



<b>MEETING TITLE</b> Trust Board Meeting in Public		<b>MEETING DATE</b> 29/01/2013	
<b>TITLE of PAPER</b>	For Approval: Yorkshire Ambulance Service Foundation Trust Directors' And Officers' Indemnity / Insurance	<b>PAPER REF</b>	6.4
<b>STRATEGIC OBJECTIVE</b>	<b>All</b>		
<b>PURPOSE OF THE PAPER</b>	The purpose of this report is to identify the potential types of liabilities of Foundation Trust (FT) Directors, Officers and Governors and review YAS current indemnities / insurance.		
<b>For Approval</b>	<input checked="" type="checkbox"/>	<b>For Assurance</b>	<input type="checkbox"/>
<b>For Decision</b>	<input type="checkbox"/>	<b>Discussion/Information</b>	<input checked="" type="checkbox"/>
<b>AUTHOR / LEAD</b>	Anne Allen, Director of Corporate Affairs & Trust Secretary	<b>ACCOUNTABLE DIRECTOR</b>	Chief Executive
<b>PREVIOUSLY CONSIDERED BY</b>	<b>Committee/Group:</b> Trust Executive Group	<b>Date:</b>	04/01/2013
<b>RECOMMENDATION</b>	It is recommended that the Trust Board: 1. Note the content of the report; 2. Approve the Trust Executive Team to proceed to the market for terms and formal quotations, to ensure appropriate indemnity/insurance cover is in place before YAS is authorised as a Foundation Trust.		
<b>RISK ASSESSMENT</b>		<b>Yes</b>	<b>No</b>
<b>Corporate Risk Register and/or Board Assurance Framework amended</b> <i>If 'Yes' – expand in Section 4. / attached paper</i>		<input type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Resource Implications (Financial, Workforce, other - specify)</b> <i>If 'Yes' – expand in Section 2. / attached paper</i>		<input checked="" type="checkbox"/>	<input type="checkbox"/>
<b>Legal implications/Regulatory requirements</b> <i>If 'Yes' – expand in Section 2. / attached paper</i>		<input type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Quality and Diversity Implications</b> <i>If 'Yes' – please attach to the back of this paper</i>		<input type="checkbox"/>	<input checked="" type="checkbox"/>
<b>ASSURANCE/COMPLIANCE</b>			
<b>Care Quality Commission Registration Outcome(s)</b>		12: Requirements relating to workers 14: Supporting workers	
<b>NHSLA Risk Management Standards for Ambulance Trusts</b>		1: Governance	

## **Foundation Trust Directors' and Officers' Indemnity / Insurance**

### **1. PURPOSE/AIM**

- 1.1 The purpose of this report is to identify the potential types of liabilities of Foundation Trust (FT) Directors<sup>1</sup>, Officers<sup>2</sup> and Governors and review YAS current indemnities/insurance.
- 1.2 Under existing arrangements the Trust may take out insurance or participate in risk pooling schemes, for the benefit of Directors and Officers, against personal liability they may incur in that role - in such terms as the Board of Directors considers appropriate.

### **2. CONTEXT**

- 2.1 The Code of Governance of NHS FTs recommends that an NHS FT maintains appropriate insurance for the liability of its Directors.

#### **2.2 Fiduciary duties at common law**

- 2.2.1 NHS FT Directors are subject to certain fiduciary duties developed through common law, mainly being the:
  - duty to act in good faith;
  - duty to conduct themselves as a reasonably diligent person;
  - duty to maintain enough knowledge and understanding of the business of the NHS Foundation Trust to properly discharge their duties.
- 2.2.3 These duties are likely to be owed to the NHS FT, so any claim for breach of duty would be to the NHS FT, and there is limited case law regarding duties and personal liabilities of Directors of NHS bodies. This does not preclude a case being brought by a third party.
- 2.2.4 Directors of NHS FTs may also be liable to repay monies if they obtain an advantage from a contract in circumstances where the Director may have a conflict of interest.

#### **2.3 Fiduciary statutory duties**

- 2.3.1 Directors of companies incorporated under the Companies Act 2006 are subject to statutory duties imposed by the Companies Act 2006.
- 2.3.2. As a result of amendments incorporated into the NHS Act 2006 by the Health and Social Care Act 2012, Directors of FTs will also be subject to statutory duties. Each Director will now have personal, not just collective, duties and these mirror duties set out in Companies Act legislation. The expectation is that these amendments will come into force on 1 April 2013.
- 2.3.3 There will be a general duty of the Board and each Director individually to act with a view to promoting the success of the FT so as to maximise the benefits for the members of the corporation as a whole and the interests of the public. There is therefore a move away from collective responsibility and board members could face personal liability.
- 2.3.4 It will also be a statutory requirement for Directors to avoid conflicts of interest and not to accept a benefit from a third party by reason of being a Director.

## 2.4 **Civil liabilities**

- 2.4.1 Contract: it would be rare for a Director to be personally liable under a contract as they are generally entered into by the FT. If a Director has given an assurance/warranty that is false there is a risk of personal liability.
- 2.4.2 Tort: in most circumstances a claim for negligence would be brought against the trust as the employer of the individual who has acted negligently and be covered under NHS Litigation Authority (NHSLA) scheme membership.

## 2.5. **Criminal liabilities**

- 2.5.1 A Director who, in the course of his or her activities, commits a criminal offence will carry personal responsibility and liability.
- 2.5.2 Certain statutes also provide that if there is a breach in the legislation a Director may commit a criminal offence, for example Health and Social Care Act 2008, health and safety and environmental protection legislation.

## 2.6 **Indemnities**

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1 – Director(s) means Non Executive and Executive Director(s) - unless otherwise specified;  
2 - "Officer(s)" means employee of the Trust or any other person holding a paid appointment or office with the Trust (YAS Standing Orders, Reservation and Delegation of Powers & Standing Financial Instructions, May 2012)

- 2.6.1 Express indemnities are not usually provided to employees by NHS trusts as the trust is vicariously liable for the actions of the employees in the course of their employment. Executive Directors are usually employees. Officers are employees.
- 2.6.2 Non-Executive Directors (NEDs) are not usually employees. Health Service Circular 1999/104 confirmed HM Treasury had agreed to the provision of indemnities to NEDs. This provides that a NED 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. However, such indemnity does *not* extend to commercial activities (see Section 2.7 'Insurance').
- 2.6.3 A statutory indemnity exists in section 265 of the Public Health Act, 1875 as amended by section 69 of the NHS Act 2006. This protection is not commonly relied upon because it is limited to situations where a person acts bona fide, for proper purpose, is not negligent and does not act *ultra vires*.
- 2.6.3 There is no indemnity for criminal acts.
- 2.6.4 There is no indemnity for FT Governors (see also Section 8. 'Position for Governors and Corporate Secretary').

## 2.7 Insurance

- 2.7.1 Director and Officer cover under the NHSLA 'Liabilities to Third Parties Scheme' (LTPS) covers those activities defined as being the 'relevant function', which is to say the function of providing services in England for the purposes of the National Health Service Act 1977, or by virtue of section 7 of the Health and Medicines Act 1966, or under paragraph 14 or 15 of schedule 2 to the National Health Service and Community Care Act 1990.
- 2.7.2 LTPS regulations were extended by subsequent legislation to allow FTs to become 'eligible bodies' and to join the Scheme. But, the scope of the Director and Officer cover was not similarly extended, so that for FTs the NHSLA still only cover activities within the 'relevant function'.

*This means any activities undertaken by FT Directors and other relevant persons that fall outside the 'relevant function' are not covered by LTPS. This was a policy decision by the DH, who feel that LTPS cover remains good value generally, but that any perceived 'gaps' are*

*intentional i.e. NHSLA simply would not wish to pick up what are effectively 'commercial' liabilities outside the NHS.*

**2.7.3 Exceptions from Director and Officer cover under LTPS include:**

- *any claim for loss arising out of, based on, or attributable to the committing in fact of any dishonest or fraudulent act;*
- *damages which are not agreed with the insurer or risk sharing scheme;*
- *civil or criminal fines or penalties imposed by law, damages, taxes or any amount for which the indemnified person is not legally liable or matters which may be deemed uninsurable.*

**2.8 Position for Governors and Corporate Secretary**

2.8.1 Circumstance where personal liability of a Governor(s) may arise is remote. However, there is a possibility where a Governor(s) might be culpable for failing to take action to remedy the performance of the Board of Directors of their Trust. This duty, to hold the NEDs individually and collectively to account for the performance of the Board of Directors, is one of the new statutory duties expected to come into force on 1 April 2013. A similar duty is found in Monitor's 'Your Statutory Duties: A Reference Guide for NHS Foundation Trust Governors'.

2.8.2 The Corporate Secretary (Trust Secretary/YAS) in most FT Constitutions is given specific and unique roles that may bring (s)he into conflict with Members and Governors. This role is usually an employee of the FT, i.e. Officer.

**3. PROPOSALS/NEXT STEPS**

3.1 It is proposed that alternative commercial insurance 'top up' solutions are sought in relation to cover for liabilities of Directors, Officers and Governors and the Trust Secretary, for consideration by the Board.

**4. COSTS**

4.1 Two brokers have been asked to supply information for costing this cover. The first were referred by Capsticks legal firm as they advise over 70 FTs on insurance issues. The second is the Trust's recognised broker and deals with YAS' motor insurance and top up insurances.

Indicative costs for this cover range broadly; from @£5k for £5m Limit of Indemnity to @£20k for up to £25m cover.

- 4.2 Terms are likely to vary between insurers and FTs and a proposal form will need to be completed before the market will offer terms and a formal quotation.

## **5. RISK ASSESSMENT**

That appropriate indemnity / insurance cover for liabilities of Directors, Officers, Governors and the Trust Secretary is not in place when YAS becomes a FT, placing those parties at potential risk from litigation.

The Trust may also be at risk of failing to retain and/or recruit to these roles in future.

## **6. RECOMMENDATIONS**

It is recommended that the Trust Board:

3. Note the content of the report;
4. Approve the Trust Executive Team to proceed to the market for terms and formal quotations, to ensure appropriate indemnity/insurance cover is in place before YAS is authorised as a Foundation Trust.

## **7. BACKGROUND INFORMATION**

NHS Act 2006  
Code of Governance of NHS FT  
Health and Social Care Act 2008, 2012  
Companies Act 2006  
Health Service Circular 104 (1999)  
Public Health Act 1875 as amended by NHS Act 2006