The Rapid Resolution and Redress Scheme for Birth Injuries: An Alternative Scheme Design

Appendix 1: Eligibility Numbers for the RRR Scheme

The consultation worked from incomplete returns to the Each Baby Counts project. These have been subsequently updated.[1] For the purposes of these calculations, the new figures will be used.

	2015	England (85.4% of total)
Reports to EBC	1136	970
Intrapartum stillbirth	126	108
Early neonatal death (0–7d)	156	133
Brain injury	854	**729**

The consultation proposes that only babies who fit the Each Baby Counts definition of serious brain injury will be investigated, 729 children. The prognosis for these children is mixed; some die, some recover, and some survive with abnormal neurological function.

In the consultation, eligibility numbers for consideration for redress were calculated using the eighteen-month survival outcomes taken from the meta-analysis carried out by Edwards et al. 2010,[2]. This has been re-run using the updated Each Baby Counts numbers (percentages taken from Edwards et al. 2010 and shown below). In England, 96 per cent of brain injury/early neonatal deaths are cooled. Of the 863 EBC-eligible babies who were born alive, 828 were cooled, 35 were not cooled.

18-month outcomes	Death	Survival	Survival with abnormal Neurological function
Cooled (n = 828)	29% (n = 240)	71% (n = 588)	36% (n = 298)

[1] Royal College of Obstetricians and Gynaecologists. *Each Baby Counts: 2015 Summary Report*. London: RCOG, 2017.

[2] Edwards A.D., Brockelhurst P., Gunn A.J., Halliday H., Juszczak E., Leverne M., Strohm B., Thoresen M., Whitelaw A., and Azzopardi D. 'Neurological outcomes at 18 months of age after moderate hypothermia for perinatal hypoxic ischaemic encephalopathy: synthesis and meta-analysis of trial data', *BMJ* 340 (2010): c363 doi:10.1136/bmj.c363.

Not cooled (n = 35)	35% (n = 12)	65% (n = 22)	42% (n = 14)
Totals (n = 863)	**29% (n = 252)**	**71% (n = 610)**	**36% (n = 312)**

Deaths (n = 252)

By eighteen months, 252 children had died; 133 of these deaths were early neonatal deaths (within seven days of birth), the remaining 119 children died between seven days and eighteen months.

Survival with normal neurological function (n = 298)

Survival with abnormal neurological function (n = 312)

RRR Consultation eligibility:

Under the RRR proposals outlined in the consultation, only the 729 serious brain injury cases would be investigated and only the 312 children who survive to eighteen months with abnormal neurological function would be eligible to be considered for redress payments.

None of the intrapartum stillbirths (n = 108) or the deaths (n = 252), a total of 360 children, would be investigated, nor would they be eligible for consideration for financial compensation.

Alternative Scheme eligibility:

Under the scheme proposed by the Maternity Review and outlined here, all of the cases of stillbirth, death, and survival with abnormal neurological function, 970 children would be investigated and a total of 511 children would be eligible for consideration for compensation, 238 of those having ongoing compensation needs.

The alternative scheme proposes carrying out far more investigations, an extra 240 per year, as well as offering the chance to apply for ongoing compensation to an additional seventy-six families.

Appendix 2: A Breakdown of the Ombudsman Costings

These are costings for all of the 970 babies in the three Each Baby Counts notification categories: serious brain injury, stillbirth, and early neonatal death.

The Each Baby Counts avoidability threshold of 76 per cent has been used for all of these calculations. This is in order that our costings represent the maximum figure.

No inflation has been added or harm reductions applied to these figures.

These figures do not include compensation awards, they are merely operational costs.

Ombudsman Costings

All EBC Cases	970
Avoidable according to EBC	76%
Start-up training for investigators and ombudsmen	**£2,000,000**
Investigations	
Annual number of investigations	970
Investigators close 1–2 cases per month	
Investigator numbers	54
Annual pay for an investigator	£50,000
On-costs at 25%	125%
Total annual investigation costs	**£3,375,000**
Redress Assessment and quantification	
Annual number	511
Redress Assessments for ongoing support	238
Redress Assessors close 3 Stillbirth/Death case or 1 Brain injury cases per month	
Redress Assessor numbers	28
Annual pay for a Redress Assessor	£50,000
On cost at 25%	125%
Total Redress Assessment costs	**£1,750,000**
Decision-making	
Annual number	1481
Ombudsman: 3 investigation decisions, 1–2 redress decision per week	20

Assistant Ombudsmen numbers	16
Deputy Ombudsmen numbers	3
Chief Ombudsman	1
Annual pay for Assistant Ombudsman	£85,000
Annual pay for Deputy Chief Ombudsman	£100,000
Annual pay for Chief Ombudsman	£125,000
On cost at 25%	125%
Total decision-making costs	**£2,231,250**

IT Reporting Tool Costs

IT reporting tool	£225,000
IT reporting tool staff: 2 staff, cost p.a.	£78,000
IT Data Analysts: 2 staff, cost p.a.	£178,000
Total IT costs	**£481,000**

Other Costs	**£4,631,250**

See infomation entitled Other Costs

Total Costs	**£12,468,500**
Start-up costs	£2,225,000
Running costs	**£12,243,500**

Other Costs

	Number	Unit cost	Cost	On-costs	Total costs
Total Investigative/Redress/Ombudsman staff	102				
Organization Infrastructure					
Main Premises/Facilities			£500,000		£500,000
Regional offices	4	£30,000	£120,000		£120,000
IT/telecoms			£700,000		£700,000
Travel			£250,000		£250,000
					£1,570,000
Staff					
Chief Operating officer	1	£100,000	£100,000	£25,000	£125,000
Ops Lead	1	£85,000	£85,000	£21,250	£106,250
Ops Deputy	1	£75,000	£75,000	£18,750	£93,750
Managers	11	£65,000	£715,000	£178,750	£893,750
Finance (1 x £70K, 1 x £50K, 2 x £35K)	4		£190,000	£47,500	£237,500
HR (1 x £60K, 2 x £35K)	3		£130,000	£32,500	£162,500
IT	2	£50,000	£100,000	£25,000	£125,000
Legal	1	£65,000	£65,000	£16,250	£81,250
Policy	2	£45,000	£90,000	£22,500	£112,500
Comms	1	£45,000	£45,000	£11,250	£56,250
Administrators	3	£20,000	£60,000	£15,000	£75,000
Regional Administrator	4	£25,000	£100,000	£25,000	£125,000
					£2,193,750
Specialist Advice					
Medical input		£500,000	£500,000		£500,000
Legal input		£200,000	£200,000		£200,000
					£700,000
Board					
Chair	1	£40,000	£40,000		£40,000
Members	6	£15,000	£90,000		£90,000
Admin (PA shared with Chief Ombudsman)	1	£30,000	£30,000	£7,500	£37,500
					£167,500
Total Other Costs					**£4,631,250**

Appendix 3: Details of Potential Associated Redress Costs

Increased numbers of claimants eligible for compensation will usually mean an increased compensation cost. However, internationally, there are examples of mechanisms that no-blame schemes use to mitigate these costs or to provide a more predictable costs profile. Broadly, costs can be mitigated by two mechanisms, altering the threshold for eligibility for compensation and/or decreasing the quantum of compensation awarded.

The RRR consultation proposed using the Experience Specialist test, which would lead to compensating 162 children out of 249 children who should be considered for compensation. So 65 per cent of potentially eligible families would be compensated. Sixty-five per cent is a mid-range threshold. In Sweden, approximately 40 per cent of applications to Löf, the Patient Insurance scheme, are compensated, but they have a very high level of applications. The Each Baby Counts assessments state that in 76 per cent of cases, different care might have resulted in a different outcome; although this is not an exact parallel, this can be used to model whether an incident was avoidable. Modelling using these three values gives a reasonable indication of the potential range of compensation payable.

The other obvious way to control compensation spend is to cap compensation payments, either by only paying specified categories of compensation (heads of damage) and/or by limiting the maximum payment available in each category. Löf in Sweden pays compensation for loss of earnings at the national average wage. The Virginia Birth-Related Neurological Injury Compensation Program[3] pays loss of earnings at the state average wage. Under both of these schemes, the payment is fixed by statute. In the USA, the birth injury schemes in Florida[4] and Virginia[5] both make ex gratia payments upon the death of a child, these are in addition to any other compensation. In Florida, this is capped at $10,000;[6] in Virginia, it is at the discretion of the program up to a maximum of $100,000.[7]

Fixing compensation at the national or state average wage provides a greater degree of predictability, and thus reduces the risk of unexpectedly high compensation payments. It is not the only mechanism to mitigate these risks. Workers' compensation companies in Finland are obliged to pay a proportion of their premium income into a pay-as-you-go top up to cover major catastrophes and resulting very high value claims. This is, in effect, risk-pooling, so that no individual

[3] https://www.vabirthinjury.com

[4] Florida Birth-Related Neurological Injury Compensation Association (NICA): www.nica.com

[5] The Virginia Birth-Related Neurological Injury Compensation Act (1987, c 540) taken from the Code of Virginia Title 32.8 Insurance Chapter 50 Virginia Birth-Related Neurological Injury Compensation Act. Available at: https://law.lis.virginia.gov/vacode/title38.2/chapter50/section38.2-5000/

[6] S 766.31(1)(b)(2) of the Florida Statutes. Available at: www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0700-0799/0766/Sections/0766.31.html.

[7] 38.2-5009 Code of Virginia, https://law.lis.virginia.gov/vacode/title38.2/chapter50/section38.2-5009/.

insurance company will have to carry the cost of a particularly high claim or incident.[8] The pharmaceutical insurance companies in Finland adopt a different strategy and purchase re-insurance to cover them if an individual claims total exceeds €3m or a serial claim exceeds €30m per year.[9]

Currently, the scheme envisaged by the Department of Health is a state-backed scheme, so is most likely to use a combination of threshold adjustment and compensation caps. If a private not-for-profit scheme were set up, the re-insurance model would also be an option.

Any decision on the threshold or caps on compensation is a policy decision for the Department of Health. These figures are purely for illustrative purposes to demonstrate the potential maximum increases in compensation payment if these limits are chosen.

	Numbers	Sweden % compensated	Number compensated using Swedish %	Consultation % of cases that were avoidable	Number compensated using Consultation %	EBC % of cases that were avoidable	Number compensated using EBC %
Consultation Brain Injuries	249	40%	100	65%	162	76%	189
Consultation updated	313	40%	125	51%	162	76%	238

Ombud All injuries by category	Numbers	Proportion of avoidable cases	Number compensated at 40%	Proportion of avoidable cases	Number compensated at 65%	Proportion of avoidable cases	Number compensated at 76%
Stillbirth	108	40%	43	65%	70	76%	82
Die before 7 days	133	40%	53	65%	87	76%	101
Die 7 days–18 months	119	40%	48	65%	77	76%	90
Survive to 18 months abnormal neurological function	313	40%	125	65%	203	76%	238

[8] An unofficial English translation of the Workers' Compensation Act detailing the pay as you go premium is available to download at: http://www.tvk.fi/en/workers-compensation-and-insurance/

[9] www.laakevahinko.fi/in-english

Capped compensation for deaths

£10,000 for all deaths, and an additional maximum of £81,000 for death before eighteen months. £81,000 as the average salary is £27,000 per year, so £40,500 per parent per year to compensate for lost earnings. This assumes that both parents give up work to care full-time for the child. There is no restriction on parents litigating if they feel that their case was negligent and they require higher compensation levels, but anything paid by the RRR Scheme will be recovered from any award of damages.

There would also be in an interaction between state benefits, such as carers allowance, which would need to be considered, as would the impact of these payments on a parent's national insurance contribution record.

At eighteen months, it is envisaged that a child would enter into the main RRR Scheme, and so be eligible for all of the associated benefits.

These figures represent absolute maximum payments for cohort at that particular threshold.

	Max compensation	40% claims compensated	65% claims compensated	76% claims compensated
Stillbirth	£10,000	£430,000	£700,000	£820,000
Die before 7 days	£10,000	£530,000	£870,000	£1,010,000
Die 7 days–18 months	£91,000	£6,097,000	£9,828,000	£11,557,000
Total Max. Additional Compensation Spend		**£7,057,000**	**£11,398,000**	**£13,387,000**

These costs are low when compared to the costs of litigated brain injury cases. With these capped costs, every single avoidable death case can be compensated for less than the cost of three average-sized brain injury awards. There would

also be a potential saving achieved by diverting cases out of litigation into the RRR Scheme. In 2012, NHSR spent on average £1.6m a year compensating stillbirth cases,[10] a figure which is likely to have risen since then.

The additional costs of counselling are detailed below. The preferred option would be to offer counselling to all parents immediately after the event. This would necessarily be before an investigation, but the option of waiting until avoidability has been proven (over a year and a half under the consultation proposals) before offering counselling seems absurd. Given the nugatory costs, and the potential benefits of early intervention, it seems absurd to wait and to restrict the offer of counselling.

Additional counselling costs for deaths	100% cases	40% claims compensated	65% claims compensated	76% claims compensated
Avoidable stillbirths	£157,532	£4,392	£102,480	£120,048
Avoidable early neonatal deaths	£195,040	£77,592	£127,368	£147,864
Die 7 days–18 months	£244,488	£98,088	£158,112	£185,928
Total for death cases	**£597,060**	**£180,072**	**£387,960**	**£453,840**

[10] NHS Litigation Authority 'Ten Years of Maternity Claims: An Analysis of NHSLA Data', October 2012. Available at: http://www.nhsla.com/safety/Documents/Ten%20Years%20of%20Maternity%20Claims%20-%20An%20Analysis%20of%20the%20NHS%20LA%20Data%20-%20October%202012.pdf