRC to claims with a maximum value of £25,000, that this approach reasonably tailored costs for less complex claims and that the overall definition was broadly consistent with claims in other FRC schemes.

However, some respondents opposed in principle the idea of an FRC scheme based on value, arguing that lower damages claims are no less complex than higher damages claims and should therefore not be subject to fixed costs. Some respondents argued that FRC would be unsuitable for any clinical negligence claims due to the need to obtain expert specialist advice. A widely expressed view by claimant legal respondents was that under any fixed costs regime, claimant solicitors may find it unprofitable to work on lower damages clinical negligence claims, and that this could restrict claimants' access to justice.

However, no data was presented for these assertions, so they are difficult to verify objectively. We have not seen evidence, either in the consultation responses or in our prior or subsequent analysis to support these ‘in principle’ objections. We do know that FRC schemes for civil claims based on damages bands already operate well in other areas of civil law, including in personal injury claims. While we acknowledge that clinical negligence claims can be more complex than other areas of civil law, the aim of Sir Rupert Jackson’s recommendation, the CJC working group and subsequent development of the proposals was to take into account this known complexity and ensure that the process and costs framework were appropriate to this specific claim group.

### **Litigants in person**

A small number of respondents asked whether litigant-in-person (LIP) claims would be included in the FRC scheme. We did not indicate whether LIPs would be included in the original proposals at consultation. Having considered this issue further and consulted data on current and historical numbers of LIPs for these lower damages clinical negligence claims, we established that there are only very low numbers of LIPs annually. It was also clear that the pre-action process set out for these claims requires a level of legal expertise that it would be unfair to expect from LIPs. LIPs are excluded from Employer’s Liability and Public Liability FRC arrangements for a similar reason.

Our response on this point is therefore that we do not believe the new protocol would be suitable for LIPs because the process is too onerous for people without legal representation and expertise to meet, and the small numbers involved should be managed as they are currently. LIPs should therefore follow the existing pre action protocol (the PAPRCD). LIP claims should not be included in the LVCD protocol or subject to the LDFRC scheme costs.

### **Summary government position**

The LDFRC scheme will apply to clinical negligence claims in England and Wales, including NHS and non-NHS claims, where the value is in excess of the small claims limit for non-road traffic accident personal injury claims (£1,500 since April 2022), up to £25,000, based on a final value at settlement or following judgment, unless a specified exclusion applies. No claims where the value is less than £1,501 will be in scope of the LDFRC scheme. If a clinical negligence claim seeks relief or remedy in relation to a breach of the Human Rights Act 1998 and otherwise satisfies the general definition for inclusion, it should be included within the LDFRC scheme.

The next step towards implementation will be consideration by the government with the CPRC, before the rules are finalised.

However, taking into account the responses to the consultation and our updated policy positions throughout this government response, we are also able to set out more detail on how we expect the LDFRC scheme to work, the parameters of the scheme and the new pre-action protocol that will govern process and requirements.

### **The LDFRC scheme and the LVCD protocol**

The LDFRC scheme described in these proposals refers to all elements of the scheme – the fixed costs, cost recovery, the pre-action protocol, sanctions and other arrangements.

The LVCD protocol referenced in these proposals refers to a new proposed pre-action protocol that will set out how claims should be conducted in the LDFRC scheme.

### **Pre-issue process**

Our LDFRC scheme involves a tailor-made process for lower damages clinical negligence claims, the LVCD pre-action protocol. All eligible claims will be required to follow the processes and requirements of the protocol. It will be for claimants at the outset of the process to assess claims and ensure they follow the correct process. Eligible claims will be those expected to fall within the value range for the LDFRC scheme at settlement or following judgment (from £1,501 and £25,000 inclusive), and do not fall within one of the specified exclusions from the scheme (see Section 5.7). Updated proposed process maps for the light and standard tracks are set out at Annex B. The finalised protocol itself will be published alongside the proposed rule changes once consideration with the CPRC is complete.

### **Commencement and completion of LVCD Protocol**

The proposed LVCD pre action protocol will begin with the letter of claim in either light or standard tracks and will be considered to have completed when:

- (a) 28 days have passed following receipt of a neutral evaluation outcome (the end of the post evaluation offer period)
- (b) a claim is settled at any time during the LVCD protocol processes
- (c) a claimant confirms at any time that they are discontinuing their claim
- (d) the parties agree, following mandatory stocktake, not to proceed with a neutral evaluation (See Section 5.6 on Neutral Evaluations)
- (e) the defendant does not agree, following mandatory stocktake, to participate in a neutral evaluation requested by the claimant, (See Section 5.6 on Neutral Evaluations)

## **Process – claims qualifying for specified exclusion(s) from the LDFRC scheme**

If a claimant decides that a specified exclusion from the LDFRC scheme applies at the outset, they should follow the existing Pre-Action Protocol for Resolution of Clinical Disputes (PAPRCD) (rather than the LVCD protocol), detailing the reasons why the exclusion should apply (in the letter of claim in the PAPRCD) and citing these reasons again in the Particulars of Claim if proceedings are issued.

If a clinical negligence claim has not followed the LVCD protocol process for any other reason, the claim should have followed the PAPRCD process.

## **Exit from the LDFRC scheme**

In the following scenarios, a claim exits the LVCD protocol and the LDFRC scheme entirely and is not limited to recovery of fixed costs under the scheme.

- (a) if, within 21 days of receipt of the Standard Track Letter of Claim or the Light Track Letter of Claim, the defendant writes to the claimant stating that they consider the claimant's claim may be time-barred under any provision of the Limitation Act 1980
- (b) if the defendant fails to respond to a Standard Track Letter of Claim within 6 months (see Section 5.8 on sanctions)

## **Expected process where a claim exits the LDFRC scheme**

If a clinical negligence claim exits the protocol because a defendant raises a limitation issue within 21 days of the letter of claim on either standard or light track, the claim should follow the PAPRCD in the usual way.

If a clinical negligence claim exits the protocol because the defendant fails to respond on the standard track, the claimant may opt to issue proceedings, given that significant time will have passed on the LVCD protocol.

## **Allocation**

Following the end of the LVCD protocol, if the claim is not settled, the claimant may proceed to litigation and if the claim is not settled before the allocation stage, the court will allocate the claim to a case management track. Allocation to a particular case management track will be for the courts to determine (see CPR Part 26).

## **Scope of fixed costs in the LDFRC scheme**

The LDFRC scheme applies only to the pre-issue phase for eligible clinical negligence claims and to pre-issue costs. The fixed costs under the LDFRC scheme apply to all work

done in the pre-action period up until the point at which the scheme is deemed to conclude, either at the point when:

- (a) a claim is settled at any time during the LVCD protocol processes
- (b) a claim form is issued by the court, or a stay of proceedings is lifted by the court (where limitation was due to expire imminently, and proceedings were issued protectively)

More details on the claims we envisage may exit the LDFRC scheme and progress to litigation, as well as cost scenarios for various types of claims, are available at Annex C.



## 5.2. The twin track approach and light track criteria

This section addresses points on 2 questions – the twin track approach and the light track criteria. This is because the issues raised in the consultation responses under these 2 questions overlapped substantially.

### Proposals as consulted on

The position in the consultation was as follows:

#### Twin track approach

There should be 2 separate tracks for qualifying low value clinical negligence claims, a standard track and a light track. We also proposed a dedicated streamlined process for each track, reflecting the characteristics and requirements of claims on each track.

All claims expected to settle above the small claims track limit, up to and including a value of £25,000, should be progressed on the standard track unless they meet the conditions set out below for entry on the light track or are otherwise excluded under the exclusion categories (see Question 10 below).

There should be a formal suspension to the limitation period relating to any claim entering the FRC scheme. This should be the case unless the defendant raises limitation as an issue within 21 days of service of the FRC letter of claim in the standard track or the FRC claim notification letter in the light track. Limitation would then remain suspended until 8 weeks after exit from the FRC scheme, (after outcome of neutral evaluation).

#### Light track criteria

Claims should be progressed on the light track if:

- parties agree no expert evidence on liability is required in respect of breach of duty of care and causation
- there is an admission of breach of duty of care (including but not limited to cases dealt with under the Welsh Putting Things Right redress scheme)
- there is a 'never event'
- there is a Serious Incident Report which identifies care below a reasonable standard of care (including investigations under the Welsh Putting Things Right redress scheme) or

- there has been an inquest and the Coroner has determined either that care amounted to neglect or that death would not have occurred but for the identified neglect

### Consultation questions:

Do you agree or disagree that the proposed scheme should incorporate a twin track approach, following the CJC model, to enable simpler, less contentious cases to progress more quickly to resolution?

Total responses to question: 90

Responses	Claimant	Defendant	Unknown	Other	All responses
Agree	17%	17%	6%	11%	44%
Disagree	39%	0%	6%	6%	50%
Don't know	0%	0%	0%	6%	6%
Total	50%	17%	11%	17%	100%

Do you agree or disagree with the proposed criteria for claims being allocated to the light track?

Total responses to question: 90

Responses	Claimant	Defendant	Unknown	Other	All responses
Agree	6%	17%	6%	11%	33%
Disagree	44%	6%	6%	6%	61%
Don't know	0%	0%	0%	6%	6%
Total	50%	17%	11%	22%	100%

## The way forward

The overarching policy intent of the light track proposals is to allow a proportion of claims to be resolved even more quickly, even if this is only a minority of claims within the LDFRC scheme. We recognise that respondents raised valid concerns about aspects of these proposals, and have taken steps to address these, explained below.

## **Liability admission**

Some respondents felt that claims proceeding on the light track should be limited to claims where breach of duty of care is admitted and it is accepted the breach resulted in loss, including injury.

Some respondents agreed that the proposals should “enable simpler, less contentious cases to progress more quickly to resolution”. Respondents also “agreed with the principle of quicker resolution of cases where the NHS fully and formally admits breach of duty and causation.”

Some respondents said that the criteria for the light track should specify claims where both breach of duty and causation are admitted, and the only outstanding issue is quantum of damages, observing that cases without this kind of admission can take much longer to settle. It was also argued that, in the absence of early expert evidence, defendants and claimants may find it too difficult to come to an agreement on breach of duty and causation.

We agree that the description of the liability admission in the light track should be strengthened so that it conveys clearly that the light track is for claims where there has been an admission of liability where breach of duty of care is admitted and it is accepted the breach resulted in loss, including injury. Claims are confirmed on the light track at the point where liability is admitted in this way by the defendant, and this must take place no more than 8 weeks after the light track letter of claim is received. The intent here is that admission on both of these elements enables swifter processing of the remaining issues in a shorter process. This was and continues to be the policy intent of our proposals, and we have adjusted the wording around the liability admission to clarify that the admission should be where breach of duty of care is admitted and it is accepted the breach resulted in loss, including injury. If there is a partial admission of liability relating only to breach of duty or only to causation at this stage, then that claim would transfer to the standard track.

It is accepted that even after a liability admission, there may still be issues in dispute even after the 2 elements of a) breach of duty; and b) that the breach caused loss, including injury, are admitted. This may include dispute about the extent of causation. If such issues remain after the admission, they should be addressed alongside quantum of damages in the light track stage 2.

## **Criteria and choice of track**

A majority of respondents disagreed with the proposed criteria for claims being allocated to the light track. A number of respondents felt that a clearer definition is required for claims that should be progressed on the light track. Many respondents felt that only a minority of cases would be “genuinely suitable” for the light track, questioning its scope and application.

Respondents raised concerns that claims may be incorrectly assessed and allocated, which it was felt could lead to additional unrecoverable costs for the claimant due to the need to resubmit the claim through the standard track. Some respondents suggested that a mechanism should be created to identify which track is most appropriate, allowing for defendants to be able to challenge when they believe the standard track is more suitable.

We appreciate respondents' concerns on the criteria or triggers set out for the light track. We agree that some of these were not suitable to function as automatic triggers for the light track. In particular, we agree that the existence of a Coroner's inquest should not be determinative of light track entry (since inquests do not, themselves, determine liability). We also acknowledge that the presence of a 'never event' may not be a useful indicator of early admission of liability in a claim.

More broadly, we agree with concerns raised by respondents that the wording in the consultation which would 'require' claims that met certain criteria to be allocated to the light track could result in inappropriate classification of claims.

In response we would emphasise that it will be for claimants to determine which track is most appropriate for the claim to start in. Subsequently, whether a claim will proceed on the light track (following the processes set out for light track claims in the LVCD protocol and be subject to LDFRC scheme light track costs) will be determined by whether or not the defendant admits breach of duty of care, and it is accepted the breach resulted in loss, including injury, within the prescribed 8-week period.

We propose changing the wording of the light track to 'suggest' likely examples or features of a claim that may be suitable for the light track rather than 'requiring' that particular criteria be met. This will give claimants clear scope to determine whether the circumstances of a particular case indicate use of the light track and should address many of the issues raised by respondents in relation to this proposal.

### **Concerns that light track will be underused, could increase costs and defendants may not make early admissions of liability**

Some claimant legal respondents suggested that currently defendants rarely admit liability early on in the process and that if that continued, the light track would not be used. Some respondents commented that the light track would only be suitable for a small number of claims and questioned its utility. Some respondents argued that if implemented, the proposed process would lead to additional costs without creating corresponding benefits.

Early resolution is in the interests of all parties, and the light track process is intended to encourage and facilitate this where appropriate. It will be for defendants to consider whether an early admission is the right way to proceed in a given claim and to ensure claims are managed efficiently and meet the deadlines set out in the process.

We acknowledge that formalising a light track stage may result in increased work in certain claims. However, overall, we agree with the CJC's intended purpose for the light track as a pathway to faster resolution that can reduce costs and shorten resolution times.

We assume, based on historical data, that the light track will comprise around 25% of claims. We think it is valuable to have a mechanism by which cases can be resolved very quickly where that is possible, even if they only constitute a minority of cases. We will look to assess at post-implementation review whether this part of the LDFRC process is working effectively, and whether defendants are making timely admissions, where that is appropriate.

### **Cost provision in cases that begin in the light track but move to the standard track**

Concerns were raised by claimant legal respondents that there is no recognition in the fixed costs of work carried out in the light track if a claim transfers to the standard track, and that this could lead to a disincentive to consider putting a claim forward for the light track. Some respondents also thought it may lead to disagreements between parties as to which track a case should start in.

We understand concerns from claimant legal respondents that where a light track claim transfers to the standard track, claimants would be uncompensated for the work involved in light track preparation.

The expectation is that work done in preparing for the light track will form a significant percentage of the work required, should the claim transfer to the standard track, so any loss to claimant legal representatives from initiating a claim in the light track should be minimal. In addition, the claimant will benefit from higher recoverable costs in the standard track. We therefore do not see a strong case for providing for extra costs for the abortive light track stage, where a defendant has responded within the prescribed 8 weeks but not admitted breach of duty and that the breach caused loss, including injury.

However, we do consider that in the event where a defendant fails to respond at all within the initial 8-week period in the light track, there should be a sanction in the form of extra costs recoverable by the claimant. This is in keeping with the importance placed on a timely defendant response within the standard track. In the light track, should a defendant fail to respond within 8 weeks, the claim will transfer and restart in the standard track, and in addition, claimants will now be able to recover 5% of light track stage one costs on top of standard track costs. This is set out in Section 5.8 on sanctions.

### **Standard track to light track transfer: Claims initiated in the standard track that receive a liability admission within 8 weeks.**

We also consider it important that corresponding arrangements be made for transfer from the standard track to the light track. Hence, where claims are initiated in the standard track, if a defendant makes, within the prescribed 8 weeks, an admission of breach of duty, and that the breach caused loss, including injury, the claim will proceed on the process set out in the LVCD protocol for the light track (from the beginning of light track stage 2), and light track costs only will be recoverable for that claim.

### **Interim stage one costs for light track claims**

We have also further considered the incentives for claimants to make appropriate use of the light track, given the benefits of early admission and rapid resolution, where possible and appropriate. Accordingly, where claims start in the light track, and the defendant admits breach of duty, and that the breach caused loss, including injury, claimants will now receive their light track stage one costs as an interim payment within 28 days of receipt of the Light Track Letter of Response (the conclusion of light track stage one).

### **Limitation**

We have given further thought to arrangements for limitation. The consultation suggested enacting a formal suspension of limitation in respect of the pre-issue phase for those claims. Having considered this issue further, rather than a formal suspension, in the event there is a genuine concern that limitation will expire before the parties have had the opportunity to complete all stages in the LVCD protocol, it will be recommended that parties should try to reach agreement on extending the limitation period. In the event that the claimant chooses to start proceedings to comply with the statutory time limit before the parties have completed the procedures in the LVCD protocol, the parties should also apply to the court for an order to stay the proceedings while the parties comply (for the duration of the LVCD protocol).

In this event, issue fees will be recoverable as a disbursement, but no other legal costs, specifically relating to issuing and seeking an order to stay the claim, will be separately recoverable where the LVCD protocol process in either track has not been completed. The question of disbursements more broadly is set out in the further short consultation published along with this document.

### **Offers including Part 36 offers**

Some responses asked whether Part 36 offers could be included under the light track criteria. As we are taking a different approach on criteria for claims that may be suitable for the light track (suggesting candidate claims for inclusion rather than stipulating hard criteria, with the determinative moment being the admission or otherwise of liability), we do

not think it is necessary to include the presence of a Part 36 offer as a criterion for inclusion.

Parties are encouraged to consider making offers to settle at any point in the processes on either track. We have included a requirement for an initial offer to be sent at the same time as the letter of claim in both tracks.

We also consider it is appropriate to adjust the arrangements around interest accrual where a Part 36 offer is made, given the fixed deadlines for claimant letter and defendant response under the LVCD protocol. Our intention is to ensure that where a Part 36 offer is sent with a letter of claim, interest does not begin to accrue until the deadline for the defendant response has expired. We therefore intend to extend the 'specified period' (the period for a Part 36 offer to be considered open where interest would not accrue), to the point of the defendant response deadline (6 months from receipt of the standard track letter of claim/8 weeks from receipt of the light track letter of claim). This is to ensure that defendants are not unfairly penalised for following the prescribed process and deadlines.

## **Summary government position**

There will be 2 separate tracks for qualifying low value clinical negligence claims, a standard track and a light track. There will be a dedicated streamlined process for each track, reflecting the characteristics and requirements of claims on each track (process maps for the 2 tracks are at Annex B.)

All claims to which the LVCD protocol applies should be progressed on the standard track unless they are claims which would be considered suitable for the light track.

The light track is designed for claims where the circumstances giving rise to the claim are such that it is anticipated that there will not be any dispute over issues of liability or that liability can be resolved quickly.

Under the proposals it is always for claimants to determine whether a claim is suitable for the light track and for defendants to determine whether, by an admission of breach of duty, and an admission that the breach caused loss, including injury, the claim should proceed on the light track, or potentially transfer to the standard track. Only claims with an admission of liability of this kind will proceed on the light track process in the new protocol.

We will change the wording of the light track criteria to 'suggest' likely examples or features of a claim that may be suitable for the light track rather than 'requiring' that particular criteria be met. Claimants are encouraged to consider starting claims on the light track where:

- there has already been correspondence between the parties about the issues and the parties agree no medical expert evidence on liability is required to determine issues of breach of duty of care and causation
- the defendant has made a binding admission of breach of duty of care (including, but not limited to cases dealt with under the Putting Things Right redress scheme)
- the cause of action arises out of a 'never event'
- the facts indicate that loss, including injury, could not have been caused by any other reason other than negligence
- there is a Serious Incident Report which identifies care below a reasonable standard (including investigations under the Putting things Right scheme) or
- there has been an inquest

In the light track, if the defendant responds within 8 weeks but does not make an admission of breach of duty, and an admission that the breach caused loss, including injury, the claim will transfer and restart in the standard track and only standard track costs will be recoverable by the claimant for that claim.

In the light track, should a defendant fail to respond within 8 weeks, the claim will transfer and restart in the standard track, and in addition, a sanction will apply whereby claimants will be able to recover 5% of light track stage one costs on top of standard track costs.

Where claims are initiated in the standard track, if a defendant makes, within the prescribed 8 weeks, an admission of breach of duty, and that the breach caused loss, including injury, the claim will transfer to the light track and proceed at light track stage 2, and light track costs only will be recoverable for that claim.

Where claims are accepted on the light track by an admission of breach of duty, and an admission that the breach caused loss, including injury by the defendant, interim costs should be paid to the claimant in respect of the light track stage one, within 28 days of receipt of the Light Track Letter of Response.

Rather than a formal suspension of limitation, we will recommend that where there are concerns around limitation, parties should try to reach agreement on extending the limitation period, and that if a claimant chooses to start proceedings, parties should also apply to the court for an order to stay the proceedings while the parties comply with the LVCD Protocol. Claimants will be able to separately recover the issue fee as a disbursement in this instance.



We will adjust the arrangements around interest accrual applying to claims in the LDFRC scheme where a Part 36 offer is made, to ensure that defendants are not unfairly penalised for following the prescribed process and deadlines.

## 5.3. Standard and light track processes

This section addresses points on both the standard track and the light track. Though distinct processes, some of the issues raised in the consultation and the responses to those issues refer to both tracks.

### Proposals as consulted on

In summary, the position in the consultation for the standard track and light track processes was as follows:

#### Standard track

1. FRC letter of claim sent by claimant to the defendant.

Claimant bundle to include:

- medical records – to be collated, sorted and paginated by the claimant
- experts' reports on breach of duty of care and causation (limited to a maximum of 3 such liability experts in different medical disciplines)
- witness statements (limited to 2 witnesses, statements in template form, including a statement of truth)
- where applicable, any separate report on condition and prognosis and
- details of losses and supporting documentation, either in the letter or in a separate schedule if required, to be supported with a statement of truth and an offer to settle the claim

2. Defendant response within 6 months.

3. Claimant reply within 6 weeks (or claimant can proceed straight to mandatory stocktake, or accept defendant's offer).

4. Mandatory stocktake and discussion must take place if the claim cannot be settled after defendant response or claimant reply (if there is no claimant reply, stocktake within 4 weeks).

5. A neutral (but non-binding) evaluation must be held within 4 weeks if the claim is not settled at the mandatory stocktake.

6. Outcome of neutral evaluation to be issued no later than 4 weeks from the start of the evaluation.

## Light track

1. FRC claim notification letter sent by claimant to the defendant.

Light track bundle to include:

- an explanation of the basis for the case being in the light track and any associated documents (such as a serious incident report)
- medical records – to be collated, sorted and paginated by the claimant and
- details of losses and any accompanying evidence

2. Defendant must respond to the FRC claimant notification letter admitting full liability within 8 weeks – if not, claim restarts in the standard track. No light track stage one costs will apply.

3. If a claim transfers from the light track, and claimants wish to restart it in the standard track, they should do so as long as the claim is started within 8 weeks.

4. Mandatory stocktake and discussion must take place within 4 weeks.

5. Decision as to whether further evidence is required taken within 2 weeks from stocktake. If yes, proceed to stages 7-9. If no, proceed to stage 10.

6. Within 6 weeks, decision whether a condition and prognosis report and a claimant witness statement are required (first 2 weeks from stocktake) and appointment of joint expert.

7. If no assessment is required, joint expert should provide report within 6 weeks of instruction. If assessment is required, report should be provided within 10 weeks of instruction.

8. Further evidence stocktake must be held within maximum of 14 weeks (no claimant assessment) or maximum of 18 weeks (assessment required) following mandatory stocktake.

9. A neutral (but non-binding) evaluation must be held within 4 weeks if the claim is not settled at the mandatory stocktake and no further evidence is required OR if the claim is not settled at the further evidence stocktake.

10. Outcome of neutral evaluation to be issued no later than 4 weeks from the start of the evaluation.

### Consultation questions:

Do you agree or disagree with the proposals for streamlined processes in the Standard Track?

Total responses to question: 90

Responses	Claimant	Defendant	Unknown	Other	All responses
Agree	6%	17%	6%	11%	39%
Disagree	44%	0%	6%	6%	56%
Don't know	0%	0%	0%	0%	6%
Total	50%	17%	11%	22%	100%

Do you agree or disagree with the proposals for streamlined processes in the light track?

Total responses to question: 90

Responses	Claimant	Defendant	Unknown	Other	All responses
Agree	6%	17%	6%	11%	39%
Disagree	44%	0%	6%	6%	56%
Don't know	0%	0%	0%	6%	6%
Total	50%	17%	11%	22%	100%

## The way forward

### Timescales – light track and standard track

Some respondents raised concerns about the timescales set out in the streamlined processes, and argued that they needed greater flexibility, especially to account for reliance on external third parties, such as experts and barristers, as their response times may be more difficult to manage.

While we appreciate these concerns, clearly defined timescales are a standard feature of civil litigation. They are important to ensure that the process is fair for all parties and facilitates faster resolution of claims. It will be incumbent on both parties to ensure that claims are managed efficiently to meet deadlines. This is particularly important for the

defendant's letter of response in the standard track which must be received within 6 months of receipt of the letter of claim and the defendant response in the light track which must be received within 8 weeks of the letter of claim. We are clear that there should be no flexibility on these deadlines – they will not be extendable. These mandated deadlines provide assurance and predictability, particularly for claimants. It is important that the initial exchange is not delayed, and we consider that 6 months/8 weeks should be sufficient time for defendants to organise their response on the standard/light tracks respectively.

However, we acknowledge concerns about some of the process deadlines, particularly where they may depend on the timely provision of expert evidence. We recognise that these deadlines may sometimes be difficult to meet and would not be wholly within either party's control. We therefore propose that the parties can agree to extend any deadline (other than the defendant response in either standard or light tracks) by mutual consent. Particular deadlines where parties may want to consider agreeing an extension to account for delays in expert evidence are, in the standard track, the deadline for the claimant reply, and in the light track, the deadline for the further evidence stocktake. Appropriate sanctions will apply to breaches of non-extendable deadlines or breaches of deadlines where there is no mutual agreement to extend (see Section 5.8).

### **Standard and light tracks: deadlines based on receipt of documents**

For the avoidance of doubt, all deadlines referred to in the LVCD protocol process for both standard and light tracks that involve an exchange of documents will be judged to have been met, or not met, based on the date of receipt of the documents by the receiving party.

### **Standard and light tracks: Compensation Recovery Unit certificate**

As a Compensation Recovery Unit certificate is likely to be needed in these claims, the Defendant should apply for one in respect of a claim in the standard and light tracks, on receipt of the letter of claim.

### **Standard and Light tracks: post-evaluation offer period**

To encourage and facilitate resolution of claims at the end of the process, following the neutral evaluation, we will specify a dedicated period for making and considering offers following the evaluation outcome. This will be called the 'post-evaluation offer period' and will extend for 28 days following receipt of the evaluation outcome.

Parties are strongly encouraged to continue negotiations during the 28-day offer period and to consider whether the claim is capable of settlement without the need to start court proceedings.

### **Standard track: workloads, impact on profitability and access to justice**

A large majority of claimant legal respondents had concerns about the proposals, arguing that, if implemented, the streamlined processes in the standard track will lead to increased workloads for claimant representatives, restricted profitability and therefore specialist lawyers leaving the field, which could impact access to justice. Defendant legal respondents thought that the proposals were appropriate and that having a more standardised process with defined timescales would provide a greater degree of certainty for the parties.

While we do not agree that the streamlined processes will, overall, involve more work, we acknowledge the concerns raised about the requirement for work to be frontloaded. The process will require changes to how claimants and defendant legal representatives manage claims. Claimants will need to do a greater proportion of the work up front. For defendants, the first response will be more labour intensive. The aim will be to facilitate earlier resolution of claims where possible and otherwise, to narrow the issues substantially. The greater costs allocated for the initial stage of claims under these proposals reflect this. We also recognise that certain respondents had concerns about the level of these costs – we have listened to those concerns and increased costs (including first stage costs) to take these concerns into account (see Section 5.5 below on the fixed costs framework).

Claimant solicitors will take a view on how they should best manage this work in a cost-effective manner and, more broadly, which claims they feel are meritorious and wish to take on.

### **Light track – liability admission**

As described in Section 5.2 above, we have adjusted the wording in the LVCD protocol to reflect that the light track should be for claims where there has been an admission of breach of duty, and an admission that the breach caused loss, including injury.

### **Track transfer arrangements**

Arrangements for transfer from standard to light track and from light to standard track are set out in Section 5.2 above.

### **Light track – addition of 2 weeks to the further evidence stage**

We have considered whether either track could be made simpler and more efficient. At consultation we included a stage on the light track further evidence phase which involved parties agreeing whether further evidence was needed, within 2 weeks of stocktake. We consider this could be agreed at stocktake instead (the previous stage), shortening the process by 2 weeks. We also explored whether mitigation could be provided for the risk

that there may be delays in receiving expert reports. To address this, in addition to providing for extension of deadlines by mutual consent, we have allocated an extra 2 weeks to the expert report preparation period within the light track 'further evidence phase.'

### **Light track – stipulation of 1 expert in further evidence phase**

The proposals at consultation set out that if a condition and prognosis report was needed in the light track, the parties should agree and instruct a joint expert (limited to 1 expert). While the need for expert reports here should be minimal (only a fraction of further evidence stage light track claims should require more than one expert), and use of expert reports should always be proportionate, on reflection the limit of 1 expert seems overly restrictive. Instead of a hard limit of 1 expert, we will amend this section of the LVCD protocol to state that where possible, the further evidence stage should be limited to a single report by an expert jointly instructed by both parties.

### **Completion of LVCD Protocol**

For details of the circumstances in which the LVCD Protocol is deemed to have concluded, see Section 5.1 above - 'Summary government position: Commencement and completion of LVCD Protocol'.

### **Summary government position**

Updated process charts showing processes and timings for Standard and Light Tracks are at Annex B.

### **Standard track**

The standard track process is as follows:

1. FRC letter of claim and evidence bundle sent by claimant to the defendant.
2. Defendant response within 6 months (if liability is admitted within 8 weeks, claim transfers to light track; if defendant fails to respond within 6 months, claim drops out of LDFRC scheme).
3. Claimant reply within 6 weeks (or claimant can proceed straight to mandatory stocktake, or accept defendant's offer).
4. Mandatory stocktake and discussion must take place if the claim cannot be settled after defendant response or claimant reply (if there is no claimant reply, stocktake within 4 weeks).

5. A neutral (but non-binding) evaluation must be held within 4 weeks if the claim is not settled at the mandatory stocktake.
6. Outcome of neutral evaluation to be issued no later than 4 weeks from the start of the evaluation.
7. Post-evaluation offer period: a period of 28 days from the neutral evaluation outcome where parties are encouraged to make offers to settle the claim.

### **Letter of claim and evidence bundle**

A Standard Track Letter of Claim must include

- a brief summary of the key facts and dates, including details of other relevant treatments by other healthcare providers
- a concise outline of each of the allegations of breach of duty of care said to have caused loss, including injury
- an outline of the causal link between each of the corresponding allegations of breach of duty of care
- a description of the claimant's adverse outcome, present condition and prognosis
- confirmation of the method of funding and whether any funding arrangement was entered into before or after April 2013
- sufficient information so that the defendant can for a certificate of recoverable benefits from the Compensation Recovery Unit
- the field(s) of expertise of any medical expert from whom evidence has already been obtained
- for claims originating in Wales, confirmation as to whether the incident has been investigated under the 'Putting Things Right' Scheme

The claimant must also provide a detailed breakdown of the value of the claim setting out general damages and details of any pecuniary losses supported by a statement of truth either set out in the Standard Track Letter of Claim or in a separate schedule.

The Standard Track Letter of Claim must be accompanied by



- an index of the claimant’s medical records obtained by the claimant and copies of the core records, relevant to the claim. The records should be collated, sorted, and paginated by the claimant
- medical expert report(s) addressing breach of duty of care and causation
- medical expert report(s) addressing the claimant’s condition and prognosis
- Witness statements addressing (limited to a maximum of 2 witnesses) in the form set out in the practice direction to CPR Part 32
- An offer to settle the claim

### **Light track**

The light track process is as follows:

1. FRC letter of claim sent by claimant to the defendant.
2. Defendant must respond to the FRC letter of claim admitting liability, (where that is appropriate) within 8 weeks – if liability not admitted, claim restarts in the standard track. If no response within 8 weeks, claim transfers to standard track and additional 5% of light track stage one costs are recoverable.
3. Mandatory stocktake and discussion must take place within 4 weeks. Decision must be taken at stocktake as to whether further evidence is required and if so, to appoint and instruct expert. If yes, proceed to stages 4-6. If no, proceed to stage 7.
4. Within 2 weeks of stocktake, expert should be instructed.
5. If no claimant assessment is required, joint expert should provide report within 8 weeks (extended from 6 weeks) of instruction. If assessment is required, report should be provided within 12 weeks (extended from 10 weeks) of instruction.
6. Further evidence stocktake must be held within maximum of 12 weeks (no claimant assessment) or maximum of 16 weeks (claimant assessment required) following mandatory stocktake. NB: these periods of time between stocktakes are corrected from the original consultation, which erroneously stated: “14 weeks (no claimant assessment) or 18 weeks (assessment required)”.
7. A neutral (but non-binding) evaluation must be held within 4 weeks if the claim is not settled at the mandatory stocktake and no further evidence is required OR if the claim is not settled at the further evidence stocktake.

8. Outcome of neutral evaluation to be issued no later than 4 weeks from the start of the evaluation.
9. Post-evaluation offer period: a period of 28 days from the neutral evaluation outcome where parties are encouraged to make offers to settle the claim.

### **Letter of claim and evidence bundle**

The Light Track Letter of Claim must include:

- an explanation as to why the claim is suitable to proceed on the Light Track
- a brief summary of the key facts and dates, including details of other relevant treatments by other healthcare providers
- a concise outline of each of the allegations of breach of duty of care said to have caused loss, including injury
- an outline of the causal link between each of the corresponding allegations of breach of duty of care
- a description of the claimant's adverse outcome, present condition and prognosis
- confirmation of the method of funding and whether any funding arrangement was entered into before or after April 2013
- if medical evidence has been obtained, the field of expertise of any medical expert(s)
- for claims originating in Wales, confirmation as to whether the incident has been investigated under the 'Putting Things Right' Scheme

The claimant must also provide a detailed breakdown of the value of the claim setting out general damages and details of any pecuniary losses either in the Light Track Letter of Claim or in a separate schedule. The Light Track Letter of Claim must be accompanied by:

- an index of the claimant's medical records obtained by the claimant and copies of the core records, relevant to the claim. The records are to be collated, sorted, and paginated
- witness statements as to liability and quantum of damages (limited to a maximum of 2 witnesses) in the form set out in the practice direction to CPR Part 32
- sufficient information so that the defendant can apply for a certificate of recoverable benefits from the Compensation Recovery Unit

- an offer to settle the claim

## 5.4. Evidentiary requirements and template letters

### Proposals as consulted on

The position in the consultation was as follows:

All evidence and other documents exchanged by the parties would have to be of a sufficient quality as to conform to the evidentiary rules to be set out in the CPR to allow the parties to consider the issues and respond fully and timeously and to facilitate rapid resolution.

Template letters should be used in the standard and light track processes (FRC letter of claim (standard track) and FRC claim notification letter (light track)). Expert report model elements should be used for standard track claims and (where applicable), for light track claims.

Example templates were annexed to the consultation.

### Consultation questions:

What are your views on the evidentiary requirements applying to both standard and light track claims, that should be set out in the Civil Procedure Rules to support this FRC scheme?

Total responses to question: 85

Responses	Claimant	Defendant	Unknown	Other	All responses
Agree	6%	18%	6%	6%	41%
Disagree	41%	0%	6%	6%	53%
Don't know	6%	0%	0%	6%	6%
Total	53%	18%	12%	18%	100%

Do you agree or disagree in principle that template letters and expert report model elements should be used as part of the streamlined processes in both the standard and light tracks?

Total responses to question: 90

Responses	Claimant	Defendant	Unknown	Other	All responses
Agree	22%	17%	6%	11%	61%
Disagree	28%	0%	6%	6%	33%
Don't know	0%	0%	0%	0%	6%
Total	50%	17%	11%	17%	100%

## The way forward

Some claimant legal respondents were concerned at the degree of evidence required at the beginning of the process and objected to the sequential disclosure of evidence. Respondents also expressed concerns about the level of medical and expert witness statements required in the process, claiming that this would increase costs.

Respondents made suggestions as to what evidentiary requirements should look like, including that witness statements should be limited to 10 pages and expert reports should be fully compliant with CPR 35.

Some respondents reported that the proposed template letters would provide consistency and standardisation and speed the claims process up, saving time and money. It was also suggested they may help guide less experienced staff. However, others expressed concerns that the proposed templates are too restrictive, and the complexity of clinical negligence claims mean it is difficult to standardise them. It was felt that the length of reports should not be restricted as long as experts are required to keep to the relevant issues.

Respondents made suggestions for further development of the templates, such as what should be included within a template and what guidance should be added. It was also suggested that the expert model report should be referred to the CPR Rule committee for consideration and that claimant and defendant legal representatives and patients should be asked to support the development of templates.

We are grateful to respondents for engaging closely with this question. We understand respondents' concerns around the front-loading of work for claimant solicitors, and regarding sequential disclosure of evidence.

These elements are, however, integral to the streamlined process. On the one hand, substantial work is required from claimants in the early stages as the evidence presented must be of sufficient quality to allow a rapid and reasoned response by the defendant or be subject to potential sanction. On the other hand, the defendant must respond within the deadline to avoid the claim dropping out of FRC and potentially incurring greater costs. It is

in the interests of both parties to adhere to evidence requirements and deadlines and to ensure a smooth initial exchange of evidence. The claimant reply stage in the standard track is a critical opportunity for claimants to respond to the defendant's case and any new information provided, so that issues can be narrowed, and agreement reached wherever possible, including at the stocktake stage.

Evidence exchanged should be sufficiently detailed and of sufficient quality for the other party to understand the issues and respond to points raised. While there are no formal restrictions to the degree of detail of expert reports, their number and level of detail should be proportionate to the claim.

In addition to Part 35 which deals with the form and content of expert evidence, Part 32 of the CPR relates to witness statements. We propose referring to those guidelines rather than prescribing too specifically for this scheme.

If the defendant considers the quality of evidence set out in an initial Letter of Claim and/or bundle of accompanying evidence is inadequate, and the claimant has failed to respond to requests for better and further clarification, the defendant should include in their Letter of Response an explanatory statement setting out how any deficiency in the claimant's evidence has hindered a full response.

Ultimately there may be costs consequences where the quality of evidence bundles presented to defendants is poor and impedes their ability to respond. Nevertheless, defendants must ensure they respond within the 6-month period regardless of the standard of evidence. If they do not, the claim will fall out of the LVCD protocol, and any sanctions incurred relating to quality of claimants' evidence will not apply.

Although respondents tended to recognise the value of templates to promote standardisation, speed and efficiency, we note the concerns around restrictiveness. In most instances we take the view that over-prescription is unhelpful and propose to refer to existing guidance in the CPR wherever possible rather than proposing too specifically for this scheme.

Templates for letters of claim in each track will be included in the protocol but their use will not be mandatory. Guidance is most important for expert report writing. We do not think this should be prescriptive as the details will vary widely, and there will not be mandatory templates. Instead, we will include suggested expert report elements as an annex to the LVCD pre-action protocol and parties should look to the guidance in the CPR on medical reports. There will be no formal restriction on the length of reports. We do not believe that templates are necessary for witness statements which already have a consistent, well-understood format. Their length and detail should be proportionate to the claim.

However, we do believe that witness statements are necessary in light track claims from the outset so that the process of proceeding quickly with expert evidence on condition and prognosis following the defendant's admission of liability can proceed unhindered. It also assists in the valuation of the claim and for the defendant to consider the reasonableness of the claimant's offer. For these reasons, we have added witness statements to the required contents of the light track bundle to be sent with the letter of claim.

We will test the content of templates and guidance with the CPRC as part of the process of considering the LVCD protocol and rule changes.

## **Summary government position**

Evidence exchanged should be sufficiently detailed and of sufficient quality for the other party to understand the issues and respond to points raised. While there are no formal restrictions to the degree of detail of expert reports, these should be proportionate to the claim. If the defendant considers the quality of evidence set out in an initial Letter of Claim and/or bundle of accompanying evidence is inadequate, and the claimant has failed to respond to requests for better and further clarification, the defendant should include in their Letter of Response an explanatory statement setting out how any deficiency in the claimant's evidence has hindered a full response.

There may be costs consequences for claimants where the quality of evidence bundles presented to defendants is poor and impedes their ability to respond. Defendants must ensure they respond within the 6-month period regardless of the standard of evidence.

There should be 2 separate template letters, one for the standard track and one for the light track, available as guides in the LVCD pre action protocol for the FRC scheme. Expert report model elements should also be used as a guide for standard track claims and, where applicable, for light track claims. Witness statements should be included in the evidence bundle in the light track as well as in the standard track. Templates are not necessary for witness statements which already have a consistent well understood format. Their length and detail should be proportionate to the claim. Beyond templates, letters of claim, expert reports and other documents should conform to existing guidelines in the CPR wherever possible.

## 5.5. Fixed costs framework

### Proposals as consulted on

The position in the consultation was as follows:

In the consultation document grids of costs were proposed based on defendant group costs suggested as part of the CJC working group process.

Protected party and child claims receive a bolt-on amount of £650 in recognition of the known extra work and steps associated with these claims.

Table 1: Grid of costs – standard track (at consultation)

Stage	Costs	Description of activity within FRC streamlined processes and maximum timeframe
Stage 1 (ST(A) to ST(D))	£5,500 plus 20% of damages agreed	All steps up to and including stocktake (the standard track process specifies this is a maximum period of 38 weeks from FRC letter of claim)
Stage 2 (ST(E) to ST(F))	£500 in addition to standard track stage 1	From stocktake up to and including neutral evaluation (the standard track process specifies this is a maximum period of 8 weeks)

Table 2: Grid of costs – light track (at consultation)

Stage	Costs	Description of activity within FRC streamlined processes and maximum timeframe
Stage 1 (LT(A) to LT(B))	£1,000 plus 10% of damages agreed	All steps up to 21 days after letter of response is due (the light track specifies this is a maximum period of 11 weeks from FRC claim notification letter)
Stage 2a (LT(B) to LT(C))	£500 in addition to light track stage 1	From 21 days after letter of response up to and including stocktake (the light track process specifies this is a maximum period of 1 week)
Stage 2b (LT(D)(NFE) to LT(E)(NFE)); or (LT(D)(FE) to LT(H)(FE))	£500 in addition to light track stages 1 and 2a	From stocktake up to and including neutral evaluation (the light track specifies this is a maximum period of 8 weeks if no further evidence is required following stocktake; or 24 weeks if further (non-liability) evidence is required.)



Table 3: Protected party claims in standard or light tracks (at consultation)

Stage	Costs	Description of activity
Suggested bolt-on cost (Protected party claims only)	£650 in addition to above stages	In recognition of extra work required in claims involving protected parties. Not applicable to non-protected party claims.

### Consultation question:

Do you agree or disagree with the proposed fixed costs framework based on the CJC Working Group 'defendant group' costs proposals, including the suggested bolt-on cost for protected party claims?

Total responses to question: 90

Responses	Claimant	Defendant	Unknown	Other	All responses
Agree	0%	17%	6%	6%	28%
Disagree	50%	6%	6%	11%	72%
Don't know	0%	0%	0%	6%	6%
Total	56%	17%	11%	22%	100%

## The way forward

Claimant legal respondents raised concerns about the level of work that claimant solicitors will need to carry out under the proposed FRC scheme and suggested that their workload is greater than that of the defendant. They also felt that the level of costs proposed were too low for the amount of work which would need to be carried out and that this may lead to claimants facing barriers to access to justice if solicitors refused to take on their claims.

Another area of concern was the bolt-on amount for the extra work required for claims involving protected parties or children. Some claimant legal respondents argued that the amount proposed was too low and that because of the level of work involved, it would be uneconomical for claimant firms to take on these claims, raising an access to justice risk. Respondents also raised concerns about the effects of inflation on the proposed costs.

Respondents also raised the issue of disbursements. Some wanted clarity on the meaning of 'disbursements' under these proposals. Others wanted clarity on the scope of the recoverability of disbursements, including for court fees, counsel fees, expert reports and

ATE insurance premium costs. Clarity was requested on disbursements in claims involving protected parties and children in particular.

Fixed costs, in conjunction with the streamlined processes, are at the heart of these proposals. We recognise that some respondents disagree with the idea of fixed costs themselves in principle, and in particular on applying fixed costs to any clinical negligence claims.

We acknowledge that clinical negligence claims can involve greater complexity and that certain claims require more time and higher costs to achieve resolution. The intention of Sir Rupert Jackson's recommendation and the subsequent work of the CJC was to design a bespoke solution for lower damages clinical negligence claims, recognising and considering that complexity.

However, the remit of that work, in keeping with wider FRC reform was also to ensure that reasonable and proportionate costs should be built in to the system for these claims. This will necessarily involve behaviour change across the system, on the part of both claimants and defendants, to ensure required processes are followed, within deadlines, and that claims are managed efficiently and resolved quickly wherever possible. We continue to agree with the CJC that this is an achievable aim.

Claimant legal respondents said that the proposed costs were too low and that the claimant view in the CJC working group was not adequately provided for in the cost levels. At the heart of the objections was that claims would become economically unviable for some claimant solicitors for certain claims and that this would become a risk to access to justice. Despite these claims, no substantive evidence of this possible impact on access to justice was provided.

However, we have taken note of the strength of feeling in the consultation on this issue and looked again at the costs suggested by both groups in the CJC process as well as the work done by Professor Paul Fenn on behalf of the CJC.<sup>17</sup> We are keen to ensure that any risks to claimants' access to justice are addressed and mitigated, in line with our commitment to ensure adequate safeguards against access to justice risks in our proposals.

We agree that there is scope to increase the cost levels from the defendant group suggestion to a level halfway between the levels suggested by claimant and defendant groups in the CJC working group. We believe this significant increase to costs at all stages will mitigate risks to access to justice across all claims in the scheme and better takes into account the claimant perspective in the CJC working group, representing a fair position on claimant costs.

We also note the concerns that the bolt-on amount for claims involving protected parties and children is too low to offset the costs of known extra items of work in those claims. Although no new data on this issue was provided in the consultation responses, we have obtained and explored new data on these cohorts of claims which suggests that a higher bolt-on amount is necessary to adequately protect those claims from unacceptable access to justice risks. Based on these data, we therefore intend to increase the bolt-on amount for these claims substantially to £1,800.

## **Disbursements**

Several respondents requested further clarity on whether disbursements would be separately recoverable. The primary concern was that including disbursements within the fixed fees set out in the costs grid would place an extra pressure on costs. Separately, respondents raised concerns about the bolt-on amount for claims involving protected parties and children, stating that, if essential disbursements in these claims (counsel fees and court fees) were to be covered by the bolt-on amount, this would be insufficient, especially given the extra solicitor time needed to cater to protected party clients and to prepare for Part 8 approval hearings. We agree that the wording on disbursements was insufficiently clear in the proposals and that there are a range of views on whether disbursements should be included.

This is an important issue and we want to explore it further and seek views, including in light of the proposed increase to the bolt-on amount for these claims and other changes to strengthen access to justice safeguards. Accordingly, we are conducting a further short consultation on the issue of disbursements under the scheme. It proposes a way forward that takes into account the responses we received in this consultation and that were expressed in the CJC working group process. We invite views from interested parties on that proposal.

## **London weighting**

We will also make provision, in keeping with existing FRC schemes and the latest FRC extension due to come into force in October 2023, set out in CPR Part 45, for these costs to be uplifted by a fixed percentage of 12.5% where the receiving party lives, works or carries on business in, London and instructs a legal representative with conduct of the litigation who practises in London.

## **Defendant's costs**

Under Qualified One-way Cost Shifting rules, defendants in clinical negligence claims are rarely able to recover their own costs from unsuccessful claimants. However, where defendants are able to recover costs, we will set out that costs would be recoverable at a sum equivalent to fixed costs set out in the table of costs for the relevant stages of the process. This includes the fixed cost amounts and any percentage of damages specified in

the table of costs. The amount of damages would be calculated from a) the amount of agreed damages at settlement or following judgment, or b) if there are no damages agreed, the amount of damages specified in the letter of claim in the LVCD protocol.

### Scope of LDFRC scheme– costs and cost scenarios

For details of the scope of fixed costs in the LDFRC scheme and further detail on costs, including various cost scenarios, see Annex C

### Summary government position

Proposed fixed costs are as follows:

Table 1 Standard Track

Stage	Description	Option 1 - Median
1	For work conducted in all steps up to and including Standard Track Stocktake	£5,750 plus 30% of damages agreed
2	For work conducted from Standard Track Stocktake up to completion of LVCD protocol	£1,250

Table 2: Light Track

Stage	Description	Option 1 - Median
1	For work conducted in in all steps up to 21 days after Light Track Letter of Response is due	£1,750 plus 18% of damages agreed
2a	For work conducted from 21 days after Light Track Letter of Response up to and including Light Track Stocktake	£1,000 plus further 2.5% of damages agreed
2b	For work conducted in from Light Track Stocktake up to completion of LVCD protocol	£500

NB. Where “% of damages agreed” appears in Tables 1 & 2 above, this refers and applies to agreed damages before any uplift due to sanctions is applied.

Table 3: Protected party or child claims in standard or light tracks

Stage	Costs	Description of activity
Bolt-on amount (Protected party/child claims only)	£1,800 in addition to above stages	In recognition of extra work required in claims involving protected parties/children. Not applicable to non-protected party/child claims.

## 5.6. Neutral evaluation

### Proposals as consulted on

The position in the consultation was as follows:

If claims are not resolved at the mandatory stocktake stage of the process (or the further evidence stocktake stage in a minority of light track claims) there should be a paper-only evaluation, with the evaluator providing a written opinion on their assessment of the likely outcome on liability, quantum or both aspects of a claim, as needed. In doing so, the evaluator will need to record and analyse the relevant parts of the evidence and to give reasons for their conclusions. This evaluation would then be provided to both parties within a 4-week period.

We proposed setting out, prior to implementation, criteria governing when it would be permitted for evaluators to move beyond the paper-only process and seek clarification from experts, so it is strictly limited to only the most complex of claims.

Evaluation fees to be split evenly between claimant and defendant except in certain circumstances set out in specific sanctions.

Evaluation fees were as follows:

Type	Fee
Liability and quantum	£2,500
Liability only	£1,500
Quantum only	£750

### Consultation question:

Do you agree or disagree with the proposed arrangements for mandatory neutral evaluation, including the costs framework for evaluations and how these are funded?

Total responses to question: 90

Responses	Claimant	Defendant	Unknown	Other	All responses
Agree	6%	17%	6%	11%	39%
Disagree	33%	0%	6%	6%	44%
Don't know	6%	0%	0%	6%	17%
Total	50%	17%	11%	22%	100%

## **The way forward**

Our proposals for neutral evaluation are a key feature in ensuring that claims which have been unable to settle after the initial party exchange and the stocktake phase have a further opportunity to settle and avoid costly litigation where that is possible. The expectation is that few claims would need to go to neutral evaluation as it should be possible for parties to reach resolution in earlier phases.

Some respondents were concerned that the proposed costs were too low for specialist barristers to take on the work. Others saw neutral evaluation as adding delay, complexity and cost to the process.

We believe that the CJC was right to consider how a form of neutral dispute resolution could be incorporated into the streamlined process and that the benefits of doing so, particularly the potential for fewer claims to enter litigation, outweigh the extra costs and time involved. We also believe that the costs proposed by the CJC were reasonable and reflected discussions with the Bar Council. Consultation responses did not adduce evidence of the insufficiency of the costs or the net costs, or time taken for neutral evaluation.

We therefore propose to retain the proposed process around neutral evaluation but with some logistical changes to ensure it does not add unnecessary friction.

### **Evaluator eligibility**

Consultation respondents suggested that evaluators could also be solicitors and other legal professionals who are appropriately skilled in this discipline and have experience of acting for both claimants and defendants. We agree and propose that choice of evaluators is not restricted only to barristers, but open to suitably experienced legal professionals, including solicitors, barristers and others with sufficient impartiality. Experience, expertise and impartiality requirements will be set out in guidance alongside expectations of the role and the evaluation itself.

### **Evaluator selection**

Respondents also asked for further information on how a panel of barristers for this work will be administered, who will be responsible for this cost and how evaluators would be selected for a case.

Our approach to this novel process has been to ensure it is as simple and fair as possible, enabling evaluations to operate smoothly and without adding unnecessary delay to the process.

We propose that evaluators be jointly instructed by both parties.

The party proposing an evaluation (party A) should offer 3 names of potential suitable evaluators to the opposing party (party B) according to the guidance criteria (first offer). Party B should then choose one of these 3.

If all 3 evaluator suggestions are unacceptable to Party B, Party B should propose 3 further names to Party A (counter-offer). Party A should choose one of these 3. If either the first offer choices, or counter-offer choices, are refused, the refusing party must set out the reasons why the suggestions are unacceptable, to avoid parties unreasonably rejecting the other party's proposals.

We also propose nominating a Protocol Referee, whose responsibility it will be to direct the selection of the evaluator, if, having followed the above process, parties do not agree on choice of evaluator.

If parties cannot agree an evaluator, then the evaluator should be selected in such manner as the Protocol Referee considers to be reasonable. This may include the Protocol Referee selecting an evaluator for parties to appoint or suggesting a selection method that is agreeable to all parties.

### **Evaluation cost**

However, we are particularly concerned, especially having heard consultation respondents' concerns on evaluation costs, that the cost of this novel process could represent a significant cost pressure to the claimant without a clear mechanism for claimant legal representatives to cover these costs under ATE insurance arrangements. Without a clear mechanism, there is a risk that claimants themselves (including claimants without means) may have to bear the claimant portion of any evaluation costs directly. We consider this to be an unacceptable cost and access to justice risk for claimants in the scheme.

We have therefore decided that the evaluator's fee will be covered by the defendant. If a claim is not settled following the mandatory stocktake, claimants and defendants should determine whether to settle the claim or go to evaluation. If either party wishes to proceed with evaluation, an evaluation should proceed, funded by the defendant.

### **Refusal to participate**

If one party wishes to proceed and the other party refuses to participate, new sanctions will apply to ensure that the process is appropriately followed. If the claimant unreasonably refuses to engage with an evaluation requested by the defendant, a reduction in recoverable costs of 50% may be applied at the point where costs are agreed. If the defendant refuses to engage with an evaluation requested by the claimant, the protocol is deemed to end and the claimant may issue proceedings. These new arrangements are set out in Section 5.8 below. There will be no sanctions on claimants relating to evaluation



costs, now that claimants will not be liable to pay evaluation costs. The sanction that applies if claimants reject an evaluation outcome on quantum of damages will remain.

If neither party wishes to proceed to evaluation, the claimant should consider whether an offer is appropriate, or may wish to issue proceedings. Where parties decide to proceed with evaluation, in order to encourage and facilitate resolution of claims, we will add a dedicated stage for making and considering offers following the evaluation outcome. This will be called the 'post-evaluation offer period' and will extend for 28 days following receipt of the evaluation outcome.

Agreement not to proceed with evaluation, or when a defendant does not agree to participate with an evaluation, would mark the completion of the process specified for these claims in the LVCD protocol. Otherwise, the LVCD protocol completes at the point when:

- (a) 28 days have passed following receipt of a neutral evaluation outcome (the end of the post evaluation offer period)
- (b) a claim is settled at any time during the LVCD protocol processes
- (c) a claimant confirms that they are discontinuing their claim

## **Summary government position**

If claims are not resolved at the stocktake stage of the process (or the further evidence stocktake stage in a minority of light track claims) there should be a paper-only evaluation, with the evaluator providing a written opinion on their assessment of the likely outcome on liability, quantum or both aspects of a claim, as needed. In doing so, the evaluator will need to record and analyse the relevant parts of the evidence and to give reasons for their conclusions. This evaluation would then be provided to both parties within a 4-week period.

Choice of evaluators is not restricted only to barristers, but open to suitably experienced legal professionals. Experience, expertise and impartiality requirements will be set out in guidance alongside expectations of the role and the evaluation itself, as well as circumstances in which it would be permitted for evaluators to move beyond the paper-only process and seek clarification from the parties on expert evidence.

Evaluators will be jointly instructed by both parties, with the matter referred to a Protocol Referee if the parties cannot agree on an evaluator.

Defendants will be responsible for paying the evaluator's fee. If one party wishes to proceed to evaluation, evaluation should proceed. If neither party wishes to proceed to

evaluation, the claimant should consider whether an offer is appropriate, or may wish to issue proceedings. There will be no sanctions relating to evaluation costs. The sanction that applies if claimants reject an evaluation outcome on quantum of damages will remain. New sanctions will apply if one party proposes evaluation and the other party refuses.

Evaluator fees remain as follows:

Type	Fee
Liability and quantum	£2,500
Liability only	£1,500
Quantum only	£750

As neutral evaluation is a novel process developed for this protocol, we will ensure that this feature of the LDFRC scheme is monitored and reviewed as part of the post implementation review process.

## 5.7. Excluded claims

### Proposals as consulted on

The proposed excluded categories in the consultation were as follows:

- claims requiring more than 2 liability experts
- claims with genuine multiple defendants (where allegations against each defendant are different)
- claims involving stillbirths or neonatal deaths
- claims where limitation is raised by the defendant as an issue

We proposed that all claims on behalf of protected parties or children should remain in the fixed costs scheme with a suggested additional bolt-on amount of £650.

### Consultation question:

Do you agree or disagree with the proposals on claims to be excluded from the FRC scheme and on the approach to protected party claims?

Total responses to question: 90

Responses	Claimant	Defendant	Unknown	Other	All responses
Agree	6%	17%	6%	11%	33%
Disagree	44%	0%	6%	6%	61%
Don't know	0%	0%	0%	6%	6%
Total	50%	17%	11%	22%	100%

### The way forward

The exclusions proposed in the consultation were selected to ensure that claims of particular complexity or sensitivity not suitable for the FRC scheme would not be subject to the process and fixed costs. Complexity and sensitivity remain the guiding principles for inclusion in, or exclusion from, the scheme. We have considered suggestions made by consultation respondents to exclude further categories of claims or modify proposed exclusion categories in light of these principles. We have also considered whether claims may be unsuited to this FRC scheme for other reasons. For the avoidance of doubt, where a claim qualifies for a valid exclusion from the LDFRC scheme, this means it is not subject

to the LVCD protocol, and recoverability of costs is not limited to the fixed costs under the LDFRC scheme.

### **Excluded claims – process and costs**

If a claimant believes that a given claim should be excluded from the LDFRC scheme, the claim will not be subject to the LVCD Protocol and will instead follow the PAPRCD. The claimant will be required to detail any reasons why they believe the claim should not follow the LVCD protocol in the letter of claim required in the PAPRCD. If the claim subsequently proceeds to be issued by the court, the claimant will be required to detail any reasons why the LVCD protocol was not followed, including any applicable specified exclusions.

The fixed costs under the LDFRC scheme will not be applied to claims that qualify for a valid exclusion from the scheme. However, if the court is not satisfied that the claim qualifies for a specified exclusion and the claim has a value at settlement or following judgment in the value range of the LDFRC scheme, then that claim would be subject to fixed costs for the pre issue period. Further information on costs in excluded claims is at Annex C.

### **Stillbirths/neonatal deaths, secondary victims and other fatal claims**

Some respondents argued for all fatal claims to be excluded, arguing that causation issues with fatal claims can be particularly complex and that all fatal claims are sensitive. Others argued that secondary victim claims of neonatal deaths and stillbirths should also be excluded.

While all deaths are distressing for families and loved ones, we remain of the view that stillbirths and neonatal deaths are particularly sensitive. We have not seen evidence, including within the consultation responses, that fatal claims are more complex than other claims in this value range. We are therefore not convinced that fatal claims more widely should be excluded as a category. However, we do think that given the particular sensitivity around neonatal deaths and stillbirths, they should continue to be excluded from the LDFRC scheme. In addition, given there are commonly secondary victims in those claims and the sensitivity principle applies to them, we consider the exclusion should also extend to secondary victims in those claims.

### **Number of experts**

Some respondents argued that many claims, though not intrinsically complex, will require an extra expert on causation, especially where there is an element of psychological injury, and that these claims should not fall out of the scheme as a result. We agree that an extra element on causation is a common feature of clinical negligence claims, including in this value band, and that this does not add undue complexity so should not automatically exclude claims from fixed costs. We have therefore decided to modify the exclusion

requirement on experts to state that claims where the allegations of negligence would require the claimant to adduce medical expert evidence as to breach of duty of care and causation from more than 3 medical experts will be excluded from the LDFRC scheme. This means that claims requiring such evidence from up to and including 3 medical experts will not unnecessarily or inappropriately drop out of the scheme.

### **Protected parties and children**

Some respondents argued that all claims involving protected parties and children should be excluded, particularly because these claims have special requirements (time spent with the claimants, preparation for and application to the court for approval hearings and counsel advice) which mean they would be more complex and costly and should not be restricted to fixed costs. They further argued that the bolt-on amount proposed to fund these claims was insufficient. There were also requests for clarity on whether disbursements for court fees and counsel advice would be included in the fixed costs or separately recoverable. Respondents argued that for these reasons, if protected party claims were not excluded, they would be uneconomical for claimant solicitors who would not take on these clients, which would be an unacceptable access to justice risk.

We acknowledge these concerns. Safeguarding access to justice for claimants is of paramount concern in our scheme and especially for claimants who may have extra needs. We have decided to ensure that claims where the claimant is a protected party, or a child are safeguarded from access to justice risks by increasing the bolt-on amount for these claims (see Section 5.5). In addition, we are conducting a short consultation on arrangements for disbursements in the scheme, which particularly concerns claims where the claimant is a protected party or a child, given the known disbursements involved. With new safeguards in place, and further clarity on disbursement arrangements for all claims to be explored in a further consultation, we believe that claims where the claimant is a protected party or child remain suitable for inclusion in the scheme.

### **Litigants in person (LIPs)**

Some consultation respondents raised concerns about the suitability of the scheme for LIPs, suggesting that the requirements of the protocol would be an unfair burden on these claimants. As discussed in Section 5.1 above, we consider that the process and requirements for conducting clinical negligence claims are unsuitable for claims where the claimant does not have legal representation (an LIP). We will therefore exclude LIPs from the fixed costs and requirements of the LVCD protocol.

### **Limitation**

As set out in Section 5.2 above, the LVCD protocol encourages parties to resolve any limitation issues by agreement but does not alter the statutory time limits for starting court proceedings. If for any reason, proceedings are started to comply with the statutory time

limit before the parties have followed the procedures in the LVCD protocol, the parties should apply to the court for a stay of the proceedings while they comply.

However, a claim will no longer continue under the LVCD protocol and will drop out of the LDFRC scheme if, within 21 days of receipt of the Standard Track Letter of Claim or the Light Track Letter of Claim, the defendant writes to the claimant stating that they consider the claimant's claim may be time-barred under any provision of the Limitation Act 1980.

## **Summary government position**

Excluded categories: The LDFRC scheme will exclude claims:

- (a) where the allegations of negligence would require the claimant to adduce medical expert evidence as to breach of duty of care and causation from more than 3 medical experts
- (b) made against 2 or more defendants, where the allegations of negligence against each defendant are materially different
- (c) arising from a still birth or neonatal death, including claims made by secondary victims
- (d) where limitation is raised by the defendant as an issue

Claims where the claimant is a litigant in person will not be included in the LDFRC scheme.

All claims on behalf of protected parties or children should remain in the fixed costs scheme with an increased bolt-on amount of £1,800.

Where a claim qualifies for a valid exclusion from the LDFRC scheme, this means it is not subject to the LVCD protocol, or the fixed costs under the scheme. However, if the court is not satisfied that a claim qualifies for a specified exclusion and the claim has a value at settlement or following judgment in the value range of the LDFRC scheme, then that claim would be subject to fixed costs for the pre-issue period.

## 5.8. Sanctions

### Proposals as consulted on

The position in the consultation was as follows:

Timely defendant response:

If deadlines are not met by the defendant, a standard track claim would fall out of the clinical negligence FRC scheme and will be processed according to the same arrangements made for clinical negligence claims above the upper limit for the scheme (£25,000). A light track claim will, if the deadlines are not met, recommence in the standard track and costs will be recoverable only for the standard track process.

We will seek to reflect in the Civil Procedure Rules (CPR) that failures to adhere to FRC process deadlines can be considered a conduct issue with potential cost consequences.

The consultation sought views on a proposed 50% reduction to the costs the claimant can recover from the defendant in the case of claimant delays and a 50% uplift to damages in the case of defendant delays.

Evidence quality:

We will seek to reflect in the CPR that failures to provide sufficiently detailed evidence at the outset of the FRC process can be considered a conduct issue with potential cost consequences in terms of limitations to the costs the claimant is able to recover from the defendant. This would mean a 50% reduction to the costs the claimant is able to recover from the defendant.

Neutral Evaluation sanctions:

If the claimant does not accept the evaluation recommendation on liability, proceeds to court and loses, the claimant would be liable to pay for the cost of the evaluation.

If the claimant does not accept the evaluation recommendation on quantum of damages, proceeds to court, and does not beat the recommendation by 20%, the claimant would be liable to pay for the cost of the evaluation.

If the claimant rejects an evaluator's recommendation on issues of quantum of damages and proceeds to court but fails to beat the evaluator's recommendation by 20%, it would be permissible to share the evaluation with the judge at the point when issues of costs are being decided, and the judge will consider whether there will be a 50% reduction.

### Consultation question:

Do you agree or disagree with the proposals on sanctions to be considered and implemented by changes to the Civil Procedure Rules?

Total responses to question: 90

Responses	Claimant	Defendant	Unknown	Other	All responses
Agree	6%	17%	6%	11%	39%
Disagree	44%	6%	6%	6%	61%
Don't know	0%	0%	0%	0%	6%
Total	50%	17%	11%	22%	100%

### The way forward

Respondents raised concerns about the level and nature of financial sanctions. Some respondents thought that the sanctions proposed were insufficient and would not incentivise parties to work constructively in accordance with the rules. Others felt that the costs sanctions were disproportionate to the instances of non-compliance they were intended to address.

In making his recommendation for an FRC scheme for low value clinical negligence claims, Sir Rupert Jackson was clear that “costs and procedure must be linked” and that “one cannot simply impose a grid of FRC and leave all the other rules of procedure as they are.” A critical part of that procedure, highlighted by the CJC report, is the rules that govern adherence to it. We are clear that sanctions are integral to the smooth running of the scheme and that they should be proportionate and targeted to areas where adherence to the procedure may be at risk.

### Evidence quality and defendant deadline

One of those areas of risk is around the initial exchange of evidence. If the claimant does not provide sufficiently detailed evidence at the outset of a claim, the ability of the defendant to provide a full, detailed response within the deadline could be compromised. Claimant legal respondents were concerned that there could be disagreements between the parties about the quality of the evidence provided which could unfairly result in a reduction to recoverable costs.

Our position is that if the defendant considers the quality of evidence set out in an initial Letter of Claim and/or bundle of accompanying evidence is inadequate, and the claimant has failed to respond to requests for better and further clarification, the defendant should



include in their Letter of Response an explanatory statement setting out how any deficiency in the claimant's evidence has hindered a full response. The court may then order a 50% reduction to the fixed costs which the claimant is able to recover from the defendant, and it will be for the court to decide whether the defendant's rationale is reasonable and whether the claimant's behaviour should be seen as a conduct issue.

Correspondingly, if the defendant fails to respond within 6 months of the letter of claim in the standard track, the claim will no longer be subject to the fixed costs or the LVCD protocol in the LDFRC scheme. We would anticipate in such a scenario that claimants may opt to issue proceedings and would be able to recover costs on the standard basis for any pre-issue work. This is intended to serve as an effective sanction whereby the defendant is potentially liable for greater costs.

For the avoidance of doubt, defendants must ensure they respond within the 6-month period, regardless of deficiencies in the claimant's bundle of evidence. If they do not, the claim will fall out of the LDFRC scheme and any sanctions relating to the quality of claimants' evidence will not apply.

We consider these twin sanctions around the initial exchange represents a fair approach to ensuring all parties follow the protocol. It is in the interests of both parties to adhere to evidence requirements and deadlines and to ensure a smooth initial exchange of evidence.

Concerns were also raised that there are no incentives for the defendant to comply with the procedures of light track cases. It was suggested that if a defendant fails to comply with the procedures of a claim in light track or standard track the case should automatically fall out of the FRC scheme.

We agree that there should be an additional incentive for defendants to adhere to the response deadline in the light track. Accordingly, a light track claim will, if the initial 8-week deadline for response to the light track letter of claim is not met, recommence in the standard track (with a standard track letter of claim). In addition, the claimant will be able to recover 5% of light track stage one costs on top of standard track costs in successful claims. We consider that the prospect of higher costs under the standard track and the additional 5% of light track stage one costs is sufficient incentive for the defendant to adhere to the light track response deadline.

### **Other protocol deadlines**

Both claimant and defendant respondents raised concerns around a sanction on deadlines in the process. It was pointed out that there are many factors outside either the claimant or defendant's control that can often result in delays, for example obtaining records, expert

availability, client availability and the extra time needed to prepare reports in non-straightforward cases.

We acknowledge that there will be external factors outside the claimant or defendants' control that could cause delays to deadlines, especially where expert reports are required. For this reason, we consider it sensible to allow for extension of any deadline, excepting the defendant response deadline in the standard and light track processes, if there is mutual agreement between parties to do so (further detail on this is set out at Section 5.3 above).

However, sanctions remain necessary to ensure that parties comply with deadlines in the LVCD protocol. Where there is not agreement to extend and a party fails to adhere to a deadline set out in the LVCD protocol, then sanctions would continue to apply. For breaches by defendants, this would mean a 50% uplift to damages agreed at settlement. For breaches by claimants, the sanction would be a 50% reduction to recoverable costs. This approach aligns with similar arrangements set out in the extension to FRC in civil claims coming into force in October 2023, whereby unreasonable behaviour may prompt a 50% reduction in costs.

We consider that adherence to deadlines is critical to the smooth running of the LVCD protocol and that these sanctions are a fair, proportionate and appropriately targeted solution to address that risk.

### **Neutral evaluation sanctions**

The neutral evaluation stage is a key part of the arrangements in the LVCD protocol to facilitate early resolution and avoid unnecessary litigation where claims have not been resolved at the stocktake stage. Concerns around the evaluation expressed in the consultation focused on the cost of the evaluation itself (and potential access to justice risks for claimants), the eligibility requirements for evaluators and the details of the process, including the selection of the evaluator.

In addressing these points, we have set out, in Section 5.6 above, how the process of initiating an evaluation should proceed and specified that the defendant is liable for the entirety of the evaluation fee.

These arrangements have prompted changes to the sanctions around evaluation.

### **Evaluation fees sanctions**

Now that we have modified the proposals to specify that defendants are liable for the evaluation fee, the proposed sanctions on evaluation fees are redundant and will not form part of the LVCD protocol or the LDFRC scheme.

### **Failure to participate in neutral evaluation**

There may be claims in which parties agree not to proceed with an evaluation. In those claims, the agreement not to proceed will mark the completion of the LVCD protocol process.

However, where an evaluation is deemed appropriate by either party, the evaluation should take place. We consider that non-participation in the evaluation process should therefore be subject to a sanction on either party.

Where the claimant unreasonably refuses to participate in the neutral evaluation process the court may order a 50% reduction to the fixed costs which the claimant is able to recover from the defendant.

Where the defendant refuses to participate in the neutral evaluation process the protocol process will be completed and claimants may decide to issue proceedings.

These sanctions are intended to ensure that where an evaluation may be appropriate, there is sufficient incentive to encourage parties to agree on and participate in the process.

### **Failure to secure a better outcome at trial**

Where the parties do not reach settlement following neutral evaluation and the claimant goes on to issue their claim, if the claimant does not obtain a judgment at a sum at least 20% greater than the amount recommended for settlement by the evaluator, a 50% reduction will apply to the fixed costs which the claimant is able to recover from the defendant.

This sanction is intended to ensure that due consideration is given to the evaluator's recommendations on quantum of damages, and that it facilitates resolution.

### **General note on sanctions**

For the avoidance of doubt, wherever the proposals in this document refer to a sanction on the costs which the claimant can recover from the defendant, this means only the costs relating to the LDFRC scheme, which are pre-issue costs. Any sanction on recoverable claimant costs relates to the total combined costs sought by the claimant.

Sanctions relating to the failure to meet deadlines, including any costs consequences and damages uplifts should be applied automatically at the point at which costs are dealt with. Likewise, the sanction relating to a failure to secure a better outcome at judgment, following an evaluation recommendation, should be applied automatically when costs are dealt with.

However, sanctions relating to deficiencies in the claimant's initial letter of claim and/or bundle of evidence, and sanctions relating to a claimant's unreasonable refusal to

participate in a neutral evaluation will be subject to consideration by the court which may make a determination on whether the sanction should be applied.

### **Note on the effect of damages uplift sanctions**

It should be noted that the application of sanctions here is not intended to render a claim ineligible for fixed costs. Therefore, any determination as to whether a claim is subject to fixed costs based on value at settlement or following judgment will be made before any damages uplift is applied.

Neither is an uplift on damages intended to increase recoverable legal costs under these proposals. Therefore, any percentage of damages calculated as a component of recoverable legal costs for the claimant will be determined with reference to the amount of damages prior to applying any uplift to damages as a result of a sanction.

## **Summary government position**

### **Evidence quality and defendant response deadlines in the light and standard tracks**

Failure by the claimant to provide sufficiently detailed evidence at the outset of the FRC process can be considered a conduct issue with potential cost consequences. The court may apply a 50% reduction to the costs the claimant is able to recover from the defendant.

Failure by the defendant to respond to the claimant letter of claim in the standard track will mean that the claim is no longer subject to the LDFRC scheme, including the fixed costs or the LVCD protocol process requirements.

Failure by the defendant to respond to the claimant letter of claim in the light track will mean that the claim restarts in the standard track and standard track costs apply. An additional 5% of light track stage one costs will be recoverable in addition to standard track costs in successful claims.

### **Other protocol deadlines**

Other than for the defendant response in the light and standard tracks, deadline extensions may be agreed by both parties. However, if there is no mutual agreement to extend a particular deadline specified in the LVCD protocol:

- failure by the defendant to meet the deadline will result in a 50% uplift to damages agreed at settlement or following judgment
- failure by the claimant to meet the deadline will result in a 50% reduction in recoverable costs

### **Failure to participate in neutral evaluation**

Where the claimant unreasonably refuses to participate in the neutral evaluation process the court may order a 50% reduction to the fixed costs which the claimant is able to recover from the defendant.

Where the defendant refuses to participate in the neutral evaluation process the protocol process will complete and claimants may decide to issue proceedings.

### **Failure to secure a better outcome at trial**

Where the parties do not reach settlement following neutral evaluation and the claimant goes on to issue their claim, if the claimant does not obtain judgment at a sum at least 20% greater than the amount recommended for settlement by the evaluator a 50% reduction will apply to the fixed costs which the claimant is able to recover from the defendant.

As part of the monitoring and evaluation of the LDFRC scheme in its first years of operation, we will assess the effectiveness of these sanctions.

## 5.9. Implementation date of scheme

### Proposals as consulted on

The position in the consultation was as follows:

From the date on which the rules come into force, all notified claims will be included and be subject to the new rules. Our guiding principle in considering this issue has been to ensure that the changes we seek to make will lead to greater certainty and smoother implementation and will begin to deliver savings early.

### Consultation question:

Do you agree or disagree that the proposals on FRC should apply to claims where the FRC letter of claim (or FRC claim notification letter) was submitted on or after the implementation date of the scheme?

Total responses to question: 90

Responses	Claimant	Defendant	Unknown	Other	All responses
Agree	11%	17%	6%	11%	44%
Disagree	39%	6%	6%	6%	50%
Don't know	6%	0%	0%	0%	6%
Total	56%	17%	11%	22%	100%

### The way forward

Some respondents said that the FRC scheme should apply to claims where the incident of harm occurred after the implementation date rather than to claims that are notified after implementation. Respondents were concerned to avoid the inclusion of claims where work had already been carried out by a solicitor. Respondents suggested that if the date of letter of claim were to be used, there would need to be a sufficient transitional period for existing claims to be progressed and notified under existing arrangements.

Other respondents agreed with the proposal to include claims notified by a letter of claim or letter of notification. Respondents suggested this would provide clarity on when the scheme would start applying to claims and ensure that there were not 2 different systems operating at the same time.

However, it was pointed out that if there was a single fixed implementation date based on letter of claim, this could lead to a spike in claims before the scheme is introduced.

We acknowledge concerns raised by respondents that the proposed approach could lead to a potential spike in claims and challenges around transition.

However, it is the government's position that, although there may be operational challenges, these are not sufficient reasons for delaying implementation. The outline of these reforms have been previewed for a substantial period of time and there remains a period of 7 months before implementation in April 2024 for claimant and defendant legal representatives to prepare for the change in approach confirmed in this response. We consider this sufficient time for claimant and defendant solicitors to ensure they are ready for the new LDFRC scheme. We also consider that a single process beginning from April 2024 for all new claims is a simpler and more comprehensible solution that will avoid uncertainty.

## **Summary government position**

The new FRC arrangements will apply to claims where the date of notification of the claim falls on or after the date when the new rules come into force.

Leading up to the implementation date (currently intended to be 6 April 2024), notification of claims should take the form of a letter of claim or a letter of notification that complies with the existing PAPRCD. Following implementation, notification of claims eligible for the LVCD protocol should be in the form of a letter of claim in the standard or light track that complies with the requirements of the LVCD protocol.

## 5.10. Post-implementation review

### Proposals as consulted on

The position in the consultation was as follows:

We will review the £25,000 limit either as part of the wider post-implementation review stage or sooner, depending on how rapidly damages inflation has increased, with a view to preserving the proportion of overall claims included. The review would only consider an increase to the limit that reflects the rate of claim value inflation over the period in question. Thereafter, we will review the limit at regular intervals.

### Consultation question:

Do you agree or disagree that the £25,000 upper limit for scheme claims should be reviewed post-implementation, and at regular intervals thereafter, specifically to take account of the effects of claims inflation?

Total responses to question: 90

Responses	Claimant	Defendant	Unknown	Other	All responses
Agree	17%	17%	6%	11%	50%
Disagree	33%	0%	0%	6%	44%
Don't know	0%	0%	0%	0%	6%
Total	50%	17%	11%	22%	100%

### The way forward

Some respondents thought that it was appropriate to review the upper limit of the FRC scheme, with a preference that this review be completed by an independent body. This included that the review should consider inflation to ensure that the proportion of claims falling within the FRC scheme does not decrease over time. Suggestions were made as to the frequency of this review, ranging from every 12 months to every 5 years.

Respondents also recommended that the fixed costs framework is reviewed on a regular basis to ensure it reflects solicitors' costs and wages. It was suggested that a review should take place annually and be indexed to wage or cost of living inflation. Respondents pointed out that if a regular costs review did not take place, it would mean that the



amounts recovered in costs would decrease over time and the work would become less commercially attractive and eventually unsustainable.

The government is committed to evaluating the policies it implements as part of a Post Implementation Review (PIR) not less than 3 years after implementation. We have considered how best to undertake a PIR of this FRC scheme and the appropriate metrics to evaluate its effectiveness in meeting our policy intent.

The evaluation will consider whether:

- the overall aims of the policy have been met
- the policy has been implemented effectively
- any unintended consequences have been identified.

It will also consider the impacts and effectiveness of these proposals with specific reference to groups with protected characteristics under the Equality Act 2010, where it is practical and proportionate to do so

The review is likely to focus on:

- the effect of the scheme on overall legal costs of relevant claims
- the effect on time to resolution for these claims
- impacts on access to justice
- impacts on equalities, including on protected party claimants
- effectiveness of arrangements for neutral evaluation
- effectiveness of sanctions
- use of exclusion categories
- use of disbursements
- the interaction of the LDFRC scheme with other existing FRC schemes
- impact of inflation

We will work closely with NHS Resolution and others to monitor relevant data to address these and other relevant questions and consider where qualitative methods may add value.

We note support from respondents for a review, especially around the impact of inflation on the upper limit of the scheme and the amounts of the fixed costs. The intention is to review the fixed costs post implementation alongside the level of the upper limit of the scheme in light of inflation. The modelling currently assumes a rate of 3.5% per annum for legal costs and in the limits of the damages band in which claims are subject to fixed costs in the LDFRC scheme. We will discuss further with the CPRC how best to take inflation into account as part of any review process.

## **Summary government position**

We will undertake a PIR of the FRC scheme not less than 3 years after implementation. We have considered how best to undertake a PIR of this FRC scheme and the appropriate metrics to evaluate its effectiveness in meeting our policy intent, including how best to take inflation into account.

## 5.11. Business impacts

The consultation requested views on how the proposals in this consultation might impact:

- businesses involved in handling and processing 'lower value' clinical negligence claims
- law firms
- other small or micro businesses involved in supporting the handling or processing of 'lower value' clinical negligence claims

### Summary of business impacts

#### Overall summary of business impacts (impact on firms and small and micro businesses)

Some organisations responded that lower damages claims are as complex as higher value claims, require the same amount of work, and that FRC will be insufficient for the volume of work needed. There were concerns over the loss of revenue for specialist professionals who deal with complex lower damages claims. Some responses argued that this work could become financially unviable for them, leading specialist firms to drop out of the clinical negligence market, and non-specialist companies to move into this field.

A common theme amongst the respondents was that businesses, especially the smaller organisations, could go out of business leading to staff redundancies and increased unemployment.

The Society of Clinical Injury Lawyers conducted a poll of its members which stated that 70% of their specialist claimant firms would withdraw from the market, as the additional work would make it impossible for them to continue under FRC.

Some respondents emphasised the need to control costs for clinical negligence claims and make litigation costs, particularly for lower damages clinical negligence claims, more reasonable.

Other responses stated the potential benefits of the scheme, including greater certainty around how to manage this group of claims, faster processing and quicker resolution of claims.

## **Specific points relating to impact on law firms**

Most concerns were focussed on the profitability impact on legal firms. These concerns included that:

- (a) some law firms could exit the market.
- (b) larger organisations may only take on higher damages claims (over £25K)
- (c) smaller businesses may not see lower damages claims as commercially viable

## **Specific points relating to small and micro businesses**

In addition to the points raised in the above sections a number of respondents indicated concerns over whether ATE insurers will continue to support lower damages claims if FRC is implemented, stating that further clarity was required on this. Organisations reported that ATE is fundamental to claims being made.

The majority of small and micro business respondents believe that the implementation of FRC will impact on the current systematic approach. However, a number of respondents who supported the proposals asserted that the small size of an entity alone would not mean it will necessarily be financially precarious or adversely affected by financial changes, and that small firms could have certain advantages over larger businesses.

## **Government position**

The Government appreciates the concerns raised by respondents about the potential business impacts of these proposals. As set out in the Impact Assessment, the proposals are expected to reduce income from claims for solicitors representing individual claimants and will result in new administrative costs for all parties. The new process is expected to be more efficient, requiring less solicitor time and resource to produce the same outcome for clients. The Impact Assessment sets out 3 scenarios for this. Claimant and defendant solicitors and NHS Resolution will face transitional set-up and familiarisation costs (although these they may be minimal as FRC is already in place for other types of personal injury claims).

As set out in the Impact Assessment, 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. Firms with small, specialised departments are therefore likely to be disproportionately impacted.

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 who are directly affected by reform) and because it would reduce the efficacy of the proposals, distort the market and reduce claimant choice.

We also acknowledge concerns that the proposals may result in changes to the way the clinical negligence legal market organises itself and manages claims. However, the proposals are intended to prompt cultural and behavioural shifts in how lower damages clinical negligence claims are handled, and we remain convinced there is a good economic case for making the proposed changes.

The LDFRC scheme will reduce legal costs reimbursed by public defendants, estimated to create £1bn in savings for NHS hospitals in England, and £1.3bn for other healthcare providers in the public and private sector, £2.3bn in total. Claimants and defendants, and their representatives, will also benefit from improved predictability of cash flows.

## 5.12. Equalities impacts, vulnerable people and health disparities

The consultation requested views on:

- how people with protected characteristics, as defined under the Equality Act 2010, may be impacted by the proposals
- how health disparities may be impacted by the proposals
- how vulnerable groups may be impacted by the proposals

### Summary of equalities/disparities/vulnerable group impacts identified

The Secretary of State for Health has legal obligations to consider equalities and health inequalities in taking policy forward, and to consider its potential impact on families. The Public Sector Equality Duty (PSED) places a duty on public bodies and others carrying out public functions. It aims to ensure that public bodies consider the needs of all individuals in their day-to-day work – in shaping policy, in delivering services, and in relation to their own employees. The PSED is set out in section 149 of the Equality Act 2010, and it applies across Great Britain to public bodies listed in Schedule 19 to the Act (and to other organisations when they are carrying out public functions). The Health and Social Care Act 2012 placed a duty on the Secretary of State to have regard to the need to reduce inequalities between the people of England with respect to the benefits that may be obtained by them from the NHS.

Throughout the development of these proposals, we have placed a high importance on taking equalities into consideration, including the impact of these changes on different groups, particularly those with protected characteristics under the Equality Act 2010.

The Department carried out analysis of demographic information relating to groups with protected characteristics under the Equality Act 2010 in relation to the proposals, as well as income, which was set out at Annex B to the consultation. For the characteristics assessed, that analysis concluded that the scheme is unlikely to directly discriminate against any group.

The data suggested that the scheme could have a disproportionate impact on people with certain characteristics, including disability and age, as these groups have more frequent interactions with the healthcare system and, as a result, increased likelihood of experiencing an incident. However, there was no evidence for a negative impact or discrimination. According to the policy intent of the proposals, all groups, including older

people and people with disabilities, should benefit from the faster resolution of claims facilitated by the scheme.

We sought further evidence on potential impacts on groups with protected characteristics through the consultation. Responses argued that protected party claimants may struggle to find firms willing to act for them because in their view, the costs are insufficient for solicitors to take these cases on due to the extra work involved. It was also felt that individuals with protected characteristics are more likely to be low earners and therefore more likely to fall within the scope of FRC. We took this analysis into account when considering whether the FRC scheme had made adequate provision to safeguard access to justice for claimants affected by the scheme and in particular for protected party or child claimants.

### **Any further equalities analysis carried out**

We have carried out further analysis of demographic information relating to groups with protected characteristics, which is set out in the Equality Duty Analysis which accompanies this response. This assessment involved comparing demographic statistics for those who would likely fall within the FRC remit, through being more likely to submit a claim, or having submitted a lower damages claim, with the wider population. It draws on a range of evidence and data including responses to the 2017 and 2022 FRC consultations, an anonymised claims level dataset sample (provided by NHS Resolution), and other published demographic statistics.

Overall, the available evidence suggests no direct discrimination from the proposed FRC scheme 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.

The available evidence suggests that those with certain characteristics may be disproportionately impacted but not directly or indirectly discriminated. We have not come across any significant new evidence of impacts, including in responses to the consultation, since the previous equalities analysis was carried out for the consultation. As in the previous analysis, disproportionate impacts may fall on older populations and those with pre-existing disabilities, which 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 and making a claim when compared to others. Those with lower earnings may also be disproportionately impacted, through their lower earnings making them more likely to fall into a lower compensation band, if loss of earnings is taken into account when agreeing the compensation amount. It is not expected that the introduction of the FRC scheme would directly cause discrimination against these groups and,

according to the policy intent of the proposals, the scheme should have a positive impact for all groups by enabling claimants to reach fair resolution more quickly.

In addition, it was noted by respondents that certain protected parties may require additional support as part of the legal process, and so will incur increased costs. These higher costs may lead to claims from these individuals becoming unviable for solicitors or potentially under-investigated, leading to under-compensation for claimants. To prevent disproportionate financial impacts, an additional 'bolt-on' amount of £1,800 recoverable by the claimant has been proposed for these cases.

Respondents highlighted concerns that this bolt-on amount may not be adequate to cover necessary disbursements for these types of claims, with potential negative impacts falling on protected party or child claimants. We are launching a mini consultation clarifying arrangements for disbursements in the proposed scheme, which will address this issue.

No data or evidence was available to assess impacts on sexual orientation, gender reassignment, religion or belief, or marriage and civil partnership.

We will keep the impacts of the scheme under review and further analysis to assess the impact on protected characteristics will be done at the PIR.

## **Government position**

We recognise concerns raised by respondents and have taken them into account in considering any changes to the consultation proposals.

In particular we have been mindful of vulnerability and the need to preserve access to justice across all claims falling within the LDFRC scheme, and with a particular focus on protected party and child claimants. As a result of this consideration, we have proposed a higher level of base fixed costs that successful claimants will be able to recover. We also propose a substantial increase to the bolt-on amount recoverable for protected party and child claimants in recognition of the extra costs involved in those claims. Finally, we are launching a short consultation on arrangements for disbursements under the LDFRC scheme that proposes a way forward and seek views on disbursements. In doing so, this further consultation will take into account access to justice risks and the views expressed on disbursements in this consultation.



## 6. Next steps

We would like to thank all respondents for their engagement with our proposals to facilitate faster resolution of lower damages clinical negligence claims at proportionate cost through our tailored LDFRC scheme.

As stated above, the next formal step in the process of implementation will be for the government to submit draft rules for consideration by the CPRC. As outlined throughout this government response, we are clear in our objectives as to what we want to achieve through FRC for lower damages clinical negligence claims, but there are a number of issues which will require further consideration, by the government with the CPRC, before the rules are finalised.

We are also launching a short consultation on the issue of disbursements under the scheme, proposing a way forward that takes into account the responses we received in this consultation and inviting views on the proposal.

The intention is that the new rules will come into force on the common commencement date for secondary legislation in April 2024.

# Endnotes

1. 'Lower damages claims' in this consultation response refers to clinical negligence claims with a value at settlement or following judgment from £1,501 to £25,000 inclusive.
2. The period here is 2006 to 2007 – 2021 to 2022. In 2021 to 2022, average claimant legal costs for lower value claims were approximately £23,200, with average damages for these claims at approximately £11,000. Tables 9.A and 11.A.1, NHS Resolution Supplementary Annual Statistics 2021/22. Accessed from: <https://resolution.nhs.uk/resources/annual-report-statistics/>
3. RH Lord Justice Jackson (2010). Review of Civil Litigation Costs: Final Report. HMSO, London. Accessed online at: <https://www.judiciary.uk/guidance-and-resources/review-of-civil-litigation-costs-reports/>
4. RH Lord Justice Jackson (2017). Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs. MoJ, London. Accessed online at: <https://www.judiciary.uk/guidance-and-resources/review-of-civil-litigation-costs-reports/>
5. Ministry of Justice (2023). Extending Fixed Recoverable Costs: a note on the new rules. MoJ, London. Accessed online at: <https://www.gov.uk/government/organisations/civil-procedure-rules-committee/about>
6. Civil Justice Council (2019). Fixed Recoverable Costs in Lower Value Clinical Negligence Claims. Report of the Civil Justice Council Working Group. London, Courts and Tribunals Judiciary. Accessed online at: <https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/archive/fixed-recoverable-costs-in-lower-value-clinical-negligence-claims/>.
7. In clinical negligence claims, qualified one-way costs shifting (QOCS) applies. This means, (subject to certain exceptions set out in CPR 44.15 and 44.16) that if the claimant wins their case, or any aspect of it, they can recover costs and enforce costs orders obtained in the usual way. If the claimant loses their case, or any aspect of it, any costs orders against them can only be enforced up to an amount which does not exceed the total amount of damages, costs and interest made in favour of the claimant.
8. Ministry of Justice (2019). Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's proposals - A consultation produced by the Ministry of Justice. MoJ, London. Accessed online at:

<https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/>

9. Ministry of Justice (2021). Extending Fixed Recoverable Costs in Civil Cases: The Government Response. MoJ, London. Accessed online at: <https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/>
10. It should be noted that the Ministry of Justice is consulting between 21 July and 8 September 2023 on tightening the criteria in relation to clinical negligence cases which may be allocated to the new intermediate track to those where admission of breach and causation are admitted in the pre-action letter of response. Update available online at: [www.gov.uk/government/organisations/civil-procedure-rules-committee/about](http://www.gov.uk/government/organisations/civil-procedure-rules-committee/about)
11. Department of Health (2017). Introducing Fixed Recoverable Costs in Lower Value Clinical Negligence Claims. London, DHSC. Accessed online at: <https://www.gov.uk/government/consultations/fixed-recoverable-costs-for-clinical-negligence-claims>; and

Department of Health and Social Care (2018). Consultation on Introducing Fixed Recoverable Costs in Lower Value Clinical Negligence Claims: Summary of Consultation Responses. London, DHSC. Accessed online at: <https://www.gov.uk/government/consultations/fixed-recoverable-costs-for-clinical-negligence-claims>.

12. RH Lord Justice Jackson (2017). Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs. MoJ, London. Chapter 5. Accessed online at: <https://www.judiciary.uk/guidance-and-resources/review-of-civil-litigation-costs-reports/>
13. Civil Justice Council (2019). Fixed Recoverable Costs in Lower Value Clinical Negligence Claims. Report of the Civil Justice Council Working Group, p.24. London, Courts and Tribunals Judiciary. Accessed online at: <https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/previous-work/fixed-recoverable-costs-in-lower-value-clinical-negligence-claims/>
14. NHS Resolution (2022). Annual Statistics (Annual Supplementary Statistics, Tables 5.A and 7.A). Available from: [NHRSR-Supplementary-Account-Stats-2021-22-Revised-For-Publication-V3.xlsx \(live.com\)](#); and

NHS Resolution (2023). Annual Report and Accounts 2022/23. Available from: [NHS Resolution - Annual report and accounts 2022/23 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk). p. 40.

15. Ministry of Justice (2019). Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson’s proposals - A consultation produced by the Ministry of Justice. MoJ, London. Accessed online at: <https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/>; and  
  
Ministry of Justice (2021). Extending Fixed Recoverable Costs in Civil Cases: The Government Response. MoJ, London. Accessed online at: <https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/>
16. Lord Justice Jackson (2017). Review of Civil Litigation Costs: Supplemental Report: Fixed Recoverable Costs, MoJ, London. p.9. Accessed online at: <https://www.judiciary.uk/guidance-and-resources/review-of-civil-litigation-costs-reports/>
17. Civil Justice Council (2019). Fixed Recoverable Costs in Lower Value Clinical Negligence Claims. Report of the Civil Justice Council Working Group (Appendix B). London, Courts and Tribunals Judiciary. Accessed online at: <https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/previous-work/fixed-recoverable-costs-in-lower-value-clinical-negligence-claims/>

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# Annex A - List of respondents

Table 1: Type of Respondents\*

Type of respondent	Number of responses	% of responses
A Law firm	43	44%
A health care provider	less than 5	less than 5%
Indemnity / insurance provider	5	5%
Representative body - health care	less than 5	less than 5%
Representative body - indemnity / insurance	less than 5	less than 5%
Representative body - claimant legal	less than 5	less than 5%
Representative body - medical experts	less than 5	less than 5%
Representative body - patients	less than 5	less than 5%
Representative body - legal	5	5%
Other	6	6%
Not answered	less than 5	less than 5%
An individual	21	21%
Total	98	100%

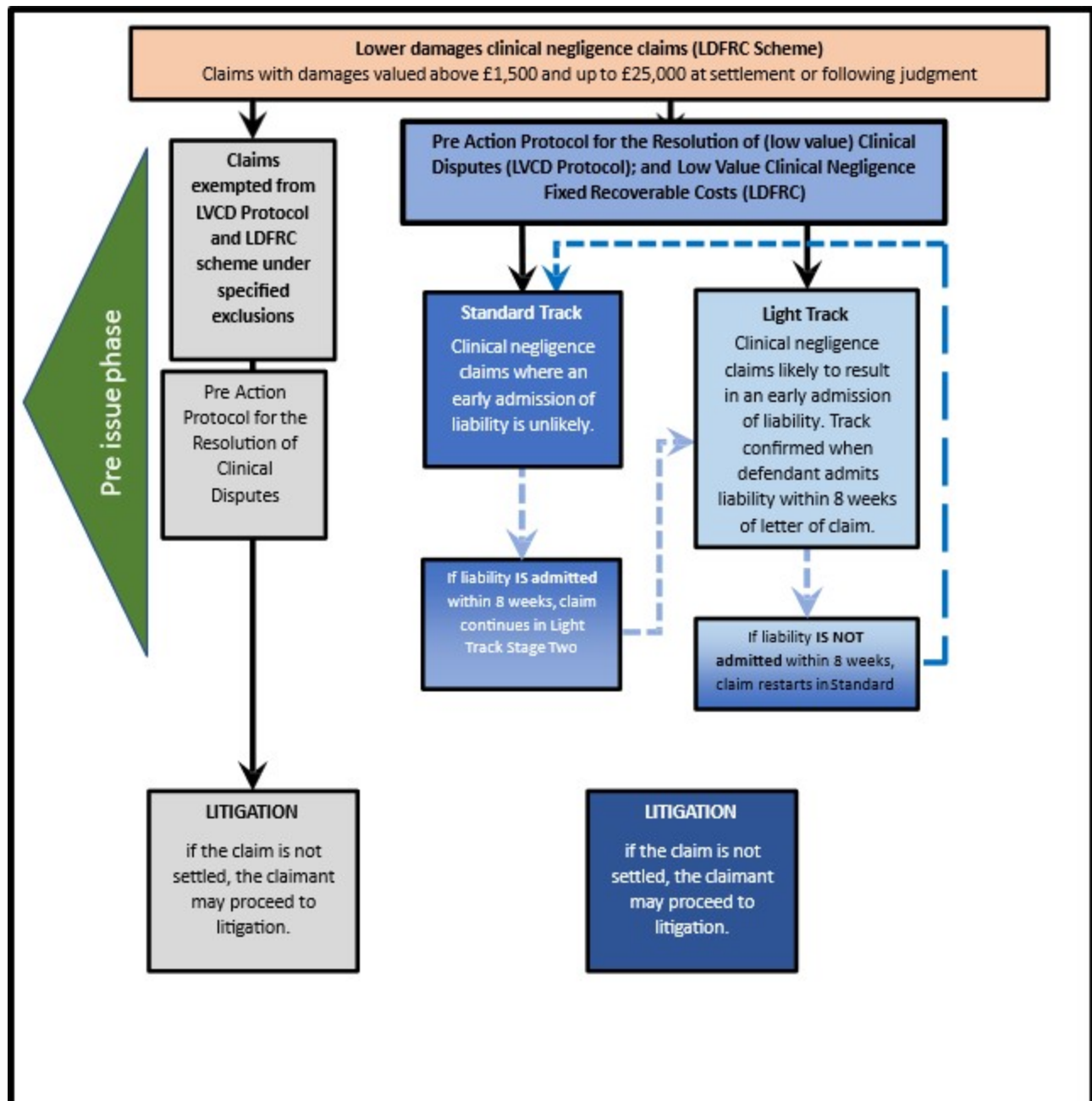
\* Due to small sample sizes for some respondent types, the count for each category with less than 5 responses has been suppressed, to prevent potentially identifying individual respondents.

Table 2: Type of Organisation

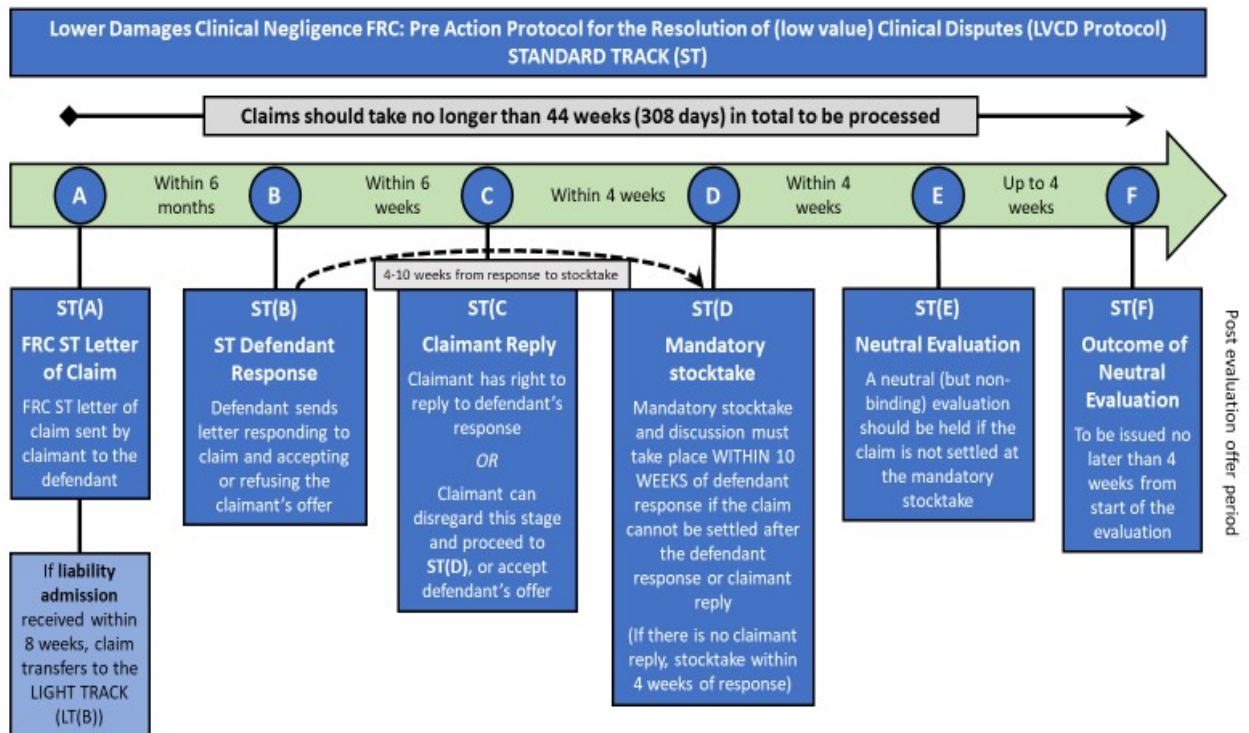
Organisation mainly represents	Number of responses	% of responses
Defendants	17	17%
Claimants	49	50%
Other	21	21%
Unknown	11	11%
Total	98	100%

# Annex B - Process diagrams

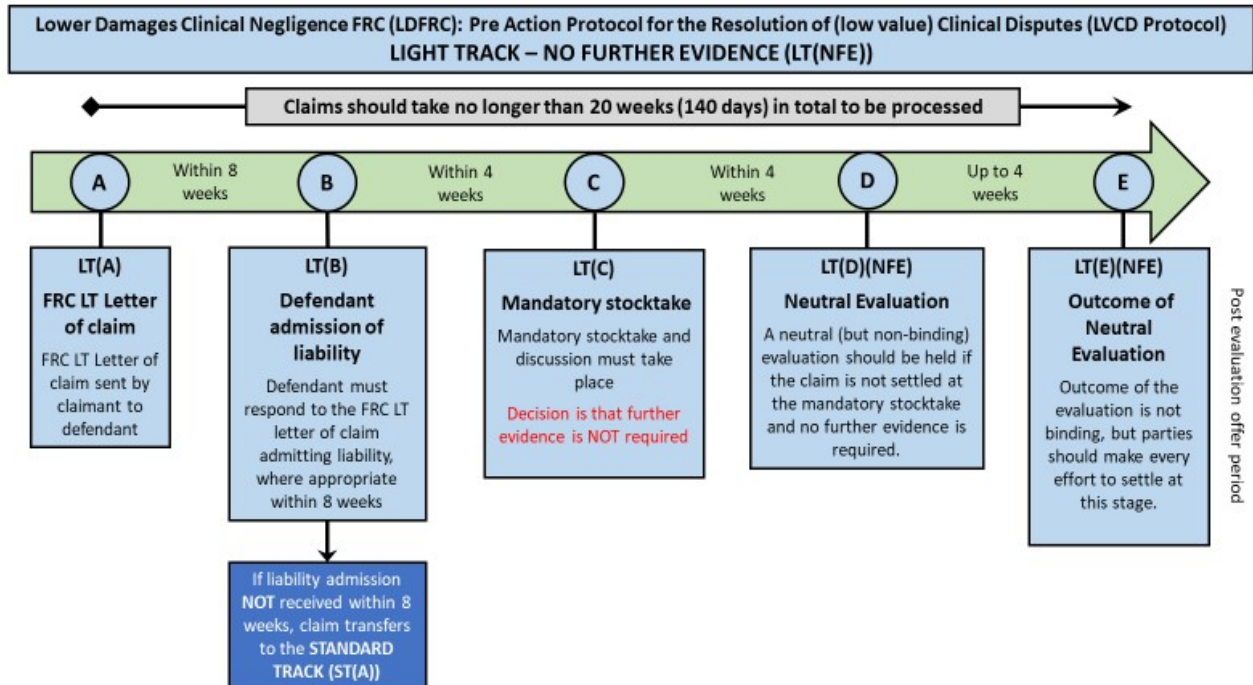
Diagram 1: lower damages clinical negligence claims process



**Diagram 2: LVCD protocol: standard track process**

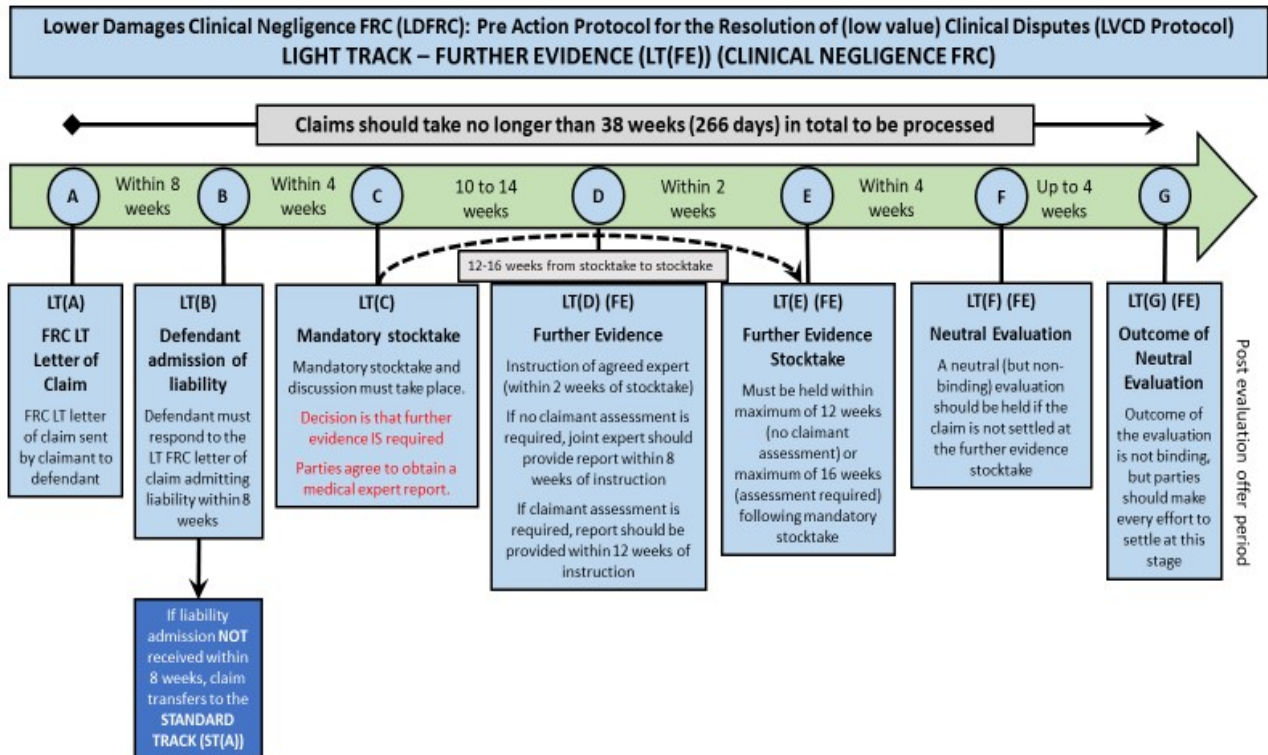


**Diagram 3: LVCD protocol: light track, no further evidence process**





**Diagram 4: LVCD protocol: light track, further evidence process.**



# **Annex C - Scenarios: exiting the scheme, interaction with other schemes, and costs**

The next formal step in the process of implementation will be for the government to submit draft rules for consideration by the CPRC. As outlined throughout this government response, we are clear on what we want to achieve through FRC for lower damages clinical negligence claims, but there are several issues which will require further consideration, by the government with the CPRC, before the rules are finalised.

Our intent is to ensure that our LDFRC scheme works smoothly together with existing FRC schemes and the proposed FRC extension due to come into force in October 2023. In doing so, we want to be as clear as possible about our policy intent for these claims and what parties engaged in conducting clinical negligence claims should expect.

In this Annex, we set out our expectations for which types of claims may exit the LDFRC scheme and how they may interact with litigation, including specific scenarios where there may be interaction with the FRC extension coming into force in October. We also set out scenarios illustrating our expectation for how costs would be dealt with for different types of claims.

## **Claims exiting the LDFRC scheme**

Our LDFRC scheme relates to the pre-issue part of the process only, and parties are not restricted from proceeding to litigation if the claim is not settled once the pre-issue process is completed.

The expectation based on previous data on stage of settlement for claims up to £25,000 is that at least 75% of these claims will settle in the pre-issue phase. We expect our LDFRC scheme to equal or increase that proportion. Additionally, we expect only small numbers of claims should be eligible for specified exclusions from the LDFRC scheme. We therefore expect that only a small number of claims overall will proceed to litigation. A proportion of that number could potentially be affected by the Ministry of Justice's FRC reforms.

We envisage these claims will be limited to the following potential groups:

- (a) claims that have completed the LVCD Protocol and proceedings have been issued
- (b) claims that have qualified for exclusion from the LDFRC scheme under the criteria set out in our proposals (see section 5.7)

- (c) claims that have exited our LDFRC scheme because the defendant has failed to respond within 6 months on the standard track
- (d) claims that have not followed the LVCD Protocol for any other reason but have a value at settlement or judgment within the range for lower damages claims in the LDFRC scheme and are subject to the pre-issue fixed costs in the LDFRC scheme

Under the CPR in force from October 2023, clinical negligence claims may only be allocated to the intermediate track if they are claims where breach of duty of care and causation have been admitted. Whether individual claims are in fact allocated to the intermediate track will depend on other criteria for that track, including anticipated length of trial, number of witnesses, value of damages and complexity.

If clinical negligence claims are not eligible for allocation to the intermediate track they would be allocated to the multi-track.

## **Cost scenarios**

In this section we set out various scenarios illustrating how we expect costs will be dealt with in respect of claims in the LDFRC scheme, claims exiting the scheme, and claims qualifying for a specified exclusion from the scheme.

The amount of costs in the LDFRC scheme that the claimant is entitled to recover will be dependent on where the scheme concludes.

Recoverable costs following issue will be subject to the rules applying to the case management track to which the claim has been allocated.

In relation to the LDFRC scheme, costs for the pre-issue phase will depend on the value at settlement or following judgment of the claim. The following scenarios set out our expectations on how these costs are dealt with (see also below, details of cost scenarios where LDFRC costs and intermediate track FRC costs may interact):

- (a) If the claim is concluded in the pre-issue phase, whether or not it has followed the LVCD process, and the value at settlement is within the range for lower damages claims in the LDFRC scheme, recoverable pre-issue costs will be limited to the fixed costs in the LDFRC scheme, unless the claim qualifies for a specified exclusion from the LDFRC scheme
- (b) If the claim is concluded in the post-issue phase, whether it has followed the LVCD process, or not, and the value at settlement or following judgment is within the range for lower damages claims in the LDFRC scheme, the intention

is that recoverable pre-issue costs will be limited to the fixed costs in the LDFRC scheme, unless the claim qualifies for a specified exclusion from the LDFRC scheme

- (c) If the claim is concluded in the post-issue phase and the value at settlement or following judgment is above the range for lower damages claims within the LDFRC scheme or qualifies for a specified exclusion from the LDFRC scheme, recoverable pre-issue costs will be calculated according to the arrangements for costs in the track to which the claim has been allocated

## **Costs - specified exclusions**

We expect that:

- (a) in claims where the claimant has asserted that a specified exclusion from the LDFRC scheme applies, and the claim is settled in the pre-issue phase, recoverable pre-issue costs will be calculated in accordance with the rules set out in CPR 44
- (b) in claims where the claimant has asserted that a specified exclusion from the LDFRC scheme applies, the claim is issued, and the court ultimately considers the exclusion is valid, pre-issue costs will be calculated according to the arrangements for costs in the track to which the claim has been allocated, whether or not the value of the claim at settlement or judgment is within the damages value range of the LDFRC scheme
- (c) however, if the court considers the specified exclusion does not apply, and the value at settlement or following judgment is within the range of the LDFRC scheme, the intention is that pre-issue costs will be limited to the costs recoverable in the LDFRC scheme
- (d) alternatively, if the court considers the specified exclusion does not apply, and the value at settlement or following judgment is not within the range of the LDFRC scheme, pre-issue costs will be calculated according to the arrangements for costs in the track to which the claim has been allocated

## **Costs when claim drops out of LDFRC scheme due to defendant's failure to respond in 6 months on the standard track**

We expect that:

If a clinical negligence claim exits the LVCD protocol because the defendant fails to respond on the standard track, costs for the entire pre-issue stage will be

calculated according to the arrangements for costs in the track to which the claim has been allocated (or in accordance with the rules set out in CPR 44, if the claim is settled pre-issue).

## **Interaction between arrangements for pre-issue costs in the intermediate track and pre issue costs in the LDFRC scheme**

Stage 1 in the intermediate track encompasses the entire pre-issue period and extends to the defendant response to the claimant's Particulars of Claim after proceedings have been issued.

We will be considering with the CPRC the most appropriate approach to costs in the circumstance where a claim has been allocated to the intermediate track but also qualifies for recoverable pre-issue costs under the LDFRC scheme.

## Annex D - Glossary

Term	Definition
Access to Justice	The principle that every person has an equal opportunity to seek justice under the law and the processes that provide people with the appropriate means to enforce their legal rights.
Adverse incidents	An event that causes, or has the potential to cause, unexpected or unwanted effects involving the safety of patients or other persons.
After the event insurance (ATE)	A type of commercially available insurance policy which provides coverage for legal costs, subject to an agreed limit of indemnity. An ATE insurance policy can provide cover for legal costs incurred in pursuing or defending legal proceedings.
Alternative dispute resolution (ADR)	A variety of ways of solving a problem without having to go to court. NHS Resolutions claims mediation service has been designed to support patients, families and NHS staff in working together towards the resolution of incidents, complaints, legal claims and costs disputes – avoiding the unnecessary expense, time, stress and potential emotional distress of going to court.
Breach of duty of care	A key element of clinical negligence liability. In determining liability, a duty of care and a breach of that duty must be established. 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	A key element of clinical negligence liability. Having established a breach of duty, the claimant must also demonstrate that the breach resulted in some injury or damage. This is usually done with reference to the 'but for' and balance of probabilities test – but for the breach of duty, was it more likely than not (more than 50%) that the injury would have been avoided.
Civil Justice Council (CJC)	An advisory non-departmental public body sponsored by the Ministry of Justice. The Civil Justice Council (CJC) is responsible for overseeing and co-ordinating the modernisation of the civil justice system.
Civil Procedure Rules (CPR)	The rules of civil procedure used by the Court of Appeal, High Court of Justice, and County Courts in civil cases.
Civil Procedure Rule Committee (CPRC)	Set up under the Civil Procedure Act 1997 to make rules ('the Civil Procedure Rules') of court for the Civil Division of the Court of Appeal, the High Court and the County Court. The CPRC is an advisory non-departmental public body of the Ministry of Justice. The Civil Procedure Rules set out

	the practice and procedure to be followed in civil justice cases, including personal injury cases.
Clinical negligence	Occurs when a doctor or other health care professional breaches their duty of care to the patient, resulting in physical and/or mental harm and suffering and injury. Where there is negligence that causes harm, the law enables the victim to claim compensation.
Clinical Negligence Scheme for Trusts (CNST)	An indemnity scheme providing cover for NHS bodies including NHS Trusts, Foundation Trusts, and Clinical Commissioning Groups as well as some independent sector providers of NHS services for claims for incidents occurring on or after 1 April 1995.
Clinical Negligence Scheme for General Practice (CNSGP)	An indemnity scheme operated by NHS Resolution to cover clinical negligence claims for incidents occurring in general practice on, or after, 1 April 2019.
Compensation	Monetary, or sometimes non-monetary benefits, awarded to someone in recognition of loss, suffering, or injury.
Conditional fee agreement (CFA)	A funding arrangement between a claimant and their lawyers where lawyers agree to act on a 'no win, no fee basis'. If the claimant wins their case, the lawyers are paid their base costs along with a success fee. The claimant will usually recover the base legal costs payable from the defendant. If the case is lost, the claimant will generally not have to pay their legal fees. A CFA may be entered into alongside insurance arrangements which reduce or eliminate the other costs (such as for medical reports or defendant's costs) for which a claimant may be liable.
Damages	A sum of money claimed or awarded in compensation for a loss or an injury.
DHSC	Department of Health and Social Care
Duty of Candour	This is the legal duty of NHS organisations to inform and apologise to patients where something unexpected or unintended happens that causes, or could cause moderate or severe harm, death or prolonged psychological harm.
Duty of care	The obligation placed on healthcare practitioners to act in accordance with the relevant standard of care which is the standard expected of an ordinarily competent practitioner performing that particular task or role.
Equality Act 2010	Legally protects people from discrimination in the workplace and in wider society.

Existing Liabilities Scheme for General Practice (ELSGP)	An indemnity scheme operated by NHS Resolution for NHS clinical negligence claims made against current and former GP members of medical defence organisations (MDOs) in respect of liabilities incurred before 1 April 2019. This applies where terms have been agreed between the government and the MDO in question.
Expert evidence	This is provided by experts (medical and non-medical) and can cover whether negligence has occurred, whether the negligence caused injury or financial loss, and on the value of the losses claimed. Whilst they are usually instructed by the claimant and/or the defendant, they owe their duties to the court. This “overriding duty to the court” means they must provide their complete opinion on matters within their expertise. Their duty is to inform the court of their entire opinion even if it harms the position of the party instructing them.
Fast track cases	Defended cases in the civil courts are assigned to one of 3 tracks, one of which is the fast track (the others are the multi-track and the small claims track. The fast track is generally for claims with a value of between the small claims track limit and £25,000. Due to their relative complexity, most clinical negligence claims under £25,000 are currently allocated to the multi-track rather than the fast track.
Fixed recoverable costs (FRC)	An arrangement in which the legal costs recovered by the successful party in litigation are limited according to agreed rates. This does not in itself, affect the sum a lawyer charges a client, which is matter of private agreement. Nor does it affect the amount of compensation awarded to the claimant (although increased damages may be payable based on penalties applied to the defendant). It solely affects the legal costs that a claimant can recover from the defendant following a successful claim.
General damages	Compensation following a tort for non-financial (non-pecuniary) losses, including pain, suffering and loss of amenity (PSLA).
Indemnity	Cover provided to healthcare staff and their employers for expenses arising from clinical negligence claims.
Liability	Legal responsibility – for example for an act of negligence resulting in personal injury.
Light track claims (Clinical negligence FRC)	Claims falling under our proposals in this consultation, which are considered more straightforward, especially where liability is not in dispute. 'Tracks' in the LDFRC scheme should not be confused with litigation tracks such as the 'fast track'.



Lower Damages Clinical Negligence Claim FRC scheme (LDFRC scheme)	The FRC scheme described in these proposals is the Lower Damages Clinical Negligence Claim FRC scheme (the LDFRC scheme). See also: Pre Action Protocol for the Resolution of (low value) Clinical Disputes ('the LVCD Protocol').
Lower damages clinical negligence claims	'Lower damages claims' in this consultation response refers to clinical negligence claims with a value at settlement or judgment from £1,501 to £25,000 inclusive.
Medical Defence Organisations (MDOs)	Mutual non-profit organisations owned and funded by their members. Their primary purpose is to indemnify healthcare professionals for incidents arising from their clinical care of patients and provide their members 24-hour access to advice on medico-legal issues arising from practice. The 3 main MDOs are the Medical Defence Union (MDU), the Medical Protection Society (MPS) and the Medical and Dental Defence Union of Scotland (MDDUS).
Multi-track cases	Defended cases in the civil courts are assigned to one of 3 tracks, one of which is the multi-track (the others are the fast track and the small claims track.) The multi-track is generally for very complex cases with a value of £25,000 or more. Due to their relative complexity, most clinical negligence claims under £25,000 are currently also allocated to the multi-track.
National Audit Office (NAO)	The UK's independent public spending watchdog. They support Parliament in holding the government to account for the way it spends public money. They do this by auditing the finances of public bodies. They do not question the merits of government policies but assess whether resources have been used efficiently and effectively.
Neutral evaluation (NE)	An approach to dispute resolution set out by the CJC, NE is a evaluation of a claim to be carried out by an specialist legal professional of a minimum level of experience agreed by joint instruction of both parties. It would apply to claims not resolved earlier in the process, and the outcome would be non-binding: claimants would be free to pursue their claim in the courts.
Never event	'Never events' are defined by NHS England and Improvement (NHSE&I) as "Serious Incidents that are wholly preventable because guidance or safety recommendations that provide strong systemic protective barriers are available at a national level and should have been implemented by all healthcare providers". NHSE&I's policy on never events and list of never event incident types are available online at: <a href="https://www.england.nhs.uk/patient-safety/revised-never-events-policy-and-framework/">https://www.england.nhs.uk/patient-safety/revised-never-events-policy-and-framework/</a>
NHS Patient Safety Strategy	Published by NHS England and Improvement in 2019 the strategy sets out plans for how safety will be improved over the next decade. The strategy focuses on fostering a safety culture underpinned by learning, developing safer national

	systems, and improving localised capability to embed safety into how healthcare professionals think and act.
NHS Resolution (NHSR)	An arm's-length body of the DHSC (the operating name of NHS Litigation Authority from April 2017).
NHS Trusts	Self-governing administrative body within the NHS; usually a group of hospitals. An NHS trust provides services on behalf of the NHS in England and NHS Wales.
NHS Wales Shared Service Partnership (NWSSP)	An independent organisation owned and directed by NHS Wales. NWSSP supports NHS Wales through the provision of a comprehensive range of high quality, customer focused support functions and services.
Particulars of claim	Sets out the facts that the claimant relies upon in their claim, including allegations made against the defendant. Served upon the defendant at the same time as, or shortly after, serving the Claim Form.
Pre Action Protocol for the Resolution of Clinical Disputes (PAPRCD)	The PAPRCD outlines the pre-issue process and deadlines for parties in clinical negligence claims to seek information from, and provide information to each other before resorting to court proceedings.
Pre Action Protocol for the Resolution of (low value) Clinical Disputes ('the LVCD Protocol').	The LVCD Protocol will describe the behaviour the court expects of the parties prior to the start of proceedings where a claimant claims damages valued at settlement or following judgment at not more than the Protocol upper limit (£25,000) but more than the Protocol lower limit (equivalent to the small claims limit for non-road traffic accident personal injury claims) as a result of clinical negligence.
Qualified one-way cost shifting (QOCS)	Regulation introduced for personal injury claims from April 2013. This means that defendants will generally be ordered to pay the costs of successful claimants but subject to certain exceptions, will not recover their own costs if they successfully defend the claim.
Quantum of damages	See 'Damages'.
Settled claims	Claims where damages have been agreed or successfully defended.
Small and micro businesses	Small businesses are defined as those employing between 10 and 49 full-time equivalent (FTE) employees. Microbusinesses are those employing between one and 9 employees. Small and micro businesses include voluntary and community bodies (also known as civil society organisations).
Small claims track	Defended cases in the civil courts are assigned to one of 3 tracks, one of which is the small claims track (the others are the multi-track and the fast track). The small claims track is intended to provide a simple and informal way of resolving disputes. The small claims track upper limit for personal

	injury claims including clinical negligence claims is currently £1,000. The £1,000 small claims track limit is due to increase to £1,500 in April 2022.
Standard track claims (Clinical negligence FRC)	Claims falling within our proposals in this consultation (where the value is estimated to be in excess of the small claims limit for non-road traffic accident, personal injury claims (currently £1,000) up to and including £25,000) should be progressed on the FRC standard track unless they meet the conditions set out for entry on the FRC light track or are otherwise excluded under the exclusion categories. Certain unusually complex claims with an expected settlement value at below the small claims limit may also be progressed on the FRC standard or light tracks. 'Tracks' in the LDFRC scheme should not be confused with litigation tracks such as the 'fast track'.

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