

# Clinical Negligence Scheme for General Practice (CNSGP)

## Scheme rules

V1 - March 2019



**Resolution**

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## **Clinical Negligence Scheme for General Practice Scheme rules**

### **1. General Description**

- 1.1. The Clinical Negligence Scheme for General Practice was established by the Regulations (as defined below) which are made pursuant to section 71 of the 2006 Act.
- 1.2. The Regulations specify that the Scheme is to be administered by the Secretary of State. The National Health Service Litigation Authority, currently known as NHS Resolution, will exercise the Secretary of State's administration functions on behalf of the Secretary of State and, accordingly, will be referred to as the **Administrator** under these Rules.
- 1.3. It is the responsibility of an Eligible Person who is relying on benefits made available under the Scheme to ensure that they have full knowledge of the Rules and any relevant guidance issued by the Administrator or the Secretary of State. It is also the responsibility of the Eligible Person to take reasonable steps to satisfy themselves that liabilities incurred for the NHS activities carried out by them, their employees or any other person engaged (or permitted) by them to undertake such activities, will be covered under the Scheme.
- 1.4. By requesting Scheme Benefits in relation to a Claim, Eligible Persons agree to be bound by these Rules.
- 1.5. Subject to the approval of the Secretary of State, these Rules may be amended from time to time by the Administrator.

### **2. Definitions and Interpretation**

- 2.1. A reference to a numbered rule is a reference to the Rule which bears that number in these Rules and a reference to a numbered regulation is a reference to a regulation which bears that number in the Regulations.
- 2.2. Nothing in these Rules shall seek to limit or amend the meaning or extent of the Regulations. In the event of a conflict between these Rules and the Regulations, the Regulations shall prevail.
- 2.3. In these Rules, unless the context otherwise requires, the following expressions shall have the following meanings:

**"2006 Act"** means the National Health Service Act 2006 as amended;

**"Administrator"** means NHS Resolution when exercising the Secretary of State's functions in administering the Scheme, or whosoever is appointed from time to time by the Secretary of State to administer the Scheme;

**"Adverse Incident"** means any event where a breach of a duty of care, as described in Rule 3.1, has occurred or has been alleged to have occurred;

**"Ancillary Health Services"** means services, other than Primary Medical Services, provided as part of the National Health Service in England by:

- a) a Part 4 Contractor whose principal activity consists of the provision of Primary Medical Services;
- b) a Primary Medical Services Sub-contractor whose principal activity consists of the provision of Primary Medical Services; or
- c) a person ("P") with whom a person specified in paragraph a) or b) above has made arrangements for P to provide the ancillary health services,

provided that, unless determined otherwise by the Administrator, any such services delivered by a Subsidiary Company are excluded;

**"Board"** means the board of the Administrator from time to time;

**"Claim"** means any demand, however made, for monetary compensation in respect of an Adverse Incident;

**"Claimant"** means a person making a Claim;

**"CNST Regulations"** the National Health Service (Clinical Negligence Scheme) Regulations 2015;

**"Commencement Date"** means the 1 April 2019;

**"Company"** has the meaning given in section 1159(4) of the Companies Act 2006;

**"Contributing Person"** means one or more Persons, in addition to the Eligible Person, who is potentially liable or jointly liable with the Eligible Person in respect of the relevant Claim;

**"Data Protection Legislation"** means (i) the Data Protection Act 1998 (ii) the Data Protection Act 2018 (iii) the General Data Protection Regulation (*Regulation (EU) 2016/679*), the Law Enforcement Directive (*Directive (EU) 2016/680*) and any applicable national Laws implementing them as amended from time to time (iv) the Data Protection Act 2018 (v) all applicable Law concerning privacy, confidentiality or the processing of personal data including but not limited to the Human Rights Act 1998, the Health and Social Care (Safety and Quality) Act 2015, the common law duty of confidentiality and the Privacy and Electronic Communications (EC Directive) Regulations;

**"Defence Costs"** means reasonable and necessary legal fees and disbursements;

**“Duty of Candour”** means the duty owed to patients under Regulation 20 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 and equivalent professional obligations to be open and transparent with patients

**“Eligible Person”** means a Person who is, or who, on the date of the Adverse Incident, was:

- a) a Part 4 Contractor;
- b) a Primary Medical Services Sub-contractor; or
- c) a Person with whom a Part 4 Contractor or a Primary Medical Services Sub-contractor has made arrangements for that Person to provide Ancillary Health Services (other than under a contract of employment);

**“Indemnity Provider”** means a provider of indemnity or insurance arrangements for liabilities arising out of the activities of an Eligible Person other than the Administrator under this Scheme;

**“NHS Digital”** means the special health authority established under statute as the Health and Social Care Information Centre;

**“NHS England”** means the National Health Service Commissioning Board established under section 1H of the 2006 Act;

**“NHS Resolution”** means the special health authority established as the National Health Service Litigation Authority, pursuant to an order made by the Secretary of State under section 28 of the 2006 Act, namely the National Health Service Litigation Authority (Establishment and Constitution) Order 1995 and this reference includes, where appropriate, the Board and any committee or sub-committee of the Board and the officers of NHS Resolution;

**“Notification of Claim”** means the method by which a Claimant notifies an Eligible Person of a Claim. It will usually, but not always be a letter before action or a claim form;

**“Part 4 Contractor”** means a person providing, or arranging for the provision of, Primary Medical Services in accordance with a contractual arrangement made with that person under section 83(2), 84(1) or 92(1) of the 2006 Act;

**“Periodical Payments Regime”** means any Settlement in respect of a Claim whereby the whole or part of the damages is expressed to be paid at future dates whether absolutely or conditionally;

**“Person”** includes companies, statutory bodies, partnerships, firms, individuals, government departments and other administrative organisations and any other body of persons, whether incorporated or unincorporated;

**“Primary Medical Services”** means the primary medical services that, in accordance with section 83 of the 2006 Act, NHS England is under a duty to secure and which are provided, or to be provided, under a contractual arrangement (including any such arrangement that is part of a set of arrangements for the provision of services, in addition to the primary medical services specified in that contractual arrangement):

- a) made under section 83(2), 84(1) or 92(1) of the 2006 Act; or
- b) made by a Part 4 Contractor with a Primary Medical Services Sub-contractor;

**“Primary Medical Services Sub-contractor”** means a person providing Primary Medical Services under a contractual arrangement made with a Part 4 Contractor;

**“Regulations”** means the National Health Service (Clinical Negligence Scheme for General Practice) Regulations 2019 (*SI 2019/334*);

**“Relevant Function”** means:

- a) making arrangements for the provision of Primary Medical Services;
- b) providing Primary Medical Services;
- c) making arrangements for the provision of Ancillary Health Services;
- d) providing Ancillary Health Services;
- e) carrying out an activity in connection with any of the activities in paragraphs (a) to (d);

**“Relevant Liability”** means a liability of the kind described in Rule 3;

**“Request”** means a request for Scheme Benefits made by an Eligible Person in accordance with Rule 6.1;

**“Rules”** means the Rules in this document, as varied from time to time in accordance with Rule 1.5;

**“Scheme”** means the Clinical Negligence Scheme for General Practice established under Regulation 3(1);

**“Scheme Benefits”** means benefits available under this Scheme;

**“Secretary of State”** means the Secretary of State for Health and Social Care;

“**Settlement**” means the amount of damages agreed pursuant to a legally binding agreement with a Claimant in respect of a Claim (whether with or without admission of liability) or the amount of damages awarded in respect of a Claim pursuant to an order of a court or other tribunal, whether the payment of such damages will be made by a single payment or under a Periodical Payments regime and “settled” shall be construed accordingly;

“**Subsidiary**” has the meaning given in section 1159(1) of the Companies Act 2006;

“**Year**” means the period from and including 1 April in any calendar year until and including 31 March the following calendar year.

- 2.4. All terms defined in the Regulations which are used in these Rules shall bear the same meaning as in the Regulations unless the context requires otherwise.
- 2.5. Clause headings and the index are for ease of reference only and are not to affect the interpretation of these Rules.
- 2.6. Words denoting the singular include the plural and vice-versa.

### 3. Relevant Liabilities

3.1. Subject to Rule 3.2 and any other provisions in the Regulations, the liabilities to which the Scheme applies are liabilities in tort under the law of England and Wales that arise as a consequence of a breach of a duty of care owed by an Eligible Person to a third party in connection with a Relevant Function, where:

3.1.1. an act, or an omission to act, on the part of:

3.1.1.1. an Eligible Person;

3.1.1.2. an employee of the Eligible Person; or

3.1.1.3. any other individual otherwise engaged, or permitted, by an Eligible Person to carry out an activity connected to a Relevant Function

results in personal injury or loss to the third party;

3.1.2. the act, or omission to act, is related to the diagnosis of an illness or the provision of care or treatment to the third party; and

3.1.3. the act or omission to act occurred on or after the Commencement Date.

- 3.2. If the liabilities of the Eligible Person meet the criteria in Rule 3.1 and in regulation 8(1) of the CNST Regulations, then the Administrator may exercise the function of the Secretary of State in determining whether the liability should be met as a Claim under this Scheme or alternatively as a claim under the scheme established by the CNST Regulations.

## 4. Scheme Commencement

The Scheme shall come into effect on the Commencement Date.

## 5. Benefits Available

### 5.1. Discretion of the Secretary of State under the Scheme (as exercised by the Administrator on the Secretary of State's behalf)

All benefits available under the Scheme are provided at the sole and absolute discretion of the Administrator (i.e. in the exercise of the Secretary of State's functions relating to the Scheme) whose decision in these matters shall be final and binding. These Rules shall not, under any circumstances, be construed to imply that any contract of insurance exists between any Person and the Secretary of State or that the benefits available under the Scheme are not discretionary. Subject to the total funds available for the purposes of the Scheme and subject to the discretion of the Administrator (as mentioned above), there shall be no limit to the financial benefits available under the Scheme in any Year.

### 5.2. Eligibility for benefits under the Scheme

The Administrator may, in relation to each Request, determine whether or not to provide any of the benefits available under the Scheme and, in doing so, may have regard to the information provided under Rule 9 and to such other factors as the Administrator considers to be relevant to the determination.

## 6. Requests for Scheme Benefits

### 6.1. Procedure

- 6.1.1. From time to time, the Administrator shall publish guidance on the form and manner in which Requests must be made. Such guidance shall be incorporated into and form part of these Rules. The nature of the information required from the Persons making Requests may vary according to the expected value and nature of the Claim.
- 6.1.2. Subject to Rule 6.1.4, upon receipt of a Notification of Claim from a Claimant, a Person may make a Request to the Administrator for benefits under the Scheme to be provided in relation to that Claim. The Request must be submitted in the form and manner specified by the Administrator and must be submitted as soon as reasonably

practicable after the Notification of Claim. The Request must include all appropriate and/or relevant documentation to enable the Administrator to determine, whether:

- 6.1.2.1. the provider of the services was an Eligible Person at the time of the Adverse Incident;
  - 6.1.2.2. the Claim is made in respect of a Relevant Liability; and
  - 6.1.2.3. any further information is required in order to establish whether the Eligible Person should be provided with Scheme Benefits in relation to the Claim.
- 6.1.3. If further information is required, the Administrator shall issue a notice to the Eligible Person in accordance with Rule 9.2.
- 6.1.4. Guidance issued by the Administrator may require Eligible Persons to inform the Administrator if they become aware of a potential class of Claim prior to sending a Notification of Claim.
- 6.1.5. Having considered all of the information relating to a Request made in respect of a Claim, including any further information that may be received as a result of a request for further information under Rule 6.1.3, the Administrator may:
- 6.1.5.1. refuse the Request. For example the Administrator could decide to refuse a request where:
    - 6.1.5.1.1. the liability in respect of which the Claim is made is not a Relevant Liability;
    - 6.1.5.1.2. the Eligible Person has failed to comply with these Rules; or
    - 6.1.5.1.3. the Administrator has determined that the Claim is to be covered under the CNST Regulations pursuant to Rule 3.2 ; or
  - 6.1.5.2. determine that benefits under the Scheme are to be made available in respect of the Claim.

## **6.2. Claims where the Eligible Person no longer exists**

Where the Eligible Person no longer exists (for example due to death, or if a company or partnership entity has been dissolved), references in these Rules to an Eligible Person should, nevertheless, be read as a reference to the Eligible Person as if they were still in existence.

## 7. Management of Claims by the Administrator

- 7.1. An Eligible Person must co-operate with the Administrator and provide all such assistance and information which the Administrator may request in respect of the conduct of a Claim made in respect of a Relevant Liability of the Eligible Person.
- 7.2. Without prejudice to the foregoing, the Administrator may exercise any contractual or other rights or powers of an Eligible Person relating to the conduct of a Claim including, in particular the selection, instruction and dismissal of legal and other advisers; the terms of any retainer for services of legal and other advisers; any right to raise claims or defences; and any right to bring proceedings.
- 7.3. In addition, and at no charge, the Eligible Person must give the Administrator full access to all documents, records, computer databases or other property, to premises and to employees, reasonably required for the purposes of enabling the Administrator to manage any Claim effectively.
- 7.4. If there is one or more Contributing Person in relation to a Claim:
  - 7.4.1. where the Contributing Person has separate indemnity or insurance arrangements in place with an Indemnity Provider which may cover the Claim, the Administrator may:
    - 7.4.1.1. liaise with the Indemnity Provider of the Contributing Person in order to apportion the value of the Claim between the Eligible Person and the Contributing Person in whatever manner the Administrator may decide; and/or
    - 7.4.1.2. liaise with the Indemnity Provider of the Contributing Person in relation to how the Claim is to be handled
  - 7.4.2. where a Contributing Person does not have separate indemnity or insurance arrangements in place and is not an Eligible Person, or is an Eligible Person but has not made a Request to the Administrator, the Administrator may liaise with the Contributing Person in order to:
    - 7.4.2.1. apportion the amount of such contribution, in whatever manner it may decide, taking into account such factors as, in the reasonable opinion of the Administrator, a court may have regard to when determining apportionment; and/or
    - 7.4.2.2. agree how the Claim is to be handled.
- 7.5. The Administrator may appoint, on its own behalf and on behalf of any Eligible Person, legal and other advisers selected by the Administrator either to act generally in respect of Claims or in relation to particular Claims or categories of Claims.

- 7.6. In the event that the Administrator appoints any legal adviser as referred to above then the Administrator may pay such legal adviser on whatever terms it considers appropriate.
- 7.7. The Eligible Person agrees to take all reasonable steps to eliminate or mitigate any cost, expense or liability in respect of any Claim. In particular, any monies recovered from any other source in respect of a Claim shall be set off against any benefits available under the Scheme, unless agreed otherwise by the Administrator beforehand.

## 8. Benefits Provided by the Scheme

### 8.1. Payments out of the Scheme

8.1.1. For the purposes of the Scheme, the Administrator may, subject to Rule 5.1, make a payment:

8.1.1.1. to, or on behalf of, an Eligible Person in respect of any Relevant Liability of the Eligible Person; or

8.1.1.2. where an Eligible Person:

8.1.1.2.1. has died;

8.1.1.2.2. been dissolved or wound up (within the meaning of the Companies Act 2006); or

8.1.1.2.3. is bankrupt or insolvent

and the Administrator is satisfied that a Relevant Liability of the Eligible Person is not also a Relevant Liability of any other Eligible Person.

### 8.2. Determination of the Amount of Payment

In determining the amount of any payment to be made under Rule 8.1 in the circumstances specified in each of Rules 8.2.1 to 8.2.6, the Administrator will have regard to the relevant matters specified in each of those paragraphs, as appropriate.

8.2.1. Where an award of damages has been made by a court against an Eligible Person, the relevant matters are the amount of:

8.2.1.1. the award;

8.2.1.2. the legal and associated costs awarded to the Claimant; and

8.2.1.3. any legal and associated costs incurred by or on behalf of the Eligible Person.

- 8.2.2. Where, in any legal proceedings, a settlement has been agreed to by, or on behalf of an Eligible Person, the relevant matters are the amount of:
- 8.2.2.1. any sum paid or payable by the Eligible Person in relation to the Claim;
  - 8.2.2.2. the Eligible Person's contribution towards any legal and associated costs incurred by the Claimant; and
  - 8.2.2.3. any legal and associated costs incurred by or on behalf of the Eligible Person.
- 8.2.3. Where, in any legal proceedings, a court has declined to award damages against an Eligible Person, the relevant matters are:
- 8.2.3.1. the amount of any legal and associated costs incurred by or on behalf of the Eligible Person; and
  - 8.2.3.2. the extent to which those costs are not recoverable either from the Claimant or from the Legal Aid Agency under regulations<sup>1</sup> made by virtue of section 26(5) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012<sup>2</sup> (costs in civil proceedings).
- 8.2.4. Where, otherwise than in the course of legal proceedings, an Eligible Person has agreed to make a payment in settlement of any Claim that has been or may be brought against the Eligible Person, or otherwise, in relation to a Relevant Liability, the relevant matters are the amount of:
- 8.2.4.1. the payment agreed; and
  - 8.2.4.2. any legal or associated costs incurred by or on behalf of the Eligible Person in connection with the claim.
- 8.2.5. Where, otherwise than in the course of legal proceedings, an Eligible Person has agreed to make any contribution towards legal or associated costs incurred by a Claimant in connection with their Claim against the Eligible Person, or otherwise in respect of a Relevant Liability of the Eligible Person, the relevant matters are the amount of:
- 8.2.5.1. that contribution; and
  - 8.2.5.2. any legal or associated costs incurred by or on behalf of the Eligible Person in connection with the Claim.

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<sup>1</sup> S.I. 2013/611

<sup>2</sup> 2012 (c. 10)

8.2.6. Where an Eligible Person has agreed to be bound by the determination of any person or body as to the making of a payment by the Eligible Person in respect of a Relevant Liability, the relevant matters are the amount of:

8.2.6.1. the payment;

8.2.6.2. any legal or associated costs incurred by the Claimant in connection with the Claim; and

8.2.6.3. any legal or associated costs incurred by or on behalf of the Eligible Person in connection with the Claim.

### 8.3. Exclusions from Scheme Benefits

8.3.1. The Administrator recognises that a Duty of Candour may be owed to the Claimant or a relevant third party. The Administrator will not withhold benefits under the Scheme as a result of compliance or attempted compliance with this duty. In particular, the Administrator would not withhold or reduce Scheme Benefits because an apology or explanation has been provided to the Claimant.

8.3.2. Without limit to the Administrator's powers under Rule 8.1.1 and subject to Rule 8.3.1, no benefits shall be provided under the Scheme if:

8.3.2.1. an Eligible Person has made an admission of liability without first obtaining written consent from the Administrator;

8.3.2.2. liability has been determined by a court in proceedings conducted by, or on behalf of, an Eligible Person, otherwise than in consultation with and in accordance with the rights of the Administrator under these Rules, in particular Rule 7;

8.3.2.3. an Eligible Person has not complied with a condition imposed by the Administrator relating to a Claim;

8.3.2.4. an Eligible Person agrees to:

8.3.2.4.1. be bound by the determination of any person or body as to the making of a payment in respect of a Relevant Liability; or

8.3.2.4.2. make any other payment in respect of a Relevant Liability otherwise than in the course of legal proceedings or in consequence of a settlement of legal proceedings agreed to by the Person,

without the prior written consent of the Administrator;

- 8.3.2.5. a payment that is of an amount less than the amount which is, for the time being, agreed between the Eligible Person and the Administrator as being the minimum amount to be paid in respect of a Relevant Liability of the Eligible Person; or
- 8.3.2.6. the Eligible Person has in the reasonable opinion of the Administrator failed, whether fully or in part, to comply with a notice issued under Rule 9.2.1.

## 9. Provision of Information

### 9.1. General

- 9.1.1. Any persons making Requests must provide such information to the Administrator in relation to a Claim made against them together with any evidence requested by the Administrator to verify the person's status as an Eligible Person. Persons making Requests acknowledge and agree that by submitting a Request any and all information and data (howsoever stored) provided by them to the Administrator may be disclosed without restriction or conditions by the Administrator, the Secretary of State and/or their respective officers, agents, employees and sub-contractors for the purposes of the Scheme, or as may be in the public interest, for example to make a report to regulatory organisations such as the General Medical Council or to notify NHS England of concerns which may be managed by the Performers List Regulations. For the avoidance of doubt, any such information provided to the Administrator shall be and remain the property of the Administrator.
- 9.1.2. Persons making Requests shall also promptly disclose to the Administrator any further information relevant to any Claim which arises post-Request, regardless of whether or not the information has been requested by the Administrator.

### 9.2. Notices issued by the Administrator

- 9.2.1. The Administrator may, by notice in writing, request Eligible Persons to provide the Administrator with any assistance or information specified by the Administrator in the notice.
- 9.2.2. A notice issued under Rule 9.2.1 may specify:
  - 9.2.2.1. the date by which the specified assistance or information must be provided; and
  - 9.2.2.2. the manner in which the assistance or information is to be provided to the Administrator.

9.2.3. Persons making Requests must comply with a notice issued under Rule 9.2.1.

### 9.3. Confidentiality of Statistical Data

On a case-by-case basis, the Administrator may ask the Eligible Person to provide certain statistical information that will enable it to identify trends in clinical negligence litigation and enable learning from claims. Whilst this information may be published to assist others in their risk management processes and learn lessons, statistical information on individual Eligible Persons will only be available to that Eligible Person and the Administrator, and the Administrator shall use reasonable endeavours not to disclose such information to third parties in a form which identifies individuals without the prior consent of that Eligible Person or unless such information is required to be disclosed by law or requested by the Secretary of State or by any regulatory authority or in accordance with such policies and procedures which require the Administrator to share and disseminate information.

### 9.4. Claim Reports

The Eligible Person will be required to meet the reporting frequency and information requirements as defined and published from time to time by the Administrator.

### 9.5. Data Protection

The Eligible Person is required to ensure that their organisation complies with Data Protection Legislation and all applicable laws and regulations relating to the processing of personal data and confidentiality. The Eligible Person should ensure that both they and their sub-contractors have robust policies in place to protect patient information. So far as is practical, the Eligible Person must act in accordance with the Administrator's Data Protection Policy, as updated from time to time. The Eligible Person must further have regard to any code of practice on the processing of patient information issued by NHS England under section 13S of the 2006 Act and by NHS Digital under section 263 of the Health and Social Care Act 2012.

## 10. Claim Management dispute procedure

10.1. If there is a dispute on the handling of a Claim between the Eligible Person and the Administrator then subject in all cases to the overriding discretion of the Administrator, the benefits available to that Eligible Person may be affected, as follows:

10.1.1. where the Eligible Person wishes to settle but the Administrator recommends defending, no benefits will be available;

- 10.1.2. where the Eligible Person wishes to defend but the Administrator recommends that the Claim is settled by agreement:
  - 10.1.2.1. the benefits available will be no more than those accruing from the amount recommended by the Administrator to be offered to settle the Claim; and
  - 10.1.2.2. should the Eligible Person continue to pursue the defence of the Claim and succeed the Eligible Person will be eligible for reimbursement of 100% of the unrecovered Defence Costs up to the value of, but not exceeding those benefits available under Rule 10.1.2.1.

## 11. Appeals procedure

- 11.1. In the event that an Eligible Person disagrees with a decision made by the Administrator pursuant to these Rules or regarding the management of a Claim the dispute will be referred to the Chief Executive of the Administrator or their nominated representative.

## 12. Liaison and Co-operation

Any Person making a Request shall fully co-operate and liaise with the Administrator and take such steps as the Administrator may request in connection with, inter alia, the administration of the Scheme including, without limitation, by responding promptly to any requests for information.

## 13. Governing Law

These Rules shall be governed by and construed in accordance with English Law.