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SCOTTISH STATUTORY INSTRUMENTS

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**2000 No. 54**

**NATIONAL HEALTH SERVICE**

**The National Health Service (Clinical Negligence and Other Risks Indemnity Scheme) (Scotland) Regulations 2000**

<i>Made</i>	- - - -	<i>9th March 2000</i>
<i>Laid before the Scottish Parliament</i>	- - - -	<i>10th March 2000</i>
<i>Coming into force</i>	- -	<i>1st April 2000</i>

The Scottish Ministers, in exercise of powers conferred upon them by sections 2(5), 85B, 105(7) and 108(1) of the National Health Service (Scotland) Act 1978(1), hereby make the following Regulations:

**Citation, commencement and interpretation**

1.—(1) These Regulations may be cited as the National Health Service (Clinical Negligence and Other Risks Indemnity Scheme) (Scotland) Regulations 2000 and shall come into force on 1st April 2000.

(2) In these Regulations—

“the Act” means the National Health Service (Scotland) Act 1978;

“member” means a body listed in regulation 3 which is a member of the Scheme;

“membership year” means any period of 12 months beginning 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 clinical kind described in regulation 4(2) or a non-clinical kind described in regulation 4(3);

“relevant function” means a function providing services in Scotland for the purposes of the National Health Service (Scotland) Act 1978;

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(1) 1978 c. 29; section 85B was inserted by the National Health Service and Community Care Act 1990 (c. 19), section 41 and was amended by the Health Act 1999 (c. 8), (“the 1999 Act”) Schedule 4, paragraph 56; section 105(7), which contains provisions relevant to the making of Regulations, was amended by the Health Service Act 1980 (c. 53), Schedule 6, paragraph 5 and Schedule 7, by the Health and Social Services and Social Security Adjudications Act 1983 (c. 41), Schedule 9, paragraph 24 and by the 1999 Act, Schedule 4, paragraph 60; section 108(1) contains definitions of “prescribed” and “regulations” relevant to the exercise of the statutory powers under which these Regulations are made. The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c. 46).

“the Scheme” means the Clinical Negligence and Other Risks Indemnity Scheme established by regulation 2;

“Special Health Boards” means the Clinical Standards Board for Scotland, the Health Education Board for Scotland, the Health Technology Board for Scotland, the Scottish Ambulance Service Board and the State Hospitals Board for Scotland and any other body established as a Special Health Board by order under the Act;

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

### **Establishment of the Scheme**

2. There is hereby established the Clinical Negligence and Other Risks Indemnity Scheme where a member shall in accordance with the following provisions of these Regulations, make provision to meet qualifying liabilities and financial losses.

### **Members of the Scheme**

3. The following bodies shall be members of the Scheme:
- (a) National Health Service Trusts;
  - (b) Health Boards;
  - (c) Special Health Boards;
  - (d) the Common Services Agency;
  - (e) the Mental Welfare Commission for Scotland; and
  - (f) the Scottish Council for Postgraduate Medical and Dental Education.

### **Liabilities to which the Scheme applies**

- 4.—(1) The Scheme applies in accordance with the following provisions of this regulation.
- (2) Any liability to any person arising from a claim to which a member is subject in respect of or consequent upon personal injury or loss arising out of or in connection with any breach of a duty of care owed by that body to any person in connection with the diagnosis of any illness, or the care or treatment of any person, in consequence of any act or omission to act on the part of a person employed or engaged by a member in connection with any relevant function of that member.
- (3) Any liability to any person arising from an incident occurring—
- (a) before 1st April 2000 except where the member had before that date a policy of insurance covering liability in respect of that incident;
  - (b) after 1st April 2000 to which a member or relevant person is subject in respect of loss, damage or injury which arises out of or in connection with any breach arising from—
    - (i) a liability in respect of personal injury and any consequential loss 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 the Occupiers' Liability (Scotland) Act 1960(2) 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;

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(2) 1960 c. 30.

- (iii) a liability in respect of personal injury and any consequential loss to any person or damage to any property of any person or other wrongful act committed by any relevant person;
  - (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 by the member or a relevant person;
- (4) Any direct financial loss sustained at any time after 1st April 2000 following a single act or omission or series of related acts of fraud or dishonesty committed by a relevant person acting alone or with others, or of theft committed by any other person.

(5) 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 acting in the course of their employment or engagement.

#### **Administration and management of the Scheme**

5. The Scheme shall be administered by the Scottish Ministers who shall from time to time appoint, on such terms and conditions as they may determine, such person or body to manage the Scheme and such person or body so appointed shall be known as the manager of the Scheme.

#### **Provision of information**

6. A member or its agents shall at such time and in such manner as Scottish Ministers or the manager of the Scheme may require, provide the Scottish Ministers or the manager of the Scheme with such information as they may request in writing concerning—

- (a) the nature of any relevant function;
- (b) the number of employees who are engaged in the performance of any relevant function, or such part of any relevant function;
- (c) the nature and extent of any claims made against the member in respect of personal injuries sustained by third parties as a result of the carrying out by the member any relevant function;
- (d) the nature and extent of any claims made against the member; and
- (e) any event of which the member is aware which it considers might give rise to a qualifying liability;
- (f) such other information as may be requested.

#### **Contributions to the Scheme**

7.—(1) A member shall pay to the Scottish Ministers 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 Scottish Ministers shall have regard to—

- (a) their 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 and financial losses 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; and
  - (d) their assessment of—
    - (i) the effectiveness of any steps being taken, or to be taken, by the member, with a view to reducing the incidence of qualifying liabilities and financial losses in connection with any relevant 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 they consider to be material to their determination.
- (3) The Scottish Ministers shall give notice in writing of the contribution due from each member—
- (a) for the first year's membership by no later than 30th April 2000;
  - (b) as respects any other membership year, by no later than 31st December in the preceding year;
- (4) Where, after notice has been given to a member in accordance with paragraph (3) in relation to any membership year which begins after 1st April 2000, it appears to the Scottish Ministers 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,
- they 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 Scottish Ministers 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 Scottish Ministers no later than the date specified in the notice issued under paragraph (3).

### **Submission of claims by members**

**8.** A member shall submit to the manager of the Scheme any claim for payment under the Scheme, in accordance with directions given by the Scottish Ministers.

### **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 Scottish Ministers may, subject to paragraph (2), pay to that member an amount to be determined by them in accordance with paragraph (3).

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

- (a) unless the Scottish Ministers are satisfied that, within 2 months of the date when the member paid the claim, the member or its agent informed the Scottish Ministers or the manager of the Scheme that the claim had been paid;
  - (b) except to such extent as the Scottish Ministers may determine, in respect of—
    - (i) any payment agreed by or made, or liability admitted by any member of an amount in excess of such sum as may from time to time be determined by the Scottish Ministers without their prior written consent;
    - (ii) subject to sub-paragraph (iii) any liability of an amount which is less than that for the time being agreed between the Scottish Ministers and the member as the minimum amount of any liability in respect of which a payment is to be made under the Scheme;
    - (iii) a cumulative amount which is less than that for the time being agreed between the Scottish Ministers and the member as the maximum cumulative amount which will not be payable in any period of one year under the Scheme for liabilities under paragraph (ii) and financial losses under regulation 9(4)(a); and
    - (iv) any liability where the member has not complied with any conditions imposed by the Scottish Ministers relating to that liability; and
  - (c) in respect of any liability which the Scottish Ministers determine is not eligible for payment under the Scheme.
- (3) The amount of any payment to a member under paragraph (1) shall be determined by reference to—
- (a) where an award of damages is made against the member by a Court, the amount of that award, together with the amounts of any legal and associated expenses awarded to the claimant and of any such reasonable expenses 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 by the member in relation to the claim;
    - (ii) the member's contribution towards any legal and associated expenses incurred by or on behalf of the claimant; and
    - (iii) any such reasonable expenses 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 expenses incurred by or on behalf of the member, to the extent that such expenses are not recoverable from the claimant or from the Scottish Legal Aid Board under section 19 of the Legal Aid (Scotland) Act 1986(3);
  - (d) where, otherwise than in the course of legal proceedings a member has agreed—
    - (i) to make a payment in settlement of a claim, the amount of that payment; and
    - (ii) to make any contribution towards the reasonable legal or associated expenses 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 reasonable 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 reasonable legal or associated expenses incurred by either party in connection with the claim.

(4) Where in any membership year, a member suffers a financial loss of a kind described in regulation 4(4), the Scottish Ministers may, subject to paragraph (5), pay to that member the amount of the financial loss.

(5) No payment shall be made under paragraph (4) except to such extent as the Scottish Ministers may determine, in respect of—

- (a) subject to sub-paragraph (b) any financial loss of an amount which is less than that for the time being agreed between the Scottish Ministers and the member as the minimum amount of any financial loss in respect of which a payment is to be made under the Scheme;
- (b) a cumulative amount which is less than that for the time being agreed between the Scottish Ministers and the member as the maximum cumulative amount which will not be payable in any period of one year under the Scheme for liabilities under regulation 9(2)(b)(ii) and financial losses under paragraph (a);
- (c) any financial loss where the member has not complied with any conditions imposed by the Scottish Ministers relating to that financial loss; and
- (d) any financial loss which the Scottish Ministers determine is not eligible for payment under the Scheme.

St Andrew's House,  
Edinburgh  
9th March 2000

*SUSAN C DEACON*  
A member of the Scottish Executive

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## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations establish the Clinical Negligence and Other Risks Indemnity Scheme whereby NHS Trusts and certain other bodies providing services under the National Health Service (Scotland) Act 1978 (c. 29), who will be members of the Scheme, may make provision for meeting liabilities arising out of negligence in the carrying out of the bodies' functions (regulations 2, 3 and 4). The Scheme also provides for indemnity for financial losses arising during the course of the carrying out of the bodies' functions (regulation 4).

The Scheme will be administered by the Scottish Ministers and managed by a person or body appointed by the Scottish Ministers (regulation 5). The Regulations also provide for members of the Scheme to give information to Scottish Ministers and the manager of the Scheme (regulation 6). Regulation 7 provides for contributions to be made by members to the Scheme. Regulations 8 deals with the submission of claims by members and regulation 9 makes provision for payments to members in connection with claims in respect of liabilities and financial losses.