



Resolution

2nd Floor
151 Buckingham Palace Road
London
SW1W 9SZ
Telephone: 020 7811 2700

November 2019
FOI_4059

The following information was requested on 30 October 2019:

I am after the guidance issued to NHSR members specifically on the operation of the Early Notification Scheme, which I believe there is a specific Q&A sheet on.

I have had a look at the NHSR website, but cannot find any detailed guidance for NHSR members specifically on the operation of the Early Notification Scheme.

Our Response

Please see the attached.

This concludes our response to your request.

If you are not satisfied with the service that you have received in response to your information request, it is open to you to make a complaint and request a formal review of our decisions. If you choose to do this, you should write to [Tinku Mitra](#), Head of Corporate and Information Governance for NHS Resolution, within 28 days of your receipt of this reply. Reviews of decisions made in relation to information requests are carried out by a person who was not involved in the original decision-making about the request.

If you are not content with the outcome of your complaint, you may apply directly to the Information Commissioner for a review of the decision. Generally, the Information Commissioner will not make a decision unless you have exhausted the local complaints procedure. The address of the Information Commissioner's Office is:

Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

What is NHS Resolution?

NHS Resolution is a Special Health Authority and an arm's length body (ALB) of the Department of Health and Social Care established in 1995.

NHS Resolution is a not-for-profit part of the NHS which provides, amongst other things indemnity cover for clinical and non-clinical liabilities, expert legal advice and professional support in claims management and support to the NHS in learning from claims and improving safety. Visit our [website](#) for more information about us.

In March 2017, NHS Resolution launched a new five year strategy, '[Delivering Fair Resolution and Learning from Harm](#)' and changed its name (from the NHS Litigation Authority). It also introduced an 'Early Notification scheme' for potential severe brain injury at birth, requiring NHS trusts to report incidents within 30 days in order to increase the level of support provided when these rare incidents occur.

Which cases qualify for the Early Notification scheme?

NHS Resolution asks trusts to notify to them all incidents of babies born at term (≥ 37 completed weeks of gestation), following labour, that had a potentially severe brain injury diagnosed in the first seven days of life. Specifically, these are any babies that had one or more of the following:

- diagnosed with grade III hypoxic ischaemic encephalopathy (HIE); or
- active therapeutic cooling; or
- all three of the following signs: decreased central tone; comatose; seizures of any kind.

The above criteria have been identified by the Royal College of Obstetricians and Gynaecologists (RCOG) through their independent Each Baby Counts (EBC) Programme as being markers for severe brain injury at birth. For a proportion of these incidents, different care might have made a difference to the outcome

Why are these cases reportable?

NHS Resolution indemnifies the NHS for compensation costs. Whilst these incidents are thankfully rare, they account for 80% of the total cost to the NHS of clinical negligence. Consequently, they are reportable to NHS Resolution as a potential liability under our indemnity scheme rules and regulations.

What is the legal basis for sharing information about these incidents with NHS Resolution?

The lawful basis for processing is that processing is "necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller" (Article 6(1)(e))

In relation to special categories of personal data, the lawful bases are that:

- processing is necessary for the establishment, exercise or defence of legal claims or where courts are acting in their judicial capacity (Article 9(2)(f));
- processing is necessary for reasons of substantial public interest (Article 9(2)(g));

- processing is necessary for the purposes of medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services (Article 9(2)(h)); and
- processing is necessary for reasons of public interest (Article 9(2)(j)).

Should Trusts notify NHS Resolution of early neonatal deaths and stillbirths?

Incidents involving babies who are sadly stillborn or do not survive beyond seven days do not need to be reported under the Early Notification scheme.

What does this mean for families and what do they need to know?

The period immediately after birth is likely to be emotional and potentially difficult. Families will not only be adjusting to life with a new baby but also coming to terms with a difficult birth and understanding what this could mean for them. They will likely have been in contact with many different professionals and had to take in a great deal of information which can be overwhelming.

It is vital that the right investigation process is put in place at an early stage. NHS Resolution supports a thorough and transparent investigation process which involves the family. It will work alongside the trust in considering whether there is also a potential entitlement to compensation and how learning from the incident might be shared in order to improve healthcare. NHS Resolution would encourage trusts to be transparent with families about its role and involvement and if families have any questions or concerns about this, they can be directed to the NHS Resolution Early Notification Team at ENTeam@resolution.nhs.uk or on 020 7811 6263

What investigations will be carried out and by whom?

NHS Resolution will carry out an initial review to understand what happened during the antenatal period, labour and birth and why with the assistance of their clinical advisors. In some cases, the trust will also have carried out a full investigation and it will be clear that good care was provided and that a change in management would not have avoided the difficulties encountered. In those cases, NHS Resolution will let the trust know their views, and will assist the trust in identifying any learning to be taken from the incident. In these cases it is likely that no further investigations will be needed.

If NHS Resolution's initial review suggests that different management may have altered the outcome, further investigations will be carried out, most likely with the assistance of their legal advisors. They in turn will review the medical records, speak with the staff involved and obtain independent expert opinions. Once again, the outcome of these investigations will be shared with the trust, with a view to providing families with a full explanation.

How long will the process take?

This will vary, depending on the time taken for NHS Resolution to obtain copies of the Trust's investigation documents and medical records. Once obtained, NHS Resolution aims to review these documents and make a decision as to whether further investigations are required within 4 to 6 weeks. If further investigations are needed, particularly with input from independent experts, these could take a further 4 to 6 months, but possibly longer in more complex situations.

How will NHS Resolution assess which families are eligible to be compensated?

In line with current legal principles, in order to qualify for compensation, it must be established that the care that was provided fell below a standard which they should have reasonably received and that this caused or materially contributed to an injury. Compensation will be payable in recognition of the impact of that injury.

How long will it take for families to receive compensation?

In those cases in which it is established that families are eligible for compensation, NHS Resolution will, wherever appropriate, make a payment to the family to help them with their immediate needs. In order to protect the interests of the baby, these payments will need to be approved by the Court. NHS Resolution will take any compensation claim forward only if and when families are ready and with their full involvement and agreement.

It may not be possible to know what the needs of the baby will be in the future and these will be determined over time by clinical experts. Compensation will however be available in the interim to meet those needs.

What additional support, aside from compensation, is available through the scheme?

In addition to an early investigation, the Early Notification Scheme offers:

- **For trusts:** advice and practical help on delivering candour in practice;
- **For trusts and families:** 'point of incident' mediation where the relationship between them may need some support; and
- **For affected staff:** support to help them through investigation processes.

NHS Resolution is also working collaboratively with other ALBs and professional bodies to identify and share learning from these incidents, with the ultimate aim of improving care across the NHS.

Do families need to seek independent advice?

NHS Resolution aims to carry out a full investigation where appropriate and will share the findings of that investigation with the trust and families. Where those investigations conclude that there is an entitlement to compensation that will be communicated to families. Independent advice and support may be helpful for families during this early stage but not essential. In the first instance, it is recommended that families make contact with the charity, Action against Medical Accidents (AvMA). In those cases in which legal liability is established, independent legal advice would assist families to be able to manage any interim payments and the quantification process.

Will notification to the EN scheme affect CNST contributions?

In November 2017, with the support of the national maternity champions Matthew Jolly and Jacqueline Dunkley-Bent we launched a new scheme to incentivise delivery of best practices in maternity and neonatal services.

We built in provision for an incentive fund into pricing for 2018/19 for trusts that are able to demonstrate compliance with 10 actions¹ agreed by the National Maternity Champions, in partnership with the Royal Colleges, NHS Improvement and NHS England. These trusts will

¹https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/662969/Safer_maternity_care_-_progress_and_next_steps.pdf

be entitled to least their contribution to the incentive fund and a share of any unallocated funds. By meeting the 10 criteria, we believe trusts are likely to deliver safer maternity services and may be expected to have fewer cases of brain injuries or other harm which can lead to negligence claims.

Trusts not yet able to demonstrate full compliance with the criteria will be eligible for a smaller discount, providing they agree to use the funds to take action towards meeting the actions.

Crucially, the 10 actions complement and support not only the Secretary of State's maternity strategy but also the recommendations made in NHS Resolution's report *Five Years of Cerebral Palsy Claims* (e.g. incentivising local, multidisciplinary training) and our Early Notification work. One of the 10 actions is to notify 100% of qualifying cases.

If families are told of NHS Resolution involvement, will this invite a claim?

At its core, early notification of cases is sought to allow us to quickly understand the liability position. In some cases we will find that care fell below a reasonable standard, causing damage to the baby and/or mother. It is in the interests of all involved to resolve these meritorious claims as soon as possible.