

NHS Redress Bill [HL]

EXPLANATORY NOTES

Explanatory notes to the Bill, prepared by the Department for Health, are published separately as Bill 137 – EN.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Ms Secretary Hewitt has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the NHS Redress Bill [HL] are compatible with the Convention rights.

NHS Redress Bill [HL]

CONTENTS

England

- 1 Power to establish redress scheme
- 2 Application of scheme
- 3 Redress under scheme
- 4 Commencement of proceedings under scheme
- 5 Duty to consider potential application of scheme
- 6 Proceedings under scheme
- 7 Suspension of limitation period
- 8 Legal advice etc.
- 9 Assistance for individuals seeking redress under scheme
- 10 Scheme members
- 11 Scheme authority
- 12 Patient redress investigators
- 13 Duties of co-operation
- 14 Complaints
- 15 Remit of Health Service Commissioner for England
- 16 Regulations

Wales

- 17 Framework power

Supplementary

- 18 Interpretation
- 19 Short title, commencement and extent

[NOTE: The words marked in bold type were inserted by the Lords to avoid questions of privilege.]

A

B I L L

TO

Make provision about arrangements for redress in relation to liability in tort in connection with services provided as part of the health service in England or Wales; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

England

1 Power to establish redress scheme

- (1) The Secretary of State may by regulations establish a scheme for the purpose of enabling redress to be provided without recourse to civil proceedings in circumstances in which this section applies. 5
- (2) This section applies where under the law of England and Wales qualifying liability in tort on the part of a body or other person mentioned in subsection (3) arises in connection with the provision, as part of the health service in England, of qualifying services.
- (3) The bodies and other persons referred to are— 10
 - (a) the Secretary of State,
 - (b) a Primary Care Trust,
 - (c) a designated Strategic Health Authority, and
 - (d) a body or other person providing, or arranging for the provision of, services whose provision is the subject of arrangements with a body or other person mentioned in paragraph (a), (b) or (c). 15
- (4) The reference in subsection (2) to qualifying liability in tort is to liability in tort owed— 20
 - (a) in respect of or consequent upon personal injury or loss arising out of or in connection with breach of a duty of care owed to any person in connection with the diagnosis of illness, or the care or treatment of any patient, and
 - (b) in consequence of any act or omission by a health care professional.

- (5) For the purposes of subsection (2), services are qualifying services if—
- (a) they are provided in a hospital (in England or elsewhere), or
 - (b) they are of such other description (including a description involving provision outside England) as the Secretary of State may specify by regulations. 5
- (6) Regulations under subsection (5)(b) may not specify services of any of the following descriptions—
- (a) primary dental services,
 - (b) primary medical services,
 - (c) services provided under section 38 of the National Health Service Act 1977 (c. 49) (general ophthalmic services), 10
 - (d) services provided under section 41 of that Act (arrangements for pharmaceutical services) or by virtue of section 41A of that Act (arrangements for additional pharmaceutical services), and
 - (e) services of a kind which may be provided under section 41 of that Act, or by virtue of section 41A of that Act, which are provided under Schedule 8A to that Act (local pharmaceutical services schemes) or section 28 of the Health and Social Care Act 2001 (c. 15) (local pharmaceutical services pilot schemes). 15
- (7) The references in subsection (6) to primary dental services and primary medical services are to primary dental services and primary medical services under Part 1 of the National Health Service Act 1977, except that the Secretary of State may by regulations provide that services of a description specified in the regulations are not to be regarded as primary dental services or primary medical services for the purposes of that subsection. 20
- (8) Regulations under subsection (5)(b) or (7) may, in particular, describe services by reference to the manner or circumstances in which they are provided. 25
- (9) In subsection (3)(d), the reference to a person providing services does not include a person providing services under a contract of employment.
- (10) In subsection (4), the reference to a health care professional is to a member of a profession (whether or not regulated by, or by virtue of, any enactment) which is concerned (wholly or partly) with the physical or mental health of individuals. 30
- (11) In this section, “hospital” has the same meaning as in the National Health Service Act 1977. 35

2 Application of scheme

- (1) Subject to subsection (2), a scheme may make such provision defining its application as the Secretary of State thinks fit.
- (2) A scheme must provide that it does not apply in relation to a liability that is or has been the subject of civil proceedings. 40

3 Redress under scheme

- (1) Subject to subsections (2) and (5), a scheme may make such provision as the Secretary of State thinks fit about redress under the scheme.
- (2) A scheme must provide for redress ordinarily to comprise—

- (a) the making of an offer of compensation in satisfaction of any right to bring civil proceedings in respect of the liability concerned,
- (b) the giving of an explanation, and
- (c) the giving of an apology,
- but may specify circumstances in which one or more of those forms of redress is not required. 5
- (3) A scheme may, in particular –
- (a) make provision for the compensation that may be offered to take the form of entry into a contract to provide care or treatment or of financial compensation, or both; 10
- (b) make provision about the circumstances in which different forms of compensation may be offered.
- (4) A scheme that provides for financial compensation to be offered may, in particular –
- (a) make provision about the matters in respect of which financial compensation may be offered; 15
- (b) make provision with respect to the assessment of the amount of any financial compensation.
- (5) A scheme that provides for financial compensation to be offered –
- (a) may specify an upper limit on the amount of financial compensation that may be included in an offer under the scheme; 20
- (b) if it does not specify a limit under paragraph (a), must specify an upper limit on the amount of financial compensation that may be included in such an offer in respect of pain and suffering;
- (c) may not specify any other limit on what may be included in such an offer by way of financial compensation. 25
- 4 Commencement of proceedings under scheme**
- (1) A scheme may make such provision as the Secretary of State thinks fit about the commencement of proceedings under the scheme.
- (2) A scheme may, in particular, make provision – 30
- (a) about who may commence proceedings under the scheme;
- (b) about how proceedings under the scheme may be commenced;
- (c) for time limits in relation to the commencement of proceedings under the scheme;
- (d) about circumstances in which proceedings under the scheme may not be commenced; 35
- (e) requiring proceedings under the scheme to be commenced in specified circumstances;
- (f) for notification of the commencement of proceedings under the scheme in specified circumstances. 40
- 5 Duty to consider potential application of scheme**
- (1) The Secretary of State may by regulations make provision requiring any body or other person mentioned in subsection (2) –

- (a) to consider, in such circumstances as the regulations may provide, whether a case that the body or other person is investigating or reviewing involves liability to which a scheme applies, and
- (b) if it appears that it does, to take such steps as the regulations may provide. 5
- (2) The bodies and other persons referred to are—
- (a) any body or other person to whose liability a scheme applies, and
- (b) the Commission for Healthcare Audit and Inspection.
- 6 Proceedings under scheme**
- (1) Subject to subsections (3) and (4), a scheme may make such provision as the Secretary of State thinks fit about proceedings under the scheme. 10
- (2) A scheme may, in particular, make provision—
- (a) about the investigation of cases under the scheme (such investigation to be confined to investigation of the facts of cases and not to consider issues of liability in tort); 15
- (b) about the making of decisions about the application of the scheme;
- (c) about the assessment of liability in tort under the scheme;
- (d) for time limits in relation to acceptance of an offer of compensation under the scheme;
- (e) about the form and content of settlement agreements under the scheme; 20
- (f) for settlement agreements under the scheme to be subject in cases of a specified description to approval by a court;
- (g) about the termination of proceedings under the scheme.
- (3) A scheme must provide for a settlement agreement under the scheme to include a waiver of the right to bring civil proceedings in respect of the liability to which the settlement relates. 25
- (4) A scheme must provide for the termination of proceedings under the scheme if the liability to which the proceedings relate becomes the subject of civil proceedings.
- 7 Suspension of limitation period** 30
- (1) A scheme must make provision for the period during which a liability is the subject of proceedings under the scheme to be disregarded for the purposes of calculating whether any relevant limitation period has expired.
- (2) In subsection (1), the reference to any relevant limitation period is to any period of time for the bringing of civil proceedings in respect of the liability which is prescribed by or under the Limitation Act 1980 (c. 58) or any other enactment. 35
- (3) A scheme may define for the purposes of provision in pursuance of subsection (1) when liability is the subject of proceedings under the scheme.
- 8 Legal advice etc.** 40
- (1) Subject to subsection (2), a scheme may make such provision as the Secretary of State thinks fit—

- (a) for the provision in connection with proceedings under the scheme of legal advice without charge;
 - (b) for the provision in connection with proceedings under the scheme of other services, including the services of medical experts.
- (2) A scheme must make such provision as the Secretary of State considers appropriate in order to secure that individuals to whom an offer under the scheme is made have access to legal advice without charge in relation to—
 - (a) the offer, and
 - (b) any settlement agreement.
- (3) Provision under subsection (1)(a) or (2) about who may provide the legal advice may operate by reference to whether a potential provider is included in a list prepared by a specified person.

9 Assistance for individuals seeking redress under scheme

- (1) It is the duty of the Secretary of State to arrange, to such extent as he considers necessary to meet all reasonable requirements, for the provision of assistance (by way of representation or otherwise) to individuals seeking, or intending to seek, redress under a scheme. 15
- (2) The Secretary of State may make such other arrangements as he thinks fit for the provision of assistance to individuals in connection with cases which are the subject of proceedings under a scheme. 20
- (3) The Secretary of State may make payments to any person in pursuance of arrangements under this section.
- (4) In making arrangements under this section, the Secretary of State must have regard to the principle that the provision of services under the arrangements in connection with a particular case should, so far as practicable, be independent of any person to whose conduct the case relates or who is involved in dealing with the case. 25

10 Scheme members

- (1) A scheme may make such provision as the Secretary of State thinks fit—
 - (a) about membership of the scheme on the part of any body or other person to whose liability the scheme applies, and 30
 - (b) about the functions of members in connection with the scheme.
- (2) A scheme may, in particular—
 - (a) require or permit a specified body or other person to be a member of the scheme; 35
 - (b) require a member of the scheme to carry out specified functions in relation to specified proceedings under the scheme;
 - (c) authorise members of the scheme to make arrangements under which functions under the scheme are carried out by one member on behalf of another; 40
 - (d) require members of the scheme to have regard, in relation to the carrying out of functions under the scheme, to any relevant advice or other guidance issued by the scheme authority;

- (e) require, or enable the scheme authority to require, members of the scheme to keep specified records in relation to the carrying out of functions under the scheme;
 - (f) require, or enable the scheme authority to require, members of the scheme to provide the authority with information or documents relevant to its functions; 5
 - (g) require members of the scheme to make payments in accordance with the scheme by way of contribution to specified costs of its operation;
 - (h) require a member of the scheme to charge a specified person with responsibility for overseeing the carrying out of specified functions conferred on the member under this Act and advising the member about lessons to be learnt from cases involving the member that are dealt with under the scheme; 10
 - (i) require a member of the scheme to prepare and publish an annual report about such cases and the lessons to be learnt from them. 15
- (3) The provision that may be made under this section includes provision which has the effect that a member of a scheme who has arranged for the provision of services has functions under the scheme which relate to someone else's liability in connection with the provision of the services.

11 Scheme authority 20

- (1) A scheme must make provision for a specified Special Health Authority (in this Act referred to as "the scheme authority") to have such functions in connection with the scheme as the Secretary of State thinks fit.
- (2) A scheme may, in particular, provide for the scheme authority to have functions in relation to – 25
 - (a) proceedings under the scheme save for the investigation of the facts of cases in accordance with section 6(2)(a);
 - (b) payments under settlement agreements under the scheme;
 - (c) the provision in connection with the scheme of advice or other guidance about specified matters; 30
 - (d) the provision in connection with the scheme of legal advice without charge;
 - (e) the assessment and payment of contributions by members of the scheme;
 - (f) the monitoring of the carrying out by members of the scheme of their functions under it; 35
 - (g) the provision to the Independent Regulator of Foundation Trusts of reports with respect to failure by NHS foundation trusts to carry out functions under the scheme;
 - (h) the publication of annual data about the scheme. 40
- (3) Section 11(1) of the National Health Service Act 1977 (c. 49) (power to establish special bodies for the purpose of exercising any functions which may be conferred on them by or under that Act) shall have effect as if the provisions of this Act were contained in that Act.

12 Patient redress investigators

- (1) The Secretary of State shall by order make provision for the appointment of suitably qualified patient redress investigators who shall have conduct of the investigation of the facts of cases in accordance with section 6(2)(a).
- (2) A patient redress investigator shall— 5
- (a) conduct the investigation of the facts of a case in accordance with the rules of natural justice; and
 - (b) produce a report on the principal findings of his investigation and on any lessons to be learnt in accordance with section 10(2)(h).
- (3) A report produced under subsection (2) may provide the basis for the giving of any explanation in accordance with section 3(2)(b) and any assessment of liability in tort in accordance with section 6(2)(c). 10
- (4) The Secretary of State shall by order set out the procedures for the investigation of cases in accordance with section 6(2)(a), prescribing such duties and conferring such powers on patient redress investigators as he may consider appropriate for the effective discharge of their functions. 15
- (5) The Commission for Healthcare Audit and Inspection shall maintain and publish a list of patient redress investigators, and shall have responsibility for overseeing the carrying out of the functions of such investigators.

13 Duties of co-operation20

- (1) The scheme authority under a scheme and the Commission for Healthcare Audit and Inspection must co-operate with each other where it appears to them that it is appropriate to do so for the efficient and effective discharge of their respective functions.
- (2) The scheme authority under a scheme and the National Patient Safety Agency must co-operate with each other where it appears to them that it is appropriate to do so for the efficient and effective discharge of their respective functions. 25

14 Complaints

- (1) The Secretary of State may by regulations make provision about the handling and consideration of complaints made under the regulations about maladministration by any body or other person— 30
- (a) in the exercise of functions under a scheme,
 - (b) in the exercise of other functions relating to proceedings under a scheme, or
 - (c) in connection with a settlement agreement entered into under a scheme. 35
- (2) Regulations under subsection (1) must provide for complaints to be considered by—
- (a) the scheme authority, or
 - (b) a member of the scheme. 40
- (3) Without prejudice to the generality of subsection (1), regulations under that subsection may make the following provision.
- (4) The regulations may make provision about—

- (a) the persons who may make a complaint;
 - (b) the complaints which may, or may not, be made under the regulations;
 - (c) the persons to whom complaints may be made;
 - (d) complaints which need not be considered;
 - (e) the period within which complaints must be made; 5
 - (f) the procedures to be followed in making, handling and considering a complaint;
 - (g) matters which are excluded from consideration;
 - (h) the making of a report or recommendations about a complaint;
 - (i) the action to be taken as a result of a complaint. 10
- (5) The regulations may impose on the scheme authority, or a member of the scheme, obligations with respect to producing, or making available to the public, information about the procedures to be followed under the regulations.
- (6) The regulations may also –
- (a) provide for different parts or aspects of a complaint to be treated differently; 15
 - (b) require the production of information or documents in order to enable a complaint to be properly considered;
 - (c) authorise the disclosure of information or documents relevant to a complaint to a person who is considering a complaint under the regulations, notwithstanding any rule of common law that would otherwise prohibit or restrict the disclosure. 20
- (7) The regulations may make provision about complaints which raise both matters falling to be considered under the regulations and matters falling to be considered under other statutory complaints procedures, including in particular provision for enabling such a complaint to be made under the regulations. 25
- (8) The regulations may, in relation to complaints in connection with a scheme which are made or purport to be made under the regulations, make provision for securing – 30
- (a) that any matters raised in such complaints which fall to be considered under other statutory complaints procedures are referred to the body or other person operating the appropriate procedures;
 - (b) that any such matters are treated as if they had been raised in a complaint made under the appropriate procedures. 35
- (9) In subsections (7) and (8), “statutory complaints procedures” means complaints procedures established by or under any enactment.
- (10) In section 31(6) of the Data Protection Act 1998 (c. 29) (exemption from subject information provisions for personal data processed for purposes of certain complaints procedures), after “complaint under” insert “section 14 of the NHS Redress Act 2006,”. 40

15 Remit of Health Service Commissioner for England

- (1) The Health Service Commissioners Act 1993 (c. 46) is amended as follows.

- (2) In section 3 (general remit of Commissioner), after subsection (1E) insert –
- “(1F) Where a complaint is duly made to the Commissioner by or on behalf of a person that the person has sustained injustice or hardship in consequence of maladministration by any person or body –
- (a) in the exercise of any functions under a scheme established under section 1 of the NHS Redress Act 2006, 5
 - (b) in connection with a settlement agreement entered into under such a scheme, or
 - (c) in the exercise of any functions under regulations made under section 14 of that Act (complaints about maladministration in connection with redress scheme), 10
- the Commissioner may, subject to the provisions of this Act, investigate the alleged maladministration.”
- (3) In section 4 (availability of other remedy), in subsection (4)(a) –
- (a) for “or (1C)” substitute “, (1C) or (1F)(a) or (b)”, and 15
 - (b) after “Act 2003” insert “, under section 14 of the NHS Redress Act 2006”.
- (4) In section 7(2) (which excludes contracts from the remit of the Commissioner) –
- (a) the word “and” at the end of paragraph (b) is repealed, and
 - (b) at the end insert “, and 20
 - “(d) matters arising from settlement agreements entered into under a scheme established under section 1 of the NHS Redress Act 2006.”
- (5) In section 11 (procedure in respect of investigations), in subsection (1C), after “section 3(1E)” insert “or (1F)”. 25
- (6) In section 12 (evidence), in subsection (1A) for “or (1E)” substitute “, (1E) or (1F)”. 30
- (7) In section 14 (reports by the Commissioner) after subsection (2F) insert –
- “(2G) In any case where the Commissioner conducts an investigation pursuant to a complaint under section 3(1F) he shall send a report of the results of the investigation –
- (a) to the person who made the complaint,
 - (b) to any member of the House of Commons who to the Commissioner’s knowledge assisted in the making of the complaint (or if he is no longer a member to such other member as the Commissioner thinks appropriate), 35
 - (c) to the person or body whose maladministration is complained of,
 - (d) in the case of a complaint under section 3(1F)(c), to any person or body whose action was complained of in the complaint made to the person or body whose maladministration is complained of, and 40
 - (e) to the Secretary of State.
- (2H) In any case where the Commissioner decides not to conduct an investigation pursuant to a complaint under section 3(1F) he shall send a statement of his reasons – 45
- (a) to the person who made the complaint, and

- (b) to any such member of the House of Commons as is mentioned in subsection (2G)(b).”

16 Regulations

- (1) The provisions of this Act about what a scheme may do are without prejudice to the generality of the power under section 1(1). 5
- (2) Any power of the Secretary of State to make regulations under this Act includes –
- (a) power to make provision conferring or imposing functions which involve the exercise of a discretion,
 - (b) power to make different provision for different cases, and 10
 - (c) power to make incidental, supplementary, consequential or transitional provision or savings.
- (3) The power under subsection (2)(c) to make consequential amendments includes power to make provision amending or revoking any instrument made under an enactment. 15
- (4) Any power of the Secretary of State to make regulations under this Act (as well as being exercisable in relation to all cases to which it extends) may be exercised in relation to all those cases subject to exceptions or in relation to any particular case or class of case.
- (5) Any power of the Secretary of State to make regulations under this Act is exercisable by statutory instrument. 20
- (6) No regulations establishing a scheme shall be made unless a draft of the statutory instrument containing them has been laid before and approved by a resolution of each House of Parliament.
- (7) A statutory instrument that – 25
- (a) contains regulations under this Act made by the Secretary of State, and
 - (b) is not subject to any requirement that a draft of the instrument be laid before, and approved by a resolution of, each House of Parliament,
- shall be subject to annulment in pursuance of a resolution of either House of Parliament. 30

Wales

17 Framework power

- (1) The National Assembly for Wales may by regulations made by statutory instrument make provision –
- (a) for the purpose of enabling redress to be provided without recourse to civil proceedings in circumstances in which, under the law of England and Wales, qualifying liability in tort arises in connection with the provision of services (in Wales or elsewhere) as part of the health service in Wales; 35
 - (b) for any purpose connected with provision under paragraph (a). 40
- (2) The reference in subsection (1)(a) to qualifying liability in tort is to liability in tort owed in respect of or consequent upon personal injury or loss arising out

- of or in connection with breach of a duty of care owed to any person in connection with the diagnosis of illness, or the care or treatment of any patient.
- (3) Subject to subsection (4), the provision that may be made under subsection (1) includes any provision that could be made by an Act of Parliament.
- (4) The power conferred by subsection (1) shall not include power – 5
- (a) to make any provision imposing or increasing taxation;
 - (b) to make provision taking effect from a date earlier than that of the making of the instrument containing the provision;
 - (c) to confer any power to legislate by means of orders, rules, regulations or other subordinate instrument, other than rules of procedure for any court or tribunal; 10
 - (d) to create any new criminal offence;
 - (e) to make provision extending otherwise than to England and Wales;
 - (f) to make provision applying in relation to England, without the consent of the Secretary of State. 15
- (5) Subsection (4)(c) does not preclude the modification of a power to legislate conferred otherwise than under subsection (1), or the extension of any such power to purposes of a like nature as those for which it was conferred.
- (6) A power to give directions as to matters of administration is not to be regarded as a power to legislate within the meaning of subsection (4)(c). 20
- (7) The power under subsection (1)(a) (as well as being exercisable in relation to all cases to which it extends) may be exercised in relation to all those cases subject to exceptions or in relation to any particular case or class of case.

Supplementary

- 18 Interpretation** 25
- (1) In this Act –
- “designated Strategic Health Authority” means a Strategic Health Authority designated for the purposes of this Act by regulations made by the Secretary of State;
 - “health service” has the same meaning as in the National Health Service Act 1977 (c. 49); 30
 - “illness” has the same meaning as in the National Health Service Act 1977;
 - “patient” has the same meaning as in the National Health Service Act 1977;
 - “personal injury” includes any disease and any impairment of a person’s physical or mental health; 35
 - “scheme”, except in section 1, means a scheme established under that section;
 - “scheme authority” has the meaning given by section 11(1);
 - “specified”, in relation to a scheme, means specified in the scheme. 40
- (2) In this Act, references to functions in connection with a scheme include functions in relation to settlement agreements under the scheme.

19 Short title, commencement and extent

- (1) This Act may be cited as the NHS Redress Act 2006.
- (2) Section 18 and this section shall come into force on the day on which this Act is passed.
- (3) Section 17 shall come into force on such day as the National Assembly for Wales may appoint by order made by statutory instrument. 5
- (4) The remaining provisions of this Act shall come into force on such day as the Secretary of State may appoint by order made by statutory instrument.
- (5) This Act extends to England and Wales only.
- (6) **Nothing in this Act shall impose any charge on the people or on public funds, or vary the amount or incidence of or otherwise alter any such charge in any manner, or affect the assessment, levying, administration or application of any money raised by any such charge.** 10

NHS Redress Bill [HL]

A

B I L L

To make provision about arrangements for redress in relation to liability in tort in connection with services provided as part of the health service in England or Wales; and for connected purposes.

Brought from the Lords 1st March 2006.

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