

Standards Committee

16 November 2006

Indemnities for Members and Officers



Report of Lesley Davies, Acting Director of Corporate Services

Purpose of Report

1. To seek endorsement of the Cabinet's decision to grant indemnities to Members and Officers of the Authority.

Background

2. At its meeting on 28 September the Cabinet considered the attached report (Appendix 1) which sets out the range of powers now available to the Council to grant indemnities to cover potential liability of Members and Officers in a wide range of circumstances following the recent introduction for the Local Government (Indemnities of Members and Officers) Order 2004.

The Cabinet adopted the recommendation contained in the report to grant an indemnity to Members and Officers of the Authority in the specified terms and requested the County Treasurer to secure insurance to cover the Authority's liability under this indemnity, in so far that he is of the opinion that such insurance would be financially prudent.

Recommendation

3. In view of the fact that all Members and Officers of the Authority potentially have a personal interest in this subject area, the Standards Committee is asked to endorse the Cabinet's decision.

Contact: Allison Mallabar Tel: (0191) 3835580

Cabinet

28 September 2006



Indemnities for Members and Officers

Report of Lesley Davies Acting Director of Corporate Services

1.0 Purpose of the Report

- 1.1 To set out the range of powers now available to the Council to grant indemnities to cover potential liability of Members and officers in a wide range of circumstances.
- 1.2 To recommend the terms of indemnities to be adopted by the Council and the taking out of appropriate insurance cover.

2.0 Background

- 2.1 Members and officers of local authorities can incur personal civil and criminal liability as a result of their actions, both within the authority and as a result of their actions carried out by participation in a wide range of outside bodies. Members and officers enjoy statutory immunity from civil liability where they act within the powers of the authority in good faith and without negligence. However, this immunity does not apply where they act beyond the powers of the authority or act in bad faith or negligently, and it does not protect them from criminal liability, for example for fraud or for corporate killing where they exercise managerial responsibilities.
- 2.2 Local authorities have had a broad power to give officers an indemnity against liabilities as part of their terms and conditions of employment. This enables the authority to take out insurance centrally to cover this risk, rather than paying for each officer to take out his/her own insurance. Members, however, have no contract of employment, and the ability of the authority to grant such an indemnity to Members has so far been extremely limited.
- 2.3 The Government has now introduced the Local Government (Indemnities for Members and Officers) Order 2004 that gives a specific power for authorities to grant indemnities, and/or to take out insurance, to cover the potential liability of Members and officers in a wide range of circumstances. This report sets out the range of powers now available to the authority and recommends the terms of such indemnities and insurance.

3.0 Indemnities for Members

Working within the authority

The following are examples of where a Member could incur personal liability:

Where a member purports to take a decision that is actually outside the powers of authority, or outside the powers of the particular Member.

- 3.1 The 2004 Order now allows the authority to provide an indemnity in so far as the Member reasonably believed that the action was within the powers of the authority, or within the powers of the particular members.

Where a Member acts in bad faith, fraudulently, out of malice, for an ulterior purpose, or as a deliberate or reckless act of wrongdoing.

- 3.2 It is unlikely to be considered to be in the public interest to provide an indemnity to a Member who has actually acted in bad faith, fraudulently, out of malice, for an ulterior purpose, or as a deliberate or reckless act of wrongdoing. However, it is in the public interest to ensure that Members are not discouraged from taking necessary decisions by the fear that they may be put to considerable legal expense in justifying decisions they have taken in good faith. Accordingly it may be considered appropriate to provide an indemnity for the costs of legal representation in these circumstances, provided that the Member is ultimately cleared of the allegation. A requirement for repayment if the allegation is eventually substantiated would also be appropriate.

Where a Member acts in a manner, which constitutes a criminal offence.

- 3.3 Again, it is unlikely to be considered to be in the public interest to provide an indemnity to a Member who has acted in a manner which constitutes a criminal offence. However, it may well be in the public interest to ensure that a Member's case in respect of any such allegation (where it arises in the context of his or her role as a Member) is properly presented, again to ensure that Members are not deterred from acting by the potential legal cost of justifying their actions taken in good faith. Accordingly the Council may consider it appropriate to provide an indemnity for the costs of legal representation in defending a prosecution, provided that the Member is ultimately cleared of the allegation of criminal conduct, and provided the Member undertakes to repay the costs should s/he be convicted of a criminal offence and that conviction is not overturned on appeal.

- 3.4 As an allied issue, a single action or decision may not only constitute a criminal action but may also give rise to civil liability. Therefore despite the limitation of the indemnity to the costs of legal representation in respect of any criminal liability the indemnity in respect of any civil liability arising from the same action or decision would cover both legal representation and civil liability.

Where the Member is sued for defamation.

- 3.5 The 2004 Order specifically includes a power to grant an indemnity to Members in respect of legal costs for defending a defamation action where it is alleged that the Member has defamed another person. It does not cover damages awarded against the Member.
- 3.6 Where a Member is acting in his/her capacity as a Member of a local authority and makes a statement s/he honestly believes to be true, s/he will be able to rely on the defence of “qualified privilege”, provided that s/he has not acted out of malice. As a result, successful defamation actions against Members of local authorities are very rare.
- 3.7 There is a public interest in ensuring full and open debate of matters of current interest to the authority, and this could be inhibited if Members felt constrained from honest debate by the prospect of the costs of having to defend a defamation action. Accordingly, the authority would be justified in providing an indemnity against the costs of defending defamation actions.
- 3.8 The 2004 Order *specifically excludes* indemnity in respect of the costs incurred by a member in *pursuing* a defamation action against a third party where the Member believes that s/he has been defamed by another person.

Working outside the authority

- 3.9 Members do not just work within the authority, but are frequently appointed to a wide range of other organisations (“outside bodies”), many of which support and advance the broad objectives of the authority. When they do work on outside bodies, Members are not always working “within the authority” and therefore would not necessarily enjoy the statutory immunity from personal liability, which they enjoy when they are acting as Members of the authority.
- 3.10 The 2004 Order provides that the authority may grant a Member an indemnity against liabilities incurred as Members of outside bodies only where the appointment of the Member to the body is at the request of, or with the approval of, the authority or for the purposes of the authority. There is no arguable public interest in the authority providing an indemnity in respect of a Member’s involvement in an organisation that the Member joins of his/her own volition

- 3.11 Accordingly, it is recommended that any indemnity should only extend to appointments made by the authority, or in consequence of a nomination by the authority, or where the authority has specifically approved the appointment as advancing the interests of the authority.

Scope for local authority indemnity

- 3.12 The 2004 Order applies the same restrictions on the power of the authority to provide indemnities for Members acting on outside bodies as they do for Members acting within the authority, namely that the indemnity –

- Cannot cover any criminal liability
- Cannot cover liability arising from fraud or deliberate wrongdoing or recklessness on part of the Member; and
- Cannot cover the costs of pursuing a defamation action.

3.13 However, unlike actions which are outside the authority's own powers, the authority's indemnity cannot cover liability for any action which is outside the powers of the outside body, even if the action was taken in the honest belief that it was within the outside body's powers.

Guidance Note for Members Serving on Outside Bodies

3.14 The County Council's existing guidance for members and of officers serving on outside bodies is currently being reviewed. It will be re-issued in the near future, taking in to account up to date advice and the effect of the recommendations of this report should they be approved.

Breach of the Code of Conduct for Members

3.15 The 2004 Order enables a local authority to grant an indemnity to its Members in respect of the cost of legal representation in "Part 3 Proceedings", which means in respect of any investigation, hearing or other proceedings for an alleged failure to comply with the Code of Conduct for Members. However, the Order provides that any such indemnity must be subject to a requirement for the member to reimburse the authority in the event that –

- There is a finding that the member has failed to comply with the Code of Conduct and that finding is not overturned on appeal, or
- The Member admits that he/she has failed to comply with the Code of Conduct.

3.16 The Council may consider that it is in the public interest to ensure that a Member's case is properly presented where an alleged breach of Code of Conduct is being considered by the Standards Board for England or the Standards Committee. It is suggested that the provision of an indemnity for this purpose is therefore appropriate.

4.0 Indemnities for Officers

Acting within the authority

4.1 Where a third party suffers loss as a result of an officer's actions or inactions in the course of their employment, the employer is vicariously liable for that loss, so that a person who has suffered loss may sue the officer and/or can sue the

authority, rather than just the officer. This is normally to the advantage of the claimant because of the authority's greater resources and insurance cover.

- 4.2 Most authorities (including the County Council) have as a matter of practice agreed to indemnify their officers against third party claims. This sort of indemnity usually only covers actions that are within an officer's employment, and not actions proved to be outside the powers of the authority. The 2004 order now provides that the authority may grant an indemnity in respect of actions that prove to be outside the powers of the authority, but only where the officer reasonably believed that the action was within the powers of the authority at the time when s/he took it.
- 4.3 It is suggested that the authority extend its current indemnity to cover officer liability incurred by inadvertently acting outside powers of the authority, and to cover the legal and other costs of defending a claim that s/he has exceeded the powers of the authority, provided that s/he has acted in good faith.
- 4.4 The 2004 order applies the same restrictions on the power of the authority to provide indemnities for officers as they do for members acting within the authority, namely that the indemnity –
- Cannot cover any criminal liability;
 - Cannot cover liability arising from fraud, recklessness or deliberate wrongdoing; and
 - Cannot cover the costs of *pursuing* a defamation action.

Action outside the authority

- 4.5 Officers also act outside the authority in a wide range of external organisations. Participation in outside bodies can assist in the discharge of the authority's functions and objectives.
- 4.6 It is suggested that the authority provide an indemnity extending appointments of officers to external bodies where the authority has approved the appointment as likely to advance the interests of the authority, either at the time of the original appointment or otherwise.

5.0 Insurance

- 5.1 Where the authority has a power to grant such an indemnity, it may also provide insurance, either in place of or in addition to the indemnity.

- 5.2 It is suggested that the County Treasurer be requested to secure such insurance to cover the authority's liability under this indemnity in so far as he is of the opinion that such insurance would be financially prudent.

6.0 Recommendations

- 6.1 It is recommended that the Council grant an indemnity to Members and to officers of the Authority by the terms set out in Appendix 2 to this report and instruct the County Treasurer to secure insurance to cover the authority's liability under this indemnity, in so far that he is of the opinion that such insurance would be financially prudent.

Contact: Colette Longbottom Tel: 0191 383 5643

Appendix 1: Implications

Finance

The provision of indemnities and insurance will have financial implications for the authority. The County Treasurer, if it is agreed that the indemnity outlined in appendix 2 should be adopted, will make arrangements as he considers appropriate to provide the level of indemnity and insurance that is necessary. Should the County Treasurer consider that formal approval of a scheme of insurance is necessary to meet the proposed indemnity a further report will be provided to the Cabinet.

Staffing

Not applicable.

Equality and Diversity

Not applicable.

Accommodation

Not applicable.

Crime and disorder

Not applicable.

Sustainability

Not applicable.

Human rights

Not applicable.

Localities and Rurality

Not applicable.

Young people

Not applicable.

Consultation

Not applicable.

Health

Not applicable.

Appendix 2

- 1.** The Authority will, subject to the exceptions set out below, indemnify each of its members and employees against any loss or damage suffered by the Member or officer arising from his/her action or failure to act in his/her capacity as a Member or officer of the authority.

The indemnity will not extend to loss or damage directly or indirectly caused by or arising from:

- 1.1** Any criminal offence, fraud or other deliberate wrongdoing or recklessness on the part of the Member or officer;
- 1.2** Any act or failure to act by the Member or employee otherwise than in his/her capacity as a Member or office of the authority, or
- 1.3** Failure by the Member to comply with the authority's Code of Conduct for Members.

- 2.** The authority will, subject to the exceptions set out below, indemnify each of its Members and officers against the reasonable costs which e/she may incur in securing appropriate legal advice and representation in respect of any civil or criminal proceedings or Part 3 proceedings to which he/she is subject.

- 2.1** "Criminal proceedings" includes an interview or investigation by the Police, and any proceedings before a criminal court, in the United Kingdom.

- 2.2** "Part 3 proceedings" means any investigation or hearing in respect of an alleged failure to comply with the authority's Code of Conduct for Members under Part 3 of the Local Government Act 2000.

- 2.3** This indemnity shall not extend to any advice or representation in respect of any claim or threatened claim in defamation to be brought by a Member or officer, but will extend to defending a claim for defamation.

- 2.4** Where any Member or office avails him/herself of this indemnity in respect of defending him/herself against any criminal proceedings or Part 3 proceedings, the indemnity is subject to a condition that if, in respect of the matter in relation to which the Member or officer has made use of this indemnity –

- 2.4.1** The Member or officer is convicted of a criminal offence in consequence of such proceedings, or

- 2.4.2** A Case Tribunal or Standards Committee determine that the Member has failed to comply with the Code of Conduct for Members and the conviction or determination is not overturned on appeal, the Member shall reimburse the authority for any sums expended by the authority pursuant to the indemnity.

- 2.5** Where the authority arrange insurance to cover its liability under this indemnity, the requirement to reimburse in Paragraph 2.4 shall apply as if references to the authority were references to the insurer.

For the purpose of these indemnities, a loss or damage shall be deemed to have arisen to the Member or officer “in his/her capacity as a Member or officer of the authority” where:

- 3.1** The act or failure to act was outside the powers of the authority, or outside the powers of the Member or officer, but the Member or officer reasonably believed that the act or failure to act was within the powers of the authority or within the powers of the Member or officer (as appropriate) at the time that he/she acted or failed to act, as the case may be;
- 3.2** The act or failure to act occurred not in the discharge of the functions of the Member or officer as a Member or officer of the authority but in their capacity as a Member or employee of another organisation, where the member or officer is, at the time of the action or failure to act, a Member or employee of that organisation either –
 - 3.2.1** In consequence of his/her appointment as such Member or officer of that organisation by the authority; or
 - 3.2.2** In consequence of his/her nomination for appointment as such Member or officer of that organisation by the authority; or
 - 3.2.3** Where the authority has specifically approved such appointment as such a Member or employee of that organisation for the purpose of these indemnities.
- 4.** The authority undertake not to sue (or join in action as co-defendant) an officer of the authority in respect of any negligent act or failure to act by the officer in his/her capacity as an officer of the authority, subject to the following exceptions:
 - 4.1** Any criminal offence, fraud or other deliberate wrongdoing or recklessness on the part of the officer: or
 - 4.2** Any act or failure to act by the officer otherwise than in his/her capacity as a Member or officer of the authority.
- 5.** These indemnities and undertaking will not apply if a Member or officer, without the express permission of the authority or of the appropriate officer of the authority, admits liability or negotiates or attempts to negotiate a settlement of any claim falling within the scope of the resolution.
- 6.** These indemnities and undertaking are without prejudice to the rights of the authority to take disciplinary action against an officer in respect of any act or failure to act.
- 7.** These indemnities and undertakings shall apply retrospectively to any act or failure to act which may have occurred before this date and shall continue to apply after the Member or officer has ceased to be a member or officer of the authority as well as during his/her Membership of or employment by the authority.