

2015 No. 102

NATIONAL HEALTH SERVICE

The National Health Service (Clinical Negligence and Other Risks Indemnity Scheme) (Scotland) Amendment Regulations 2015

<i>Made</i>	- - - -	<i>3rd March 2015</i>
<i>Laid before the Scottish Parliament</i>		<i>5th March 2015</i>
<i>Coming into force</i>	- -	<i>3rd April 2015</i>

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 85B and 105(7) of the National Health Service (Scotland) Act 1978(a) and all other powers enabling them to do so.

Citation and commencement

1. These Regulations may be cited as the National Health Service (Clinical Negligence and Other Risks Indemnity Scheme) (Scotland) Amendment Regulations 2015 and come into force on 3rd April 2015.

Amendment of the National Health Service (Clinical Negligence and Other Risks Indemnity Scheme) (Scotland) Regulations 2000

2.—(1) The National Health Service (Clinical Negligence and Other Risks Indemnity Scheme) (Scotland) Regulations 2000(b) are amended as follows.

(2) In regulation 1 (citation, commencement and interpretation), in paragraph (2)—

(a) after the definition of “the Act”, insert—

““applicant” means a body which makes an application under regulation 3A;

“enactment” includes an Act of the Scottish Parliament and an instrument made under an Act of the Scottish Parliament;”;

(a) 1978 c.29. Section 85B was inserted by the Community Care and Health (Scotland) Act 1990 (c.19), section 41 and relevantly amended by the Health Act 1999 (c.8), Schedule 4, paragraph 56(b); the Community Care and Health (Scotland) Act 2002 (asp 5), section 21; the Public Services Reform (Scotland) Act 2010 (asp 8), schedule 17, paragraph 18(a); the Public Bodies (Joint Working) (Scotland) Act 2014 (asp 9), section 65 and by S.S.I. 2005/465. Section 105(7) was amended by the Health Services Act 1980 (c.53), Schedule 6 paragraph 5 and Schedule 7; the Health and Social Services and Social Security Adjudications Act 1983 (c.41), Schedule 9 paragraph 24 and by the Health Act 1999 (c.8), Schedule 4 paragraph 60. Section 108(1) provides a definition of “regulations” which is relevant to the exercise of these powers. Functions conferred on the Secretary of State are transferred to the Scottish Ministers by virtue of Section 53 of the Scotland Act 1998 (c.46). In relation to section 85B the requirement to obtain Treasury consent was removed by section 55 of the Scotland Act 1998 (c.46).

(b) S.S.I. 2000/54, as amended by S.S.I. 2000/168; S.S.I. 2002/239; S.S.I. 2008/60 and S.S.I. 2011/211.

- (b) after the definition of “following year”, insert—
 - ““integration joint board” means an integration joint board established by order under section 9(2) of the Public Bodies (Joint Working) (Scotland) Act 2014(a);”;
- (c) in the definition of “member”, after “3”, insert “or 3A(2)”;
- (d) for the definition of “relevant function”, substitute—
 - ““relevant function”—
 - (a) in the case of a Health Board means—
 - (i) a function providing services in Scotland for the purposes of the Act;
 - (ii) the power, conferred by section 7(2)(d) of the Health and Medicines Act 1988(b), to supply services to any person and to provide new services, to the extent that it is exercised for the purpose of providing forensic services in Scotland; and
 - (iii) a function which is an integration function within the meaning given by section 85B(2D)(c) of the Act, subject to the modification that references to “the authority” are to be read as references to the Health Board;
 - (b) in the case of an integration joint board means—
 - (i) a function conferred on the integration joint board by an enactment; and
 - (ii) a function delegated to the integration joint board by virtue of an integration scheme prepared in pursuance of section 1 or 2 of the Public Bodies (Joint Working) (Scotland) Act 2014;
 - (c) in the case of a local authority means a function which is an integration function within the meaning given by section 85B(2D) of the Act; and
 - (d) in the case of any other member a function providing services in Scotland for the purposes of the Act”.
- (3) After regulation 3 (members of the scheme) insert—

“Applications by eligible bodies to be members of the Scheme

3A.—(1) A body described in paragraph (2) may make an application to be a member of the Scheme (“an application”) in writing to the Scottish Ministers.

- (2) The bodies are—
 - (a) an integration joint board;
 - (b) a local authority.
- (3) An application must include information on—
 - (a) the nature of the applicant’s relevant functions;
 - (b) the number of employees of the applicant who are engaged in its performance of a relevant function, and the qualifications and experience of those employees; and
 - (c) the nature and extent of any claims made against the applicant in the past 5 years (or, where the applicant has performed a relevant function for a period which is shorter than 5 years, that shorter period) in respect of personal injuries sustained by third parties as a result of the carrying out of any relevant function.
- (4) In the case of an applicant which is an integration joint board, the reference to “employees” in paragraph (3)(b) includes the chief officer of the integration joint board.

(a) 2014 asp 9.
 (b) 1988 c.49. The powers conferred by section 7 may only be exercised in order to make more income available for improving the health service. Section 7 confers powers on the Secretary of State which are transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998. Directions under section 7(3) (HDL 2005/59) provide for the exercise of those powers by Health Boards constituted under the National Health Service (Scotland) Act 1978.
 (c) Section 85B(2D) was inserted by the Public Bodies (Joint Working) (Scotland) Act 2014, Section 65.

(5) The Scottish Ministers may require an applicant to provide such further information as they consider necessary in order to notify the applicant of the information referred to in paragraph (6)(b).

(6) On receipt of an application, the Scottish Ministers must, at least 30 days before the date on which the applicant's membership of the Scheme is to take effect, notify the applicant of—

- (a) the date on which the applicant's membership of the Scheme is to take effect; and
- (b) the way in which the Scottish Ministers consider that the applicant's contributions to the Scheme would be likely to be determined under regulation 7(2).

(7) The date notified under paragraph (6)(a) must be the 1st of April of the year following the calendar year in which the application is made.

(8) Paragraph (7) does not apply in the case of an application which is made before 31st October 2016.

(9) An applicant may withdraw an application by writing to the Scottish Ministers within 30 days of the notification under paragraph (6) being sent to the applicant.

Termination of membership of the Scheme

3B.—(1) This regulation applies to a body which is a member by virtue of regulation 3A.

(2) The Scottish Ministers may give notice in writing of their intention to terminate a body's membership of the Scheme if any payment which the body is required to pay to the Scottish Ministers by virtue of regulation 7 remains unpaid for a period of at least 30 days from the date on which the payment should have been made.

(3) If a payment referred to in paragraph (2) remains unpaid for 30 days after a notice under that paragraph is issued the Scottish Ministers may issue a notice of termination to the body.

(4) The effect of a notice under paragraph (3) is that the body will cease to be a member of the scheme on the day after the day on which the notice is issued.

(5) Subject to paragraph (6) a body to which this regulation applies may terminate its membership of the Scheme with effect from 31st March in any year by giving not less than 12 months' notice in writing to the Scottish Ministers.

(6) A body may not give notice under paragraph (5) unless it has been a member of the Scheme for at least 3 years.”.

(4) In regulation 4 (liabilities and financial losses to which the Scheme applies)—

(a) after paragraph (2) insert—

“(2A) Paragraph (2) applies, in respect of a body which is a member by virtue of regulation 3A, as if the reference to a “claim” was a reference to a claim arising in consequence of any act or omission taking place on or after the date on which the body became a member of the Scheme.”;

(b) after paragraph (4) insert—

“(4A) Paragraphs (3) and (4) apply, in respect of a body which becomes a member by virtue of regulation 3A, as if references to “1st April 2000” were references to the date on which the body became a member of the Scheme.”;

(c) in paragraph (5), in the definition of “board member” at the end insert “and in respect of a member which is a local authority, any councillor of that local authority.”.

(5) In regulation 7(2), (contributions to the Scheme) at the end insert—

“(e) in the case of a body which is a member by virtue of regulation 3A, the nature and extent of any claims not falling within the amount referred to in paragraph (a) made against the body in the past 5 years (or, where the body has performed a relevant function for a period which is shorter than 5 years, that shorter period) in respect of personal injuries sustained by third parties as a result of the carrying out of any relevant function.”.

St Andrew’s House,
Edinburgh
3rd March 2015

SHONA ROBISON
A member of the Scottish Government

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the National Health Service (Clinical Negligence and Other Risks Indemnity Scheme) (Scotland) Regulations 2000 (“the principal Regulations”). The principal Regulations establish the Clinical Negligence and Other Risks Indemnity Scheme (“the Scheme”) which makes provision for meeting liabilities and indemnity in respect of other financial loss by scheme members. By virtue of the principal Regulations, all Health Boards, other statutory health bodies and the Mental Welfare Commission must be members of the scheme.

These Regulations amend the provisions of the principal Regulations so that integration joint boards and local authorities may become members of the Scheme, and to adjust the liabilities of a Health Board that are covered by the scheme.

Regulation 2(2) amends regulation 1 of the principal Regulations. Regulation 2(2)(a), (b) and (c) insert new definitions for the purpose of the other amendments.

Regulation 2(2)(d) amends the definition of “relevant functions” in order that liabilities and losses relating to all integrated health and social care functions may be covered by the Scheme. The liabilities and losses to which the Scheme applies are described in regulation 4 of the principal Regulations. Regulation 2(2)(d) also extends the application of the Scheme to Health Board functions to cover forensic services that a Health Board provides to third parties as an income-generation activity under the Health and Medicines Act 1988.

Regulation 2(3) inserts new regulations 3A and 3B into the principal Regulations. New regulation 3A makes provision allowing local authorities and integration joint boards to join the scheme. Membership of the scheme is not mandatory for these bodies. An application is to be considered by Scottish Ministers before a body may become a scheme member. New regulation 3A(3) – (9) set out this application process, including the information that is to be provided. The Scottish Ministers may not reject an application, but must notify the member of information about the likely determination of the contributions to be made by the applicant under regulation 7 of the principal regulations. This information reflects the risk associated with the applicant’s membership of the scheme. The applicant may withdraw its application within 30 days after it has been notified of this information.

When an application is made and not withdrawn, membership of the scheme is to begin on 1st April in the calendar year after the application is made, except during the period from the coming into force of the Regulations until 31st October 2016.

Provision is made in new regulation 3B for bodies which become members to terminate their membership of the scheme, or for Scottish Ministers to terminate membership if there is a default in financial contributions which are due in respect of a body’s membership of the Scheme.

Regulation 2(4) amends regulations 4 of the principal Regulations. Sub-paragraphs (a) and (b) provide that the Scheme is only to cover liabilities and losses from incidents arising on or after a local authority or integration joint board becomes a member of the scheme. If a body’s membership of the Scheme is terminated, the effect of regulation 4 of the principal Regulations is that the scheme will not apply to claims to which the body is subject after the body ceases to be a member of the Scheme. Sub-paragraph (c) provides that the definition of “relevant person” is to include a councillor of a local authority.

Regulation 2(5) amends regulation 7 of the principal Regulations, in order that, for a member of the Scheme which is a local authority or integration joint board, any claims against the body during the period of up to 5 years preceding the body’s membership of the scheme will be taken into account in determination of the body’s contributions to the Scheme.

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