



*Dup*

National Health Service in Scotland  
St Andrew's House  
Edinburgh EH1 3DE

Telephone Direct Dialling 031-244  
Switchboard 031-556 8400  
GTN 7188  
Telex 72202  
Fax 031-244 2683

NHS Circular No 1991(GEN)1

General Managers of Health Boards  
General Manager, Common Services Agency  
General Manager, State Hospital

Your ref

Our ref NXA/4/2

Date 10 January 1991

Dear General Manager

16 JAN 1991

THE NHS AND COMMUNITY CARE ACT 1990  
REMOVAL OF CROWN IMMUNITY

1. Section 60 of the NHS and Community Care Act 1990 removes Crown immunity from specified health service bodies. Schedule 8 of the Act provides for a limited number of exceptions and certain transitional arrangements.

2. The NHS and Community Care Act 1990 (Commencement No 1) Order 1990 appoints 1 April 1991 for the coming into force of Section 60 of the Act. Health Boards are already subject to certain legislation (eg that relating to health and safety) and have had to comply with the substantive requirements of other legislation, but with the removal of Crown immunity both the procedural and the substantive requirements of all relevant legislation will be legally enforceable by the relevant authorities. NHS Trusts will not be Crown bodies.

3. The attached guidance note deals with the main provisions of Section 60 of the Act and the exemptions and transitional arrangements specified in Schedule 8, and deals with the position of NHS Trusts. Where necessary health boards may wish to discuss the procedures needed for compliance with the appropriate enforcing authorities, but any general enquiries on this circular should be made up to 31 March 1991 to Mr Grant (031-224 2381) and thereafter to Management Executive Division 2.

Yours faithfully

G M D THOMSON

D1401838.120

## REMOVAL OF CROWN IMMUNITIES FROM THE NHS - NOTE OF GUIDANCE

### INTRODUCTION

1. The National Health Service and Community Care Act 1990 (Section 60) provides for the removal, with limited exceptions, of the remaining Crown immunities enjoyed by the NHS. These provisions take effect from 1 April 1991 with transitional arrangements in some areas. The removal of Crown immunity will considerably extend the range of statutory standards legally enforceable on the NHS.

2. NHS Trusts will not be Crown bodies. Most of the few Crown immunities retained by, health service bodies and the transitional provisions will apply to NHS Trusts.

3. This guidance note gives advice on the removal of Crown immunity in selected areas to assist managers in identifying the effects and making the necessary arrangements with the relevant enforcing authorities. It is not necessarily comprehensive.

### HEALTH SERVICE BODIES

4. The Act removes Crown immunity from "health service bodies", which for this purpose are defined in section 60(7) of the Act as:

4.1 a Health Authority, within the meaning of the National Health Service Act 1977;

4.2 a Health Board or Special Health Board constituted under Section 2 of the National Health Service (Scotland) Act 1978;

4.3 a State Hospital Management Committee constituted under Section 91 of the Mental Health (Scotland) Act 1984;

4.4 a Family Health Service Authority;

4.5 the Common Services Agency for the Scottish Health Service;

4.6 the Dental Practice Board;

4.7 the Scottish Dental Practice Board; and

4.8 the Public Health Laboratory Service Board.

5. The NHS (Amendment) Act 1986 removed crown community in respect of food hygiene and health and safety registration. Sections 1 and 2 of the 1986 Act will be repealed on 1 April 1991 and superseded by the provisions of section 60 of the NHS and Community Care Act 1990.

### THE EXCEPTIONS

6. Crown immunity is being preserved in a few areas and these are set out in Part 1 Schedule 8 of the Act. They are as follows:

### The Employer's Liability (Compulsory Insurance) Act 1969

Crown immunity is retained for health service bodies in respect of exemption from the requirement to carry insurance against injury or disease sustained as a result of employment. A similar immunity is conferred on NHS Trusts.

The NHS makes equivalent arrangements for staff under the NHS (Injury Benefit) Regulations 1974. NHS Trust staff will be covered by these regulations.

### The Vehicle (Excise) Act 1971

Health service bodies retain immunity from motor vehicle taxation for NHS vehicles. A similar immunity is conferred on NHS Trusts.

### The Copyright, Designs and Patents Act 1788

The Act preserves the status quo for the use of registered designs and patented inventions by the NHS for patient services. Although Crown status for the purposes of this Act is generally removed from the relevant bodies, that status is preserved for the purposes of section 48 of this Act which relates to copyright on material communicated to the Crown in the course of public business.

### The Road Traffic Act 1988

Immunity is retained from the requirement to effect third party insurance (or security requirements) for all vehicles operated by a health service body. A similar immunity in respect of ambulances only is conferred on NHS Trusts. NHS Trusts will need to make suitable arrangements for third party insurance (or security) for non-ambulance vehicles.

## **IMPLICATIONS AND TRANSITIONAL ARRANGEMENTS**

7. The removal of Crown immunity has many implications. Some of the more important for NHS managers are discussed in the following paragraphs.

### **FIRE PRECAUTIONS (FIRE PRECAUTIONS ACT 1971, AS AMENDED BY THE FIRE SAFETY AND SAFETY OF PLACES OF SPORT ACT 1987)**

#### Fire Certificates

8. The main effect of removing Crown immunity from Health service bodies will be the transfer of fire certification work from HM Fire Service Inspectorate to fire brigades. There are 8 Scottish brigades, 2 are run by joint brigades covering Highland Region and the 3 Island authorities and the Lothian and Borders respectively with the remaining 6 being the responsibility of the Regional Council. The removal will not affect the type of premises requiring certification. Only certain NHS premises which are put to a use designated by order under Section 1 of the 1971 Act are required to have fire certificates. Operating theatres, for example, do not require fire certificates and will not require them after 1 April 1991. The position then is set out in the following paragraphs.

9. Applications for fire certificates must be made to the fire authority for all health service premises which are used as shops, offices or factories, or are occupied together with such premises in connection with these uses, and meet the criteria for certification.

10. Under the Fire Precautions (Factories, Offices, Shops and Railway Premises) Order 1989, a certificate must be applied for when more than 20 people are at work on the premises, or more than 10 are at work elsewhere than on the ground floor. In buildings in multiple occupation containing 2 or more shop, office or factory premises, a certificate is required when the aggregate of people at work exceeds the same totals. Fire certificates are also required for factory premises (eg manufacturing pharmacies) where explosive or highly flammable materials are stored or used, regardless of the number of people at work, unless the fire authority has determined otherwise.

11. There are 2 conditions under which factory, office, shop and railway premises are not required to have a fire certificate:

11.1 when a fire certificate would normally be required but the fire authority has granted exemptions under Section 5A of the Fire Precautions Act;

11.2 not enough people are at work in them for a fire certificate to be necessary.

Section 9A of the 1971 Fire Precautions Act applies to all premises not required to have a fire certificate and these premises are required to be provided with satisfactory means of escape and means for fighting fire in accordance with the guidance contained in the publications "code of practice for Fire Precautions in Factories, Offices, Shops and Railway Premises not required to have a Fire Certificate". The code is available from HMSO, price £3.50.

12. Applications for fire certificates must also be made to the fire authority for any health service premises which are used as a hotel or boarding house and meet the criteria for certification. Under the Fire Precautions (Hotels and Boarding Houses) Order 1972, a certificate must be applied for in respect of such premises if sleeping accommodation is provided for more than 6 persons (whether staff or guests) or there is some sleeping accommodation above the first floor or below the ground floor. The 1972 Order contains no exemption provisions.

13. Normally, health service bodies using sleeping accommodation for staff or guests other than health service employees would not be regarded as "carrying on the business of a hotel or boarding house keeper". In most cases, eg when the premises are used for accommodating persons attending medical conference or courses, this may reasonably be regarded as part of a health service body's routine activities, particularly as the accommodation is not offered generally to members of the public. The difference comes if and when the health service body goes outside what might be regarded as its normal activity, eg by advertising that accommodation will be for a limited period, it is arguable that, for this period, the business of a hotel or boarding house keeper is being carried on and, as such, can be held to come within the provisions of the 1972 Order. Much will, of course, depend on the facts of the particular case, and it will be for the fire authority to decide in the circumstances whether or not a fire certificate is required.

14. All existing fire certificates, applications for certificates, notices issues etc will remain valid and the Fire Service Inspectorate will transfer all such documents to fire authorities on or soon after 1 April 1991.

15. NHS Trusts will be required to comply with the relevant parts of the 1971 Act.

#### Fees

16. Fire authorities are able to charge a fee Under Section 8B of the 1971 Act for the issue, amendment or replacement of a fire certificate arising from any application received after 1 January 1988, but not where the application was made to the Fire Service Inspectorate before that date. The level of the fee is determined by the individual authority, but must not exceed the cost of work reasonably done by them for the purposes of issuing, amending or replacing the certificate. Nor may it take into account the cost of any inspection carried out as part of the process of certification.

#### Prohibition Notices

17. From 1 April 1991, fire authorities will have powers under Section 10 of the 1971 Act to prohibit or to restrict the use of any premises occupied by health service bodies and NHS Trusts where they consider there is a serious risk to persons in the event of fire.

#### State Hospital

18. No preserved Crown immunities relating to fire precautions have been sought in respect of the State Hospital. The removal of Crown immunity, in conjunction with the repeal of subsections (2) (c) and (10) of Section 40 of the 1971 Act, has the effect of applying the provisions of the 1971 Act to the State Hospital in the same way as they are applied to other health services premises. The State Hospital should apply to its local fire authority, by 1 April 1991, for fire certificates for any certifiable designated premises.

#### Fire Precautions (Firecode)

19. Health Service bodies and NHS Trusts are required to comply with the relevant parts of Firecode, which will be revised to take account of the removal of Crown immunity and forthcoming amendments to the Building Regulations.

### **BUILDING STANDARDS REGULATIONS BUILDING (SCOTLAND) ACT 1959**

#### Transitional Immunity

20. Under the transitional provisions, Crown immunity will continue to apply to projects which have completed the detailed design stage (or progressed further) by 1 April 1991. These projects will be self-certified by Health Boards and local authority building regulations approval will not be required. A copy of a model certificate for use by Health Boards, CSA and the State Hospital is attached at Annex A. The detailed design stage is equivalent to Stage 3 of the stages in Planning, Design, Construction and Commissioning as set out in Paragraph 4 of "Health Building Procurement in Scotland: Procedures Subsequent to Approval in Principle", SHHD 1982. The aim of these transitional provisions is to

limit delay and abortive design work which would be caused if Health Boards were required to seek regulation approval for projects which are well advanced.

#### Limitation of Transitional Immunity

21. Transitional immunity only applies to Part II of the 1959 Act (building regulations). There are no transitional immunities for other parts of the 1959 Act. After cessation of Crown immunity, health service bodies and NHS Trusts will be subject to local authority procedures and payment of fees (eg building regulation plan approvals, site inspections etc).

#### Local Authority Powers

22. Managers should be aware that local authorities have various powers under the 1959 Act, eg:

section 10 - Powers in relation to buildings constructed without warrant or in contravention of conditions of warrant, and buildings whose life has expired;

section 11 - Power of local authorities to require buildings to conform to building standards regulations;

section 13 - Action to be taken in respect of buildings found to be dangerous.

Local authorities also have powers under section 87 of the Civic Government (Scotland) Act 1982 in relation to buildings in need of repair.

#### Discussions with Local Authorities

23. On the whole most building control authorities deal with a preponderance of small building jobs rather than major constructions, so it would be advisable for health service bodies and NHS Trusts to have preliminary discussions with building control officers before submitting applications for any major development eg a new hospital. The amount of resources likely to be required by building control authorities to deal with major developments will vary considerably from time to time and over the country; since most building control authorities have not dealt with hospital developments, it is not possible to provide guidance on how they will cope with these major developments.

#### Firecode

24. Firecode will be revised to take account of the changes.

PLANNING (TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1972)

#### Planning applications

25. With the removal of Crown immunity health service bodies and NHS Trusts will have to submit planning applications for all developments (including changes of use of consecrated land or burial grounds) in accordance with statutory procedures. They may also be required to submit an Environmental Assessment with planning applications for certain types of developments, for example, certain hospital incinerators. (Further guidance on Environmental Assessments is set out in SDD

Circular 13/1988.) They will require to obtain listed building consent to demolish, alter or extend a listed building.

#### Section 30 Agreements

26. Health service bodies and NHS Trusts will be able to enter into Section 30 agreements when disposing of surplus property.

#### Transitional arrangements

27. Developments notified to the planning authority under the present arrangements or in progress on 1 April 1991 will continue to have Crown immunity whilst the Secretary of State holds an interest in them.

### ENVIRONMENTAL PROTECTION

#### New Legislation

28. The Environmental Protection Act 1990 brings in new regulations and these will be binding on the NHS.

### ATMOSPHERIC POLLUTION (CLEAN AIR ACTS 1956 AND 1968 AND CONTROL OF POLLUTION ACT 1974)

#### Current legislation

29. Crown exemption is granted by Section 22 of the Clean Air Act 1956 and Section 105(3) of the Control of Pollution Act 1974. Section 22 does not confer full immunity on Health Boards for emission into the atmosphere but provides for a complaint to be made to the Secretary of State who must then investigate and take appropriate remedial action. The removal of Crown immunity will allow local authorities to act directly against health service bodies and NHS Trusts.

#### New Regulations

30. Details of the requirements of the Environment Protection Act will be contained in the guidance on the clinical waste incineration process to be published by the Department of the environment in early 1991 and which will apply throughout the GB. An authorisation will be required by operators of incinerators under the Environmental Protection Act and this is in addition to any site licence required under the Control of Pollution Act. The regulating authority is Her Majesty's Industrial Pollution Inspectorate for incinerator plant over 1 tonne per hour capacity and local authority Environmental Health Departments for smaller plant. In both cases, an initial flat rate application fee, and an annual fee, is chargeable.

### SEWERAGE (SEWERAGE (SCOTLAND) ACT 1968)

#### Discharge to the Public Sewer

31. Currently, health service bodies enjoy Crown immunity under Section 55 of the 1968 Act. The main effect of this has been that where facilities are connected to the public sewer, the trade effluent discharges have not been automatically subjected to the arrangements for consent and review which are contained in Part II of the Act. Instead, agreements

were negotiable with the local sewerage authorities in lieu of applications for consent.

#### Consent to discharge

32. With the removal of Crown immunity, health service bodies, and NHS Trusts, may have to obtain local authority consent to discharge. Anyone discharging trade effluent to sewers without such consent as may be required by the local authority is liable to prosecution. Local authority consent may be granted unconditionally or may be subject to such conditions as the authority thinks fit to impose; charges may also be levied by the local authority for the reception and treatment of trade effluent. Consents are usually granted and reviews implemented within a period of 3 months from the dates of application and intimation respectively. However, right of appeal to the Secretary of State is also provided to any applicant for consent who feels aggrieved at the authority's decision.

#### WASTE DISPOSAL (CONTROL OF POLLUTION ACT 1974)

##### Discharge not to the Public Sewer

33. With the removal of Crown immunity, all discharges from institutions/facilities which are not connected to the public sewer will require the consent of the local River Purification Authority (RPA) in whose area the discharge will be made. Application for consent to discharge should be made to the RPA under section 34(1) of the 1974 Act (as substituted by Schedule 23 of the Water Act 1989). Section 32 makes it an offence to discharge trade and sewage effluent without the authority's consent. Consent will not be unreasonably withheld but is frequently subject to conditions.

34. A right of appeal to the Secretary of State is provided for parties who feel aggrieved by the RPA's decision. These consents are reviewed by the authority from time to time.

##### Solid Waste Provisions

35. With the removal of Crown immunity, health service bodies and NHS Trusts, will have to comply with the solid waste provisions which are contained currently in Part 1 of the 1974 Act. In particular they will be subject to the provisions of Section 3-11, which deals with the licensing of disposal of controlled wastes; and Section 17 which makes special provision applicable to special waste. Medicinal products which are available only on prescription are defined as "special waste" for the purposes of Section 17, in the Control of Pollution (Special Waste) Regulations 1980, which spell out the applicable procedures.

36. The provisions of the 1974 Act will be replaced in due course by Part II of the Environmental Protection Act 1990. Implementation of Part II of the 1990 Act will be a phased process, commencing in Scotland from around the end of 1991. The Scottish Office will provide advice on implementation in due course.

#### RADIOACTIVE SUBSTANCES (THE RADIOACTIVE SUBSTANCES ACT 1960)

##### Authorisation Procedures



37. Section 104 of the Environmental Protection Act 1990 removes Crown exemption from NHS hospitals in respect of registration under Section 1 of the Radioactive Substances Act 1960 for the keeping and use of radioactive material. From 1 January 1990, when section 104 comes into operation, NHS hospitals will need to be formally registered under Section 1 of the Radioactive Substances Act and health service bodies should approach Her Majesty's Industrial Pollution Inspectorate to obtain the necessary application forms.

38. Although hospitals will be required to register for the keeping and use of radioactive materials, they may be exempt from the controls over radioactive waste disposal in certain circumstances. A new Radioactive Substances (Hospitals) Exemption Order comes into force in January 1991. This replaces the Radioactive Substances (Hospital's Waste) exemption (Scotland) Amendment Order 1963 and the Radioactive Substances (Hospitals Waste) exemption (Scotland) Amendment Order 1963 and the Radioactive Substances (Hospitals Waste) Exemption (Scotland) Amendment Order 1974. Hospital's already authorised to dispose of radioactive waste should approach HMIPI to obtain the necessary application forms for authorisation under the new order. Hospitals currently exempt should obtain a copy of the new exemption order and study it carefully to establish whether they continue to be covered by the new order.

#### TENANCY AGREEMENTS (HOUSING (SCOTLAND) ACT 1988 AND RENT (SCOTLAND) ACT 1984)

##### New Lettings

39. With the removal of Crown Immunity, new lettings of houses by health service bodies will come within the scope of the Housing (Scotland) Act 1988 and Rent (Scotland) Act 1984:

##### Transitional Arrangements

40. Transitional arrangements provide for the retention of Crown immunity for existing tenancy agreements in respect of assured tenancies under the Housing (Scotland) Act 1988 and protected tenancies under the Rent (Scotland) Act 1984. The 1990 Act amends the Housing (Scotland) Act 1988 to provide that a health service body may seek a possession order from a court in respect of property let in consequence of a tenant's employment, on the ground that employment has ceased. A court order is required in future in these cases if agreement cannot be reached.

##### Tenancy Agreement

41. A new model tenancy agreement for NHS staff is being developed by the Central Legal Office and will take account of the removal of Crown immunity.

#### HOUSES IN MULTIPLE OCCUPATION (PART VIII OF THE HOUSING SCOTLAND ACT 1987)

##### Legislative Provisions

42. In respect of houses in multiple occupation the enforcing authority for the above legislation is the local authority. This authority has power to serve various notices, for example:

- a notice to require compliance with a management code.
- a notice to execute works to make the property fit for the number occupants involved;
- a notice to require provision of means of escape from fire.

COMPULSORY PURCHASE (THE ACQUISITION OF LAND  
(AUTHORISATION PROCEDURE) (SCOTLAND) ACT 1947)

Protection against Compulsory Purchase

43. The 1990 Act amends The Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 to give health service bodies and NHS Trusts the same protection against compulsory purchase as statutory undertakers.

VAT (VALUE ADDED TAX ACT 1983)

VAT Refunds

44. The NHS and Community Care Act 1990 amends the Value Added Tax Act 1983 so that health service bodies will continue to be eligible to claim refunds of VAT on designated contracted-out services. NHS Trusts also benefit from these arrangements.

GOODS VEHICLES

Licensing

45. Health service bodies and NHS Trusts which operate goods vehicles (over 3.5 tonnes in weight) will be required to obtain a goods vehicles operators' licence from their local vehicle licensing authority. The nature of the licence (full or restricted) and the compliance procedures required will depend on whether goods are carried for hire or reward. Health service bodies and NHS Trusts which operate transport arrangements by contract with other health service bodies or NHS Trusts or with private hospitals or nursing homes may require a full licence.

RATES

Payment of Rates

46. With the removal of Crown immunity, health service bodies will be required to pay rates as opposed to contributions in lieu of rates. From 1 April 1991 health service bodies will have normal rights of appeal against rateable values, and local authorities will be able to pursue them for non-payment. These arrangements will also apply to NHS Trusts.

MEDICINES ACT 1968

Options Available to Health Services Bodies or NHS Trusts following Abolition of Crown Immunity

47. The Health service bodies or NHS Trusts have 3 options open to them:-

a. To apply for Product Licences, Manufacturers Licences or Wholesale Dealers Licences from the Medicines Control Agency (MCA);

b. Register as pharmacies with the Royal Pharmaceutical Society of Great Britain (RPSGB));

c. Take advantage of the exemption from licensing under Section 10 of the Medicines Act 1968.

48. Option a. would allow health service bodies or NHS Trusts the same freedom of operation as the pharmaceutical industry.

49. Option b. only allows them to register as a pharmacy and to indulge in a limited amount of wholesale activity (not exceeding 5% of their total activity).

50. Option c. allows them to prepare, procure, dispense or assemble a medicinal product provided it is:

50.1 done in a registered pharmacy, hospital or a health centre;

50.2 under the supervision of a pharmacist working to a prescription given by a practitioner; or

50.3 under the supervision of a pharmacist to a specification given by a person to whom the product is to be sold or supplied for administration to that person or to a person under his care.

#### Possible Costs of the Options

51. Option a. If a Health service body or NHS Trust were to apply for a licence it would incur an initial application cost depending on the type of licence applied for and an initial inspection fee depending on the classification of the site inspected. A typical example could be:

#### MANUFACTURERS LICENCE

Initial Application	£1,955
Initial Inspection (standard non sterile)	£3,400
Average 2 further inspections on the 5 year period of a licence	£6,800
Renewal after 5 years	£1,000

They would also have to pay fees if they varied the terms of the licence (£300 or £100 depending on the type of variation). Fees are payable in advance with the application and on completion of inspections.

Option b. The registration fee is £92 per annum payable to the RPSGB.

Option c. Some monitoring of this activity would be necessary - it is not clear how this would be funded.

### Transitional Arrangements

52. Health service bodies or NHS Trusts who apply for licences before 1 April 1991 can continue to manufacture, sell or supply medicines, if those activities were carried out prior to the making of the application. This will be subject to final determination of the application.

### REDUNDANT PAYMENTS (EMPLOYMENT PROTECTION (CONSOLIDATION) ACT 1978

53. Section 60(3) of the Act provides that where as a result of the removal of crown status a health service employee has a dual entitlement to both contracted and statutory redundancy payments, the benefits provided to him by virtue of his contractual rights will be taken to satisfy any entitlement to benefit under Part VI of the Employment Protection (Consolidation) Act 1978 (Redundancy Payments). This prevents a dual entitlement arising in cases of redundancy.

ANNEX A

**HEALTH BUILDING: REMOVAL OF CROWN IMMUNITY,  
TRANSITIONAL ARRANGEMENTS.  
CERTIFICATE OF PROJECT HAVING COMPLETED DETAIL DESIGN STAGE.**

PROJECT \_\_\_\_\_

HEALTH BOARD \_\_\_\_\_

I certify that the detail design of this project was completed prior to the appointed day of [1 April 1991]. Detail design for this purpose is equivalent to stage III of the stages in Planning, Design, Construction and Commissioning as set out in the Health Building Procurement in Scotland: 'Procedures Subsequent to Approval-in-Principle'.

SIGNED \_\_\_\_\_

DATE \_\_\_\_\_

(Board General Manager)