Chartered surveyors in employment: Guidance on liabilities for employed members

February 2011

1. Aims

The guidance aims to:

- clarify when work done by an employee may not be covered by an employer's PII
- explain the potential liabilities of employees; and
- recommend steps that might be taken to limit exposure to personal liability.

2. Acting in the course of employment

This guidance covers the liability for work done by employed members during the course of their employment. Employed members should be aware that any work undertaken by them as a surveyor outside the course of their employment renders them subject to 9 of the Rules of Conduct for Firms as their employer's professional indemnity insurance (PII) may not cover the work done so the member will have to obtain their own PII to cover any potential liabilities, as they are, in effect, then acting as sole principals.

This would include, for example, any private surveys carried out as favours for directors, advice to local charities, schools, churches etc. for no charge. Members should note that the absence of remuneration for surveys or any other type of advice, does not affect their potential exposure to liability. In these circumstances, members are unlikely to be protected by any insurance or indemnity they may have through their employers and are obliged to arrange PII to cover their potential liabilities. If no PII is in place, members will be in breach of the rules. If no insurance or indemnity is in place, the member should not undertake this kind of work.

Where work is undertaken by members for joint ventures or for separate companies formed for specific projects, the scope of any indemnity obtained from the employer will need to be extended.

Members are reminded that if they allow their names, with or without designatory letters, to appear on the notepaper, or in the advertisements of any firm where no principal is a member, they may attract liability on the grounds that they are 'holding themselves out' as

principals of that firm. In these circumstances, they will be subject to the RICS' rules and they must arrange PII to cover any potential liabilities.

3. Potential liabilities of employees

The main areas of risk for employees are:

- liability to clients and third parties
- liability to employers
- liability to an insurer (subrogation);

Liability to clients and third parties

The principle of vicarious liability dictates that an employer is responsible for the negligent acts or omissions of his employees when acting in the course of their employment. This does not remove the employee's potential liability to clients and third parties. Either the employer, or the employee, or both may, therefore, be sued, although in practice the employer is usually the more attractive target, having generally far greater assets than the employee.

Also, liability will continue after an employer ceases to exist and employees should be aware that a claim could be made against them. Unless insurance is in place to cover them against the claim in question, they will be unprotected.

Employees will be particularly vulnerable if their employer or former employer:

- is insolvent
- has ceased trading
- is under-insured and cannot meet the full claim
- is unable to pay the excess due under the policy
- is unable to obtain indemnity from their professional indemnity insurers as a result of a coverage dispute

The Court of Appeal decision in the Merrett v Babb case has served to highlight to all professional employees the issue of their own personal liability. The case involved an RICS member being personally sued for work he undertook, whilst an employee, following the bankruptcy of his employer and the cancellation of his employer's professional indemnity insurance (PII).

Supervisors at risk

It is not only employers who can be held vicariously liable for the acts or omissions of others. Employees with a direct responsibility for supervising others may find themselves joined in an action against their employer and another employee under their supervision.

Liability to a third party for whom the employer is acting as an agent

Members could, in the course of their employment, be in a situation in which their employer is acting contractually on behalf of another organisation as its agent. Such a situation could give rise to a right of action by the other company against the employee as well as his employer.

Members may encounter this kind of risk if the business of their employer is carried out by separate subsidiaries of a holding company where they are employed by one subsidiary and carry out work for another. Members employed in the public sector may also find themselves

acting in a similar capacity to a private contractor and similar liability issues may arise. Members are advised to seek confirmation from their company board or secretariat as to who is instructing them and who will be relying on their advice.

Employed members of an LLP and employed/salaried partners

An LLP is a distinct and separate legal entity and has a status distinct from that of its members (unlike an unincorporated professional partnership). It is the LLP who contracts with clients and it is that entity which is exposed to claims, not the individual owners.

However, RICS members who are employed members of a limited liability partnership (LLP) or employed/salaried partners have a separate potential liability for negligence to that of the firm if a court is satisfied that a personal duty of care should be imposed. For example, the individual who undertakes the work may still be personally liable. If the individual had assumed responsibility for the act or omission in question and that reliance by the client on such an assumption of responsibility was reasonable.

Employed directors

Member employees who are directors may be at greater risk than ordinary employees. A client's assertion that he was relying directly on the skill of a particular individual will generally be more plausible in the case of a director than in the case of a more junior or less experienced employee. There are many other potential risks inherent in the status of director, whether executive or non-executive (i.e. whether an employee or not). Although directors do not have the unlimited liability of partners, under the Companies Act 2006 there are more than 200 offences of which directors can be guilty. Directors also have a whole range of civil liabilities under the common law. The Companies Act
2006 includes a prohibition against companies exempting or indemnifying their directors and officers in respect of their liability for negligence, default, breach of duty or breach of trust in relation to the company, and it is for this reason that companies are recommended to consider the option of purchasing specific Directors and Offices cover, to protect their directors. Further information regarding liabilities of Directors is available from RICS.

Liability to the employers

There is an implied term in all contracts of employment that employees will exercise reasonable care and skill so as not to cause damage to third parties. In the event of a breach of this implied term, they may be sued by the employer. In addition the Civil Liability (Contribution) Act 1978 entitles employers to recover from their employees losses the employer suffers as a result of the employees' negligence.

Liability to insurers: subrogation

An insurer has a right, after paying a claim under an insurance policy, to look to recover the amount settled under the claim from the party responsible for the incident giving rise to the claim. Such a right is known as 'subrogation'. In professional indemnity insurance situations, it is usually exercised only where fraud is involved but in some cases it may not be clear whether fraud or negligence is the cause of damage.

RICS insurance policies include a 'waiver of subrogation' clause which prevents the insurers from taking this action unless the employee has been fraudulent or wilfully reckless in his actions. It does not, of course, prevent an employer from taking any action against his employee.

4. Protection against claims

Employees' indemnities

Members may be indemnified by their employer in three ways:

- the employer, who has vicarious liability for the actions of employees, may agree not to seek to recover damages from them if proceedings are brought by third parties
- if an employee in the course of his duties becomes the subject of a claim, the employer may agree to take over the conduct of the case from the outset and in effect become the defendant in the action, accepting financial responsibility for payment of legal costs and any damages awarded
- the employer may agree not to make any claim against the employee if loss is suffered by the employer as a result of the employee's negligence.

Need for express term

In order to be effective, any indemnity needs to be expressly included in the contract of employment or form part of some other written contract between the employer and the employee. An indemnity will not be implied in the absence of an express term and nor will the court imply a term that the employee will receive the benefit of any contract of insurance effected by his employer covering the employer's liability to third parties.

However, any indemnity is only as good as the firm's solvency at the time a claim is made and it is, regrettably, the case that an employee is most likely to be pursued if his employer or previous employer is unable to satisfy a claim.

Form of indemnity

A specimen draft indemnity clause is set out at Appendix I. For so long as the employer remains able to perform its obligations under the clause, it should afford adequate protection to employee members in respect of claims made by third parties arising out of the ordinary course of their employment. It should also prevent the employer from demanding indemnity or contribution from employed members.

It is in the best interest of you, and your employer, that steps are taken to ensure certainty, and remove concern, by obtaining such an express indemnity. It is appreciated that asking such questions of employers can be difficult, if not impossible. If you feel that you cannot ask these questions then you should consider taking specialist legal advice.

Acting on behalf of employer

Contracts for the provision of advice and services will usually contain an implied term that the advice and services will be provided with all reasonable care and skill. A party who is not a party to the contract can also sometimes enforce contract terms if it is apparent that the contracting parties intended to confer such a benefit on the third party and in England, also under the Contracts (Rights of Third Parties) Act 1999, where the contract contains an express term to that effect.

Therefore, members should, where possible, sign contracts, documents, reports or letters "for and on behalf of" their employer, rather than in their personal capacity (recognising

however that the signature of the report by the valuer in accordance with the requirements of the Building Societies Act was not a pivotal factor in Merrett v Babb).

Terms of engagement must be confirmed in writing with clients and should contain a clause that states an employee is only acting as an employee of the firm and the client is relying on the duty of care owed to it by the firm, not the individual. See the draft specimen wording at Appendix II.

Exclusion from liability clauses

Firms are advised to include a statement in their terms of engagement with clients, to the effect that in instructing an individual within the firm, the client acknowledges that any duty of care which that individual owes to the client is excluded on the basis that the client is relying solely on the duties owed to it by the firm as a whole. Such a provision will significantly reduce the risk of any individual within the firm subsequently being held personally liable in respect of advice given or in respect of his own shortcomings in supervising others within the firm. The validity of any such clause would be subject to the Unfair Contract Terms Act 1977 and, in the case of any contract agreed with a consumer, the Consumer Rights Act 2015. The law is untested in this particular area but the clause would have to satisfy the 'test of reasonableness' in England and Wales and a 'fair and reasonable' standard in Scotland. The key points to consider are whether the clause is clearly drafted and has been drawn specifically to the client's attention.

However, these exclusion clauses in terms of engagement with clients cannot protect employee members against any claims relating to personal injuries, nor will they protect them against claims made by non-client third parties. Exclusion of liability clauses in contracts, documents or reports on which third parties rely on may be of assistance, provided that such exclusions satisfy the requirements of the Unfair Contracts Terms Act 1977 and Consumer Rights Act 2015 if with a consumer.

Liability to insurers - Waiver of right of subrogation

A specific waiver of the right of subrogation has been negotiated with insurers for employee members who are covered by an RICS compliant insurance policy. Members in firms who are not subject to the RICS Rules are advised to explore obtaining a waiver of subrogation from insurers as well as from their employers.

5. Insurance

Professional indemnity insurance

PII provides indemnity to firms where allegations of professional negligence are made. PII is available to most types of organisation, at least in respect of some aspects of their work. The limits and scope of PII cover available may vary over time, depending upon levels of capacity and trading conditions within the professional indemnity market.

The RICS Rules apply to all members who are present and past principals, employees and consultants in firms providing surveying services to clients (unless they are specifically excluded). Other individuals, such as sub-contractors, may only be covered if specifically named on the policy.

Firms are required to carry insurance for the whole firm, and when a firm ceases to trade or merges or otherwise winds up then run-off cover must be maintained for at least six years. This is because an employee member may face a claim for anything up to 6 years after he completed the work to which the claim relates.

PII should meet RICS minimum policy wording and minimum requirements of cover as laid out in the regulations. An RICS policy automatically covers employees as part of the 'insured'. All employed members are advised to check at regular intervals whether or not their employers have taken out such a policy and whether they are protected by it, especially when the member is the only RICS member in the firm. Non-RICS policies may not provide this cover automatically, or such comprehensive cover.

Members who are covered by their employer's insurance could be sued by the employer for the amount of any excess payable by the employer if damage is caused to third parties. Members are therefore advised to seek a written indemnity from their employer to prevent this happening, as set out in Appendix I.

Members should also remember that a firm's PII can only protect them whilst the cover is in place. If there is no insurance when a claim is made then no protection is in place. This is because of the claims made basis of PII. It is the policy in place at the time the claim is made, not when the negligent advice was given, that will meet the claim.

The need for run-off cover

PII is provided on a claims-made basis as stated above. Run-off cover is a PII policy for a firm that has ceased trading but it will not cover any work completed after the date that insurers have been advised the firm ceased to trade. If run-off cover is maintained, then protection will be in place for any claim made after a firm has ceased trading, for the period the run off cover applies (up to 6 years), but if a firm does not maintain this run-off cover on expiry of their PII, no insurance protection will be in place for the work previously undertaken.

Members leaving employment
When employees leave a firm, they are in a very vulnerable position, since they are unlikely to have any control over a firm's PII policy (and run off cover, if any) and whether adequate cover is being maintained.

It is difficult, if not impossible, for individual employees to obtain personal cover in respect of work carried out in previous employment because of insurers' concerns about the adverse selection of risks. Where it is available, it will almost certainly be an addition to cover carried in respect of the member's current practice. If cover is available separately, then the most likely source of run-off cover would be the last insurer of the employer, as insurers who have not previously insured a firm are usually unwilling to provide run-off cover. It will not cover claims already notified and will be expensive.

In addition, former employees are unlikely to have ready access to records which would enable them to defend a claim. Even if a claim is thought to be invalid, the member may suffer considerable anxiety and expense in defending it. Employees are advised to keep a personal record of work carried out whilst in employment. It is recognised that this is very difficult in practice, but access to files for a defence if a claim is lodged is extremely helpful.

Failure of insurance company

Whilst rare, it is not unknown for an insurance company to fail. This can present firms with difficulty in obtaining replacement cover, particularly if the firm is already in run-off. Normally other insurers will provide cover and there is some protection for clients and members through the Policyholders Protection Act 1997 where the insured is a sole practitioner or a professional partnership (as opposed to a limited company). Ex- employees of a firm could, however, find themselves without cover in these unusual circumstances where they are not insured under the relevant policy.

Directors and officers insurance

Companies are allowed, under the provisions of the Companies Act 2006 to purchase insurance for their directors against certain liabilities for negligence, default, breach of duty and breach of trust, including associated legal costs. Members who are company directors are advised to find out whether or not their employer has taken out such a policy.

Legal defence policies

Members who are not covered by their employer's insurance, or by a written indemnity, should consider other ways of protecting themselves. In practice, it is virtually impossible for employees to take out individual professional indemnity or public liability policies, given insurers' concerns about the possibility of adverse selection.

Individuals or groups of employees may wish to consider legal defence policies which meet the cost of the best defence available. The level and type of cover provided, however, may be extremely limited as otherwise these insurers would be effectively providing professional indemnity insurance.

Members Support Service

RICS has set up a members' support service designed to assist employees who find themselves being or potentially being personally sued and have no access to PII (normally due to the former employers having no or inadequate PII or run-off cover). This is not insurance and the public have no recourse via this fund. Further information on the service can be found at www.rics.org/regulation

6. Charitable Activities

Liability advice to members working for charitable and voluntary organisations.

Some professional people are invited to provide their services to charitable organisations, sports and social clubs, youth groups, parish councils and the like. Many are invited to serve as committee or board members. There are two distinct liabilities to be aware of: professional liability and liability as a Trustee, Director or Officer. These legal obligations and liabilities require careful attention and, ideally, should be protected by separate and appropriate insurance.

No Automatic Cover

You must not assume that you are covered under your own or your firm's PII policy for any liability that may attach to you in your personal capacity as an advisor to, or Trustee, Director or Officer of any such organisation.

PI Insurance

A typical PII policy covers only legal liability as a Chartered Surveyor. If you are a Sole Practitioner or Sole Principal and you decide to take on pro bono advisory work as a Chartered Surveyor, then you could be covered for this under your own PII policy. You should check with your insurer or broker. You would not be covered in your capacity as a Trustee, Director or Officer of the organisation. Separate insurance is required and this is discussed below.

If you are a Partner or a Director of a firm of Chartered Surveyors, once again you must not assume that you are covered automatically by the firm's policy. First of all, you should obtain the agreement of your Partners or Co-Directors to carrying out pro bono or charitable work and come to an agreement that any remuneration you receive is payable to the firm and not to you as an individual. Insurers would usually agree to provide cover under the firm's policy under these circumstances, with the firm's permission.

If you are a qualified Surveyor who is employed in a firm, company or public authority you must obtain the agreement of your employer to carry out pro bono or charitable work. They may or may not agree to you doing this in their name. In many cases they will not agree to it, in which case you will need your own PII insurance.

If your employer does agree to it they must obtain the specific agreement of their insurer to provide this cover and the insurer may require special terms or conditions, depending on the circumstances.

Self-Insured Excess

Where cover is afforded to you by your firm or employer, you should ascertain whether you will be responsible, personally, for the self-insured excess on their policy, in whole or in part. If you are solely responsible, you may decide that the risk / reward ratio is too high to make the work worthwhile to you.

Trusteeship & Directorship

If you are already a Trustee, Director or Officer of, for example, a voluntary organisation or sports or social club (whether a registered charity or not), you will almost certainly be relied upon as a "professionally qualified" person. This reliance may, unreasonably, go further than it should. It is reasonable for your fellow committee or board members to rely upon your professional advice as a Surveyor and, subject to what has been said above, you can be insured for that. It is not, however, reasonable for them to rely upon your professional status as a Surveyor for any other advice whatsoever. Your professional skills and your general business experience may nevertheless qualify you as a suitable person to act as a Trustee, Director or Officer of the organisation but if you accept this position it must be distinguished from your professional status.

You should also be aware that the obligations on a Trustee, and the duties they owe to beneficiaries, are considerably more onerous than the duties owed to clients and the public at large.

Should you be invited to offer your professional services in connection with, for example, building projects or planning that the organisation wishes to undertake, then you may have a conflict of interest between your role as a Chartered Surveyor and your role as a Trustee, Director or Officer. If you are in any doubt about this, you should seek legal advice and you may be advised to resign as a Trustee, Director or Officer for the period that you provide your professional services.

Trustee, Director or Officer Insurance

Suitable trustee's liability insurance and/or directors & officers liability insurance should be arranged for the entire committee or board to cover the liabilities that can arise as a Trustee, Director or Officer. There are both common law liabilities and statutory and regulatory liabilities. You should seek experienced advice from your lawyer, insurer or broker to properly understand how these liabilities can arise and how they can be protected by insurance. Furthermore, it is inadvisable for isolated individuals on a board of trustees or directors to be insured individually, as this can create a single target for a claim, as the potential claimant sees a target with deep pockets.

Statute of Limitation

Remember also that your professional and Trustee, Director or Officer liability carries on for well over six years from the time that you leave the organisation in a professional or official capacity, or from the time that the organisation is wound up. Limitation periods can in some cases extend to around 15 years and it is necessary to keep insurance in force throughout the whole of this time if you are to avoid being unprotected in your personal capacity. The cost of this insurance should be taken into consideration in the amount that you charge for your fees.

Letter of Indemnity

Whilst RICS recognises individuals may wish to assist charities, the above guidance strongly recommends caution. Do enter into such relationships from an informed position. At appendix III is a letter of indemnity for use when involved with charitable activities. Do be aware of the notes at the foot of this appendix.

7. Check-list

Questions to ask yourself:

- Are you covered by your employer's insurance and/or by a written indemnity?
- Does the insurance cover, and/or indemnity, protect you in the event of claims by third parties or claims by your employer?
- Claims by another party for whom your employer is acting as agent?
- Claims by an insurer?
- Do you know for whom you are working and who will rely on your advice?
- Does the letter of engagement exclude personal liability?
- Where practicable, do you sign reports or letters 'for and on behalf of' your employers, rather than in your personal capacity?
- Have you discussed these issues with your employer? Are you able to?
- Does protection continue after you have left your employer? Can you obtain personal cover?
- If you are a company director, are you protected against claims arising from this status?
- Do you ever give advice outside your normal course of work, whether written or oral, paid or unpaid? If so, are you covered by an insurance policy which complies with the CPIIR, or do you have an indemnity?

Appendix I

Contract of employment clauses (incorporating an indemnity, an exclusion of liability and an agreement by the employer to maintain run-off insurance)

1. The parties acknowledge their intention that, in the performance of his professional duties, the employee's duties and responsibilities shall be owed exclusively to the employer and that it is not intended that any act or omission on the part of the employee (save to the extent that the same amounts to fraud, dishonesty, wilful misconduct or unauthorised conduct) shall give rise to any personal liability on the part of the employee to the employer's client or to any other third party.

2. Accordingly, in the event of any claim being made against the employee in respect of any alleged act or omission committed in the course of his employment by the employer (not amounting to fraud, dishonesty, wilful misconduct or unauthorised conduct), the employer will indemnify the employee against all sums which the employee may be legally liable to pay to the claimant, whether by way of damages, interest or costs together with all reasonable costs and expenses of defending any such claim, subject to prior written approval from the employer or its insurer.

3. The employer undertakes not to claim against the employee any indemnity, contribution or damages in respect of any liability which it may incur by reason of any claim against the employer arising out of any alleged act or omission committed in the course of his employment by the employee (not amounting to fraud, dishonesty, wilful misconduct or unauthorised conduct).

4. The following are conditions precedent to the employee's entitlement to indemnity under 2 above and to the employer's undertaking under 3 above:
    (a) The employee will notify the employer immediately of any claim being made or intimated against the employee and of any circumstance arising which may give rise to a claim.
    (b) The employee will seek prior written consent from the employer or its insurer for any costs or expenses incurred in defending any claim.
    (c) The employee will not make any admission to or negotiate or agree any settlement with any third party without the prior written consent of the employer or its insurers.
    (d) The employee will fully co-operate with the employer and its insurers in the investigation, defence and settlement of any claim or potential claim: such co-operation will be given without charge, save that the employer will pay all reasonable expenses actually incurred.
    (e) The employer or its insurers will be entitled to take over and conduct in the name of the employee the defence and settlement of any proceedings brought against the employee.

5. The employer will ensure that, for a period of at least six years following termination of his employment, the employee will be insured by the employer on an each and every claim basis against any claim arising from work previously undertaken by him in the course of his employment by the employer. [Such insurance will comply in all respects with the provisions of compulsory professional indemnity insurance regulations of the Royal Institution of Chartered Surveyors for the time being in force.]

Notes:

• Clause 4 of the indemnity imposes a number of conditions precedent on the employee's right to indemnity and is likely to reflect, in part, the requirements of the employer's professional indemnity insurance
• Clause 5 provides an additional sentence in brackets for members employed in private practice who are subject to the RICS' Rules.

Appendix II

Specimen clause for retainer letters/contracts of engagement

It is a condition of your agreement with the [firm/company/limited liability partnership] that (save where the [firm/company/limited liability partnership] instructs independent experts, consultants or other third parties on your behalf) the duties and responsibilities owed to you are solely and exclusively those of the [firm/company /limited liability partnership] and that no employee of the [firm/company /limited liability partnership] shall owe you any personal duty of care or be liable to you for any loss or damage howsoever arising as a consequence of the acts or omissions of such employee (including negligent acts or omissions) save and to the extent that such loss or damage is caused by the fraud, dishonesty, wilful misconduct or unauthorised conduct on the part of such employee.

This term is intended to be enforceable by and for the benefit of the employees of the [firm/company /limited liability partnership].

Appendix III

Draft specimen letter of indemnity to be used for charities (incorporated or otherwise)

This letter must be typed out on the letter headed notepaper of the charity granting the indemnity.

[Name and address of member]
[Date]

Dear [ ]

Indemnity and Exclusion of Liability

In consideration of your agreeing to [continue to] provide professional advice and services to [insert name of charity] (also referred to hereafter as "we") [without charge, save for reasonable expenses actually incurred,] we undertake that:

1. We shall not claim against you any indemnity, contribution or damages in respect of any loss or damage or liability, whatsoever and howsoever arising, which we may incur by reason of any alleged act or omission (including, without limitation, any negligent act or omission, breach of duty or breach of trust) by you in connection with or arising out of your provision of professional advice or services to us, save to the extent that:

such loss or damage or liability is caused by your fraud, dishonesty or wilful misconduct; or

your liability cannot be lawfully excluded;

2. In the event of any claim being made against you, whatsoever or howsoever arising, in respect of any alleged act or omission (including, without limitation, any negligent act or omission, breach of duty or breach of trust) by you in connection with or arising out of your provision of professional advice or services to us, we shall indemnify you against all sums which you may be legally liable to pay to the claimant, whether by way of damages, interest or costs, save to the extent that:

   such liability is caused by your fraud, dishonesty or wilful misconduct; or
   your liability cannot be lawfully excluded.

3. We shall also indemnify you in respect of reasonable costs and expenses incurred in the defence of any such claim, provided that any such costs shall have been incurred with our prior written consent (such consent not to be unreasonably withheld). You will fully co-operate with us in the investigation, defence and settlement of any claim or potential claim and such co-operation will be given without charge, save that we shall pay all reasonable expenses actually incurred.

Yours sincerely

TRUSTEE …….

[Print Name] for and on behalf of [Insert name of Charity]

Affix seal if *the* charity is incorporated

TRUSTEE …….

[Print Name] for and on behalf of [Insert name of Charity]

We confirm that we are duly authorised by and on behalf of all trustees of [insert name of charity] to provide this indemnity on the basis of authority provided to us by the trustees in accordance with [Section 60(4) or Section 82 Charities Act 1993] [Section 44 Companies Act 2006] pursuant to the attached resolution of the meeting of the trustees on [insert date and attach copy resolution].

You have explained that you will not meet any liabilities that may arise from the professional advice and services you are providing us [as the work is being done free of charge]. We fully understand that the effect of us signing this letter of indemnity is that we will have no recourse against you if you are negligent or in breach of duty or trust.

Notes to Members

1. The draft specimen wording set out above is for outline guidance and illustrative purposes only and must not be relied upon as constituting legal advice. Members should obtain independent legal advice on any proposed indemnity/exclusion having regard to the circumstances of the relevant agreement and the requirement of reasonableness under the Unfair Contract Terms Act 1977 ("UCTA") and, in the case of consumers, the Consumer Rights Act 2015 (CRA).

2. The draft specimen wording is intended to encompass work undertaken by members in private practice, the public sector or commerce for charities, free of charge.

3. The specimen indemnity/exclusion set out above incorporates two elements: an exclusion of liability to the client, whether for damages or an indemnity or contribution in respect of liability to third parties; and an indemnity against liability to third parties, including the costs of defending proceedings.

4. In England and Wales, the execution of documents by a charity is governed by s60 of the Charities Act 1993 for incorporated charities and s80 of the Charities Act for unincorporated charities. If the charity is incorporated under the Companies Act, execution of documents by the charity is governed by s44 of the Companies Act 2006. These Acts set out various methods of execution.

   One method that suffices for both incorporated (under the Charities Act and Companies Act) and unincorporated (under the Charities Act) charities is for execution to take place by at least two trustees who have been authorised, by a specific resolution of all the charity trustees, to execute documents in the name and on behalf of the body of trustees. This resolution should be produced and annexed to the letter of indemnity. Both the resolution and the letter of indemnity should refer to authority having been granted to the two or more trustees pursuant to either s60(4) (in the case of incorporated charities) or s82 (in the case of unincorporated charities) of the Charities Act 1993 or s44 of the Companies Act 2006.

   The resolution can also refer to the trustees' consideration of the matters relevant to UCTA and CRA, which are set out in note 5 below.

5. Any exclusion of liability must satisfy the "reasonableness" test under UCTA and CRA. In order to persuade the court that the exclusion is not unreasonable and therefore unenforceable, the member should be able to evidence:
   - that it has been fully explained to the client that the member is not in a position to (or prepared to) meet any potential liability out of his own resources, particularly in circumstances where work is being undertaken free of charge; and

   - that at the time of signing the letter of indemnity, the client has agreed to proceed in the full knowledge that the effect of signing the letter of indemnity is that they will have no recourse against the member if he is negligent or in breach of duty or trust.

   The client should also be given the opportunity to obtain independent legal advice before signing the letter of indemnity.

END