Handover and Closedown Guidance

Transfer of Claims, Liabilities and related Financial Assets

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1. Purpose

1.1 This guidance sets out the policy and principles for the transfer or discharge of claims, liabilities, potential liabilities and financial assets, currently held by those senders, which under the Health and Social Care Act 2012 (the Act) will be abolished on 31st March 2013.

1.2 The information in this guidance is consistent with that contained in other guidance published by the Department on:

- Land and Buildings and related assets, rights and liabilities;
- Staff and Employees;
- Clinical Contracts;
- Maintaining Quality through Handover;
- Intellectual Property Rights;
- Finance transition arrangements checklist; and
- Transfer Documentation.

1.3 This guidance sets out the policies and principles in respect of claims, liabilities and financial assets to ensure senders:

- identify all actual and classes of liabilities;
- where appropriate (and it represents value for money) discharge liabilities where possible prior to 31st March 2013;
- allocate liabilities that crystallise after 31st March 2013 to an appropriate receiver;
- provide receivers to whom liabilities are transferred with the following:
    - access to the relevant information and associated assets (such as data and records and, if relevant, security access details to such data and records; in relation to a contractual dispute, the original contract (even if terminated or expired), correspondence between the SHA/PCT and relevant counterparties and/or lawyers, and proceedings commenced); and
    - sufficient resource to discharge or satisfy the liability post 31st March 2013;
- complete transfer documentation information, including agreement between senders and receivers, in accordance with timelines set in the Transfer Documentation guidance.

2. Background

2.1 Strategic Health Authorities and Primary Care Trusts will be abolished on 31st March 2013 so all their assets and liabilities must be identified and disposed of or discharged prior to 31st March, or agreed for transfer. Under this NHS Transition, SHA and PCT

assets and liabilities will be split between different 'Receivers' and, in some cases, multiple 'Receivers' will require access to an asset or be assigned a liability. Therefore the process adopted for the NHS Transition needs to be sufficiently robust so that all assets and liabilities are identified correctly and by reference to their registered legal owner.

2.2 The majority of assets and liabilities (including all land and buildings) will transfer by way of a 'Sender' organisation's Transfer Schemes. A Transfer Scheme is an instrument in writing made by the Secretary of State under sections 300 to 302 of the Act. It can deal with the transfers of staff, property and liabilities between those entities as specified in Schedules 22 and 23 to the Act but unlike Transfer Orders does not need to be laid before Parliament.

2.3 In terms of this guidance, and for the purposes of a Transfer Scheme, the 'liabilities' of a sender include any outstanding obligations, disputes, claims by third parties (including legal claims and enforcement notices) under a contract or monies owed by the Sender. The liabilities of a sender can also include liabilities arising in respect of obligations under expired contracts, particularly where there is an ongoing or potentially contingent liability in respect of that contract.

2.4 Sender organisations have requested guidance on how to treat these liabilities in terms of determining their destination in the new system, where they cannot be discharged. There is a need to provide consistency of approach across the system and to ensure the receiver of a liability is aware of its transfer and has access to the relevant associated asset, data and information.

3. Policy and Principles

3.1 Where functions transfer, the general intention is any claim, liability and financial asset, which relate to that will follow. There are however some exceptions to this, for example, there will be instances where the NHS Commissioning Board (NHSCB) take historical NHS Litigation Authority (NHSLA) indemnified clinical negligence claims, including those incurred but not reported (IBNR)) relating to new functions of CCG's or Local Authorities.

3.2 The final year-end aggregate surplus generated by SHAs and PCTs in 2012/13 will be carried forward to the NHS Commissioning Board in 2013/14, and is included in the Mandate funding announced in November 2012 (based on the quarter two forecast outturn). CCGs will not inherit legacy debt as set out in the 2012/13 Operating Framework, but balances will transfer from SHAs and PCTs, in line with provisions of the Act, based on the principles set out below.

3.3 The following principles have been established to assist PCTs and SHAs with completion of their transfer documentation and instructions for transfer schemes, and ensure a consistent approach to the transfer of liabilities and potential liabilities (and financial assets) across the system.

3.4 In light of the provisions of the Act, the following principles apply in respect of claims, liabilities, potential liabilities and financial/associated assets:

(a) Liabilities that can and should be discharged or terminated should be by 31st March 2013 either by:

- notice of termination or break (if appropriate and possible);
- financial settlement; or
- in accordance with a deed of termination and/or release clause.

(b) Liabilities that correspond to an asset which relate to a particular function should transfer with that asset from a sender to a receiver by reference to the destination of the function.

(c) Liabilities that correspond to a function or policy that is being moved from a sender should transfer to the nominated receiver for that function.

(d) Discrete, and current assets and liabilities (i.e. expected to be discharged within three months), even if associated with a function continuing in 2013/14 will transfer to the Department of Health. This is to ensure that continuity of service is preserved.

(e) Liabilities relating to a SHA/PCT as a statutory body in its own right that do not relate to an ongoing function such as VAT or tax liabilities, will transfer to the Department of Health.

(f) Employer liabilities will transfer to the new employer, where an individual's employment is transferred to a receiver organisation.

(g) Where employment of staff ceases prior to 1st April 2013, the employer liabilities related to those staff members will transfer to Department of Health.

(h) The arrangement for liabilities relating to claims associated with the NHS Litigation Authority risk pooling schemes are set out in paragraph 3.8 below.

3.5 Property owner responsibilities that have liabilities attached will transfer with each asset. Legal advice should be sought on a case by case basis where a sender or receiver considers that an owner liability may arise from such a responsibility. Examples of owner responsibilities are:

- The control of Asbestos Regulations 2012 (SI 2012/632);
- Control of Major Accident Hazards Regulations 1999 (SI 1999/743);
- Defective Premises Act 1972; and
- Regulatory Reform (Fire Safety) Order 2005 (SI 2005/1541).

3.6 Where an insurance policy is / was in place to cover any liability, the insurer should be contacted to ensure that the policy follows the liability.

3.7 The following are specific examples that follow the principles set out above:

- **Continuing Health Care (CHC)**.Transfer with function. CCGs will be responsible for managing and funding historic claims, with expenditure cover for these supported through receipt of PCT CHC provisions. Funding for future claims will be reflected in funding for the Mandate and CCG allocations.

- **Terminated/expired contracts** (e.g. continued obligations such as holding records, payment of funds etc.) Transfer with function. If not related to a continuing function the responsibility will transfer to the DH.
- **Security (mortgages, charges over assets) granted by Senders** (e.g. a charge that would have been due to the Sender as a result of change in use by tenant). Where the asset transfers to a provider we would expect the provider to receive the charge. Estate that transfers to NHS Property Services will also receive the charge. In the event of the charge being realised the benefit will then pass to the commissioner associated with the location.
- **Employee related claims and disputes**. Follow the individual if they transfer to a receiver organisation. If the individual does not transfer and ceases to be employed the responsibility will transfer to the DH.
- **Fraud**. Transfer with function. If not related to a continuing function the responsibility will transfer to the DH.

3.8 For liabilities that are covered, or partly covered, by the NHS Litigation Authority (NHSLA) schemes the arrangements below will apply. This covers all claims relating to incidents up to 31st March 2013, including those where the claim is made after this date. Clinical negligence liabilities, and some of the other liabilities, are reported in NHSLA accounts, so as long the receiver is a member of the NHSLA risk pooling scheme the liability is to make the relevant contribution to the NHSLA.

- **Clinical negligence claims relating to PCT public health function.** The liability will be distributed between PHE and the NHS CB.
- **Clinical negligence claims relating to liabilities held by PCTs relating to contracts with the 'independent sector (IS)'.** In most instances the responsibility for commissioning this activity will transfer to CCGs, but responsibility for funding claims arising from incidents under these contracts will transfer to the NHSCB. The DH policy position is that the IS will secure its own indemnity cover, from the NHSLA or another appropriate indemnifier where the current indemnities should expire in 2013/14.
- **Clinical negligence claims relating to liabilities held by PCTs relating to historic provider functions.** Where these liabilities, including those 'incurred but not reported IBNR' did not transfer to the provider sector the liability will transfer to the NHSCB.
- **Property related claims (partially covered by the NHSLA Property Expenses Scheme (PES)).** These liabilities should go to the new owner of the property, which in most cases will be NHS Property Services.
- **Liabilities to third parties scheme (LTPS). This is predominantly employer liability and public liabilities claims.** Employer liabilities for staff that remain employed in the system will be transferred to the new employer. For all other liabilities covered by the LTPS (including IBNR up to 31 March – unless the exception above applies), the liabilities will transfer to the DH. Since the NHS LA scheme only covers a proportion of the cost of claims, there will be provisions in the balance sheets of SHAs and PCTs, and these provisions should be transferred along with the liabilities.

4. Funding of Liabilities

4.1 The majority of claims and liabilities that transfer to receivers will relate to the ongoing operating costs associated with delivering the functions that have been transferred, so

receivers will fund the claims and liabilities from the operating budgets relating to those functions.

4.2 Commissioners and ALBs will receive the annual cash allocation derived from their operating budget, which will reflect the funding for functions transferred, so will have sufficient cash to fund liabilities recognised on their balance sheet.

4.3 The exception to this is the short term balances in SHAs and PCTs transferred to the DH to settle (by finance teams locally). The DH will be settling the prior year balances of functions transferred to receiver bodies, so the cash limits of Commissioners and ALB will be reduced in order to provide the DH with sufficient cash funding.

5 Limitation periods

5.1 Limitation periods, relevant to the majority of claims/disputes, specify a maximum time period allowed by a claimant to bring a claim or dispute. **Annex A** below sets out the indicative basic rule of limitation periods by claim/dispute category. However, the intricacies/facts of each case may alter the limitation period, but not necessarily the destination of liabilities. It is important to note that the Court always has a discretion to waive limitation if it sees fit (for example, limitation for PI does not start to run for a child until that child reaches 18 (in other words a child can bring a claim for PI up to the age of 21)). It is therefore important that where required, legal advice is taken from retained legal providers on an individual case by case basis and senders and receivers agree any alterations.

6. Contacts

6.1 Sender and receiver bodies should seek to resolve issues locally, with support and guidance from the SHA Transition/Governance Director/Lead. Where this is not possible and your SHA Transition Director/Lead is of the view it is a national (rather than local) issue the matter can be escalated by them. Any 'national' query should be sent to handoverandclosedown@dh.gsi.gov.uk where it will be recorded and escalated to the relevant stakeholder for resolution. Any query sent to this address needs to clearly marked 'claims and liability guidance query'.

ANNEX A

GENERAL LIMITATION PERIODS

• **Negligence (other than personal injury or death) – within 6 years of the negligent act or omission**	• **6 Years**
• Tort (generally, including conversion and trespass) – within 6 years of the date the cause of action accrued	• 6 Years
• Product liability claims – within 10 years of the relevant time defined by the Consumer Protection Act	• Defective Product – under the Consumer Protection Act 1987 is 10 years or section 6 (1) (a) of the Consumer Protection Act 1987 (death caused by defective product) is 6 years
• Personal injury or death – within 3 years of accrual of the negligent act or omission or knowledge if later	• 3 Years
• Fraud – within 6 years of the date the cause of action accrued. Time does not begin to run until the fraud has, or with reasonable diligence would have been, discovered, if the defendant deliberately conceals any fact relevant to the cause of action	• 6 Years
• Libel, slander and malicious falsehood – within 1 year of the cause of action accruing	• 1 Year
• Contract – within 6 years of the date of breech. The cause of action occurs as soon as the contract is breached	• 6 Years
• Contract under seal (deeds) – within 12 years of the breach of contract or deed	• 12 Years
• A claim for the recovery of land, proceeds of sale of land or money secured by a mortgage or charge – within 12 years of the right accruing (after that time, the title of the person is extinguished)	• 12 Years but the Limitation Act 1980 contains a number of exclusions
• A claim for arrears of rent – within 6 years of the date the rent became due	• 6 Years
• An action for non-fraudulent breach of trust – within 6 years of the date on which the right of action accrued	• 6 Years
• An action for a contribution – within 2 years of the right accruing. A contribution here refers to a defendant's entitlement to claim against another party with whom they may be jointly liable for the claimant's loss	• Basic limitation period is 2 years
• To enforce a judgement – within 6 years of the date upon which the judgement became enforceable	• 6 Years