

HEALTH AND SOCIAL CARE (COMMUNITY HEALTH AND STANDARDS) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 - Recovery of Nhs Charges

NHS Charges

Section 150: Liability to pay NHS charges

310. *Section 150* sets out the circumstances in which NHS costs can be recovered. *Subsections (1)* and *(2)* provide that any person who makes a compensation payment in consequence of an injury, whether physical or psychological, will also be liable to pay NHS charges for treatment received by the injured person at a health service hospital as a result of the injury and/or for the provision of NHS ambulance services provided to the injured person as a result of the injury. The effect of *subsection (2)* is that there will be two separate recovery schemes – one for England and Wales under which money will be payable to the Secretary of State and one for Scotland under which money will be payable to the Scottish Ministers. References in this section of the notes to “the authority” are to be taken as referring to both the Secretary of State and the Scottish Ministers. The regulation making powers in Part 3 are, by virtue of section 167(1), exercisable by the Secretary of State (in relation to England and Wales) and the Scottish Ministers (in relation to Scotland). Before making any regulations the Secretary of State must, by virtue of section 195(3), consult the National Assembly for Wales.
311. *Subsection (3)* defines compensation payment. The definition is a broad one which covers payments made by the person liable, or alleged to be liable, for the injury or by his representative such as an insurance company or the Financial Services Compensation Scheme¹. The definition catches not only a final payment of damages but also an interim payment or a payment of costs only. The subsection also provides that the term “compensation payment” includes not just payments of money but payment in money’s worth which might include, for example, provision of free rehabilitation services. It does not, however, capture *ex gratia* payments where there can be no legal liability to make a payment.
312. *Subsections (3)(b)* and *(11)* specifically extend the scheme to payments made by the Motor Insurers Bureau which operates schemes to make compensation payments where drivers are uninsured or untraceable.
313. *Subsection (3)* also introduces *Schedule 10*, which lists a number of payments which are not to count as compensation payments. These include compensation orders made by the criminal courts (*paragraph 1*), payments under the Fatal Accidents Act 1976 or its Scottish or Northern Irish equivalent (*paragraphs 6 and 7*) and payments made by

¹ The Financial Services Compensation Scheme is a scheme set up under the Financial Services and Markets Act 2000 to provide compensation when the insurance company can not for example because the business has failed.

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trusts prescribed in regulations (*paragraph 3*). The intention is that this power would be used to prescribe trusts such as those that are set up to compensate haemophiliacs infected with HIV from blood products. *Paragraph 5 of Schedule 10* provides that the scheme will not apply where the compensator is the same hospital or ambulance service as the one which would receive NHS charges under the scheme. This might arise for example if an employee of an NHS trust was injured at work, received treatment at their employing hospital and later made a successful claim for compensation against their employer. *Paragraph 8* provides that additional items can be added to the Schedule by regulations. It is envisaged that this power will be used to prescribe items such as payments under the Criminal Injuries Compensation Scheme or the Vaccine Damage Payments Act 1979. *Subsection (12) of section 150* enables items already in the Schedule to be omitted or modified by regulations.

314. *Subsection (4)* applies the scheme to all types of payment including those made voluntarily.
315. *Subsection (5)* clarifies the meaning of the term injury, providing that it does not include disease. However, where the injured person suffers a disease attributable to the original injury for which compensation has been paid, *subsection (6)* clarifies that treatment received or ambulance services provided as a result of that disease will be received or provided as a result of the injury and would therefore fall within the scheme. Thus, treatment received as a result of a free-standing disease, such as asbestosis would be outside the scheme whereas treatment received as a result of a disease linked specifically to the injury suffered - for example, septicaemia resulting from a broken leg – would be within it.
316. *Subsections (7) to (9)* exclude from the definition of NHS treatment, private treatment provided at health service hospitals or treatment provided at such hospitals as part of primary medical or dental services (under Part 4 of this Act) or personal or general medical or dental services.
317. *Subsection (13)* makes clear that the scheme will apply only to injuries which take place after these provisions have been brought into force. *Subsection (14)* confirms that for the purposes of the scheme it is irrelevant whether an admission of liability is made when making the compensation payment.

Certificates of NHS charges

Section 151: Applications for certificates of NHS charges, section 152: section 151: supplementary, and section 153: Information contained in certificates

318. *Section 151* deals with applications for certificates. *Subsection (1)* provides that a person (for example, an insurance company) may apply to the Secretary of State or the Scottish Ministers for a certificate before a compensation payment is made to an injured person. Under *subsections (7) and (8)*, a compensator must apply for a certificate if, at the time of making a compensation payment, he has not already been issued with a certificate or any previously issued certificate has expired. These obligations do not arise if the compensator has applied for a certificate within a period before making payment set out in regulations. It is envisaged that this would be a short period such as 28 days.
319. When the authority receives an application for a certificate, it must, under *subsection (2)*, issue such a certificate as soon as is “reasonably practicable”. A time limit is not prescribed as the authority will have to gather information from one or more NHS trusts which can take some time.
320. *Subsection (3)* deals with the length of time for which a certificate is to remain in force. This can be until a specified date which might be appropriate for example where there was ongoing treatment; until the occurrence of a specific event – for example any further admission to hospital; or indefinitely which would be appropriate for example where there was a nil certificate of charges, a certificate where the maximum charge

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recoverable (i.e. the cap set in regulations under *subsection (2)* of *section 153*) had already been reached, or an out patient charge and/or ambulance charge only was recorded.

321. *Section 152* makes provision in cross-border cases. *Subsections (1)* and *(2)* enable applications wrongly made to the Secretary of State or the Scottish Ministers to be referred to the other authority. *Subsections (3)* and *(4)* enable applications sent to one authority which are relevant to both to be referred to the other as well. *Subsections (5)* and *(6)* allow for a single certificate to be issued to cover liability under both the English/Welsh and the Scottish schemes.
322. *Section 153* deals with the information to be included in certificates. *Subsections (1)* and *(2)* provide that the certificate must state the amount or amounts, determined in accordance with regulations, that the compensator must pay in NHS charges.
323. *Subsection (3)* provides that where the damages awarded to an injured person have been reduced to reflect a finding of contributory negligence either made by a court under the Law Reform (Contributory Negligence) Act 1945 or its equivalent outside Great Britain or set out in an agreed judgement or order entered or sealed by a court in England and Wales or Northern Ireland or in a joint minute executed by the parties in Scotland (or equivalent documents elsewhere), the amount due in NHS charges will also be reduced by the same proportion.
324. *Subsection (4)* provides that where it is ascertained that no NHS charges are due because the injured person did not receive NHS treatment at a health service hospital and was not provided with NHS ambulance services as a result of the injury then the authority must issue a nil certificate of charges to show that no payments are due.
325. *Subsection (5)* sets out particular matters which may be covered by regulations. These include a cap on the overall amount payable (*subsection (5)(a)*); different amounts for different circumstances – for example out-patient or in-patient treatment and/or ambulance services, and different amounts for different areas (*subsection (5)(b)*); provision for cases where a person receives treatment at more than one hospital (*subsection (5)(c)*); and provision for cases where a fresh certificate is issued or a certificate revoked as a result of a review or appeal (*subsection (5)(f)*). Under *subsection (5)(e)*, regulations may also provide for apportionment of liability for NHS costs in cases where there is more than one person paying compensation to the same injured person. This may occur for example in a multiple road traffic accident where several compensators are involved. *Subsection (5)(g)* deals with the situation where a person has received treatment or ambulance services in both England/Wales and in Scotland and the compensator therefore has liability for NHS charges under both the English/Welsh and the Scottish schemes. It enables regulations to be made to allow liability under the English scheme to be reduced in recognition of liability in respect of the same injury arising under the Scottish scheme and vice versa. This is to ensure that a compensator is not penalised just because a person's treatment has taken place in two separate parts of Great Britain.
326. *Subsection (6)* makes clear that the amounts which regulations under *subsection (5)* (*a*) and (*b*) prescribe to be specified on certificates will be before any reduction for contributory negligence. This means that any reduction resulting from a finding of contributory negligence will be applied to the amounts set in regulations and not, for example, to the full treatment costs which may have exceeded the prescribed maximum recoverable.
327. *Subsections (7)* and *(8)* provide that regulations relating to apportionment or to fresh certificates issued or certificates revoked after a review or appeal can include provisions giving credit for amounts already paid, for the payment of balances and the recovery of excesses. These situations might arise, for example, where a fresh certificate was issued for a higher amount and the original lower amount had already been paid – in such cases it is envisaged that credit would be given for the amount already paid and only the

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outstanding balance would be due. Conversely, if a person had already paid more than was due it is envisaged that the excess payment would be recouped from the hospital or ambulance trust to which it had been passed and returned to the compensator.

328. *Subsections (9) and (10)* relate to cases where a claim by an injured person has been settled by a prescribed mediation process and the damages payable under the settlement are to be reduced to reflect the injured person's contributory negligence. Regulations may provide that in specified circumstances the amount due in NHS charges will be reduced by the same proportion. Regulations may also specify acceptable mediation processes. This might include, for example, prescribing the qualifications of the independent mediator or specifying that the outcome of the mediation should be a full and final settlement of the compensation claim.
329. *Subsection (11)* provides for regulations to specify the information that a compensator can, on receipt of a certificate of charges, request from the authority as to how it has arrived at the amount specified.
330. *Subsection (12)* provides that regulations setting out the amounts due may apply to any certificates issued after the date on which the regulations come into force except where a certificate is issued after settlement of a case and the compensation payment to which it relates was made before the date of coming into force of the regulations. This is to provide for cases where, for example the tariff is revised on say 1 April, a claim has settled on 30 March but the compensator doesn't apply for a certificate until after 1 April when the tariff has changed. This makes it clear that the tariff rate before the revision will apply.

Recovery of NHS charges

Section 154: Payment of NHS charges

331. *Section 154* sets out the time limits for payment of NHS charges. *Subsection (1)* provides that where a certificate is issued before settlement of a claim, payment must be made within 14 days of settlement. *Subsection (2)* provides that, where a certificate is issued on or after settlement, payment must be made within 14 days of issue of the certificate.

Section 155: Recovery of NHS charges

332. *Section 155* makes provision for the recovery of unpaid NHS charges. If the person paying compensation either has not applied for a certificate under *Section 151* or has not paid the amount due under a certificate, *subsections (1) and (2)* provide for the authority to issue a new or duplicate certificate and a demand for immediate payment. *Subsections (3) to (5)* enable joint certificates and demands to be issued by the Secretary of State and the Scottish Ministers. *Subsections (6) to (8)* set out the procedures to be used to enforce payment. *Subsections (9) and (10)* make clear that a document stating the amount due, signed by an authorised person, is the only proof required that an amount is recoverable.

Review and appeal

Section 156: Review of certificates

333. *Section 156* provides for internal review of certificates. *Subsection (1)* requires the authority to review a certificate if, after it has been issued, a finding of contributory negligence is either made by a court under the Law Reform (Contributory Negligence) Act 1945 or its equivalent outside Great Britain or set out in an agreed judgement or order entered or sealed by a court in England and Wales or Northern Ireland or in a joint minute executed by the parties in Scotland (or equivalent documents elsewhere). This reflects the fact that such a finding reduces the liability for NHS charges as provided in *section 153*. *Subsection (2)* provides for regulations to be made to deal with cases where a claim becomes a qualifying claim as defined in *section 153(9)*, that is where a

claim has been settled by a prescribed mediation process and the damages payable under the settlement are to be reduced to reflect the injured person's contributory negligence. *Subsection (3)* provides for cases where a certificate relating to the same injury has been issued in relation to the same injured person by both the Secretary of State and the Scottish Ministers or where a joint certificate has been issued to reflect liability under both schemes. It provides that, where the amounts due under one of these certificates (or parts of a certificate) have been adjusted following review or appeal, then the other authority must review its certificate (or part of a certificate) if it is satisfied that consequential adjustments are necessary or expedient. In addition to these two cases, *subsection (4)* enables a review of a certificate to be carried out by the authority either on its own initiative or on application by the compensator. *Subsection (4)(a)* provides for regulations to be made relating to the timing of such reviews and the circumstances or cases in which they may take place.

334. *Subsection (5)* provides that, following review, the authority may verify that the existing certificate is correct, make appropriate variations and issue a new certificate or revoke the old certificate. *Subsection (6)* prevents the authority from issuing a fresh certificate for a higher amount than a previous one unless satisfied that the previous certificate was based on incorrect or insufficient information supplied by the person to whom the certificate was issued. *Subsection (7)* enables a single certificate to be issued following a review to cover liability under both the English/Welsh and Scottish schemes.

Sections 157 to 159: Appeal against a certificate or a waiver decision; Appeal tribunals; and Appeal to Social Security Commissioner

335. *Sections 157 to 159* provide for appeals against certificates of charges and waiver decisions to an independent body.
336. *Subsection (1)* of *section 157* sets out the circumstances in which an appeal against a certificate may be made and *subsection (2)* provides that no appeal may be made until the claim to which the compensation payment relates has finally been disposed of and the amounts set out in the certificate of NHS charges have been paid. *Subsections (4)* and *(5)* enable compensators to apply for the requirement for prior payment in *subsection (2)* to be waived, and allow the Secretary of State or the Scottish Ministers to grant such a waiver only where it appears to him or them that requiring payment would cause exceptional financial hardship. *Subsection (6)* provides compensators with a right of appeal against a waiver decision using the same mechanisms as for an appeal against a certificate. It is envisaged that the waiver would only be granted in truly exceptional cases, such as where the raising of money which might later fall to be refunded might, for example, put an individual's home at risk or bankrupt a single-handed business.
337. *Subsection (7)* provides for regulations to be made as to the timing, manner and procedure for appeals and for enabling an appeal against a certificate to be treated as a review. *Section 167(2)* provides that regulations made by Scottish Ministers under this subsection may only be made with the consent of the Secretary of State.
338. *Section 158* provides that appeals against both certificates and waiver decisions will be heard by appeals tribunals set up under social security legislation ('the Appeals Service'). *Subsection (3)* sets out the powers available to tribunals on an appeal against a certificate and *subsection (4)* requires the authority to act in accordance with any tribunal decision. *Subsection (5)* enables a single certificate to be issued following appeal to cover liability under both the English/Welsh and Scottish schemes. *Subsection (6)* sets out the powers available to tribunals on an appeal against a waiver decision. *Subsection (7)* enables regulations to be made to set out the circumstances in which medical evidence submitted for an appeal does not have to be disclosed. This might be appropriate for example in cases in which it was thought that disclosure of such evidence to the injured person or their representatives might be harmful to the person's health.

339. *Section 159* provides for onward appeal, by either the authority or the compensator, on a point of law only, to a Social Security Commissioner. *Subsection (3)* applies to hearings by the Commissioner under this Section those subsections of section 14 of the Social Security Act 1998 which set out the Commissioner's powers in dealing with cases. The effect is that he may either determine a case himself or refer it back to a tribunal for decision with directions. *Subsections (4) and (5)* provide that, where the Commissioner refers a case back for decision, the tribunal will have the same powers as on an appeal under *section 158* and that in the case of an appeal against a certificate the authority must, as under that Section, act in accordance with the tribunal's decision. *Subsection (6)* provides that where a Commissioner determines himself a case relating to an appeal against a certificate, the authority must act in accordance with his decision.

Information

Section 160: Provision of information

340. The system for recovery of NHS charges is reliant upon information being exchanged by the various parties involved in the chain of events from accident to payment of compensation. *Subsections (1) and (2)* of this Section provide that a person against whom a claim for compensation is made and other persons set out in *paragraphs (b) to (g) of subsection (1)* must provide the authority with such information about the case as is required by regulations and that such information must be provided within the timescales and in the manner required by regulations. *Subsection (3)* makes clear that the information required may include information about NHS treatment or ambulance services provided to an injured person. It is envisaged that the only information which would be needed about the injured person's NHS treatment would be the category of treatment - treatment without admission, for example in accident and emergency or at an out-patient clinic, or treatment given as an in-patient plus the number of days' admission and in some instances the type of treatment provided.

Section 161: Use of information held by the Secretary of State or the Scottish Ministers etc.

341. This section allows information obtained for the purposes of the benefit recovery scheme, as set out in the Social Security (Recovery of Benefits) Act 1997, to be used for the purposes of the scheme relating to recovery of NHS costs and vice versa. This will mean, for example, that in cases involving both NHS and benefit recovery a single set of information can be used for both purposes. *Subsections (1) to (3)* enable information held for the purposes of the social security scheme to be supplied to those responsible for the NHS costs recovery scheme. *Subsections (4) to (6)* enable information held for the purposes of the NHS costs recovery scheme to be supplied to those responsible for the social security scheme.

Payments to hospitals or ambulance trusts

Section 162: Payment of NHS charges to hospitals or ambulance trusts

342. *Section 162* requires the authority to pay NHS charges which it has recovered (other than, under *subsection (2)*, overpayments which they are required to repay following a review or appeal) to:
- the body responsible for the hospital which provided treatment to the injured person; and/or
 - the NHS trust or NHS foundation trust or, in Scotland, Special Health Board, designated by the Secretary of State or Scottish Ministers as the relevant ambulance trust in relation to the hospital to which the injured person was taken for treatment.

343. Where treatment has been received at more than one health service hospital or both treatment and ambulance services have been provided, *subsection (1)(c) and (d)* enables the authority to divide the money received between the bodies concerned as it thinks appropriate. *Subsection (3)* enables regulations to be made as to how and when the authority will make payments of the amounts due (*paragraph (a)*); and to deal with the situation where the body which provided the treatment or ambulance services no longer exists (*paragraph (b)*). Regulations could for example enable payments to be passed to the new trust taking over from the former NHS trust or ambulance trust. *Subsections (4) and (5)* provide that the income received by hospitals should be used to provide goods and services for patients receiving NHS treatment at those hospitals and that received by ambulance trusts to provide NHS ambulance services.

Miscellaneous and general

Section 163: Regulations governing lump sums, periodical payments etc.

344. As explained above in relation to *Section 150*, liability for payment of NHS charges is triggered by any payment of compensation, whether it is a single payment, an interim payment or a second or subsequent payment of compensation. *Subsection (1)* enables regulations to be made as to the application of the scheme to particular types of payments which are made in personal injury cases. These are:
- multiple payments (*subsection (1)(a)*).
 - structured settlements (*subsection (1)(b)*). In such cases it is envisaged that regulations might allow for the settlement agreement to count as a single payment of compensation and for no further liability in respect of NHS costs to arise when payments are made in accordance with the agreement;
 - interim payments of damages which are ordered to be repaid by a court (*subsection (1)(c)*). In such cases, it is envisaged that regulations might provide for repayment to the compensator of any payment of NHS costs made as a result of the interim payment.
345. Under *subsection (2)*, regulations relating to multiple payments may give credit for amounts already paid or provide for the payment of balances or recovery of excesses. For example, regulations might allow the amount of NHS charges due in respect of a later payment to be reduced to take account of earlier payments; or if, as a result of a finding of contributory negligence, the final sum due was less than an earlier payment, they might provide for refund of the overpayment.
346. *Subsection (3)* enables regulations to be made to deal with the particular situation of payments into court and the circumstances in which such payments – which are made to the court rather than to the injured person – are to count as compensation payments. It allows regulations to modify the scheme as it applies in such cases – for example by providing that the period within which a compensator must apply for a certificate under *section 151* runs from the date on which any payment is accepted rather than the date on which it is made or that the date of acceptance of the payment is to count as the settlement date for the purposes of *Section 154*. Under *section 202(3)(b)*, *section 163(3)* does not extend to Scotland.

Section 164: Liability of insurers

347. *Section 164* provides that where an insurance policy covers, to any extent, a compensation payment made by an insured person in consequence of an injury, that policy will also cover any NHS costs for which the insured person is liable in respect of that injury and that this cover cannot be restricted or excluded. *Subsection (4)* enables regulations to be made limiting an insurer's liability in circumstances set out in the regulations. It is envisaged that this might be appropriate, for example, to enable a reduction in the NHS costs payable in cases where an insurer has only covered a

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proportion of the total compensation due as a result of a cap on the amount payable under the insurance policy.

Section 165: Power to apply Part 3 to treatment at non-health service hospitals

348. *Section 165* enables regulations to be made extending the scheme for recovery of NHS costs to cases in which treatment has been provided at a non-health service hospital under an arrangement with one of the NHS bodies listed in *subsection (3)(b)*. This would cover, for example, treatment at private or voluntary hospitals paid for by the NHS. The regulations could also extend the scheme to cases in which an injured person has been provided with ambulance services to take him to such a hospital for treatment. The regulations could cover such issues as the bodies who would receive any payments recovered under the extended scheme. *Subsection (2)* excludes from any such extension treatment which, had it taken place at an NHS hospital, would have been private treatment or treatment under arrangements for primary dental services or general or personal medical or dental services. This mirrors the exclusions from the main scheme set out in *section 150(7)*.

Section 166: The Crown

349. This section provides that the scheme for recovery of NHS costs will extend to the Crown (i.e. the Queen and Government Departments) except, as a result of the definition of compensation payment in *section 150(3)(a)*, in circumstances where the person concerned can have no legal liability. This applies, for example, to *ex gratia* payments made by or on behalf of the Queen in her personal capacity.