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For the attention of Peter Walsh Esq
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BY E-MAIL Peter.Walsh@achcew.org.uk AND BY POST

11 October 2002

Our Ref: RDN/1003/81747/2/JAS
Your Ref:

Dear Mr Walsh

GENERAL ADVICE CONCERNING THE ABOLITION OF ACHCEW

Following our telephone conversations in the past week and in particular, yesterday 10 October, I set out in bullet point format key legal principles and issues for those involved with ACHCEW. I explained that specific advice can only be given if we have details of the particular circumstances.

BASIC PRINCIPLE

- An unincorporated association has no separate legal identity.
- An outsider must therefore determine who is actually liable for eg any contracts concerning the activities of ACHCEW.

WHAT POSSIBLE LIABILITIES MAY ARISE?

- These may include:
 - Contractual liability.
 - Tortious liability ie, for civil wrongs such as the giving of negligent advice.
 - Libel.
 - Holding of property.
 - Liability for employees.

WHO MAY BE LIABLE?

- This depends on the scenario. I highlight contractual and other civil liability (tortious).

CONTRACT

- A person who enters into a contract on behalf of the Association will either do so as agent on behalf of his principal (to be identified) or in his own capacity, thereby incurring personal liability.

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INVESTOR IN PEOPLE

- An agent must act within his authority on behalf of his principal.
- That person (or people) must not pledge the credit of the Association unless authority or the rules of the Association provide for this.
- The mere fact of membership does not by itself make a member of the Association a principal to contracts entered into on behalf of the Association: there is no implied authority.
- Nor does the fact the members have entrusted the affairs of the Association to a (Standing) Committee by itself give that Committee authority to contract on behalf of all the members and make all of them the principal.
- The rules of the Association are largely silent on the question of the making of contracts, other than Article 6(a), providing that the business of the Association shall be conducted between Annual General Meetings by the Standing Committee and Article 9(a), outlining in general terms the business of the AGM, including to discuss any proposition submitted by the standing Committee.
- Unless it is possible on the facts to show the Standing Committee had the necessary authority from the AGM to enter into a particular contract or has subsequently sought ratification of that contract then it is unlikely that all the members of the Association (the Community Health Councils which themselves are composed of individual members) would be liable and instead liability for that contract would lie with the members of the Standing Committee, unless the people who entered into the particular contract did so without authority of the Standing Committee (see below).
- The liability will be of all those members of the Standing Committee responsible for authorising the contract. This could include both members of ACHCEW (ie, members of CHCs) and non-members.
- If paid officers of the Association have entered into contracts on behalf of the Association, then they could be personally liable on those contracts unless they have acted within the authority given to them by eg the Standing Committee.
- If anyone incurs personal liability, then that will be unlimited, unless the particular contract with an outsider specifically restricts liability to eg, the funds of the Association.
- In relation to a contract on which all members are liable, any member who pays more than his proper share is entitled to a contribution from the other members.
- Similarly, a committee member may claim contribution from other members of the Committee in respect of their Committee liability.
- If someone has become liable on a contract personally, he is not entitled to an indemnity from the other members of the Association unless there is a rule or an agreement to the contrary. I have not seen any in the papers provided.

TORT (eg, negligent advice)

- The person/people responsible for any negligent advice will be personally liable. (This may include those who have authorised the giving of the advice in question).
- Other activities of members may give rise to liability in tort.
- As the Association has no legal identity, insurance cannot be taken out in the name of the Association. It should be issued to either the Committee for the time being or to a particular officer who is clearly stated to hold it in a representative capacity.
- To ensure any member incurring liability to an outsider can claim on the policy it should contain a member to member indemnity.
- If a member or an officer is in a position to give advice or otherwise act in such a way as to face possible exposure to a claim for eg, negligence, that person/those people should ensure they have the benefit of any insurance policy in place. The AON professional indemnity policy states that the Association is insured. The Association should clarify which people have the benefit of that cover.

- If run off cover is required after abolition of the Association, then again those who need the cover should ensure they have it.

LIBEL

- An action for libel will not lie against an Association because it has no capacity to publish a libel.
- The correct Defendants will be the officers or particular Committee of the Association who directed publication.
- Members of an Association sued in respect of their activities will only be entitled to an indemnity from the Association for damages and costs if they are sued as representatives of all the members or they were carrying out functions for them with the approval of the Association.

PROPERTY

- The property always has to be held by some individual or individuals on behalf of an Association. There are four different ways in which property can be held on behalf of an unincorporated Association:
 - By all the members of the Association as joint tenants;
 - By trustees on trust for the members;
 - By trustees on trust for the purposes of the Association;
 - By the members subject to their contractual right and liabilities to each other in the rules of the Association (there do not appear to be any specific Association rules on this point).
- The position should be clarified.

EMPLOYEES

- The employer will often be the persons who actually engage the employee, for example, the Committee, although the employer may be all the members.
- The Association should ensure there is in existence a valid employer's liability policy of insurance.

ABOLITION OF ACHCEW (NATIONAL HEALTH SERVICE ETC ACT 2002 SECTION 22)

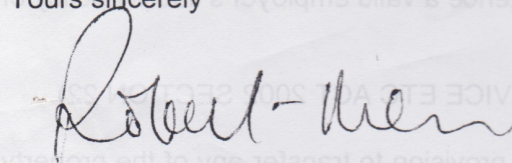
- The Secretary of State has discretion to make provision to transfer any of the property held, rights enjoyed or liabilities incurred in respect of the functions of ACHCEW by a person as a member or former member of a CHC which was a member of a CHCEW. [emphasis added]
 - This only envisages a discretionary assumption of the liability of members and not of eg officers.
 - ACHCEW should clarify whether:
 1. the Secretary of State will underwrite any liability; and if so
 2. who will receive the benefit.
 - ACHCEW should argue that people who have carried out public duties in good faith should not be saddled with personal liability (even if there is insurance cover in place).
 - There are possible human rights arguments, in that the Secretary of State should not act in an arbitrary fashion and deprive those who may have incurred personal liability of the peaceful enjoyment of their possessions (Article 1 of the first Protocol to the Human Rights Act 1998). Although any such claim may be speculative, the Secretary of State will be aware that he is required to act in a manner compatible with HRA 1998.

SUMMARY

- In principle, where action is taken with the authority of all members of ACHCEW all the members could be liable. The members of the Association are the individual CHCs. The CHCs in turn are comprised of individual members.
- Depending on the circumstances, officers and non-CHC members could be liable for acts (and omissions) carried out for the Association if the action has not been authorised by the Association or is in excess of their particular mandate.
- Each potential exposure should be looked at:
 - What possible exposure is there, eg contractual?
 - Who was involved?
 - Was this action authorised?
 - If so, by whom?
- Is relevant insurance in place and does it cover the necessary people? Should run-off cover be taken out?
- Should individuals/the Standing Committee seek ratification of eg, contracts entered into in order to provide retrospective approval, where necessary?
- The Secretary of State should confirm whether:
 - He will underwrite liability and if so:
 - To what extent will do so.

I hope this summary provides useful guidance to you and your colleagues. If you require specific advice, then please let me know.

Yours sincerely



Robert Nieri