

Health Service Circular



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Personal Liability of Non-Executives: Amendment of Indemnity

For action by: Health Authorities (England) - Chairman and Non-Executive Directors
Health Authorities (England) - Chief Executives
NHS Trusts - Chairman and Non-Executive Directors
NHS Trusts - Chief Executives
SHAs - Chairmen and Non-Executives
SHAs - Chief Executives

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Personal Liability of Non-Executives: Amendment of Indemnity

Introduction

1. HSC 1998 (010) provided guidance on the extent to which non-executive directors of NHS Trusts and non-executive members of Health Authorities may be personally liable for their decisions and actions. The circular provided advice on the precautions which should be taken to minimise the risk of legal action and recommended the form of indemnity which non-executives may be given by their NHS Trust or Health Authority. The present circular extends the actions which the indemnity should cover. Where this guidance refers to Health Authorities, this means HAs and SHAs unless specified. Where it refers to non-executives, this includes non-executive chairmen.

Summary

2. The threat of legal action against non-executives personally rather than the NHS Trust or Health Authority on which they serve remains very small. Nevertheless, we believe that, other than in rare circumstances, non-executives are personally liable for their actions and decisions whether acting as individuals or as members of a board. For the reassurance of non-executives, NHS Trusts and Health Authorities may provide them with an indemnity for decisions taken in the normal course of board business and in accordance with the correct procedures.

3. The Treasury, acting on a recommendation from the Neill Committee on Standards in Public Life, has reviewed the terms of a standard indemnity which should be offered to board members. The indemnity goes further than that previously set out in HSC 98(010) and is intended to reflect the protection which would be offered under a commercial insurance policy. The cover excludes any personal criminal liability nor will it protect the reckless who have acted in bad faith.

Action

4. NHS Trusts and Health Authorities are advised to issue suitable indemnities to their non-executive board members in accordance with the following text:

A chairman or non-executive member or director who has acted honestly and in good faith will not have to meet out of his or her own personal resources any personal civil liability which is incurred in the execution or purported execution of his or her board function, save where the person has acted recklessly.

5. This indemnity may be extended to members of those committees which have delegated powers to make decisions or take actions on behalf of NHS boards. Examples are those committees which consider the discharge of patients under Section 23 of the Mental Health Act, the committees which consider complaints and Primary Care Groups.

Insurance

6. Some NHS Trusts may in the past have taken out commercial insurance against the risk of litigation against their non-executives (Health Authorities may not, of course, commercially insure for this or other purposes). Under the terms of HSC 1999(021) this option has no longer been available to NHS Trusts from 1 April 1999. However, the new Liabilities to Third Parties Scheme, set up under Section 21 of the NHS and Community Care Act 1990 and administered by the NHS Litigation Authority, will provide cover for this risk in terms identical to the wording in paragraph 4. All NHS Trusts are eligible to apply for membership of the new scheme. Further details are available from the scheme managers, Willis Corroon, on the following helpline number: 0845 - 6010193.

Executive Directors and Executive Members

7. HSC 1998(010) provoked questions about the position of executive directors of NHS Trusts and executive members of Health Authorities. Their position is markedly different from non-executives and so the indemnity does not extend to them. The reason for this is that the NHS Trust or Health Authority is always liable for the actions of its employees in the course of their employment. It would therefore be a matter for the NHS Trust or Health Authority whether it sought to recover from its employees the costs of loss or damage. Individual executives may however be prosecuted for criminal acts committed in the course of their employment such as breaches of the Health and Safety at Work Act 1974.

This circular has been issued by:

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