
Litigation Policy

Solent NHS Trust policies can only be considered to be valid and up-to-date if viewed on the intranet. Please visit the intranet for the latest version.

Purpose of Agreement	To effectively manage litigation against the Trust regarding allegations of clinical or general negligence giving rise to liability for the Trust.
Document Type	<input checked="" type="checkbox"/> Policy
Reference Number	Solent NHST/Policy/GO06
Version	Version 2
Name of Approving Committees/Groups	Policy Steering Group
Operational Date	December 2022
Document Review Date	December 2025
Document Sponsor (Job Title)	Chief Nurse
Document Manager (Job Title)	Head of Risk and Litigation
Document developed in consultation with	Head of Risk and Litigation
Intranet Location	Business Zone / Policies, SOPs and Clinical Guidelines
Website Location	Publication Scheme / Policies and Procedures
Keywords (for website/intranet uploading)	Claim, Litigation, NHS Resolution, NHSR, Negligence, Loss, Damage, Policy, GO06

Review and amendment log

Version Number	Review date	Amendment section no.	Page	Amendment made / summary	Changes approved by
1.0	10.01.2020	All	All	New policy. Replaces the Claims Management Policy.	Policy Steering Group.
2.0	Oct/Nov 2022	Appendix A	9	Updated EIA template	Policy Steering Group, Clinical Executive Group
		10 & Annex 3	8 & 15	Updated NHR Panel Solicitors	
		Annex 1	12	Change name to job title – Chief of Staff	
		Annex 2	3, 12 & 13	Small Claims & Ex Gratia Payments Process added	

SUMMARY OF POLICY

- The Trust is a member of the NHS Resolution (NHSR) litigation indemnity schemes.
- These schemes cover clinical, employee, public and property liabilities.
- The Trust pays an annual contribution to the schemes.
- There is no excess for costs regarding clinical liabilities, although there are excesses for employee, public and property liabilities that must be met by the Trust.
- The Trust will abide by the requirement of the schemes for administration of litigation.
- These requirements are outlined in the appropriate NHSR guidance documents.
- This document outlines the procedures in place to ensure compliance with the NHSR requirements.
- All staff in the Trust are required to co-operate with the Trust's application of the NHSR requirements as appropriate.
- This document includes a Small Claims & Ex Gratia process for local resolution when the schedule of loss and quantum involved are below the excess amounts of the NHSR schemes, or the NHSR schemes do not match the requirements of the Trust.

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LITIGATION POLICY

1. INTRODUCTION & PURPOSE

- 1.1 The Trust may be subject to litigation regarding the application of its statutory duties and obligations. The trust is a member of the NHS Resolution indemnity schemes. These schemes ensure the Trust is protected against the negative impacts of litigation.

2. SCOPE & DEFINITIONS

- 2.1 This policy applies to locum, permanent, and fixed term contract employees (including apprentices) who hold a contract of employment or engagement with the Trust, and secondees (including students), volunteers (including Associate Hospital Managers), bank staff, Non-Executive Directors and those undertaking research working within Solent NHS Trust, in line with Solent NHS Trust's Equality, Diversity and Human Rights Policy. It also applies to external contractors, agency workers, and other workers who are assigned to Solent NHS Trust.
- 2.2 Any litigation outside the scope of the NHS Resolution schemes is out of scope of this policy.

3. PROCESS/ REQUIREMENTS

- 3.1 Solent NHS Trust is a member of the NHS Resolution (NHSR) Clinical Negligence Service for Trusts (CNST), and the Risk Pooling Scheme for Trusts (RPST).
- 3.2 The CNST handles all clinical negligence claims against member NHS bodies where the incident in question took place on or after 1 April 1995 (or when the body joined the scheme if that is later). Cover under CNST includes the cost of representation at inquests if the eligible criteria are met.
- 3.3 The costs of the scheme are met by membership contributions. The projected claim costs are assessed in advance each year by professional actuaries. Contributions are then calculated to meet the total forecast expenditure for that year.
- 3.4 Individual member contribution levels are influenced by a range of factors, including the type of trust, the specialties it provides and the number of "whole time equivalent" clinical staff it employs. Claims history is also considered meaning that members with fewer, less costly claims pay less in contributions.
- 3.5 When a claim is made against a member of CNST, the NHS body remains the legal defendant. However, NHSR take over full responsibility for handling the claim and meeting the associated costs. Until April 2002, trusts handled claims within their chosen excess themselves. Such claims were then "called-in" and all CNST claims are now handled centrally regardless of value.
- 3.6 The Risk Pooling Schemes for Trusts (RPST) is the collective name for two separate schemes covering non-clinical risks, the Liabilities to Third Parties Scheme (LTPS) and the Property Expenses Scheme (PES).
- 3.7 Both schemes date from 1 April 1999, and cover begins from that date, or from the date when the NHS organisation joined the scheme where that is later. NHS organisations may join either

or both schemes. All NHS trusts and Foundation trusts in England currently belong to both schemes.

- 3.8 LTPS and PES claims are subject to excesses, with members responsible for funding below-excess claims themselves. Both schemes are funded by contributions from members and contributions are calculated on an annual basis using actuarial techniques, including the member's previous claims experience.
- 3.9 The Trust will adhere to the requirements of the appropriate version of the Reporting claims to NHS Resolution guidance document regarding the process for managing litigation. This document is found on the NHSR website.
- 3.10 In addition to the guidance document, the Trust will apply the requirements of NHSR policy and guidance such as that outlined in NHSR guidance booklets and leaflets etc.

4. ROLES & RESPONSIBILITIES

- 4.1 **Chief Executive** – Trust Accountable Officer with the Accountable Executive Officer (AEO) responsibilities as set out in the Accountable Officers Memorandum issued by the Department of Health.
- 4.2 **Chief Finance Officer** - responsible for ensuring the Trust is adequately protected against the financial risks of litigation.
- 4.3 **Chief Nurse** - responsible for ensuring the Trust has the appropriate processes in place to enable protection from the impacts of litigation. The Chief Nurse is responsible for ensuring responses requested from NHSR or their panel solicitors are appropriately authorised e.g. Letters of Response, admission of breach of duty etc.
- 4.4 **Head of Risk and Litigation (HoRL)** - responsible for managing the Trust's application of the requirements within the Reporting claims to NHS Resolution guidance document when a claim is received by the Trust. The HoRL is responsible for managing and communicating with NHSR and their panel solicitors and up and downloading information via the online NHSR claims management system. The HoRL is responsible for arranging support for staff if they are required to attend Court.
- 4.5 **Heads of Quality and Professions (HQP)** - act as the service liaison points for the Head of Risk and Litigation. HQPs will ensure the requirements of the NHSR Reporting Claims to NHS Resolution guidance are adhered to by their service line.
- 4.6 **Head of Health and Safety** - responsible for acting as the liaison point for any litigation regarding Health and Safety incidents.
- 4.7 **Staff employed by the Trust** - responsible for co-operating with the application of the NHSR requirements. This includes (but not limited to) carrying out investigations, providing information, providing witness statements, completing claim forms, providing roster and earnings information, corresponding, and communicating directly with NHSR panel solicitors and appearing in Court as witnesses if required.

5. TRAINING

- 5.1 The Head of Risk and Litigation will attend any panel solicitor or NHSR training events and conferences as appropriate.
- 5.2 Formal training within the Trust is not required. Awareness raising can be provided by the HoRL if required.

6. EQUALITY IMPACT ASSESSMENT AND MENTAL CAPACITY

- 6.1 The Impact Assessment has indicated no negative equality impacts. (See Appendix A).

7. SUCCESS CRITERIA / MONITORING EFFECTIVENESS

- 7.1 The effectiveness of this document will be reviewed via a report to the Board once every six months.
- 7.2 The Head of Risk and Litigation will carry out the review. The NHSR report system will be the tool. The results will be presented to the Board via the report every six months. Actions will be monitored by the Board governance process.

8. REVIEW

- 8.1 This document may be reviewed at any time at the request of either staff side or management but will automatically be reviewed 3 years from initial approval and thereafter on a triennial basis unless organisational changes, legislation, guidance or non-compliance prompt an earlier review.

9. REFERENCES AND LINKS TO OTHER DOCUMENTS

- 9.1 NHS Resolution website <https://resolution.nhs.uk/>
- 9.2 NHS Resolution website claims management section <https://resolution.nhs.uk/services/claims-management/>
- 9.3 NHSR Claims Reporting Guidelines <https://resolution.nhs.uk/resources/claims-reporting-guidelines/>
- 9.4 NHSR Being a witness in a clinical negligence claim <https://resolution.nhs.uk/resources/being-a-witness-in-a-clinical-negligence-claim/>
- 9.5 NHSR Being a witness in a non-clinical negligence claim <https://resolution.nhs.uk/resources/being-a-witness-in-a-non-clinical-negligence-claim/>
- 9.6 NHSR Giving evidence in court <https://resolution.nhs.uk/resources/giving-evidence-in-court/>
- 9.7 NHSR claims management system (requires account set up by NHSR, restricted access). <https://extranet.resolution.nhs.uk/Pages/login.aspx>
- 9.8 Equality, Diversity and Human Rights Policy

10. GLOSSARY

10.1 **NHS Resolution (NHSR)** – Government funded body who deal with claims on behalf of members of the NHSR insurance schemes and pay out compensation on their behalf.

Clinical Negligence Scheme for Trusts (CNST) – One of the schemes run by NHSR for dealing with and paying out compensation in respect of clinical negligence claims.

Risk Pooling Scheme for Trusts (RPST) – The collective name for two separate schemes covering non-clinical risks, the Liabilities to Third Parties Scheme (LTPS) and the Property Expenses Scheme (PES).

Liability to Third Parties Scheme (LTPS) – One of the schemes run by the NHSR for dealing with and paying out compensation in respect of claims pursued by third parties, e.g. visitors or members of staff. This will include personal injury claims.

Property Expenses Scheme (PES) – One of the schemes run by the NHSR in respect of property claims pursued by the Trust, members of staff or patients.

Claim – Any request for imbursement of damages against the trust, either clinical or non-clinical.

Subject Access Request (SAR) – A request for all records (usually System1) regarding an individual the Trust has had contact with. Solicitors can do this on behalf of their claimant client if they have permission from that client. Often this is the first indication of a potential claim.

Letter of Claim – The first stage in the claims process prior to the issue of formal proceedings.

Panel Solicitors – Pre-approved list of solicitor firms that can be used to handle legal issues.

Hampshire County Council (HCC) – County Council Legal Services. On the Trust list of panel solicitors.

Patient Advisory Liaison Service (PALS) – Trust team that handles signposting enquiries and complaints.

Letter of Response (LoR) – letter from NHSR or NHSR panel solicitor to the claimant or their representative outlining the Trusts response to the alleged claim for damages.

Head of Risk and Litigation (HoRL) – Trust lead on litigation process.

Head of Quality and Professions (HQP) – leads for litigation for their individual service areas.

Clyde & Co LLP, or DAC Beachcroft – Panel solicitors used by NHSR.

Equality Analysis and Equality Impact Assessment

Equality Analysis is a way of considering the potential impact on different groups protected from discrimination by the Equality Act 2010. It is a legal requirement that places a duty on public sector organisations (The Public Sector Equality Duty) to integrate consideration of Equality, Diversity and Inclusion into their day-to-day business. The Equality Duty has 3 aims, it requires public bodies to have due regard to the need to:

- **eliminate unlawful discrimination**, harassment, victimisation and other conduct prohibited by the Equality Act of 2010;
- **advance equality of opportunity** between people who share a protected characteristic and people who do not;
- **foster good relations** between people who share a protected characteristic and people who do not.

Equality Impact Assessment (EIA) is a tool for examining the main functions and policies of an organisation to see whether they have the potential to affect people differently. Their purpose is to identify and address existing or potential inequalities, resulting from policy and practice development. Ideally, EIAs should cover all the strands of diversity and Inclusion. It will help us better understand its functions and the way decisions are made by:

- **considering the current situation**
- **deciding the aims and intended outcomes of a function or policy**
- **considering what evidence there is to support the decision and identifying any gaps**
- **ensuring it is an informed decision**

You can find further information via the Solent e-learning module:

<https://mylearning.solent.nhs.uk/course/view.php?id=170>

Equality Impact Assessment (EIA)

Step 1: Scoping and Identifying the Aims

Service Line / Department	Quality & Governance, Chief Nurse	
Title of Change:	No Change	
What are you completing this EIA for? (Please select):	Policy	<i>(If other please specify here)</i>
What are the main aims / objectives of the changes	N/A	

Step 2: Assessing the Impact

Please use the drop-down feature to detail any positive or negative impacts of this document /policy on patients in the drop-down box below. If there is no impact, please select "not applicable":

Protected Characteristic	Positive Impact(s)	Negative Impact(s)	Not applicable	Action to address negative impact: (e.g. adjustment to the policy)
Sex	X			Enables fair resolution of damage/ loss suffered.
Gender reassignment	X			Above
Disability	X			Above
Age	X			Above
Sexual Orientation	X			Above
Pregnancy and maternity	X			Above
Marriage and civil partnership	X			Above
Religion or belief	X			Above
Race	X			Above

If you answer yes to any of the following, you MUST complete the evidence column explaining what information you have considered which has led you to reach this decision.

Assessment Questions	Yes / No	Please document evidence / any mitigations
In consideration of your document development, did you consult with others, for example, external organisations, service users, carers or other voluntary sector groups?)	No	
Have you taken into consideration any regulations, professional standards?	No	

Step 3: Review, Risk and Action Plans

How would you rate the overall level of impact / risk to the organisation if no action taken?	Low	Medium	High
	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
What action needs to be taken to reduce or eliminate the negative impact?			
Who will be responsible for monitoring and regular review of the document / policy?			

Step 4: Authorisation and sign off

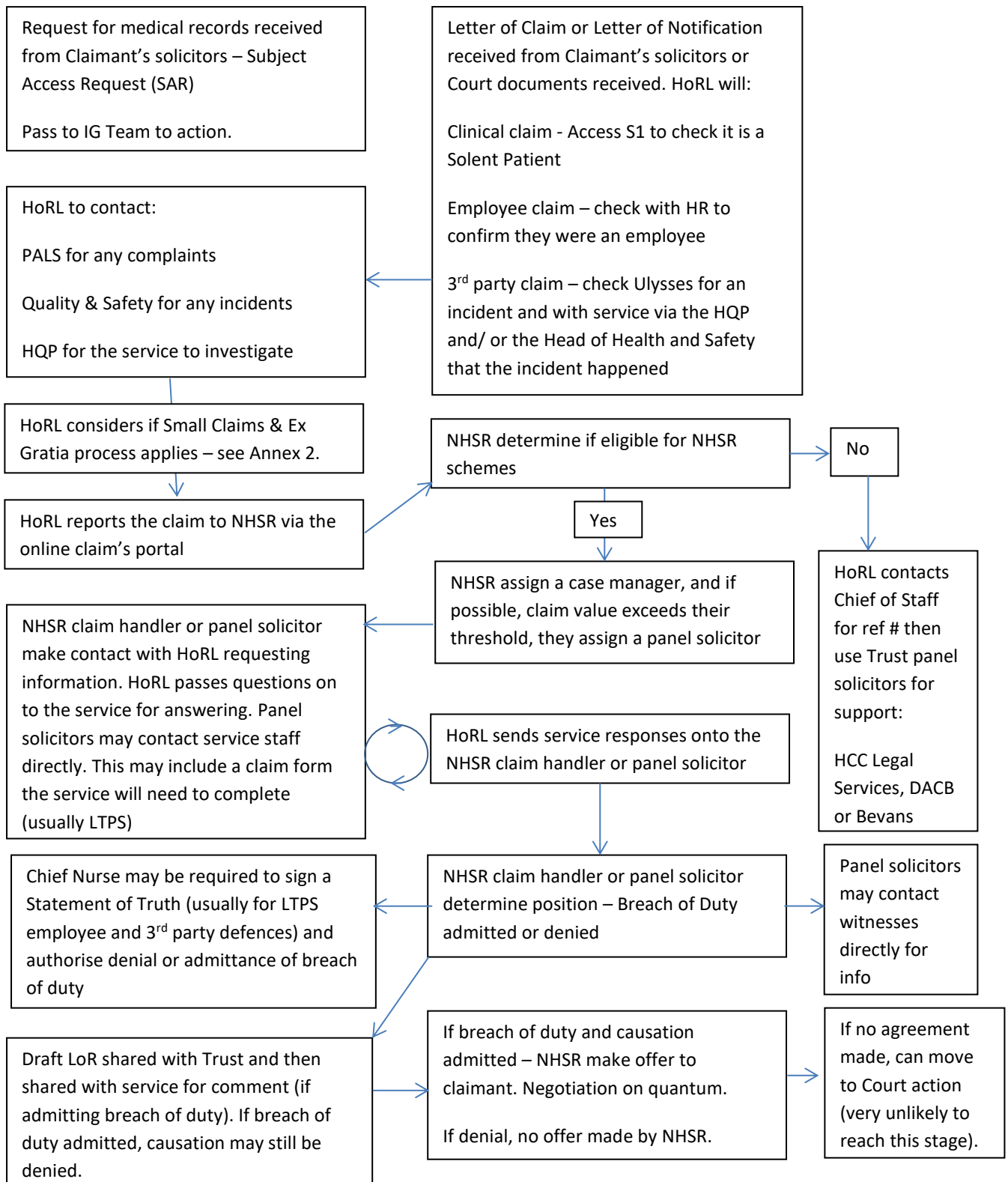
I am satisfied that all available evidence has been accurately assessed for any potential impact on patients and groups with protected characteristics in the scope of this project / change / policy / procedure / practice / activity. Mitigation, where appropriate has been identified and dealt with accordingly.

Equality Assessor:	Ben Heaton	Date:	04/10/2022
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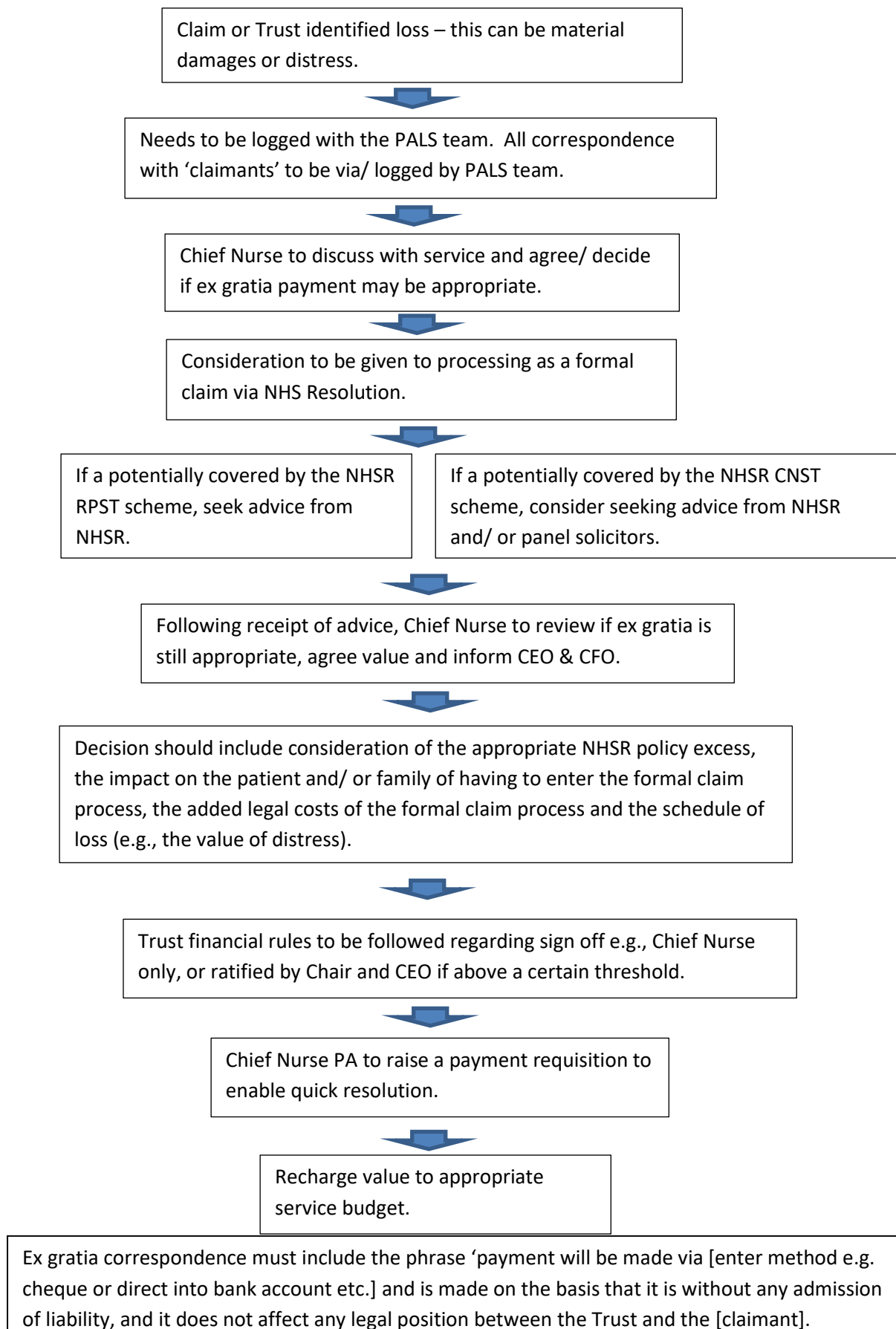
Additional guidance

Protected characteristic	Who to Consider	Example issues to consider	Further guidance
1. Disability	A person has a disability if they have a physical or mental impairment which has a substantial and long term effect on that person's ability to carry out normal day today activities. Includes mobility, sight, speech and language, mental health, HIV, multiple sclerosis, cancer	<ul style="list-style-type: none"> • Accessibility • Communication formats (visual & auditory) • Reasonable adjustments. • Vulnerable to harassment and hate crime. 	Further guidance can be sought from: Solent Disability Resource Group
2. Sex	A man or woman	<ul style="list-style-type: none"> • Caring responsibilities • Domestic Violence • Equal pay • Under (over) representation 	Further guidance can be sought from: Solent HR Team
3. Race	Refers to an individual or group of people defined by their race, colour, and nationality (including citizenship) ethnic or national origins.	<ul style="list-style-type: none"> • Communication • Language • Cultural traditions • Customs • Harassment and hate crime • "Romany Gypsies and Irish Travellers", are protected from discrimination under the 'Race' protected characteristic 	Further guidance can be sought from: BAME Resource Group
4. Age	Refers to a person belonging to a particular age range of ages (e.g., 18-30 year olds) Equality Act legislation defines age as 18 years and above	<ul style="list-style-type: none"> • Assumptions based on the age range • Capabilities & experience • Access to services technology skills/knowledge 	Further guidance can be sought from: Solent HR Team
5. Gender Reassignment	" The expression of gender characteristics that are not stereotypically associated with ones sex at birth" World Professional Association Transgender Health 2011	<ul style="list-style-type: none"> • Tran's people should be accommodated according to their presentation, the way they dress, the name or pronouns that they currently use. 	Further guidance can be sought from: Solent LGBT+ Resource Group
6. Sexual Orientation	Whether a person's attraction is towards their own sex, the opposite sex or both sexes.	<ul style="list-style-type: none"> • Lifestyle • Family • Partners • Vulnerable to harassment and hate crime 	Further guidance can be sought from: Solent LGBT+ Resource Group
7. Religion and/or belief	Religion has the meaning usually given to it but belief includes religious and philosophical beliefs, including lack of belief (e.g Atheism). Generally, a belief should affect your life choices or the way you live for it to be included in the definition. (Excludes political beliefs)	<ul style="list-style-type: none"> • Disrespect and lack of awareness • Religious significance dates/events • Space for worship or reflection 	Further guidance can be sought from: Solent Multi-Faith Resource Group Solent Chaplain
8. Marriage	Marriage has the same effect in relation to same sex couples as it has in relation to opposite sex couples under English law.	<ul style="list-style-type: none"> • Pensions • Childcare • Flexible working • Adoption leave 	Further guidance can be sought from: Solent HR Team
9. Pregnancy and Maternity	Pregnancy is the condition of being pregnant or expecting a baby. Maternity refers to the period after the birth and is linked to maternity leave in the employment context. In non-work context, protection against maternity discrimination is for 26 weeks after giving birth.	<ul style="list-style-type: none"> • Employment rights during pregnancy and post pregnancy • Treating a woman unfavourably because she is breastfeeding • Childcare responsibilities • Flexibility 	Further guidance can be sought from: Solent HR team

Annex 1: Claims Process Flow Chart



Annex 2: Small Claims & Ex Gratia Payments Process



Annex 3: Claims Frequently Asked Questions

What do we do with a request for medical records received from Claimant's solicitors – Subject Access Request (SAR)?

When a request for medical records is received from the Claimant's solicitors in relation to a potential claim ensure this is sent to Information Governance (InformationGovernanceTeam@solent.nhs.uk) for them to action. There is no need to report the claim to NHS Resolution at this stage as no formal claim against the Trust has been received.

What is a Letter of Claim or Letter of Notification received from Claimant's solicitors?

A Letter of Notification or Letter of Claim is likely to be sent directly to the Trust from the Claimant's solicitors and will usually be headed as a Letter of Notification or Letter of Claim.

A Letter of Notification can also be referred to as a Letter Before Action. This means that the Claimant's solicitors are letting the Trust know about a claim before taking formal action. This letter is usually quite brief in relation to the allegations made against the Trust. It is not governed by the Civil Procedure Rules (CPR) so there is no formal deadline to respond to the Claimant's solicitors. It is however usually best practice to respond as soon as possible.

A Letter of Claim is when the Claimant (patient or patient's representative if they are Deceased, a child or lack capacity) take legal action regarding a complaint against the Trust. This procedure is governed by the CPR. Once a Letter of Claim is received the Pre-Action Protocol is then activated. This means that the Trust and NHS Resolution will have 4 months from the date of the Letter of Claim to formally respond to the Letter of Claim. The response is called a Letter of Response. The Letter of Response will be drafted by NHS Resolution or Panel solicitors but will always be sent to the Trust for approval before it is sent.

When a Letter of Notification or a Letter of Claim is received, we access System1 Referral Viewer to check where the treatment received relates to and whether the Trust is responsible for the treatment provided in the first instance. We only have limited access to the records though, so our use is limited to seeing which service they had contact with.

If the claim does not relate to the Trust, then we let the Claimant's solicitors know and ask them to address the claim to the correct Defendant (i.e. most likely to be another Trust).

If the Trust is responsible for the treatment, we ensure this is reported to NHS Resolution as soon as possible via the online NHSR Claims Management System.

Information from the Letter of Claim or Letter of Notification is used to fill in the online NHSR claim notification forms.

NHS Resolution will then either accept or reject the claim and then allocate this to a claim's handler. We will be notified of NHS Resolution's reference.

NHS Resolution will then have conduct of the claim and will assign the case to their Panel Solicitors. This simply refers to a list of solicitor firms NHSR has agreement with to use.

For Solent NHS Trust this is usually Clyde & Co LLP or DAC Beachcroft.

What actions required once a Letter of Claim or Letter of Notification has been received?

- The Letter is sent to the Information Governance team (InformationGovernanceTeam@solent.nhs.uk) requesting relevant medical records. We ask for an email to be sent to the legal services inbox when the records have been located. The Information Governance Team will then save the records to the R Drive in the IG and Litigation folder under the patient's name so they can be easily located.
- The Letter is sent to PALS (Pals@solent.nhs.uk) to see whether there has been any previous complaint/s in relation to the incident.
- The Letter is sent to the Quality & Safety team (Quality&Safety2@solent.nhs.uk) to see whether there are any incident reports and/or investigation documents.
- If we can ascertain what service the Letter relates to, a copy is sent to the relevant Head(s) of Quality and Professions.

Once we have received copies of the above, the documentation is sent to NHS Resolution or to the Panel solicitors if we have been advised by NHS Resolution that they have been instructed.

It is likely that the Trust will be asked to obtain comments from the clinicians who were involved with the Claimant's care and treatment. We will review the Letter of Claim and/or Letter of Notification or the medical records to try and locate this information. We will then contact the Service Lead and ask them to obtain comments from the clinician/s involved.

If the relevant clinicians are no longer employed by the Trust, then we will ask the service or HR for forwarding details and provide them to NHS Resolution or Panel solicitors as they have resources in place to try and locate them.

What happens when Court documents are sent to the Trust?

Sometimes the Claimant's solicitors will send Court Documents (serve proceedings) to the Trust without taking any of the above steps first. This therefore may be the first time that the Trust is aware of a claim/complaint made against them. This can happen for various reasons:

- The Claimant's solicitors have just chosen not to utilise the Pre-Action Protocol
- Limitation is about to expire. A Claimant has 3 years from the date of the incident or the date of knowledge of the injury to make a claim. If the Claimant is a minor, then they have until the age of 18 to bring the claim.

If Court documents are sent to the Trust directly then it is extremely important that this is reported to NHS Resolution as soon as possible. The Claimant's solicitors usually send a Claim Form, Particulars of Claim, an expert report, and a Schedule of Loss. If the Claimant's solicitors do not send the Particulars of Claim at this stage, then they have 14 days after sending the Claim Form to do so.

NHS Resolution will usually instruct Panel solicitors at this stage, so it is important that all documentation is sent to them. If it is a completely new claim, then we will take all the steps required when a Letter of Notification or a Letter of Claim is received as outlined above.

If it is an existing claim that has now turned into a litigated case (i.e. we have now received a Claim Form from the Claimant's solicitors) then Panel solicitors will take/retain conduct of the claim and the Trust will have to assist Panel solicitors as and when required. The Trust will be asked to approve certain documents, but Panel solicitors will provide their advice and guidance.

What is an LTPS Claim Report Form (Portal Claims)?

The Head of Risk and Litigation may request the service to complete an LTPS Claim Report Form (Portal Claims). This is a standard claim form that the service needs to complete so NHSR can take on the case. It is for Claims against the Trust regarding Employee and Public Liability such as injury to staff or visitors.

What if NHSR Panel Solicitors have questions?

NHSR and/ or their Panel Solicitors may require further information from the service and have questions that may need answering. These will be sent on to the service leads or corporate service for answering, e.g. roster changes, loss of earnings details, risk assessments etc.

Will Panel Solicitors contact me directly?

They might. Clinicians who were involved in the care of the patient involved may be contacted by the Panel Solicitors. This is to seek your input as a factual witness and not an expert. Claims are brought against the Trust and not against clinicians personally, because as an employer the Trust is vicariously liable for the acts and omissions of its staff.

The panel solicitors will often obtain expert evidence to inform a preliminary view on whether the claim can be defended. If that is not the case, we would be looking to settle and would not be contacting you.

Whilst we may deny any liability, the patient's solicitors will often obtain their own expert reports which may disagree, and so they are likely to issue Court proceedings at some stage. As a result, our panel solicitors may arrange a conference with those involved in the case and a barrister to consider in depth whether there are any risks which would lead us to consider a compromise settlement or whether we are confident of a successful defence. In practice, these types of claim often carry considerable risk in that much would come down to how a judge feels on the day if we went to trial.

The reason the panel solicitors need to speak to you is to get a better idea of the decision making at the time and how you might respond to questions about the same. It is natural that you would not have a detailed recollection off the top of your head, and we would provide you with access to your notes for the purpose of refreshing your memory. It is an unavoidably difficult aspect of the process that these claims often rear their heads sometime after the events in question.

Are you obliged to act as a witness?

As outlined in the Litigation Policy, you are obliged to co-operate with the process, both as an employee of the Trust, and as a clinician.

Can the Claimant or their solicitors ask you for a witness statement?

Yes, they can, witnesses are not restricted to one party only. You can be a witness for both Claimant and the Trust. However, unlike when we ask you for cooperation, you can choose whether you wish to do so for the Claimant. The Trust has no say in the matter.

Will I have to attend Court?

Highly unlikely, but yes, you may be required to attend Court. By far the majority of cases never reach this point as NHR seeks to resolve cases outside of the Court process. Going to Court is the last resort and given the risk of high costs, all parties seek to avoid this.