
STATUTORY INSTRUMENTS

2018 No. 756

The National Health Service (Liabilities to Third Parties Scheme) (England) Regulations 2018

PART 2

The Scheme

Liabilities to Third Parties Scheme

3.—(1) The Liabilities to Third Parties Scheme (“the Scheme”)(1) established under the 1999 Regulations shall continue to exist in accordance with, and as if it had been established under, these Regulations.

(2) An eligible body may participate in the Scheme only if it is a member of the Scheme.

(3) The Secretary of State is to continue to administer the Scheme.

Eligible Bodies

4.—(1) The bodies which are eligible to be members of the Scheme are—

- (a) the Board(2),
- (b) a clinical commissioning group,
- (c) an NHS Trust,
- (d) a Special Health Authority,
- (e) NICE(3),
- (f) the Health and Social Care Information Centre,
- (g) Health Education England,
- (h) an NHS foundation trust,
- (i) the Care Quality Commission,
- (j) the Health Research Authority, and

(1) The 1999 Regulations were made in exercise of powers conferred by section 126(4) of the National Health Service Act 1977 (c. 49) and powers conferred by section 21 of the National Health Service and Community Care Act 1990 (c. 19) (“the 1990 Act”). Section 21 of the 1990 Act was re-enacted by section 71 of the National Health Service Act 2006. By virtue of paragraph 1(2) of Schedule 2 to the National Health Service (Consequential Provisions) Act 2006, anything done under a provision repealed by the NHS Act 2006 continues to have effect as if done under any re-enactment of the repealed provision. These Regulations are made in exercise of the powers conferred by sections 71 and 272(7) and (8) of the National Health Service Act 2006.

(2) “The Board” is defined in Section 275(1) of the 2006 Act as the National Health Service Commissioning Board. This definition was inserted by section 55(1) of, and paragraph 138(2) of Schedule 4 to, the 2012 Act. The Board is a body corporate established under section 1H of the 2006 Act and is also known as NHS England. Section 1H was inserted by section 9(1) of the 2012 Act.

(3) “NICE” is the National Institute for Health and Care Excellence is a body corporate established under section 232 of the 2012 Act.

- (k) a company formed under section 223 of the 2006 Act and wholly owned by the Secretary of State.

Membership of the Scheme

- 5.—**(1) Any eligible body may apply to the Secretary of State to become a member of the Scheme.
- (2) An application under paragraph (1) must—
- (a) be in writing;
 - (b) be made in such form and submitted in such manner as the Secretary of State may require;
 - (c) specify a date on which the eligible body proposes that its membership should start; and
 - (d) if required by the Secretary of State, contain, or be accompanied by the information specified in paragraph (4).
- (3) At any time before determining an application, the Secretary of State may in writing require the applicant to provide such further information as the Secretary of State considers necessary for the purposes of that determination.
- (4) Information that may be required under paragraph (2) is—
- (a) the nature of the applicant’s relevant functions;
 - (b) the number of employees of the applicant who are engaged in the performance by the applicant of any relevant function specified by the Secretary of State, or any part of such a function;
 - (c) the qualifications and experience of such employees; and
 - (d) the details of any claim 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 exercise by the applicant of any relevant function.
- (5) The Secretary of State must—
- (a) within six weeks of receiving an application made in accordance with requirements under paragraph (1), determine whether or not to grant it; and
 - (b) as soon as reasonably practicable, inform the applicant of the determination by a notice in writing which, if the application is granted, must specify the date on which the applicant’s membership is to start.
- (6) In determining whether to grant an application, the Secretary of State must have regard to—
- (a) the information provided by the applicant; and
 - (b) such other factors as the Secretary of State considers relevant.
- (7) Where an eligible body’s application is granted, the body’s membership of the Scheme starts on the date specified in the notice under paragraph (5)(b).

Cancellation of membership by a member

- 6.—**(1) This regulation applies only in relation to a member which has been a member of the Scheme for at least three consecutive membership years.
- (2) The member may cancel its membership of the Scheme by giving the Secretary of State notice in writing of the cancellation.
- (3) Where a notice under paragraph (2)—
- (a) is given before 1st September in a membership year, the notice takes effect at the end of that membership year;

- (b) is given on or after 1st September in a membership year, the notice takes effect at the end of the following membership year.

Cancellation of membership by the Secretary of State

7.—(1) The Secretary of State may cancel a member’s membership of the Scheme where any of paragraphs (2) to (4) apply.

(2) This paragraph applies where the member is liable to make a payment to the Secretary of State under regulation 11 (duty of members to make contributions to the Scheme) and that payment remains unpaid for a period of 28 days or more which starts on the date on which the payment becomes due.

(3) This paragraph applies where the member has failed to provide any information required under regulation 18 (duty of members to provide information)—

- (a) before the end of the period of 28 days which starts on the date on which the Secretary of State requests the information; or
- (b) if the Secretary of State in writing allows a further period for providing such information, before the end of that further period.

(4) This paragraph applies where the Secretary of State considers that it would be detrimental to the efficient administration of the Scheme or the interests of other members for the member to remain a member of the Scheme.

(5) Where the Secretary of State cancels a member’s membership under paragraph (1) the Secretary of State must inform the member by notice in writing that its membership of the Scheme is to cease with effect from a date specified in the notice and that date must not be earlier than the 28th day after the day on which the notice is sent.

(6) The Secretary of State may determine not to cancel the membership by giving the member a further notice in writing to that effect.

(7) A notice given under paragraph (6) must be given before the date on which membership was to cease as specified in the notice given under paragraph (5).

Automatic termination of membership

- 8. Where a member ceases to be an eligible body, its membership ceases immediately.

Liabilities to which the Scheme applies

Liabilities of members

9.—(1) The Scheme applies to any liability which a member of the Scheme owes to any third party in respect of loss, damage or injury arising out of an act or omission in the course of the carrying out of any relevant function of that member which is a qualifying liability.

(2) A “qualifying liability” is—

- (a) 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;
- (b) 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 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;
- (c) a contractual liability in respect of personal injury to any person or damage to any property of any third party;

- (d) 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;
 - (e) 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;
 - (f) 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;
 - (g) 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;
 - (h) a liability arising out of any indemnity properly given by a member to any board member;
 - (i) 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) For the purposes of paragraph (2)—
- (a) “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;
 - (b) “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;
 - (c) “relevant person” means, in respect of a member, a person employed or engaged by that member and includes an employee or agent of the person so engaged.
- (4) Where the liability meets the criteria in—
- (a) paragraph (1); and
 - (b) regulation 5(1) of the National Health Service (Existing Liabilities Scheme) (England) Regulations 2018⁽⁴⁾;

the Secretary of State must determine whether the Scheme or the scheme provided for in the Regulations referred to in sub-paragraph (b) is to apply.

- (5) Where the liability meets the criteria in—
- (a) paragraph (1); and
 - (b) regulation 8(1) of the National Health Service (Clinical Negligence Scheme) Regulations 2015⁽⁵⁾,

the Secretary of State must determine whether the Scheme or the scheme provided for in the Regulations referred to in sub-paragraph (b) is to apply.

- (6) 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.

Payments into the Scheme

Determination of amounts payable by members

10.—(1) The Secretary of State must determine the amount which each member of the Scheme must pay to the Secretary of State in respect of each membership year.

(4) [S.I. 2018/755](#).

(5) [S.I. 2015/559](#).

(2) In determining that amount in respect of a member, the Secretary of State may have regard to—

- (a) the Secretary of State's estimate of the total amount which, under regulations 13 to 17 (payments out of the Scheme), is likely to be payable during that membership year in respect of all liabilities to which the Scheme applies;
- (b) the nature of the member's relevant functions;
- (c) the number of the member's employees who are engaged in the member's performance of each relevant function or any part of a relevant function;
- (d) the qualifications and experience of those employees;
- (e) any agreement in respect of the member which falls within regulation 13(4)(c) (agreement that Scheme to cover claim for liability incurred before membership starts);
- (f) any agreement in respect of the member which falls within regulation 13(7)(c) (agreement that Scheme to cover claim for liability which falls to be met after membership ceases); and
- (g) the Secretary of State's assessment of—
 - (i) the likely effectiveness of any steps being taken, or to be taken, by the member as to the manner in which the member exercises any relevant function for the purpose of reducing the incidence of qualifying liabilities; and
 - (ii) the effectiveness of any steps which have already been taken for that purpose; and
- (h) any other factor relating to the member or any other member of the Scheme which the Secretary of State considers relevant to the determination under paragraph (1).

(3) In respect of each membership year, the Secretary of State must give each member notice in writing which specifies the amount determined in respect of the member under paragraph (1).

(4) In respect of a member's—

- (a) first membership year, the notice must be given no later than six months after the date on which the Secretary of State receives the member's application to become a member;
- (b) second membership year, the notice must be given no later than 1st July in that membership year;
- (c) third and any subsequent membership year, the notice must be given no later than 31st December in the membership year before that to which the notice relates.

(5) For the purposes of paragraph (4), reference to "the first membership year" of a body which is a member of the Scheme is to the whole or part of any membership year immediately following any period during which the body was not a member.

Duty of members to make contributions to the Scheme

11.—(1) Where a member receives a notice under regulation 10(3) in respect of a membership year, the member must pay—

- (a) the amount due in respect of the member's first membership year no later than 8 months after the date on which the Secretary of State receives the member's application to become a member;
- (b) the amount due in respect of the member's second membership year no later than 1st August in that membership year.

(2) Where a member which receives a notice under regulation 10(3) in respect of its third or a subsequent membership year, the member must pay the amount due—

- (a) in accordance with such arrangements as may be agreed between the Secretary of State and the member (which may include payment in instalments to be made at an agreed time); and

(b) if no agreement is reached by 1st March immediately before the start of the membership year, by such time and in such a manner as the Secretary of State may determine.

(3) For the purposes of paragraph (1), reference to “the first membership year” of a body which is a member of the Scheme is to be construed in accordance with regulation 10(5).

Revision of determination of payable amount

12.—(1) Paragraph (2) applies where the Secretary of State identifies before the end of a membership year that the amount determined under regulation 10(1) as being payable by the member in respect of that year—

- (a) is incorrectly calculated;
- (b) is determined by reference to information which was incorrect; or
- (c) ought to be reconsidered in light of further information that has become available to the Secretary of State.

(2) The Secretary of State—

- (a) must reconsider the amount determined; and
- (b) at any time before the end of the membership year in question, may revise the amount payable by the member in respect of that year.

(3) The Secretary of State must give the member notice in writing of any revised amount determined under paragraph (2)(b).

(4) Where the revised amount determined under paragraph (2)(b) is higher than the original amount, the member must pay any amount that remains due in respect of the membership year—

- (a) in accordance with such arrangements as may be agreed between the Secretary of State and the member (which may include payment in instalments to be made at agreed times); and
- (b) if no agreement is reached by the end of the membership year, by such time and in such manner as the Secretary of State may determine.

(5) Where the revised amount determined under paragraph (2)(b) is lower than the original amount the member’s remaining payments for that membership year will be reduced to account for the revised amount and are to be paid in accordance with any arrangements that have been, or may be, agreed between the Secretary of State and the member.

(6) The reference in paragraph (1) to an amount determined by the Secretary of State under regulation 10(1) includes any revised amount determined under paragraph (2)(b).

Payments out of the Scheme

Payments out of the Scheme: liabilities of members

13.—(1) Where a payment falls to be made by a member of the Scheme in connection with a claim in respect of a liability to which the Scheme applies, the Secretary of State may pay to the member or on the member’s behalf an amount determined by the Secretary of State under regulation 16.

(2) No payment may be made under paragraph (1) 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 is not eligible for payment under the Scheme.

(3) No payment may be made under paragraph (1)—

- (a) in respect of any liability of the member which is excluded from the Scheme by any of paragraphs (4) to (7); or
- (b) in respect of any liability of, or payment by, the member which is excluded from the Scheme by regulation 15 (exclusions from the Scheme).

(4) Any liability which was incurred by an eligible body before it became a member of the Scheme is excluded from the Scheme unless—

- (a) the claim by a third party against the eligible body in respect of the liability was made after the start of its membership of the Scheme;
- (b) the Secretary of State is satisfied that the eligible body informed the Secretary of State before the end of the qualifying period that the claim had been made;
- (c) the Secretary of State agreed before the start of the eligible body's membership that any liability of the body that results from a claim to which sub-paragraphs (a) and (b) apply should not be excluded from the Scheme; and
- (d) that agreement remains in force at the date on which the claim against the eligible body falls to be met.

(5) Any liability of a member which falls to be met after the member gives notice of cancellation under regulation 6(2) (cancellation of membership by a member) but before its membership has ceased is excluded from 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 a notice.

(6) Any liability of a member which falls to be met after the Secretary of State gives notice of cancellation under regulation 7(1) (cancellation of membership by the Secretary of State) but before its membership has ceased is excluded from the Scheme unless the Secretary of State is satisfied that the liability would have fallen to be met at that time irrespective of its decision to give such a notice.

(7) Any liability of a body ("B") which falls to be met after its membership of the Scheme has ceased is excluded from the Scheme unless—

- (a) the claim by a third party against B in respect of the liability was made before B's membership ceased;
- (b) the Secretary of State is satisfied that B informed the Secretary of State before the end of the qualifying period that the claim had been made;
- (c) the Secretary of State agreed before B's membership ceased that any liability of B that results from a claim to which sub-paragraphs (a) and (b) apply should not be excluded from the Scheme; and
- (d) that agreement remained in force on the date on which B's membership ceased.

(8) In paragraph (4)(b) and (6)(b), the "qualifying period" is the period of 14 days starting with the date on which the member became aware that the claim had been made or, if earlier, the date on which the Secretary of State considers that the member ought to have become aware that a claim had been made.

Payments out of the Scheme: liabilities of former members

14.—(1) Where—

- (a) a payment falls to be made by a former member which has previously been a member of the Scheme in connection with a claim in respect of a liability to which the Scheme applies; and
- (b) the claim related to a breach of the duty of care by the former member whilst it was a member of the Scheme,

the Secretary of State may, if the conditions specified in paragraph (2) are met, pay to the former member or on the former member's behalf an amount determined by the Secretary of State under regulation 16.

(2) The conditions are that—

- (a) before the former member's membership of the Scheme ceased, the Secretary of State agreed with the former member that the former member would pay an additional amount determined for the purposes of this regulation;
 - (b) that amount was determined by the Secretary of State as being sufficient to meet any liabilities of the former member falling within paragraph (1) which were incurred whilst the former member was a member but fall to be met after the date on which the former member's membership ceases; and
 - (c) before that date, the former member either paid the additional amount in full or entered into an agreement with the Secretary of State to pay it in instalments.
- (3) No payment may be made under paragraph (1) in respect of any liability of, or payment by, B which is excluded from the Scheme by regulation 15 (exclusions from the Scheme).

Exclusions

15.—(1) Except to such extent as the Secretary of State may determine, the following are excluded from the Scheme—

- (a) any liability to which the Scheme applies in respect of which a member has made an admission of liability without first obtaining the Secretary of State's written consent;
 - (b) any liability to which the Scheme applies in respect of which the liability of a member has been determined by a Court in proceedings conducted by a member otherwise than in consultation with the Secretary of State;
 - (c) any payment falling to be made by a member where the member has not complied with any condition imposed by the Secretary of State relating to a claim;
 - (d) any payment falling to be made by a member where, without first obtaining the Secretary of State's written consent, the member agrees—
 - (i) 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 liability to which the Scheme applies; or
 - (ii) to make any other payment in respect of the liability otherwise than in the course of legal proceedings or in consequence of a settlement of legal proceedings agreed to by the member;
 - (e) any amount payable by a member, in respect of a liability to which the Scheme applies, that is less than the amount agreed by the member and the Secretary of State as being the minimum amount payable under the Scheme; and
 - (f) any amount payable by a member, in respect of a liability to which the Scheme applies, to the extent that the amount exceeds the amount agreed by the member and the Secretary of State as being the maximum amount payable under the Scheme.
- (2) In paragraph (1), references to "member" include a former member of the Scheme—
- (a) in respect of which the requirements of regulation 13(7)(c) and (d) are met (agreement that Scheme to cover existing claim not met before membership ceases); or
 - (b) to which regulation 14 applies (liabilities of former members).

Determining the amount of any payment to be made out of the Scheme

16.—(1) In respect of each liability to which the Scheme applies, the Secretary of State must determine the amount of any payment which is to be made under regulation 13(1) or 14(1) (payments out of the Scheme in respect of members and former members).

(2) In determining the amount of the payment to be made in the circumstances specified in each of paragraphs (3) to (9), the Secretary of State must have regard to the matters specified in the appropriate paragraph.

(3) Where an award of damages has been made by a Court against the member, those matters are the amount of—

- (a) the award;
- (b) the legal and associated costs awarded to the claimant; and
- (c) any legal and associated costs incurred by or on behalf of the member.

(4) Where legal proceedings are the subject of a settlement agreed to by the member, those matters are the amount of—

- (a) any sum paid or payable by the member in relation to the claimant's claim for damages;
- (b) the member's contribution towards any legal and associated costs incurred by the claimant; and
- (c) any legal and associated costs incurred by or on behalf of the member.

(5) Where in any legal proceedings a Court has declined to award damages against the member, those matters are the amount of any legal and associated costs incurred by or on behalf of the member but only to the extent to which those costs are not recoverable either from the claimant or from the Legal Aid Agency under regulations made by virtue of section 26(5) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (costs in civil proceedings)(6).

(6) Where a member has, otherwise than in the course of legal proceedings, agreed to make a payment in settlement of a claim, those matters are the amount of—

- (a) the payment agreed; and
- (b) any legal or associated costs incurred by or on behalf of the member in connection with the claim.

(7) Where, otherwise than in the course of legal proceedings, 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 liability to which the Scheme applies, those matters are the amount of—

- (a) the payment agreed; and
- (b) any legal or associated costs incurred by or on behalf of the member in connection with the claim.

(8) 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 liability to which the Scheme applies, those matters are the amount of—

- (a) the payment;
- (b) any legal or associated costs incurred by the claimant in connection with the claim; and
- (c) any legal or associated costs incurred by or on behalf of the member in connection with the claim.

(9) In respect of any contract under which a member has obligations, those matters are the amount—

- (a) payable by the member under that contract; and
- (b) of any legal or associated costs incurred by or on behalf of the member and by the other contracting party.

(6) 2012 c. 10.

(10) In this regulation “member” has the same meaning as in regulation 15(2).

Power to make payments on account

17.—(1) Where, in any membership year, a payment falls to be made by a member in connection with a claim in respect of which an amount may become payable by the Secretary of State under regulation 16 (determining the amount of any payment to be made out of the Scheme), the Secretary of State may make a payment on account of that amount.

(2) A payment on account may be made to or on behalf of the member.

(3) Where the amount of any payment on account exceeds the amount subsequently determined under regulation 16 as being the amount of payment to be made in connection with the claim, the excess is recoverable from the member.

Miscellaneous

Duty of members to provide information

18.—(1) In this regulation “specified” means specified by the Secretary of State in a notice under paragraph (2).

(2) The Secretary of State may by notice in writing require a member to provide the Secretary of State with specified information.

(3) Specified information includes—

- (a) the nature of any relevant function carried on, or to be carried on, by the member in a specified membership year;
- (b) the number of the member’s employees who are engaged in the member’s performance of a specified relevant function or in a specified part of any such function;
- (c) the qualifications and experience of those employees; and
- (d) any event of which the member is aware which it considers might give rise to a liability to which the Scheme applies.

(4) The member must comply with a notice under paragraph (2) and must—

- (a) provide the information within 28 days of receiving the notice or within such further period as the Secretary of State may in writing allow;
- (b) provide the information in any specified form; and
- (c) submit the information in any specified manner.

Directions and guidance

19.—(1) The Secretary of State must make the following information available to eligible bodies in such form and at such times as the Secretary of State considers appropriate—

- (a) any directions which the Secretary of State gives to a relevant body with respect to the exercise by that body of its functions in connection with administering the Scheme; and
- (b) any guidance which the Secretary of State gives to a relevant body as to the manner in which the Scheme is to be administered.

(2) “Relevant body” means a body directed by the Secretary of State under any enactment to carry out functions in connection with the administration of the Scheme.

Revocations and savings

20.—(1) Subject to paragraph (2), the instruments specified in the first column of the Table set out in the Schedule are, in relation to England only, revoked.

(2) Where a claim under the Scheme is made before the appointed day—

- (a) any determination as to whether the Scheme applies to the liability; and
- (b) any determination as to whether to make a payment in respect of the liability (and the amount of any such payment),

is to be made in accordance with the relevant provisions of the 1999 Regulations as if those Regulations remained in force.

Transitional provision

21.—(1) An eligible body which, immediately before the appointed day, was a member of the Scheme is to continue to be a member of the Scheme (subject to any cancellation of the membership under regulation 6 (cancellation by a member) or 7 (cancellation by the Secretary of State)(7)).

(2) Any application for membership of the Scheme which—

- (a) has been made under regulation 6 of the 1999 Regulations (membership of the Scheme) before the appointed day; and
- (b) has not been determined before the appointed day,

is to be dealt with as if the application had been made under regulation 5 of these Regulations (membership of the Scheme).

(3) For the purposes of regulation 9(1) loss, damage or injury which occurred on or after 1st April 1999 and before 1st May 2014 and which—

- (a) before 1st May 2014 was not loss, damage or injury arising out of the carrying out of any relevant function of that member; but
- (b) would have been loss, damage or injury arising out of the carrying out of any relevant function of that member, had the change to the definition of “relevant function” in regulation 1(2) of the 1999 Regulations that was made on 1st May 2014 been made before the loss, damage or injury occurred,

is loss, damage or injury arising out of the carrying out of any relevant function of that member.

(4) Any amount payable by a member of the Scheme under regulation 8 of the 1999 Regulations (members’ contributions to the Scheme) which has not been paid before the appointed day is to be treated as payable under regulation 11 of these Regulations (duty of members to make contributions to the Scheme).

(5) Where a period of time specified in the 1999 Regulations is current on the appointed day, and a period of time is also specified in a corresponding provision of these Regulations, these Regulations have effect as if the corresponding provision of these Regulations had been in force when the period began to run.

(6) Except as stated in regulation 20(2)—

- (a) anything done, if effective immediately before the appointed day, has effect after the appointed day as if done under or for the purposes of the corresponding provision of these Regulations; and

(7) By virtue of regulation 21(4) of these Regulations, a notice given under regulation 7 of the National Health Service (Liabilities to Third Parties Scheme) Regulations 1999 (termination of membership) has effect as if given under the corresponding provisions of these Regulations in any case where membership of the Scheme has not ceased by the date on which these Regulations come into force.

- (b) any matter that is ongoing under or for the purposes of the 1999 Regulations immediately before the appointed day is to be treated as ongoing under these Regulations.