

NATIONAL HEALTH SERVICE, ENGLAND

The National Health Service Litigation Authority (Scheme for Meeting Liabilities) Directions 2016

The Secretary of State, in exercise of the powers conferred by sections 7(1), 8(1), 272(7) and 273(1) of the National Health Service Act 2006(a), gives the following Directions:

Citation, commencement and interpretation

1.—(1) These Directions may be cited as the National Health Service Litigation Authority (Scheme for Meeting Liabilities) Directions 2016 and come into force on [1 December 2016].

(2) These Directions are given to the National Health Service Litigation Authority (“the Authority”)(b).

The Scheme

2. The Secretary of State directs the Authority to—

- (a) establish a scheme (“the Scheme”) to enable eligible bodies to make provision to meet liabilities to which the Scheme applies; and
- (b) administer the Scheme;

in accordance with the Schedule to these Directions.

Signed by authority of the Secretary of State for Health



Alison Ismail
Member of the Senior Civil Service
Department of Health

29th November 2016

SCHEDULE

Direction 2

Interpretation

1. In this Schedule—

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- (a) 2006 c. 41. By virtue of section 271(1) of the National Health Service Act 2006 (“the 2006 Act”) the functions of the Secretary of State in making these Directions are exercisable only in relation to England. Section 7 has been amended by section 21 of the Health and Social Care Act 2012 (c. 7). Sections 8, 272 and 273 have been amended but the amendments are not relevant to these Directions.
 - (b) The National Health Service Litigation Authority is a Special Health Authority established by the National Health Service Litigation Authority (Establishment and Constitution) Order 1995, S.I. 1995/2800; relevant amending instruments are S.I. 2005/1445 and 2013/295.

“the 2006 Act” means the National Health Service Act 2006;

“the 2015 Regulations” means the National Health Service (Clinical Negligence Scheme) Regulations 2015(a);

“CNST” means the scheme continued by regulation 3 of the 2015 Regulations (Clinical Negligence Scheme for Trusts);

“eligible body” means a body falling within paragraph 2(1) of this Schedule;

“membership year” in respect of any eligible body means any 12 month period starting on 1st April during which the body is a member of the Scheme;

“relevant health services” has the meaning given in regulation 2(1) of the 2015 Regulations (Interpretation);

“relevant function” means—

- (a) arranging for the provision of social care services; or
- (b) providing social care services,

where those services are arranged or provided as part of an arrangement which also includes the provision of relevant health services; and

“social care services” has the meaning given in 13N(4) of the 2006 Act (duty as to promoting integration).

Membership of the Scheme

Eligible bodies and applications for membership

- 2.—(1) A body is eligible to be a member of the Scheme if it is a member of the CNST.
- (2) An application by an eligible body to become a member of the Scheme must be made to the Authority in writing.
- (3) An application under sub-paragraph (2) must be made in such form, and be accompanied by such information, as the Authority may require.
- (4) Within 6 weeks of receiving an application under sub-paragraph (3) the Authority must determine whether or not to grant it and, within a reasonable time thereafter, notify the applicant in writing of that determination.
- (5) Where an eligible body’s application is granted, the notice under sub-paragraph (4) must specify the date on which the body’s membership of the scheme starts.

Cancellation of membership by a member

- 3.—(1) Any member which has been a member of the Scheme for at least 3 consecutive membership years may cancel its membership by giving notice in writing to the Authority.
- (2) Where notice under sub-paragraph (1) is given—
- (a) before 1st September in a membership year, the notice takes effect at the end of that membership year;
 - (b) 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 Authority

- 4.—(1) The Authority may cancel a member’s membership of the Scheme in any of the circumstances specified in sub-paragraphs (2) to (5).

(a) S.I. 2015/559.

(2) The member is liable to make a payment to the Authority under paragraph 9 (duty of members to make contributions to the Scheme) and that payment remains unpaid for a period of 28 days or more from the date on which the payment becomes due.

(3) The member has failed to provide any information required by the Authority under paragraph 17 (duty of members to provide information) within 28 days, or such further period as the Authority may in writing allow, from the date on which the Authority requests the information.

(4) The Authority considers it detrimental to the efficient administration of the Scheme or the interests of the other members for the member to remain a member of the Scheme.

(5) A member whose eligibility under paragraph 2(1) arises by virtue of the fact that it falls within regulation 4(2), (3) or (4) of the 2015 Regulations (arrangements by means of which a body may be eligible to be a member of the CNST), either—

- (a) enters into insolvency, or
- (b) ceases to be an eligible body.

(6) The Authority 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 where the cancellation—

- (a) is in circumstances specified in sub-paragraph (2), (3) or (4)—
 - (i) the date to be specified must not be less than 28 days after the date on which the notice is given; but
 - (ii) the Authority may determine not to cancel the membership by giving the member a further notice in writing to that effect;
- (b) is in circumstances specified in paragraph (5), the date to be specified is the date on which the notice is given.

Liabilities to which the Scheme applies

Liabilities of members

5.—(1) Subject to sub-paragraph (4), the Scheme applies to any liability in tort under the law of England and Wales which a member of the Scheme owes to a third party in respect of or consequent upon personal injury or loss as specified in paragraph (2).

(2) The personal injury or loss referred to in sub-paragraph (1) is personal injury or loss arising out of or in connection with any breach of a duty of care which—

- (a) the member owes to any person in connection with the provision of social care services to that person, where those services are provided as part of an arrangement which also includes the provision of relevant health services; and
- (b) is in consequence of any act or omission specified in sub-paragraph (3).

(3) The act or omission referred to in sub-paragraph (2) is an act or omission to act on the part of—

- (a) a person employed or engaged by the member in connection with any relevant function of the member; or
- (b) an employee or agent of a person engaged by the member in connection with any such function.

(4) The relevant health services referred to in sub-paragraph (2)(a) must be provided under an arrangement described in regulation 4(1)(k), or 4(1)(l) when read with 4(2), of the 2015 Regulations (arrangements by means of which a local authority or other body may be eligible to be a member of the CNST).

Liabilities of insolvent former members for which members are treated as liable

6.—(1) In this paragraph, references to “an insolvent former member” are to a body falling within regulation 9(1) of the 2015 Regulations which—

- (a) was a member of the Scheme established by these Directions; and
- (b) ceased to be a member of the Scheme in circumstances specified in paragraph 4(5)(a) (cancellation of membership by the Authority on grounds of insolvency).

(2) The Scheme applies to the qualifying liabilities of an insolvent former member.

(3) Qualifying liabilities to which the Scheme applies under paragraph (2) are to be treated for the purposes of the Scheme and these Directions as if they were liabilities of the Board, the CCG, the Special Health Authority, or local authority which entered into the arrangement referred to in paragraph (1)(a).

(4) Qualifying liabilities of an insolvent former member are any liability of a kind described in paragraph 5 which was incurred before the date on which the former member's membership of the Scheme ceased but falls to be met after that date.

Other liabilities for which members are treated as liable

7.—(1) In this regulation, “provider” means an NHS Trust, NHS foundation trust, local authority, or other body which provides social care services, where those services are provided as part of an arrangement which also includes the provision of relevant health services.

(2) The Scheme applies to the qualifying liabilities of a provider (“the sub-contractor”) where its provision of social care services together with relevant health services (“the provision of services”) is the subject of—

- (a) an arrangement made between it and another provider; and
- (b) an arrangement made between —
 - (i) the Board, a CCG, a Special Health Authority or local authority; and
 - (ii) a provider which is a member of this Scheme.

(3) In determining whether paragraph (2) applies in any case, it does not matter whether the provision of services by the sub-contractor is the subject only of the arrangements referred to in paragraph (2)(a) and (b) or is also the subject of further arrangements made between providers.

(4) Qualifying liabilities to which the Scheme applies under paragraph (2) are to be treated for the purposes of the Scheme and these Directions as if they were liabilities of the provider which entered into the arrangements referred to in paragraph (2)(b).

(5) Qualifying liabilities of a sub-contractor are any liability in tort under the law of England and Wales which—

- (a) the sub-contractor owes to a third party in respect of or consequent upon personal injury or loss as specified in paragraph (6); and
- (b) is in consequence of the arrangement referred to in paragraph (2)(a).

(6) The personal injury or loss referred to in paragraph (5)(a) is personal injury or loss arising out of or in connection with any breach of a duty of care which—

- (a) the sub-contractor owes to any person in connection with the provision of social care services to that person, where those services are provided as part of an arrangement which also includes the provision of relevant health services; and
- (b) is in consequence of any act or omission specified in paragraph (7).

(7) The act or omission referred to in paragraph (6)(b) is an act or omission to act in connection with the provision of services on the part of—

- (a) the sub-contractor;
- (b) a person employed or engaged by the sub-contractor; or
- (c) an employee or agent of a person engaged by the sub-contractor.

Determination of amounts payable by members

8.—(1) The Authority must determine the amount which each member of the Scheme must pay the Authority in respect of each membership year.

(2) In determining that amount in respect of any member (“M”) the Authority may have regard to—

- (a) the Authority’s estimate of the total amount which, under paragraphs 11 to 15 (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 M’s relevant functions;
- (c) the number of M’s employees who are engaged in M’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 M which falls within paragraph 11(3)(c) (agreement that Scheme to cover future claim in respect of liability incurred before membership starts);
- (f) any agreement in respect of M which falls within paragraph 11(5)(c) (agreement that Scheme to cover existing claim not met before membership ceases);
- (g) any agreement in respect of M which falls within paragraph 12(2)(a) (agreement on payment of additional contribution that Scheme to cover claim in respect of liability incurred before membership ceases);
- (h) the Authority’s assessment of—
 - (i) the likely effectiveness of any steps being taken, or to be taken, by M as to the manner in which M exercises any relevant function for the purpose of reducing the incidence of liabilities in connection with that function to which the Scheme applies; and
 - (ii) the effectiveness of any steps which have already been taken for that purpose; and
- (i) any other factor relating to M or any other member of the Scheme which the Authority considers relevant to the determination under sub-paragraph (1).

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

(4) Except as stated in sub-paragraph (5) the notice must be given no later than 31st December in the membership year before that to which the notice relates.

(5) The notice in respect of—

- (a) the first membership year must be given no later than 6 months after the date on which the Authority receives the member’s application under paragraph 2; and
- (b) the notice in respect of the second membership year must be given no later than 1st July in that membership year.

(6) For the purposes of sub-paragraph (5) references 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

9.—(1) Each member of the Scheme must, in respect of each membership year, pay to the Authority the amount determined in respect of the member under paragraph 8(1) (determination of amounts payable by members).

(2) Except as stated in sub-paragraph (3) a member which receives a notice under paragraph 8(3) of the amount payable in respect of a membership year must pay the amount due—

- (a) in accordance with such arrangements as may be agreed between the Authority and the member (which may include payment in instalments to be made at agreed times); and
 - (b) if no agreement is reached by 1st March immediately before the start of the membership year, by such time and in such manner as the Authority may determine.
- (3) Where a member receives a notice under paragraph 8(3) in respect of a membership year, the member must pay—
- (a) the amount due in respect of the first membership year no later than 8 months after the date on which the Authority receives the member's application under paragraph 2 (membership of the Scheme); and
 - (b) the amount due in respect of the second membership year no later than 1st August in that membership year.
- (4) For the purposes of sub-paragraph (3), references to “the first membership year” of a body which is a member of the Scheme are to be construed in accordance with paragraph 8(6).

Revision of determination of payable amount

10.—(1) Sub-paragraph (2) applies where the Authority identifies before the end of a membership year that the amount determined by the Authority under paragraph 8(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 the light of further information that has become available to the Authority.

(2) The Authority—

- (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 Authority must give the member notice in writing of any revised amount determined under sub-paragraph (2) and 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 Authority and the member (which may include payment by 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 Authority may determine.

(4) The reference in sub-paragraph (1) to an amount determined by the Authority under paragraph 8(1) includes any revised amount determined under sub-paragraph 2(b).

Payments out of the Scheme

Payments out of the Scheme: liabilities of members

11.—(1) Where a payment falls to be met by a member of the Scheme in connection with a claim in respect of a liability to which the Scheme applies, the Authority may pay to the member or on the member's behalf an amount determined by the Authority under paragraph 15.

(2) No payment may be made under sub-paragraph (1)—

- (a) in respect of any liability of the member which is excluded from the Scheme by any of sub-paragraphs (3) to (5); or
- (b) in respect of any liability of, or payment by, the member which is excluded from the Scheme by paragraph 13 (exclusions from the Scheme).

(3) 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 Authority is satisfied that the eligible body informed the Authority before the end of the qualifying period that the claim had been made;
- (c) the Authority 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.

(4) Any liability of a member which falls to be met after the member gives notice of cancellation under paragraph 3 (cancellation of membership by a member) but before membership has ceased is excluded from the Scheme unless the Authority 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.

(5) 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 Authority is satisfied that B informed the Authority before the end of the qualifying period that the claim had been made;
- (c) the Authority 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.

(6) In paragraph (3)(b) and (5)(b), the "qualifying period" is the period of 14 days starting with the date on which the member became aware that a claim had been made or, if earlier, the date on which the Authority considers that the member ought to have become aware that a claim had been made.

Payments out of the Scheme: liabilities of former members

12.—(1) Where—

- (a) a payment falls to be made by a body ("B") which has at any time 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 relates to a breach of the duty of care by B whilst it was a member of Scheme,

the Authority may, if the conditions specified in paragraph (2) are met, pay to B or on B's behalf an amount determined by the Authority under paragraph 15.

(2) The conditions are that—

- (a) before B's membership of the Scheme ceases, the Authority agrees with B that, in respect of the membership year immediately preceding the cessation of B's membership, the amount to be paid by B under paragraph 9 (duty of members to make contributions to the Scheme) is also to include an additional amount determined for the purposes of this regulation;
- (b) that amount is determined by the Authority as being sufficient to meet any liabilities of B falling within paragraph (1) which were incurred whilst B is a member but fall to be met after the date on which B's membership ceases; and
- (c) before that date, B either pays the additional amount in full or enters into an agreement with the Authority 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 paragraph 13 (exclusions from the Scheme).

Exclusions

13.—(1) Except to such extent as the Authority may determine, the following are excluded from the Scheme—

- (a) any liability admitted by a member without first obtaining the Authority’s written consent;
 - (b) any liability determined by a Court in proceedings which are conducted by a member otherwise than in consultation with the Authority;
 - (c) any payment falling to be made by a member where the member has not complied with any condition imposed by the Authority relating to a claim;
 - (d) any payment falling to be made by a member where, without first obtaining the Authority’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; 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 liability that is of an amount less than the amount which is for the time being agreed between a member and the Authority as being the minimum amount of any liability in respect of which a payment is to be made 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 paragraph 11(5)(c) and (d) are met (agreement that Scheme to cover existing claim not met before membership ceases); or
 - (b) to which paragraph 12 applies (liabilities of former members).

Payments out of the Scheme: liabilities for which members are treated as liable

14.—(1) Paragraph (2) applies to any payment in connection with a claim in respect of a qualifying liability falling within paragraph 6 (liabilities of insolvent former members for which members are treated as liable), where the payment falls to be made by a member of the Scheme which under paragraph 6(3) is treated as being liable in respect of the claim.

(2) Paragraphs 11 to 13 (circumstances in which payments are to be made out of the Scheme in respect of liabilities of members and former members) are to apply to enable payments to be made to or on behalf of any member of the Scheme in respect of qualifying liabilities as those paragraphs apply in respect of the member’s own liabilities.

(3) In the application of paragraph 11, 12 or 13 for the purposes of paragraph (2), references to anything being done by, to or against a member in respect of a liability to which the Scheme applies includes references to it being done in respect of a qualifying liability for which the member is treated as being liable.

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

15.—(1) In respect of each liability to which the Scheme applies, the Authority must determine the amount of any payment which is to be made under paragraph 11(1) or 12(1) (payments out of the Scheme in respect of liabilities of members and former members).

(2) In determining the amount of the payment to be made in circumstances specified in each of sub-paragraphs (3) to (8), the Authority must have regard to the relevant matters specified in that sub-paragraph.

(3) Where an award of damages has been made by a Court against the member, the relevant 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, the relevant 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, the relevant matters are—
- (a) the amount of any legal and associated costs incurred by or on behalf of the member; and
 - (b) 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) Where a member has, otherwise than in the course of legal proceedings, agreed to make a payment in settlement of a claim, the relevant 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, the relevant matters are the amount of—
- (a) that contribution; 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, the relevant 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 this paragraph, references to “member” are to be construed in accordance with paragraph 13(2).

Power to make payments on account

16.—(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 Authority under paragraph 15 (determining the amount of any payment to be made out of the Scheme), the Authority may make a payment on account of any amount which may become payable.

(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 paragraph 15 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

17.—(1) In this paragraph “specified” means specified by the Authority in a notice under sub-paragraph (2).

(2) The Authority may by notice in writing require a member to provide the Authority 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 sub-paragraph (2) and must—

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

Directions and guidance

18.—(1) The Authority must make the following information available to eligible bodies in such form and at such times as it considers appropriate—

- (a) these directions, and any other directions the Secretary of State gives the Authority with respect to the exercise by the Authority of its functions in relation to the Scheme; and
- (b) any guidance the Secretary of State gives to the Authority as to the manner in which the Scheme is to be administered.