

# **PERSONAL LIABILITY IN PUBLIC SERVICE ORGANISATIONS (PSOs) IN ENGLAND AND WALES**

**The Government's comments on the recommendations of a legal  
research study  
published by the Committee on Standards in Public Life.**

*Note: The Committee's study was concerned with the law of England and Wales, and the views of the Welsh Office were taken into account in drafting the Government's response. Many of the functions previously undertaken by the Welsh Office transferred to the National Assembly for Wales on 1 July, and that body will be considering the need for further action in Wales.*

## **A. The Law Commission should consider the case for promoting comprehensive legislation to clarify appointees' duties and responsibilities.**

The Law Commission has considered this recommendation but is not expected to include consideration of comprehensive legislation in its current work programme. The Commission felt that the very small practical risk of liability being incurred made this issue a relatively low priority for its programme; moreover this project would be comparatively complex given that the duties and responsibilities of appointees are already set out in different items of legislation.

The Government agrees with this assessment. A large proportion of public sector bodies are incorporated and the role of board members is set out in law. This includes the majority of non-departmental public bodies (NDPBs) and of the higher and further education sectors. The roles and duties of school governors are also set out in legislation. It would be legislatively complex to bring together the duties of board members and trustees in a wide range of bodies in a single, comprehensive Act. Moreover, it is doubtful that such an Act would be accessible for the appointees it is designed to help: instead, the existing legislative provisions for individual bodies are likely to be more relevant for individuals.

The Government is also not persuaded that the practical risk of appointees incurring liability would justify a major Bill on this issue. On current experience, the risk of liability being incurred is likely to be more perceived than real.

**B. Legislation is required to ensure equal legal protection for all appointees to responsible bodies of PSOs, in the form of a statutory discretion to grant relief equivalent to section 61 of the Trustee Act 1925 and section 727 of the Companies Act 1985.**

Any protection afforded to appointees by an extension of the legislation along the same lines as the Trustee and Companies Acts would only be partial and would not cover all potential liability. The Acts in essence only provide protection to trustees and directors in respect of claims brought by people such as beneficiaries and share-holders (in practice such claims are very unlikely provided appointees have acted honestly and reasonably); they provide no protection against claims brought by third parties independent of the body concerned.

Moreover, company law is currently subject to a comprehensive review which will include the duties and liabilities of directors. The Law Commission is expected to report its findings on the current law on such duties later in the year. In particular, section 727 of the Companies Act raises some difficult legal issues. For example, there is some difficulty in reconciling the concept that a director could engage in conduct amounting to a lack of reasonable care at common law, thus constituting a breach of duty to the company, with the concept that the very same conduct could be reasonable for the purposes of section 727.

**C. PSOs, with the assistance of their regulators, should review the guidance which they provide to appointees. Such guidance should stress the low risk of personal liability arising where there has been no wrongdoing on the appointees' part, and should describe the means of protection which are available to appointees who are faced with potential liability.**

The Government agrees that it is important that board members and trustees have access to clear guidance about their roles and duties, and that such guidance should emphasise the very low risk of personal liability arising where there has been no wrong-doing by the appointee.

Government departments already issue guidance about the roles of appointees to bodies which they sponsor. Board members of NDPBs and NHS bodies are required to adhere to codes of practice which set out their roles and duties; such codes and other material for new appointees also refer to the issue of personal liability and the existing indemnity provided by the Government. The guidance on such codes will be revised to reflect the recent review of indemnities (recommendation H below). Depending on the nature of the body, further advice is often provided by either sponsoring departments or the bodies themselves.

The Further Education Funding Council publishes guidance for governors of FE colleges which it is currently revising, and which will take full account of

issues of personal liability. The Committee of University Chairmen published a revised Guide for Members of Governing Bodies of Universities and Colleges in England, Wales and Northern Ireland in 1998. This included the need for members to be fully aware of their responsibilities, as well as the issue of personal liability. All school governors are provided with comprehensive advice in the Governors' Guides to the Law, with versions tailored for different categories of maintained school. The Guides are currently being fully revised for publication in the autumn of 1999. The sections dealing with governor liability will be updated in the light of legal advice. All Training and Enterprise Councils (TECs) have induction arrangements which would normally cover the responsibility of directors and the TEC National Council has produced guidance for board members.

The Housing Corporation issues regulatory Performance Standards for Registered Social Landlords (RSLs) which set out standards of governance for RSL including that it is for the governing body to ensure that RSLs act within the terms of their own constitutions and within their objectives.

The Charity Commission publishes 'Responsibilities of Charity Trustees' as well as 55 other publications aimed at trustees on aspects of charity law, trustees' duties and charity administration. Where appropriate these cover liability questions. The publication covering indemnity insurance is currently under review.

**D. PSOs whose appointees are treated as 'quasi-trustees' should ensure that clear information is provided to them on those aspects of a trustee's duties which apply to them. Such information should indicate the possibility that 'quasi-trustee' status may lack the protection afforded to true trustees.**

The Government notes the Committee's recommendation. The area of 'quasi-trustee' status is legally extremely complex, and – as the legal research study acknowledges – uncertain. The Government has some concerns whether it is possible or appropriate to clarify the current legal position for lay members beyond general guidance on duties and responsibilities as set out above. Any simple and general guidance must run the risk of being misleading.

**E. The Audit Commission and the Department of the Environment, Transport and the Regions (DETR) should consider providing guidance to local authorities about indemnities for officers and councillors who are nominated to serve on a PSO, in light of the study's conclusions.**

It is not for the Audit Commission to provide such guidance. The Commission is responsible for giving advice to auditors. DETR has held a meeting with the

Association of Council Secretaries and Solicitors to discuss this recommendation. The Association are considering this matter, in particular whether any further legislative provision is required. The Association is due to report on its findings during the summer.

**F. Wherever possible, regulators should advocate the use of corporate structures for newly formed PSOs in preference to non-corporate structures. Existing non-corporate PSOs should consider obtaining a corporate structure for the greater protection of their appointees.**

The overwhelming majority of PSOs are established using corporate structures. This includes executive and other non-departmental public bodies, nationalised industries and public corporations, and the majority of the further and higher education sectors, the permanent governing bodies of maintained schools, and Training and Enterprise Councils and the vast majority of Registered Social Landlords. An increasing proportion of new charities are adopting corporate structures.

A minority of NDPBs are established administratively (i.e. not incorporated). They generally do not have their own budget or staff, and are instead supported by their sponsor Department. The risk of these board members incurring any personal liability is even smaller than for other public sector bodies. Any small additional legal certainty on the basis of a statutory regime therefore needs to be balanced against valuable flexibility inherent in a non-statutory regime. The Cabinet Office will draw out the issues involved, and the need to strike an appropriate balance between flexibility and legal certainty, in the next revision of the *NDPB Guide for Departments*.

A small number of governing bodies in the further education and higher education sector are unincorporated. Further and higher education bodies are free to pursue incorporation as limited companies.

The Charity Commission provides guidance on the advantages and disadvantages of the most common legal structures for charities. If a charity wishes to incorporate it currently has to adopt an organisation form designed for a different sort of body (e.g., principally, a commercial business). The Government is therefore considering whether there should be a form of incorporation designed to meet charities' needs.

**G. PSOs which are not permitted to purchase personal liability insurance from the PSO's funds should review the position with their regulators. PSOs and regulators should ensure that the reasons for the prohibition on such insurance remain valid.**

Personal liability insurance is one way in which board members may be protected against incurring personal liability. It needs to be seen in the context of other protection available, for example indemnities by the Government.

Many PSOs already have the opportunity to purchase personal liability insurance. Training and Enterprise Councils, as private companies, are required to do so on behalf of their directors. All governing bodies in the further and higher education sectors may generally purchase personal liability insurance. All maintained school governing bodies may purchase personal liability insurance and provision has been made in regulations to ensure that this is not prevented by conflict of interests considerations. The Department for Education and Employment is currently considering whether to recommend they should purchase such insurance.

The Housing Corporation's Performance Standards require that Registered Social Landlords should take a prudent approach in managing financial risks, including statutory and prudent insurance against potential risks. In particular, the National Housing Federation, the trade body for housing associations, offers its members an insurance policy specifically designed to provide insurance for board members in relation to personal liability.

Charities are able to take out insurance provided they have the legal power to do so, in the form of an explicit constitutional authority or the authority of the courts or the Charity Commission. Although the risk of any liability being incurred, and therefore the benefit of insurance, is small, the Charity Commission generally gives such authority in order to ensure that potential trustees are not unnecessarily discouraged.

NDPBs and NHS health authorities are expected to carry their own risks and meet any claims arising. On this basis, NDPBs are only allowed to take out commercial insurance exceptionally, particularly if they either conduct operations of a mainly commercial nature, or where the purchase of such insurance offers value for money compared with non-insurance. Given that the actual risk of being incurred personal liability is very low, it seems unlikely that the value for money test can be satisfied. The Treasury review of the protection available to board members (see H below) found that the current arrangements offer sufficient protection. NHS trusts have been able to take out such insurance, but are not expected to do so in future as the terms of the Government indemnity are extended. A number of public corporations and nationalised industries are also NDPBs and are therefore covered by NDPB guidance. But, in general, nationalised industries and public corporations are expected to act commercially and therefore to make their own arrangements for insurance.

**H. The Treasury should undertake a review of the means of legal protection available to appointees in non-departmental public bodies (NDPBs). It should ensure that if such protection continues to be provided in the form of a standard indemnity, its terms accord with the**

**protection which would be afforded under a commercial insurance policy.**

An indemnity is provided by the Government to all board members of NDPBs. The Treasury has reviewed the protection available to board members and the terms of the existing indemnity in consultation with the Cabinet Office. The review confirmed that the existing form of protection provided to board members – on the basis of an indemnity– was an appropriate and effective means of providing relevant protection to board members, and that the Government’s ‘non-insurance’ rule should continue to apply in this area.

However, the review also concluded that a wider indemnity should be offered at this stage and this has now been provided in the following terms:

"The Government has indicated that an individual board member who has acted honestly and in good faith will not have to meet out of his own personal resources any personal civil liability which is incurred in the execution or purported execution of his board functions, save where the person has acted recklessly."

This wording is broadly comparable both with the cover that would be available in a commercial insurance policy and that which is given to those civil servants who, as part of their official duties, act as directors of companies (as provided in the Civil Service Management Act). The cover excludes any personal criminal liability and does not protect the reckless or those who have acted in bad faith. There are also robust governance arrangements in place for NDPBs and ministers have the ability to dismiss board members who are negligent.

The indemnity for board members of NHS bodies will mirror that for board members of NDPBs.