

1999 No. 873

NATIONAL HEALTH SERVICE, ENGLAND AND WALES

The National Health Service (Liabilities to Third Parties Scheme) Regulations 1999

Made - - - - - *17th March 1999*

Laid before Parliament *18th March 1999*

Coming into force *1st April 1999*

The Secretary of State for Health, in exercise of powers conferred by section 126(4) of the National Health Service Act 1977(a) and section 21 of the National Health Service and Community Care Act 1990(b) and of all other powers enabling him in that behalf, and with the consent of the Treasury, hereby makes the following Regulations:

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the National Health Service (Liabilities to Third Parties Scheme) Regulations 1999, and shall come into force on 1st April 1999.

(2) In these Regulations, unless the context otherwise requires—

“the Act” means the National Health Service and Community Care Act 1990;

“an eligible body” means a body of a kind described in regulation 3;

“member” means an eligible body which is a member of the Scheme;

“membership year” means, in relation to an eligible body, any period of 12 months beginning on 1st April during any part of which that body is a member of the Scheme;

“preceding year” means, in relation to a membership year, the period of 12 months immediately preceding that membership year;

“qualifying liability” means a liability of a kind described in regulation 4;

“relevant function” means the function of providing services in England for the purposes of the National Health Service Act 1977 or by virtue of section 7 of the Health and Medicines Act 1988(c) or under paragraph 14 or 15 of Schedule 2 to the Act;

“the Scheme” means the Liabilities to Third Parties Scheme established by regulation 2.

(3) In these Regulations, a reference to a numbered regulation is a reference to the regulation which bears that number in these Regulations, and a reference in a regulation to a numbered paragraph is a reference to the paragraph which bears that number in that regulation.

(a) 1977 c. 49 (“the 1977 Act”); section 126(4) was amended by section 65(2) of the National Health Service and Community Care Act 1990 (c. 19) (“the 1990 Act”).

(b) 1990 c. 19; *see*, for the definition of “regulations”, section 128(1) of the 1977 Act, as amended by section 26(2)(i) of the 1990 Act; section 21 is amended by paragraph 79(a) of Schedule 1 to the Health Authorities Act 1995 (c. 17).

(c) 1998 c. 49.

Establishment of scheme

2. There is hereby established a scheme, to be known as the Liabilities to Third Parties Scheme, whereby an eligible body may, in accordance with the following provisions of these Regulations, make provision to meet qualifying liabilities.

Eligible bodies

3. A body is eligible to participate in the Scheme if it is—
- (a) a National Health Service trust,
 - (b) a Health Authority whose area is situated in England, or
 - (c) a Special Health Authority.

Liabilities to which the Scheme applies

4.—(1) The Scheme applies to any liability to any third party to which a member is subject in respect of loss, damage or injury which—

- (a) arises out of the carrying out of any relevant function of that member;
- (b) is a qualifying liability; and
- (c) is not a qualifying liability for the purposes of the National Health Service (Clinical Negligence Scheme) Regulations 1996(a), the National Health Service (Existing Liabilities Scheme) Regulations 1996(b) or a qualifying expense for the purposes of the National Health Service (Property Expenses Scheme) Regulations 1999(c).

(2) In this regulation—

“board member” means, in respect of a member, any member of the board of that member whether or not that person is an employee of that member;

“personal injury” includes bodily injury, death, disease, illness and nervous shock and is to be treated as including wrongful arrest, detention, imprisonment and malicious prosecution;

“relevant person” means, in respect of a member, a person employed or engaged by that member;

“qualifying liability” means, in respect of a member, a liability which falls within one or more of the following categories—

- (i) a liability in respect of personal injury sustained by a relevant person arising out of and in the course of his or her employment or engagement by the member;
- (ii) a liability in respect of or consequent upon personal injury or loss arising out of or in connection with any breach of a duty of care or breach of any statutory duty or breach of a duty under any of the Occupiers’ Liability Act 1957(d), the Occupiers’ Liability Act 1984(e) or the Defective Premises Act 1972(f) in each case owed by the member to any person in consequence of any act or omission to act on the part of any relevant person;
- (iii) a contractual liability in respect of personal injury to any person or damage to any property of any third party;
- (iv) a liability arising out of the act or omission to act on the part of a relevant person which is dishonest, fraudulent, criminal or malicious;
- (v) a liability arising out of the making or publishing of any defamatory statement (whether in written or oral form) by the member or a relevant person;
- (vi) a contractual liability to make payment to any relevant person in connection with any personal injury sustained by the relevant person directly as a result of assault;
- (vii) any legally enforceable liability in respect of or consequent upon personal injury or loss arising out of or in connection with any tortious or other wrongful act committed by any relevant person;

(a) S.I. 1996/251, as amended by S.I. 1997/527.

(b) S.I. 1996/686, as amended by S.I. 1997/526.

(c) S.I. 1999/874.

(d) 1957 c. 31.

(e) 1984 c. 3.

(f) 1972 c. 35.

- (viii) a liability arising out of any indemnity properly given by any member to any board member;
 - (ix) any liability in respect of any consequential or ancillary expense which arises in connection with any liability referred to in any of the above categories.
- (3) The Secretary of State and a member may agree—
- (a) a minimum level of liability which must arise before a payment or other provision in respect of such a liability may be made under the Scheme; and
 - (b) an amount which is to be the maximum amount of any payment or other provision in respect of such a liability which may be made under the Scheme.

Administration of the Scheme

5. The Scheme shall be administered by the Secretary of State.

Membership of the Scheme

6.—(1) An eligible body which, before 31st March 1999, gave notice in writing to the Secretary of State of its wish to participate in the Scheme with effect from 1st April 1999, or such later date being not later than 31st March 2000 as the Secretary of State may determine, shall be a member of the Scheme with effect from 1st April 1999 or, as the case may be, such later date.

(2) An eligible body to which paragraph (1) does not apply which wishes to participate in the Scheme during any period beginning after 31st March 2000 shall apply to the Secretary of State to be admitted as a member.

(3) An application under paragraph (2) shall—

- (a) be made in writing in such form as the Secretary of State may require; and
- (b) be made no later than 1st October in the calendar year preceding that in which the eligible body wishes its first membership year to begin, or such later date as the Secretary of State may agree in relation to any specific eligible body.

(4) An applicant shall provide such information as the Secretary of State may in writing request it to provide, as respects—

- (a) the nature of its relevant functions;
- (b) the number of employees of the applicant who are engaged in its performance of any relevant function, or such part of any relevant function as the Secretary of State may specify, and the qualifications and experience of those employees;
- (c) the nature and extent of any claims made against the applicant in respect of any qualifying liability arising from loss, damage or injury sustained by third parties as a result of the carrying out by the applicant of any relevant function; and
- (d) such other information as he may request in connection with the application.

(5) The Secretary of State shall, having regard to the information provided by the applicant under this regulation, and to such other factors as he considers to be material to the application, determine whether or not the applicant should be admitted as a member, and shall notify the applicant of his decision in writing.

(6) Where the application of an eligible body under paragraph (2) has been successful, that body shall be admitted as a member with effect from the beginning of the membership year next following the Secretary of State's decision.

(7) In this regulation “applicant” means an eligible body which has applied under paragraph (1) or (2) to be admitted as a member, and “application” shall be construed accordingly.

Termination of membership

7.—(1) Subject to paragraph (2), a member may terminate its participation in the Scheme on 31st March in any year by giving not less than 12 months' notice in writing to that effect to the Secretary of State.

(2) A member's participation in the Scheme may not be terminated, by notice under paragraph (1)—

- (a) where its membership takes effect on a date on or after 1st April 1999 and not later than 31st March 2000, before 31st March 2002; and
- (b) in any other case, before the expiry of three consecutive membership years beginning on the date on which, by virtue of regulation 6(6), its membership takes effect.

(3) Where—

- (a) any payment which a member is, by virtue of regulation 8 (contributions under the Scheme), liable to make to the Secretary of State has remained unpaid for a period of not less than 28 days beginning on the date on which the payment should have been made,
- (b) a member has failed to provide, within 28 days, or such further period as the Secretary of State may in writing allow, of being requested to do so, any information which it is required by virtue of regulation 10 (provision of information) to provide, or
- (c) the continued membership of any member would, in the opinion of the Secretary of State, be detrimental to the efficient administration of the Scheme or to the interests of other members,

the Secretary of State may give notice in writing to that member that its participation in the Scheme is to cease on a date falling not less than 28 days after that on which the notice is given, and that member's participation in the Scheme shall, unless the Secretary of State in writing withdraws the notice before that date, be terminated on that date.

Members' contributions to the Scheme

8.—(1) A member shall pay to the Secretary of State in respect of each membership year such amount as shall be determined in relation to that member, and notified to it, in accordance with this regulation.

(2) When determining in relation to any member the amount of the payment to be made under paragraph (1), the Secretary of State shall have regard to—

- (a) his estimate of the total amount which will, by virtue of regulation 9 (payments under the Scheme), fall to be paid during that membership year in respect of all qualifying liabilities under the Scheme;
- (b) the nature of the member's relevant functions;
- (c) the number of employees of the member who are engaged in its performance of a relevant function, or any part of such a function, and the qualifications and experience of those employees;
- (d) any agreement between the Secretary of State and the member that regulation 9(2)(b) or (c) is not to apply in relation to certain liabilities incurred by the member; and
- (e) his assessment of—
 - (i) the likely effectiveness of any steps being taken, or to be taken, by the member, as respects the manner in which it exercises any relevant function, with a view to reducing the incidence of qualifying liabilities in connection with that function, and
 - (ii) the effectiveness of any such steps which may previously have been taken;

and may have regard to any other factor concerning that or any other member or the Scheme which he considers to be material to his determination.

(3) The Secretary of State shall give notice in writing to each member—

- (a) as respects the membership year beginning on 1st April 1999, by no later than 31st May 1999; and
- (b) as respects any other membership year, by no later than 31st October in the preceding year;

of the amount of the payment which it is to make under paragraph (1).

(4) Where, after notice has been given to a member in accordance with paragraph (3) in relation to any membership year, it appears to the Secretary of State that—

- (a) the amount specified in the notice was—
 - (i) incorrectly calculated, or
 - (ii) determined by reference to information which was incorrect, or
- (b) in the light of further information which has become available to him, the determination of that amount ought to be reconsidered,

he shall reconsider the determination and may, at any time before the end of the membership year to which it relates, revise the amount of the payment to be made under paragraph (1).

(5) Where an amount is revised under paragraph (4), the Secretary of State shall give to the member notice in writing of the revised amount, and that paragraph shall have effect in relation to that amount as if the notice had been given under paragraph (3).

(6) Any amount which falls to be paid by a member under paragraph (1) shall be paid by the member to the Secretary of State—

- (a) in relation to the membership year beginning on 1st April 1999, by 30th June 1999 or by such later date as the Secretary of State may allow; and
- (b) in relation to any other membership year, at such time, or in such instalments at such times, and in such manner—
 - (i) as the Secretary of State and the member may, by no later than 1st March immediately preceding the membership year in question, agree, or
 - (ii) in default of such agreement by that date, as the Secretary of State shall determine.

Payments under the Scheme

9.—(1) Where, in any membership year, a payment falls to be made by any member in connection with a claim in respect of a qualifying liability, the Secretary of State may, subject to paragraph (2), pay to or on behalf of that member an amount determined by him in accordance with paragraph (3).

(2) No payment shall be made under paragraph (1)—

- (a) in respect of any liability which falls to be met after a member has given notice under regulation 7(1) to terminate its participation in the Scheme, unless the Secretary of State is satisfied that the liability would have fallen to be met at that time irrespective of the member's decision to give such notice;
- (b) in respect of any liability incurred by an eligible body before the beginning of its first membership year, unless—
 - (i) the claim by a third party against the member in respect of that liability was made after the beginning of the first membership year,
 - (ii) the Secretary of State is satisfied that the member informed him, by no later than the qualifying date, that the claim had been made,
 - (iii) the Secretary of State agreed, no later than the beginning of the first membership year, that this sub-paragraph shall not apply so as to preclude a payment under paragraph (1) in respect of any claim in relation to which heads (i) and (ii) above are satisfied, and
 - (iv) that agreement remains in force at the date on which the claim falls to be met by that member;
- (c) in respect of any liability which falls to be met after the date of the termination of the member's participation in the Scheme, unless—
 - (i) the claim by a third party against the member in respect of that liability was made prior to that date,
 - (ii) the Secretary of State is satisfied that the member informed him, by no later than the qualifying date, that the claim had been made,
 - (iii) prior to the date of termination of the member's participation in the Scheme, the Secretary of State agreed that this sub-paragraph shall not apply so as to preclude a payment under paragraph (1) in respect of any claim in relation to which heads (i) and (ii) above are satisfied, and
 - (iv) that agreement remained in force at the date of termination;
- (d) except to such extent as the Secretary of State may determine, in respect of—
 - (i) any payment made by or liability admitted by any member without the Secretary of State's consent;

- (ii) any liability of an amount which is less than that for the time being agreed between the Secretary of State and the Member as the minimum amount in respect of which payment is to be made under the Scheme;
 - (iii) any liability of an amount in excess of such amount for the time being agreed by the Secretary of State and the Member as the maximum amount in respect of which a payment in respect of such liability may be made under the Scheme, to the extent of that excess; and
 - (iv) any liability where the member has not complied with any condition imposed by the Secretary of State relating to that liability;
- (e) in respect of any liability which is of a nature in respect of which the Secretary of State has in respect of all members and in respect of the relevant membership year determined that the same is not eligible for payment under the Scheme.
- (3) The amount of any payment under paragraph (1) shall be determined by reference to—
- (a) where an award of damages is made against a member by a Court, the amount of that award, together with the amounts of the legal and associated costs awarded to the plaintiff and of any such costs incurred by or on behalf of the member;
 - (b) where legal proceedings have been compromised by the member, the amount of—
 - (i) any sum paid or payable where properly payable by the member in relation to the plaintiff's claim for damages, and
 - (ii) the member's contribution towards any legal and associated costs incurred by or on behalf of the plaintiff, and
 - (iii) any such costs incurred by the member;
 - (c) where in any legal proceedings a Court has declined to award damages against the member, the amount of any legal and associated costs incurred by or on behalf of the member to the extent that such costs are not recoverable from the plaintiff or from the Legal Aid Board under section 18 of the Legal Aid Act 1988^(a);
 - (d) where, otherwise than in the course of legal proceedings—
 - (i) a member has agreed to make a payment in settlement of a claim, the amount of that payment, and
 - (ii) a member has agreed to make any contribution towards legal or associated costs incurred by a person in connection with that person's claim against the member in respect of a qualifying liability, the amount of that contribution,
 and the amount of any legal or associated costs incurred by or on behalf of the member in connection with the claim;
 - (e) where a member has agreed to be bound by the determination of any person or body as to the making of a payment by that member in respect of a qualifying liability, the amount of the payment and the amount of any legal or associated costs incurred by the person making the claim and any such costs incurred by or on behalf of the member in connection with the claim;
 - (f) where the member has decided to make a payment into the Court, the amount of that payment;
 - (g) in respect of any contractual obligation, the amount properly payable under the relevant contract including the amount of any legal or associated costs incurred by or on behalf of the member and by the other contracting party.
- (4) Where in any membership year a payment (including a payment into court) falls to be made by a member in connection with a claim in respect of which a payment may become payable by the Secretary of State under this regulation, the Secretary of State may make a payment on account of any amount payable by him under this regulation.
- (5) Where the amount of any payment on account under paragraph (4) exceeds the amount of any payment the Secretary of State subsequently determines to make under this regulation the excess shall be recoverable from the member.

^(a) 1988 c. 34.

(6) In this regulation—

- (a) “first membership year” means any membership year immediately following any period during which the eligible body was not a member;
- (b) “member” includes an eligible body whose participation in the Scheme has been terminated and in respect of whom the conditions specified in paragraph (2)(c)(iii) and (iv) are satisfied; and
- (c) “qualifying date” means the date falling 14 days after that on which the member became aware that a claim had been made, or after that on which, in the opinion of the Secretary of State, the member ought to have become aware of that fact, whichever is the later.

Provision of information

10. A member shall, at such times and in such manner as the Secretary of State may require, furnish to the Secretary of State such information as he may request, about—

- (a) the nature of any relevant function being carried on, or to be carried on, by the member in any membership year which the Secretary of State may specify;
- (b) the number of employees of the member who are engaged in its performance of any relevant function, or such part of any relevant function as the Secretary of State may specify, and the qualifications and experience of those employees; and
- (c) any event of which the member is aware which it considers might give rise to a qualifying liability.

Availability of directions and guidance

11. The Secretary of State shall make available to eligible bodies, in such form and at such times as he may consider appropriate—

- (a) any directions **(a)** he may give, to any body directed under section 21(4)(b) **(b)** of the Act to carry out functions in connection with the administration of the Scheme, with respect to the discharge by that body of those functions;
- (b) any guidance he may give to that body as to the manner in which the Scheme is to be administered.

Signed by authority of the Secretary of State for Health

15th March 1999

John Denham
Minister of State,
Department of Health

We consent,

17th March 1999

Clive Betts
David Jamieson
Two of the Lords Commissioners of
Her Majesty’s Treasury

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- (a)** See section 17 of the National Health Service Act 1977 (c. 49), as substituted by paragraph 2 of Schedule 3 to the Health and Social Security Act 1984 (c. 48) and amended by sections 3(4) and 12(2) of the National Health Service and Community Care Act 1990 (c. 19); see also paragraph 8 of Schedule 1 to the Health Authorities Act 1995 (c. 17).
 - (b)** See S.I. 1995/2800.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations establish a Scheme (to be known as the “Liabilities to Third Parties Scheme”) whereby NHS trusts and certain other bodies providing services under the National Health Service Act 1977 may make provision for meeting liabilities to third parties in connection with any loss, damage or injury arising out of the carrying out of the bodies’ functions (regulations 2, 3 and 4) other than liabilities to which the NHS (Clinical Negligence Scheme) Regulations 1996 or the NHS (Existing Liabilities Scheme) Regulations 1996 apply.

The Scheme is to be administered by the Secretary of State (regulation 5). Provision is also made for the admission of members to, and their withdrawal and expulsion from, the Scheme (regulations 6 and 7), for payments by members and by the Secretary of State under the Scheme (regulations 8 and 9), for the provision of information by members to the Secretary of State for the purposes of the Scheme (regulation 10) and for the provision by the Secretary of State of certain information to members (regulation 11).

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