

EXPLANATORY MEMORANDUM TO
THE NATIONAL HEALTH SERVICE (EXISTING LIABILITIES SCHEME)
(ENGLAND) REGULATIONS 2018

2018 No. 755

THE NATIONAL HEALTH SERVICE (LIABILITIES TO THIRD PARTIES
SCHEME) (ENGLAND) REGULATIONS 2018

2018 No. 756

AND

THE NATIONAL HEALTH SERVICE (PROPERTY EXPENSES SCHEME)
(ENGLAND) REGULATIONS 2018

2018 No. 757

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instruments

2.1 The three instruments consolidate and revoke the following regulations:

- The National Health Service (Existing Liabilities Scheme) Regulations 1996 (SI 1996/686) and all amending regulations (the ‘ELS Regulations’)
- The National Health Service (Liabilities to Third Parties Scheme) Regulations 1999 (SI 1999/873) and all amending regulations (the ‘LTPS Regulations’)
- The National Health Service (Property Expenses Scheme) Regulations 1999 (SI 1999/874) and all amending regulations (the ‘PES Regulations’)

2.2 The three statutory indemnity schemes established under the regulations listed above are administered by NHS Resolution (legally known as the NHS Litigation Authority) on behalf of the Secretary of State and provide cover (through the pooling of annual contributions from member bodies in relation to LTPS and PES and through direct DHSC funding for ELS) for certain kinds of expenses incurred by, or compensation claims made against, bodies that perform functions in relation to the health service.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 As these instruments are subject to negative resolution procedure and have not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 Section 71 of the National Health Service Act 2006 (“ the 2006 Act”) enables indemnity schemes to be established to cover the liabilities to third parties of bodies and other persons providing NHS services. Cover for any expenses incurred by such bodies and persons, in relation to their property, may also be included in a scheme under section 71 of the 2006 Act.
- 4.2 The ELS, LTPS and PES Regulations were made under enabling provisions in the National Health Service Act 1977 and the National Health Service and Community Care Act 1990. Following the repeal of the National Health Service Act 1977 and provisions in the National Health Service and Community Care Act 1990, the Regulations had effect as if made under section 71 of the 2006 Act and section 30 of the National Health Service (Wales) Act 2006. This was by virtue of the National Health Service (Consequential Provisions) Act 2006.
- 4.3 The three sets of Regulations were amended on a number of occasions, mainly due to the changing nature of the bodies involved in the NHS since the three schemes were first established in the mid-to-late 1990s. As a result of the various amendments made, the regulations were no longer user-friendly and were in need of consolidation. To address this, the ELS, LTPS and PES Regulations have been consolidated and replaced by the three instruments which are the subject of this memorandum, respectively the ELS, LTPS and PES Regulations 2018. These consolidating sets of regulations have been updated to reflect the current structures of the NHS and drafted using a more modern drafting style with the intention to make them clearer to understand for users.

5. Extent and Territorial Application

- 5.1 The extent of these three sets of instruments is England and Wales.
- 5.2 The territorial application of these instruments is England.

6. European Convention on Human Rights

- 6.1 As the instruments are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 These three instruments consolidate the ELS, LTPS and PES Regulations and do so by using a more modern drafting style and terminology. Section 71 of the 2006 Act gives the Secretary of State power to establish schemes whereby the bodies and other persons specified in section 71(2) of that Act may make provision to meet expenses arising from any loss of, or damage to, their property and to meet liabilities to third parties for loss, damage or injury arising out of the carrying out of the functions of those specified bodies and persons.
- 7.2 The ELS Regulations established a scheme to cover liabilities to third parties for personal injury or loss arising out of the provision of NHS services where the act or omission giving rise to the liability occurred prior to 1st April 1995. Where a body that was providing health services prior to April 1995 no longer exists, the ELS

covers any existing body or other person to whom the liabilities of the former body were transferred.

- 7.3 The LTPS Regulations established a scheme for meeting the liabilities of its members to third parties arising out of non-clinical negligence and other circumstances. The LTPS typically covers employers' and public liability claims from NHS staff, patients and members of the public. These range from straightforward slips and trips to serious workplace manual handling, bullying and stress claims. The LTPS also covers claims arising from breaches of the Human Rights Act 1998, the data protection legislation and the Defective Premises Act 1972, as well as defamation, unlawful detention and professional negligence claims. The LTPS also extends to covering any indemnity given by a member of the LTPS to a person appointed to any board of a body that is a member of that scheme, including an indemnity given to non-executive directors.
- 7.4 The PES Regulations established a scheme to cover losses of its members for material damage to buildings and contents from a variety of causes, including fire, theft and water damage. The PES also offers business interruption expense cover arising from property damage.
- 7.5 In consolidating the ELS, LTPS and PES Regulations, a few changes have been incorporated to improve the clarity of the provisions governing the schemes in order to make the consolidated 2018 Regulations more user-friendly. For example, redundant provisions have been removed, such as the inclusion of former health authorities in the definition of "eligible bodies" (namely, the bodies eligible to participate in the ELS, PES and the LTPS) and the requirement in the ELS Regulations for bodies to apply to participate in the ELS because the eligible bodies specified in the ELS Regulations were, and continue to be, automatically covered by the ELS.
- 7.6 Other changes made include the updating of some provisions to provide more flexibility in the future, for example, the inclusion in the list of eligible bodies in the PES and LTPS Regulations 2018 of companies formed under section 223 of the National Health Service Act 2006 rather than a reference to any particular 'section 223' company. A new provision has also been included in the LTPS and PES Regulations 2018 to make clear that membership of the schemes will be automatically terminated when a body ceases to be an eligible body.

Consolidation

- 7.7 The ELS, LTPS and PES Regulations were identified as being difficult to follow, due to the number of amendments made, and as requiring consolidation to ensure that the law is clear and easy to understand.
- 7.8 The regulations for a fourth indemnity scheme administered by NHS Resolution, known as the Clinical Negligence Scheme for Trusts ("CNST"), were also identified as being in need of clarification and consolidation. The regulations for the CNST were updated and consolidated in 2015 (SI 2015/559). This subsequent consolidation of the ELS, LTPS and PES Regulations will also provide further clarity for NHS Resolution, scheme members, those making claims and others participating in the schemes. A further benefit arising from updating and consolidating the ELS, LTPS and PES Regulations is that of consistency in the terminology used which, where appropriate, reflects that of the regulations underpinning the CNST.

8. Consultation outcome

- 8.1 Given there are no policy changes being introduced by these consolidating instruments, the Department has conducted no consultation in connection with their implementation but we have engaged with NHS Resolution in their preparation.
- 8.2 All three sets of regulations require consent from HM Treasury which has been sought and received.

9. Guidance

- 9.1 The Department does not have any general day to day involvement in the administration of the PES, ELS or LTPS. NHS Resolution is directed to administer the schemes on behalf of the Secretary of State and does so subject to any further directions given by the Secretary of State. NHS Resolution publishes guidance for members on the operation of the LTPS and PES schemes in the form of Scheme Rules and Reporting Rules. There is no equivalent guidance for ELS since it has no members. The guidance on LTPS and PES is amended from time to time and is available on the NHS Resolution's website at:

<http://www.nhsla.com/Claims/Pages/NonClinical.aspx>

<http://www.nhsla.com/Claims/Pages/Clinical.aspx>

Hard copies may be obtained by emailing: generalenquiries@resolution.nhs.uk or by writing to:

NHS Resolution

2nd Floor, 151 Buckingham Palace Road
London, SW1W 9SZ

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 There is no impact on the public sector.
- 10.3 An Impact Assessment has not been prepared for these instruments.

11. Regulating small business

- 11.1 The three instruments have no impact on the regulation of small businesses which will be able to continue to obtain insurance cover in the usual ways.

12. Monitoring & review

- 12.1 As these instruments make provision for the continuation of existing clinical and non-clinical NHS negligence schemes, there is no measurable outcome anticipated. As the delegated administrator for the schemes, NHS Resolution will monitor and review the on-going operation of the schemes as part of its obligation to report and provide advice to the Secretary of State.

13. Contact

- 13.1 Cheryl Lynch at the Department of Health and Social Care. Telephone: 020 7210 5143 or email: Cheryl.lynch@dh.gsi.gov.uk can answer any queries regarding the instrument.