

## **MEMBERS AND OFFICERS ON OUTSIDE BODIES**

### **1 PURPOSE OF THE GUIDANCE NOTE**

The purpose of this Guidance is to:

- a) outline the context within which the issues are raised; and
- b) summarise the current legal position including insurance;
- c) suggest an approach to dealing with the issues raised.

### **2 SUMMARY**

- 2.1 This advice is for Members and Officers who represent the Council on organisations outside the Council; whether as a Company Director, the Trustee of a charity, a representative on a Management Committee, School Governing Body or other unincorporated association (e.g. professional or trade associations). It simply sets out some of the most important responsibilities. **It is not meant to be a comprehensive guide. If Members or Officers have specific queries then the Council Solicitor or Legal Services would be happy to advise on the circumstances of your particular case.**
- 2.2 Issues relating to the liability of Members and Officers serving on outside bodies are complex. The rest of this Guidance Note provides a flavour of the factors which may be relevant and what to watch out for. It is not a substitute for advice on your own specific circumstances, which you always should seek.
- 2.3 Where there is a conflict between the interests of the outside body and your role as a representative of the Council, the law usually demands and expects you to put the outside body first. You must, in particular, ensure you comply with the National Code of Local Government Conduct for Members, particularly in relation to declarations of interests.
- 2.4 It is usually the case that you will share in the responsibility for the actions an outside body may take, even though you may not attend all (or indeed any) of its meetings. Having “observer” status as opposed to being appointed as a member of the outside body may often be a preferable way of being involved, with issues about conflicts of interest; insurance and indemnities being less problematic.

### **3 KEEPING THE ISSUES IN PERSPECTIVE**

- 3.1 Members should be aware of the liabilities attached to serving on organisations of the Council. However, it is important to keep those risks in some perspective:

- It is worth noting that Members and Officers have been carrying out these sorts of activities for many years. Instances of situations going badly wrong or personal liability arising are extremely rare.
- In the case of many groups or organisations, few decisions will involve much financial risk. Their assets and activities may be relatively modest. The transactions involved are often straightforward and it can be fairly simple to determine whether or not the funds are there.
- Generally speaking, outside organisations will have access to experts or professionals to advise them on major decisions. Provided prudent and reasonable steps are taken, it should rarely happen, that difficulties will arise in the first place.
- Circumstances which may lead to personal financial liability are rare. However, they do sometimes happen. Apart from fraud or dishonesty, examples of the sort of situations which may arise are:
  - where Directors or Trustees ignore or overlook the obligation to act for the benefit of the Company, Trust or other organisation they represent, and financial loss arises;
  - where a Director of a Company is party to a decision that results in the Company continuing to trade when it is apparent that the Company has not the funds to do so;
  - where gross negligence or recklessness leading to loss can be demonstrated.

## **4 LEGAL POSITION**

- 4.1 The issue was highlighted by the decision in the High Court in the case of *Burgoine and Cooke –v- London Borough of Waltham Forest and McWhirr (the District Auditor)*.
- 4.2 The Waltham Forest case concerned the creation of a joint venture company involving the Council. Two Council Officers were asked by the Council to become directors of the joint venture company – indeed it appears that the Council required them to become directors as part and parcel of the responsibilities of their respective posts. On the creation of the company the Council gave to the two officers an indemnity to protect them against any personal liability which might arise in performing their duties as company directors (the indemnity did not cover the officers if they were fraudulent or acted with wilful misconduct).

- 4.3 Subsequently Waltham Forest LBC have been found by the High Court to have acted beyond their powers in creating the joint venture company. The High Court has also decided that as the creation of the company was unlawful the indemnity given to the officers was also unlawful – the one automatically following from the other. The two officers concerned had personal claims of between £300,000 - £900,000 made against them because of their involvement in the company which failed with considerable debts – they faced claims relating to unlawful trading.
- 4.4 Although the case concerned Officers, its implications and consequences would also have applied to Councillors appointed as directors of companies and appointments to unincorporated bodies, such as trusts.
- 4.5 The High Court did not decide that the giving of an indemnity would always be unlawful. On the contrary, the Judge's comments were to the effect that such an indemnity would be lawful in given circumstances. **Since this case the Secretary of State has issued Regulations relating to Indemnities (See Annex 1) which clarifies the position.**
- 4.6 It is lawful for a Council to nominate representatives to companies and board of outside bodies provided the appointment is within statutory powers and follows any rules or regulations which may apply to that statutory power. For example, under Section 33 of the Local Government and Housing Act 1989, a Council is empowered to participate in companies which are formed as part of a project for the economic development of the area. Such participation could also be as representative on a charitable trust. In other circumstances the underlying statutory power would have to be identified in the particular case to provide the legal basis for participation.
- 4.7 Section 265 of the Public Health Act 1875 states that there is no personal liability on a Member or Officer acting under the direction of their Authority for any action, liability, claim or demand against any such Member or Officer which is done bona fide for the purposes of executing the Act. This section has been extended to cover the exercise of any other Local Government functions.
- 4.8 Annex 1 contains further detailed legal guidance and a list of the principal duties of Members and Officers who serve on outside organisations

## 5 THE INSURANCE POSITION

- 5.1 When a Member or Officer is appointed to sit on an outside body they could be in one of a number of positions:

- Director
  - Trustee
  - Member of a School Governing Body
  - Member of an Association making decisions and/or spending money
- 5.2 The “Local Authorities (Indemnities for Members and Officers) Order 2004 (See Annex 1 for detail) clarifies the position relating to insuring Members and Officers against claims.
- 5.3 Depending on the circumstances the body may be legally responsible for the decisions (with, for example, the Directors and Trustees having specific responsibilities in reaching those decisions in the case of Companies and Trusts) or the individuals participating in the organisation may be personally responsible for the decisions or for contracts to spend money (e.g. in an unincorporated association or partnership).
- 5.4 The organisation itself may take out insurance. Some insurance companies provide specific policies designed for voluntary organisations. The existence of an insurance policy covering the Member or Officer will not remove all personal risk from the representative. However, it is lawful for Companies, for example, to purchase insurance to protect their Directors against claims of negligence and breach of duty or trust.
- 5.5 In terms of specific arrangements for insurance, details of the cover provided by the County Council’s current policies are set out in Annex 2.

## **6 SUGGESTED APPROACH TO ACTING AS A REPRESENTATIVE**

The following areas should be addressed in the case of each outside organisation if as a principle, it is considered that an appointment to the relevant outside body in a decision making capacity is the most appropriate way to be involved:

- 6.1 Before accepting (or continuing with) a Directorship (or similar role) on an external organisation the Member or Officer should consider how onerous the responsibilities are likely to be and should only accept/carry on in the office if satisfied that he or she has the time and capacity to undertake them. In addition they should clarify with relevant Officers what degree of Officer support and briefing they can expect and what expectations will be placed upon them in terms of reporting back to the Council on what is going on in the organisation. The term “relevant Officers” will vary depending on which Service has the most connection with the particular organisation. In the first instance the appropriate Manager should be contacted, or legal services if guidance is needed.

- 6.2 The Member or Officer should also consider (with any necessary advice from legal services) whether there is (or likely to be) any significant conflict of interest between his or her role on the organisation and his or her Council role – if such a conflict of interest exists (or is likely to arise) then the Member or Officer should consider giving up/not take on the office.
- 6.3 The Member or Officer should assess (with appropriate advice) the risk of things going wrong which might raise the spectre of personal liability. Matters to be taken into account are the nature of the functions of the organisation and the amount of money it holds/deals with. For example, some external companies are handling considerable sums of money during the course of each year and have major functions. On the other hand the risks associated with relatively small local charities are much less.
- 6.4 **An alternative way of being involved with an outside organisation (and avoiding the above complications) would be in a non decision-making capacity (e.g. observer representing the Council's interests as a funder). This would often afford greater clarity to the Member or officer's role as the Council's representative, and remove the potential conflict/duality of role that, for example, being a Director on that body creates. It is suggested that barring compelling reasons to the contrary, this should be the preferred approach.**

**ISSUES FOR MEMBERS AND OFFICERS ON OUTSIDE BODIES**

**1 GENERAL**

- 1.1 There are some general provisions which apply to Members and Officers who act in the role of Company Director, Trustee or member of an incorporated body, such as the Committee of Management of an unincorporated voluntary organisation.
- 1.2 Members are under a duty to exercise independent judgement in the interest of the organisation in which they are involved. Whilst it is recognised that Members and Officers may have a commitment to representing the Council on the outside organisation, it is their responsibility to decide what view to take on any question before that organisation. Where a Member or Officer is participating in an outside organisation in a representative capacity, he/she must declare that fact to the organisation. There will be a fine line to tread between his/her duty to the organisation and to the Council.
- 1.3 The Member or Officer in acting as a Director/Trustee or member of a Management Committee of an organisation must act in accordance with the interests of that organisation. A mandate from the Council to vote one way or the other would put the Member or Officer in breach of the duty to the organisation. It is permissible to take account of the Council's wishes, but not to vote simply in accordance with them. The overriding duty in considering an item before the outside organisation is to vote in accordance with the interests of that organisation.
- 1.4 Members and Officers must also ensure that avoidable loss is not incurred in managing the organisation. They cannot avoid this responsibility by not reading the papers or failing to ask for appropriate reports. They will be expected to seek professional advice where appropriate.

**2 COMPANIES**

- 2.1 On incorporation a company becomes a separate legal entity which can hold property in its own right, enter into contracts and sue and be sued in its own name. The Company is distinct from its shareholders and members. In the case of a limited liability company, the liability of members of the Company is limited to the amount they paid or agreed to pay when they joined the Company. This can be as little as £1.
- 2.2 Companies limited by shares are those which have a share capital (e.g. 1000 shares of £1 each). Each Member holds shares and receives a share in the profits made by the Company according to the value of the shares held. Shares can be sold.

Companies limited by guarantee are those where there is no shareholding. Instead each Member agrees that in the event of the Company being wound up they will agree to pay a certain amount. This may also be as little as £1. This form of Company is the most usual in the public and voluntary sector, particularly where charitable status is sought.

- 2.3 The management of a company is generally the responsibility of a Board of Directors. The powers of the Directors are usually set out in the Company's Articles of Association (the rules each Company has to govern its internal management). Sometimes even though a Company has been incorporated the Directors may be referred to as members of the Committee of Management, Governors or even Trustees. However, this does not change their status as Directors. Conversely, sometimes officials are called Directors, but they are not members of the Board. Again, their status will not be affected. Directors are those who are appointed by the Company to act in that capacity.

#### 2.4 **Directors' Duties**

A Director is an agent of the Company. His/her prime duties are as follows:

- (1) A fiduciary duty to the Company (not individual shareholders) to act honestly and in good faith and in the best interests of the Company as a whole. Directors must take proper care of the assets of the Company and not seek to profit from their position. The fiduciary duty of the Director towards the Company is very similar to the Council.
- (2) A general duty of care and skill to the Company, but a Director requires no greater skill than might reasonably be expected of someone of that individual's particular knowledge and experience. A Director is not deemed to be an expert, but is expected to use due diligence and to obtain expert advice if necessary. An "honest but incompetent" approach is no defence.
- (3) As with a Member in respect of Council decisions, the Director is under a duty to exercise independent judgement, though it is permissible for him/her to take account of the interests of a third party which he/she represents. In such a case the Director must disclose that position and treads a fine line between the interests of the Company and the party represented (in this case the Council). The Director cannot vote simply in accordance with the Council mandate. To do so would be a breach of the duty owed to the Company.

- (4) No conflict. There may be actual or potential conflicts between the interests of the Council and the interests of the Company. In such circumstances the only proper way for the conflict to be resolved is for the Member or Officer to resign either from the Company or (perhaps less likely – from the Council).
- (5) Directors are not allowed to make a private profit from their position. They must therefore disclose any interests they or their family may have in relation to the Company's contracts. Whether they are then allowed to vote will depend on the Articles of Association.
- (6) Directors must ensure compliance with the Companies Acts in relation to the keeping of accounts, and that the relevant returns are made to the Registrar of Companies. Failure to do so incurs fines and persistent default can lead to disqualification as a Director.

## 2.5 **Directors' Liabilities**

- (1) The Company's identity must be clearly shown on its stationery. The Company number, place of registration, registered office address and if any of the Directors' names are shown then they must all appear. Non-compliance is an offence and the Directors and Company Officers can be fined.
- (2) A Company can only act within the scope set out in its Memorandum of Association (the document which sets out the objects of the Company). Those Directors knowingly causing the Company to act beyond the activities set out in the Memorandum will be liable personally. In very limited circumstances it is possible for the actions of the Directors to be ratified by the Members of the Company.
- (3) A Director may also be liable for breach of trust, if he/she misapplies the money or property of the Company. Directors may also be liable if they fail to take action to prevent the breach of a co-Director of which they are aware.
- (4) In the event of failure to act in accordance with the best interests of the Company, or if a Director uses his/her powers improperly or makes a personal profit from his/her position as Director, then the Director may be personally liable for loss to the Company and may be required to give to the Company the personal profit made.
- (5) If the level of skill and care shown by a Director falls below that which could be reasonably expected and the



Company suffers loss, the Director will be liable for the loss incurred. However, if it believes the Director acted honestly and reasonably, a Court may excuse the Director the liability.

- (6) If a Director knows or ought to know that there is no reasonable prospect of the Company avoiding liquidation, a Court may require that Director to contribute to the Company's assets on liquidation if the Company continues to trade. This is known as wrongful trading. No such order will be made if the Court is satisfied that the Director took all reasonable steps to minimise the loss to the creditors. If a Director has concerns about the Company's financial position he/she could be well advised to inform the other Directors and seek advice from the Company Auditors. He/she should try to ensure that further debts are not incurred.
- (7) A Director will also be liable if to his/her knowledge the Company carried on business with intent to defraud creditors or any other person, or for any other fraudulent purpose. Fraudulent trading can also lead to disqualification from acting as a Director.
- (8) All cheques and similar documents which purport to be signed on behalf of the Company must bear the Company name. Where they do not, the Director signing on behalf of the Company may be liable to a fine and may also be liable to the payee if the Company fails to honour the cheque. It is therefore wise of Directors to make sure that all documents they sign on behalf of the Company state very clearly that they act as agent for the Company (e.g. Director, for and on behalf of ...).
- (9) A third party who enters into a contract on the assumption that a Director has power to bind the Company, may be able to claim damages against the Director if it subsequently transpires that the Director had no such power. Directors would be well advised to ensure that contracts are approved by the Board and that the authority to enter into any contract has been properly delegated before signing it.
- (10) Though Company liability ceases on dissolution the liability of the Directors (if any) may still be enforced after dissolution in certain circumstances.

## 2.6 Indemnities by Companies

A Company can not directly or indirectly indemnify a Director against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation

to the Company. This is subject to a Companies power to grant “qualifying third party indemnity provisions” in certain limited situations (specialist legal advice should be sought as to the circumstances where this may apply).

## 2.7 THE INSURANCE POSITION

- 1) When a Member or Officer is appointed to sit on an outside body they could be in one of a number of positions:
  - Director
  - Trustee
  - Member of a School Governing Body
  - Member of an Association making decisions and/or spending money
- 2) The “Local Authorities (Indemnities for Members and Officers) Order 2004 (See Annex 1 for detail) clarifies the position relating to insuring Members and Officers against claims.
- 3) Depending on the circumstances the body may be legally responsible for the decisions (with, for example, the Directors and Trustees having specific responsibilities in reaching those decisions in the case of Companies and Trusts) or the individuals participating in the organisation may be personally responsible for the decisions or for contracts to spend money (e.g. in an unincorporated association or partnership).
- 4) The organisation itself may take out insurance. Some insurance companies provide specific policies designed for voluntary organisations. The existence of an insurance policy covering the Member or Officer will not remove all personal risk from the representative. However, it is lawful for Companies, for example, to purchase insurance to protect their Directors against claims of negligence and breach of duty or trust.

### Indemnities by Councils

- 1) The Secretary of State has made Regulations (SI 2004 No. 3082) relating to Indemnities for Members and Officers. An indemnity may be provided by means of the Authority securing the provision of an insurance policy for the Member or Officer. Indemnities (including those provided by insurance) may be provided in cases in which the Member or Officer is carrying on any function at the request of, with the approval of, or for the purposes of, the Authority.

- 2) It does not extend to cases in which, when exercising the function in question, the Member or Officer does so in a capacity other than that of a Member or Officer of the Authority. It would, however, permit an indemnity where a Member or Officer acts as a Director of a company at the request of the Authority.
- 3) Indemnities (or insurance) cannot be offered in relation to criminal acts, any intentional wrong doing, fraud, recklessness or in relation to the bringing of (but not the defence of) any action in defamation. There is a limited power to provide indemnity where the act complained of is outside the powers of the Authority or the Member or Officer.

(On 18th January 2005 the Organisation Committee (Cheshire County Council) agreed that Members be indemnified to the maximum extent permitted by the Regulations).

## **INSURANCE COVER**

- 1) The Council's corporate insurance policies provide cover for activities undertaken in fulfilment of the County Council's statutory purposes. The cover is extensive and is listed below, but is invalidated if the Council does not have the legal capacity to act.
- 2) The extent to which this cover will apply to Officers or Members in dealings with outside bodies will be critically dependent on the nature of the role they are fulfilling. For example, a company director has a fiduciary duty to act in the company's interests and as such the Council's insurance is unlikely to be in force. Alternatively, an observer nominated by the Council merely to attend meetings may be able to benefit from Council cover.

The insurance policies held by the Council (and applicable to Members and Officers) are:

**Official's indemnity:** covers financial loss arising from a breach of professional duty by reason of a negligent act or accidental error or omission by the Council or its employees undertaking normal Council business (e.g. a poorly designed road leading to flooding of a business).

This policy will provide an indemnity to Members and Officers acting on behalf of outside bodies, with the Authority's knowledge and consent, providing the body

is a “not for profit entity.” Insurer’s definition of a not for profit entity is,

“any entity registered under the Charities Act 1993 or any organisation existing for any educational, research, promotional, training or similar non-profit making purpose.”

**Professional Indemnity**

covers the Council for financial loss from an alleged breach of professional duty arising from the performance of non-statutory duties by the Council. This policy is taken out on an ad hoc basis (i.e., Department or function specific) where non-statutory services are provided, particularly those giving advice which could lead to a third party suffering financial loss

**Libel and slander:**

covers libellous statements appearing in official Council publications and slanderous statements made orally as arising in pursuit of Council duties (other than claims by one Officer against another)

There is no cover for non-official publications, therefore documents such as emails from individuals will not be covered

**Fidelity Guarantee:**

covers the Council for financial loss arising from the dishonesty or fraud of Officers (except where committed by persons in respect of whom the systems of selection and control have not been properly applied).

**Public Liability:**

covers the Council for claims from members of the public for death, bodily injury, disease or property damage arising from the County Council’s negligence in pursuit of its usual statutory duties.

**Employer’s Liability:**

covers the Council as employer against claims by employees for death, injury or disease arising from the County Council’s negligence during the course of employment. Claims for loss or damage to employee’s property and effects are insured under the Public Liability insurance.

Insurance policies that may be held by commercial organisations:

**Directors & Officers (to be taken out by**

This policy is the equivalent of the Council’s Officials Indemnity policy. The policy

**Commercial Organisations only)**

applies to claims by third parties alleging financial losses arising from errors or omissions by Directors and Officers in the management of the Company.

**Any Member or Officer acting on behalf of a Commercial organisation should check to ensure the organisation has Directors and Officers insurance.**

- 3) There are also various other specific policies providing cover for damage to property (fire), Council motor vehicles and other specified assets.
- 4) It must be understood that all insurances contain specific limits, terms, conditions and warranties which may apply in particular circumstances, and that the above cover descriptions are provided for brief outline purposes only.

## 2.8 Local Authorities (Companies) Order 1995

- (1) This Order, made under the Secretary of State's powers contained in Part V Local Government and Housing Act 1989, sets out rules concerning local authorities' involvement in "regulated companies" which are subject to extensive controls, and their involvement in other companies where a number of rules apply.
- (2) "Regulated companies" are so defined if they are controlled or influenced by the Local Authority. "Influenced companies" under the effective control of the Local Authority, will be subject to capital finance regime and special propriety controls. In broad terms, the test as to whether companies are Local Authority influenced is whether the Local Authority has the right to or in fact does exercise a dominant influence over the Company in question.
- (3) The original concepts of controlled, influenced and minority interests in companies were introduced by the 1989 Act. "Influenced" means at least 20% Local Authority interest, plus a business relationship with the Company accounting for over 50% Local Authority interests, and "minority" less than 20% interest. The concept in the 1989 Act stands, but the Order introduces the term "regulated".
- (4) Councillors who are Directors of outside companies to which they have been nominated by the Council are under the following obligations:

- (a) that the remuneration they receive from the Company should not exceed that received from a Local Authority, and should be declared;
- (b) to give information to Councillors about their activities as required by the Local Authority (save for confidential information); and
- (c) to cease to be a Director immediately upon disqualification as a Councillor.

### **3 CHARITIES**

3.1 To be a charity an organisation must operate for a charitable purpose. There are four:

- the relief of poverty and human suffering
- the advancement of education
- the advancement of religion
- another purpose for the benefit of the community

It must operate for the public benefit and have exclusively charitable purposes. An organisation which operates for political purposes will not qualify for charitable status.

3.2 To register as a charity the organisation must submit its Trust Deed (usually the Memorandum and Articles of Association of a Company limited by guarantee) to the Charity Commissioners for approval. If they are satisfied that the organisation is charitable it will be registered as such.

3.3 Those who are responsible for the control and administration of a charity are referred to as its Trustees, even where the organisation is a Company limited by guarantee, even though they are not strictly Trustees. Trustees of a charity retain personal liability, and can only delegate if the Trust Deed authorises them so to do.

#### **3.4 Trustees' Duties**

- (1) Trustees must take care to act in accordance with the Trust Deed and to protect the charity's assets. They are also responsible for compliance with the Charities Acts.
- (2) Trustees must not make a private profit from their position. They must also perform their duty with the standard of care which an ordinary, prudent business person would show. Higher standards are required of professionals and in relation to investment matters.

- (3) Charitable Trustees must ensure that the information relating to the Trust and Trustee is registered with the Charity Commissioners and that annual accounts and returns are completed and sent.
- (4) If charitable income exceeds £5,000, the letters, adverts, cheques etc., must bear a statement that the organisation is a registered charity.
- (5) Trustees are under a duty to ensure compliance with all relevant legislation (e.g. in relation to tax matters).

### **3.5 Trustees' Personal Liability**

- (1) If in doubt, always consult the Charity Commissioners. A Trustee who does so will avoid personal liability for breach of trust if he/she acts in accordance with the advice given.
- (2) Generally though, a Trustee incurs personal liability if he/she:
  - acts outside the scope of the Trust Deed
  - falls below the required standard of care
  - makes a personal profit from the Trust assets
- (3) In such circumstances the Trustee will incur personal liability for losses incurred.
- (4) Trustees can be liable personally to third parties because unlike a Company, a Trust has no separate identity from the Trustees. Trustees are, however, entitled to an indemnity from the Trust assets, provided they act properly in incurring the liability. Trustees remain personally liable once they retire (e.g. if they have entered into a contract on behalf of the Trust) and should, therefore, seek an indemnity from their successors. If the charity is a company however the Trustees for the time being will be responsible.
- (5) Trustees may be liable to fines if they do not comply with the duty to make returns etc.

### **3.6 Indemnities by Trusts**

An indemnity can be given from the Trust Fund provided the Trustee has acted properly and within his/her powers. Trustees may take out insurance to protect themselves against personal liability, but not for criminal acts, fraud etc. There will be no problem if the Trustees themselves pay the premiums, but if they are paid out of the charitable funds the Trustees will need the

consent of the Charity Commissioners unless the Trust Deed allows it.

## **4 COMMITTEES OF MANAGEMENT**

### **4.1 Unincorporated Associations**

Groups which are not charitable trusts or limited companies are “unincorporated associations” and have no separate legal identity from their members. The rules governing the Members’ duties and liability will be set out in a constitution, which is simply an agreement between the members as to how the organisation will operate. Usually, the constitution will provide for a Management Committee to be responsible for the everyday running of the organisation. An unincorporated organisation may be charitable and may register as a charity.

4.2 Property will have to be held by individuals as the organisation has no existence of its own.

### **4.3 Duties**

Broadly, Management Committee Members must act within the constitution, and must take reasonable care in exercising their powers.

### **4.4 Liabilities**

- (1) Generally, the Management Committee Members are liable for the acts of the organisation, but are entitled to an indemnity from the funds of the organisation if they have acted properly. If there are not enough funds, the Committee Members are personally liable for the shortfall.
- (2) If one person is appointed by the constitution to act as the agent of the organisation for certain purposes, then that person acts as the agent of all the members, who have joint liability for the agent’s actions.
- (3) Members of the Committee of Management will have personal liability if they act outside the authority given to them or if they do not comply with statute e.g. the payment of employees’ tax etc.

### **4.5 Indemnities by Management Committees**

Members will be entitled to an indemnity from the association if they act in accordance with the constitution and are not at fault. It is possible to obtain insurance but if the organisation is to pay the premium it must be permitted by the constitution.



## **5 SCHOOL GOVERNING BODIES**

5.1 Education legislation requires that LEAs appoint representatives to the governing bodies of maintained schools. All schools are bodies corporate and as such their governing bodies are separate legal entities, which may enter into contracts and sue and be sued in their own right.

5.2 Generally, the members of a governing body are not personally liable for the acts of the governing bodies, provided those acts are within its powers. Schools can only do those acts enabled under Education legislation and the Instruments and Articles of Association of the governing body, or any act that appears to them to be necessary for, or in connection with, the conduct of the school.

### **5.3 Duties and Liabilities**

Like directors of a limited company, school governors have a general duty to act honestly and in good faith. They do not, however, have the same liabilities as imposed on directors by statute. A stronger analogy may be drawn between the obligations of a trustee and a school governor, as both may have personal liability for their own acts or defaults where there has been negligence or fraudulent conduct by the individual. However, a governor would not, for example, be automatically personally liable for the school's contractual obligations or other legal liabilities.

### **5.4 Indemnities by Governing Bodies**

All governing bodies should have insurance cover, which at present is arranged by the Authority. The notes in Annex 3 relating to insurance cover for Officers and Members in dealings with outside bodies apply equally to individuals acting as school governors. LEA representatives on governing bodies should be aware of any potential conflicts between the interests of the Authority and of the school, bearing in mind that governors must reach individual decisions based upon their own perception without regard for the specific interest or wishes of the appointing Authority. The governor and the school must resolve such conflict in its individual circumstances.

## **6 PRIMARY CARE TRUSTS DUTIES AND LIABILITIES**

6.1 Local Social Services Authorities are required to nominate a Social Services Officer to each Primary Care Trust (PCT) in their area. The prime responsibility of PCTs is to ensure a smooth transition from fund holding and to promote input to health services commissioning from 1999/2000 onwards. There is an expectation that PCTs will act corporately and operate as part of

the NHS. They are responsible for pursuing the development of the highest quality of health provision within their area, whilst acting to ensure value for money.

## **6.2 Indemnities by PCTs**

As an employee, the nominated officer is accountable to the Local Authority, but as a PCT member, will be collectively accountable for the performance of the PCT. The Local Authority will need to be clear about the level of delegation to the Officer concerned and degree to which they can bind the Council without referral back.

## **INSURANCE COVER**

The Council's corporate insurance policies provide cover for activities undertaken in fulfilment of the Authority's statutory purposes. The cover is extensive and is listed below, but is invalidated if the Council does not have the legal capacity to act.

The extent to which this cover will apply to Officers or Members in dealings with outside bodies will be critically dependent on the nature of the role they are fulfilling. For example, a company director has a fiduciary duty to act in the company's interests and as such the Council's insurance is unlikely to be in force. Alternatively, an observer nominated by the Council merely to attend meetings may be able to benefit from Council cover.

Where services (including professional advice) are involved, then in addition to the cover listed below, it is likely that professional indemnity insurance will also be required.

The insurance policies held by the Council (and applicable to Members and Officers) are:

- |                              |  |
|------------------------------|--|
| <b>Official's indemnity:</b> | covers financial loss arising from third party claims (e.g. a wrongly issued planning consent).  |
| <b>Libel and slander:</b>    | covers defamatory statements made by Officers or Members (there is an exclusion on the policy in respect of e-mails)   |
| <b>Fidelity Guarantee:</b>   | covers the Council for financial loss arising from the dishonesty or fraud of Officers (except where committed by persons in respect of whom the systems of selection and control have not been properly applied). |
| <b>Public Liability:</b>     | covers the Council for claims from members of the public for bodily injury or damage arising from the Council's negligence.  |
| <b>Personal Accident:</b>    | provides cover (up to certain limits) for accidental injury arising in the course of their duties. It also covers assault. There is no cover for loss of personal possessions.                                     |
| <b>Employer's Liability:</b> | covers the Council as employer against claims by employees for injury or damage to property arising from the Council's negligence.   |

Plus various other specific policies providing cover for damage to property (fire), Council motor vehicles and other specified assets.