EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE (CLINICAL NEGLIGENCE SCHEME) AMENDMENT REGULATIONS 2014

2014 No. 933

THE NATIONAL HEALTH SERVICE (LIABILITIES TO THIRD PARTIES SCHEME) AMENDMENT REGULATIONS 2014

2014 No. 931

AND

THE NATIONAL HEALTH SERVICE (PROPERTY EXPENSES SCHEME) AMENDMENT REGULATIONS 2014

2014 No. 932

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

2. Purpose of the instruments

2.1 These regulations make amendments to three statutory indemnity schemes, administered by the NHS Litigation Authority (NHS LA) on behalf of the Secretary of State, which provide cover (through the pooling of annual contributions from member bodies) for certain kinds of compensation claims made against member bodies that perform functions in relation to the health service. Amendments are being made to all three regulations to update the definition of 'relevant function' to reflect more clearly how functions are now performed in the health service and so that activities known as 'income generation' functions of NHS bodies, such as the private patient work of NHS trusts and foundation trusts, are clearly included in the definition, and 'qualifying liabilities' arising out of these functions will be covered. In respect of the Liabilities to Third Parties Scheme (LTPS) regulations and the Property Expenses Scheme (PES) regulations, both also require miscellaneous amendments in order to bring them into line with changes that took place to the Clinical Negligence Scheme (CNS) regulations in April 2013 (for example, the length of the notice period required should a member wish to leave the scheme and the date by which members must be notified of contributions payable for the following year) so that where possible, taking account of necessary differences, the three schemes will operate broadly similar processes.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 The Regulations which are being amended are the National Health Service (Clinical Negligence Scheme) Regulations 1996 (SI 1996/251) (the "CNS Regulations"), the National Health Service (Liabilities to Third Parties Scheme) Regulations 1999 (SI 1999/873) (the "LTPS Regulations") and the National Health Service (Property Expenses Scheme) Regulations 1999 (SI 1999/874) (the "PES Regulations"). Section 71 of the National Health Service Act 2006, gives the Secretary of State power to establish schemes whereby the bodies set out in that section may make provision to meet expenses arising from any loss of or damage to their property and for liabilities to third parties for loss, damage or injury arising out of the carrying out of the bodies' functions.

4.2 The CNS Regulations established a scheme whereby eligible bodies make provision for the meeting of qualifying liabilities (as set out in the scheme) to third parties in connection with personal injury or loss arising out of negligence in the carrying out of the members' functions. The Clinical Negligence Scheme for Trusts was established as a way of enhancing clinical negligence handling expertise across the whole of the English NHS. Its creation effectively centralised the way the NHS bodies cover their clinical negligence risks, and enables expert and efficient handling of claims and also learning from claims to be shared with a view to reducing harm to patients.

4.3 The LTPS Regulations established a scheme for the meeting of members' qualifying liabilities to third parties arising out of non-clinical functions. The Liabilities to Third Parties Scheme 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. LTPS covers claims arising from breaches of the *Human Rights Act 1998*, the *Data Protection Act 1998* and the *Defective Premises Act 1972*, as well as defamation, unlawful detention and professional negligence claims. LTPS also extends to cover the personal liabilities of the members of NHS boards, including non-executive directors.

4.4 The Property Expenses Scheme, established by the PES regulations, covers members' losses for material damage to buildings and contents from a variety of causes, including fire, theft and water damage. PES also offers business interruption expense cover arising from property damage.

5. Territorial Extent and Application

5.1 These instruments apply to England. The original CNS, LTPS and PES regulations extend to England and Wales; the amending regulations apply to England only.

6. European Convention on Human Rights

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

7. Policy background

7.1 All three amendment regulations amend the definition of "relevant function" to reflect existing practice in relation to the scheme. The definition is important because only 'qualifying liabilities' arising in connection with such a function are covered by the scheme. The definition is updated to reflect more clearly how functions are now performed in the health service by eligible bodies and to show that those functions include situations where NHS bodies undertake income generating activities (such as hiring out operating theatres, car parking and retail units) and the private patient work of NHS trusts and foundation trusts. These functions - separate from their core functions – generate additional income for the health service. The regulations are also amended in respect of the treatment of liabilities where events occurred before 1 May 2014. The usual practice of NHS LA, in administering the scheme, is to look at the regulations in force at the time a qualifying liability arose to see if it is covered. Here however, it is provided that NHS LA's prospective treatment of claims which arise from an event prior to 1 May 2014 must take account of the change to the definition of relevant function. This reflects what had in practice been happening as regards the interpretation of "relevant function".

7.2 Some of the changes that took place to the CNS regulations in April 2013 mean that the LTPS and PES regulations are out of kilter with the CNS regulations. The other miscellaneous amendments to the LTPS and PES regulations therefore include:

- reducing the notice periods for a member wishing to leave the scheme (after it was determined that the 12 month termination period was undesirable and a shorter period would allow members to exit the schemes more easily and buy commercial insurance from private sector firms, if this was found to be better value for money);
- putting back the notification date for contributions to 31 December each year, to allow time for Monitor and NHS England's joint annual consultation process on the national tariff payment system to complete (contributions are a factor in the tariff calculations and objections could be raised to the method for determining prices during the consultation period);
- making the factors taken into account by the NHS LA when calculating contributions optional and not obligatory

The changes also enable a member wishing to leave LTPS to have ongoing cover under the scheme for liabilities incurred prior to its membership terminating (but which have not fallen to be met whilst it is a member), by making additional payments. This is not included for PES because it covers members' own losses only and there is no prospect of liabilities arising once membership has been terminated.

Consolidation

7.3 The Department had hoped to consolidate, rather than amend, the CNS regulations at this time of further amendment. However, the CNS Regulations

require substantial modernisation and to do so would have meant that they were out of step in appearance with the LTPS and PES Regulations. The Department did not have the resources to consolidate all three sets of regulations at this time. The Department's view is that it would be more helpful to the NHS LA, which administers the schemes, and to scheme members, to have three schemes set out in regulations which closely mirror each other in terms of how they are drafted, subject to differences in policy content. The Department is therefore considering consolidating all three regulations the next time one of the sets of regulations is significantly amended (barring any unexpected emergency amendment), or other ways of reducing regulation.

Secretary of State Duties

7.4 The Department has considered the Secretary of State's duties as set out in the National Health Service Act 2006 (as amended by the Health and Social Care Act 2012) and considers that the policy changes effected by these instruments are consistent with:

i. The duty as to promoting autonomy, by reducing the burden on those carrying out health service functions and providers through, for example, the reduction in notice periods to terminate membership.
ii. The duty as to reporting on and reviewing treatment of providers, by making it easier for them to leave the schemes and seek alternative cover if desired.

The Department considers that the other duties are either not relevant to the operation of the schemes in general or are not relevant in respect of the policy changes to be brought about by these instruments.

8. Consultation outcome

8.1 The Department considers that the impact on the private or public sector is considered to be broadly nil. Accordingly, no formal consultation is required. It also considers that the changes to made to the CNS regulations in April 2013 were developed through an engagement exercise with health regulators, mutual and commercial indemnity market, healthcare bodies (both private and public sector), and patient and claimant representative organisations, with broad agreement reached on all the policy proposals. This included consultation on the changes of the type now being made to the LTPS and PES regulations only (as described in 7.2) and although it was not explicitly anticipated that these would be applied to those schemes at the time, they were considered to be favourable to members by improving the prospects of them being able to take advantage of a competitive indemnity/insurance environment. In terms of the reduced notice period for contributions, this was introduced in response to other stakeholder requirements, i.e. the need for Monitor and NHS England to consult on the national tariff payment system each year, and like the other changes to LTPS/PES was consulted upon in relation to the CNS regulations. It was also a consequence The Department therefore considers that that no further consultation is required in order to extend these parallel changes beyond the CNS regulations to these schemes.

8.2 All three sets of regulations require consent from HM Treasury which has been sought and received.

9. Guidance

9.1 The Department of Health does not have any general day to day involvement in the administration of the scheme. The NHS Litigation Authority administers the scheme on behalf of the Secretary of State and it publishes guidance on the operation of all three schemes in the form of Scheme Rules. These are amended from time to time and are available on the NHS LA's website at:
http://www.nhsla.com/Claims/Documents/CNST%20Rules.pdf
http://www.nhsla.com/Claims/Documents/RPST%20Rules.pdf
Hard copies may be obtained by emailing: GeneralEnquiries@nhsla.com
Or by writing to:
NHS Litigation Authority
2nd Floor, 151 Buckingham Palace Road
London, SW1W 9SZ

10. Impact

10.1 The impact on business, charities or voluntary bodies is considered to be broadly nil.

10.2 The impact on the public sector is considered to be broadly nil.

10.3 An Impact Assessment has not been prepared for these instruments.

11. Regulating small business

11.1 The legislation can apply to small business, however, the regulations' effect is to allow access to a voluntary scheme; they do not place or impose burdens on small business.

12. Monitoring & review

12.1 As these instruments are intended to make provision for the continuation of the existing clinical and non-clinical NHS negligence schemes, there is no measurable outcome anticipated. As the delegated administrator for the schemes, the NHS Litigation Authority 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

Emma Addy at the Department of Health (Tel: 0113 254 5970 or email: emma.addy@dh.gsi.gov.uk) can answer any queries regarding the instruments.