

CABINET – 4 JANUARY 2006

INDEMNITIES FOR MEMBERS AND OFFICERS

1. INTRODUCTION

- 1.1 This Council, along with many others, has historically accepted the principle that in certain circumstances it will indemnify members and officers who incur costs, legal expenses etc as a result of their duties. A copy of the Council's current policy is attached at Appendix 1 to this report. (It should be noted that paragraph (iii) is now redundant as District Audit surcharges no longer apply).
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- 1.2 Until now, there has been no specific legislation granting specific power to Councils to indemnify their members and officers. To justify any such expenditure, Councils have generally relied on section 111 of the Local Government Act 1972, which gives local authorities "power to do anything (whether or not involving ... expenditure....) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions". However, there has been some debate as to the extent to, and circumstances in, which section 111 gives Councils authority to grant indemnities to individual members and officers. Case law on the subject has not always been clear or helpful beyond its application to the facts of the particular case being determined in the Courts.
- 1.3 On 23 November 2004 the Local Authorities (Indemnities for Members and Officers) Order 2004 came into force. This gives Councils explicit powers to provide indemnities, under specific conditions laid down in the Regulations. However, the explanatory note to the Regulations states that: "These powers are in addition to any existing powers that such authorities may have (such as powers under section 111 of the Local Government Act 1972)".
- 1.4 The Council's existing policy on indemnities needs reviewing in the light of these new Regulations.

2. THE COUNCIL'S EXISTING INDEMNITY AND THE NEW REGULATIONS

- 2.1 In many ways, the new regulations are consistent with the Council's current indemnity policy. In some respects, the Council's present indemnity appears to give greater protection to officers and members than any policy for indemnities that may be based solely on the new Regulations. In other respects, the new regulations appear to give greater powers to provide indemnities than the Council's existing scheme. These differences are explained below. However, there seems to be no reason why any Council should not rely on both the new regulations, and on section 111, in drawing up a scheme for indemnities if it thinks this is the best way of providing an appropriate level of protection.

2.2 Drawbacks to the Council's current scheme

- 2.2.1 There is considerable judicial doubt that indemnities provided under section 111 (ie the Council's current basis for providing indemnities) will cover members and officers sitting in a decision making capacity on outside bodies, albeit that they are still representing the Council's interests (see 2.3.1 below).
- 2.2.2 Following some high profile cases, it is now established that the Council's current indemnity policy would not cover acts that are found to be "ultra vires" the Council (see 2.3.2 below).
- 2.2.3 Although the wording of the current provision does not specifically prevent the Council from indemnifying negligent acts (or even seriously careless ones), providing the person concerned acted in good faith and with an honest belief, there is some academic debate over whether indemnities provided under section 111 can be provided where the officer or member has acted negligently (or recklessly) (see 2.3.3. below).

2.3 Ways in which the regulations allow for wider indemnities than the Council's current provision.

- 2.3.1 Indemnities are now permissible under the regulations for any acts or failures by an officer or member which arises from powers conferred or duties placed on him/her, whether or not when exercising them he/she does so in his/her capacity as a member or officer of the authority, providing the function is undertaken at the request of, or with the approval of, the Council. This means that acts or omissions while sitting as a member of an outside body to which the person has been formally appointed by the Council can be covered.
- 2.3.2 Indemnities can now definitely be provided for acts which were ultra vires the Council, providing the member or officer reasonably believed the act was within the Council's powers, and that the contents of any document issued or statement made were true.
- 2.3.3 Indemnities are also definitely possible under the new regulations for negligent acts, but not for criminal acts, fraud, other deliberate wrongdoing or recklessness. The regulations do however allow for indemnities for civil liabilities arising as a consequence of a criminal offence.

2.4 Ways in which indemnities under the new regulations are narrower than the Council's current provision.

- 2.4.1 The provision in the new regulations preventing indemnities for criminal acts applies to all criminal acts, including health and safety related ones. Indemnities can be provided to pay for the cost of defending criminal prosecution, but must be repaid if the member or officer is found guilty. The Council's current scheme

allows for indemnification of losses arising from offences under the Health and Safety at Work Act and related regulations, without the requirement to repay defence costs if found guilty. If the Council wishes to continue to indemnify officers on these terms, it will need to continue to rely on section 111. This is covered further in paragraph 2.8 below.

2.5 Indemnities permitted for the first time under the new regulations

2.5.1 For the first time, indemnities may be provided to members in proceedings in respect of allegations of breaches of the national Code of Conduct. This is a new provision and the Council will need to decide whether indemnities to members should be provided in this respect. It is a condition of the regulations that (as with indemnities for the defence of criminal proceedings) any indemnity can only be given on the basis that if it is found that the member failed to comply with the Code of Conduct, the member must reimburse the Council for all monies paid out under the indemnity.

2.6 Other issues

2.6.1 The new regulations do not permit indemnities to cover the expense of taking defamation proceedings (though they do permit indemnities to cover the cost of defending such proceedings). No specific mention of indemnities for pursuing defamation proceedings (by officers) against individuals is made in the Council's existing indemnity scheme. However, the legitimacy of providing indemnities to officers under section 111 for this purpose has recently been established in law. However, it is not proposed to include this in any general scheme for indemnities the Council may approve, as specific requests will be brought before members at the relevant time should the need arise.

2.6.2 The regulations make it clear that "member" includes the Independent and Parish Council representatives on the Standards Committee, so any power to grant indemnities to members should also encompass them.

2.7 The terms of any indemnity given under the new Regulations may be such as the Council shall agree (subject to the requirements to repay indemnities for the defence of criminal or Code of Conduct allegations if found guilty).

2.8 To sum up, while the new Regulations do clarify the position with regard to indemnities in many ways, there are two areas in which they do not apply, so that the Council would need to rely on the old powers in section 111 if it wished to indemnify members and officers. These are:

- (a) taking defamation proceedings (as opposed to defending them), and
- (b) losses arising from proven criminal acts – specifically the question of the Council unconditionally funding the defence costs of the accused. This area is of particular concern given that the Crown Prosecution Service is tightening up on strict liability offences under health and safety and so called "corporate crime". The new offence of corporate killing is also relevant. The Government is on record as having said that in public policy terms it is unacceptable to indemnify

officers in these circumstances and to do so would “undermine the deterrent effect of criminal sanctions”. Another area in which officers may find themselves liable to prosecution for “work-related” actions is offences under the Data Protection Act. It should be noted that, particularly in light of the Government comment quoted above, if an indemnity were to be agreed in these circumstances arguments could arise about whether this was a proper use of public funds.

3. INSURANCE

3.1 There is now express provision in the regulations for Councils to provide indemnities by securing insurance cover for the situations included in the regulations.

3.2 At present, the Council’s Officials Indemnity insurance generally covers acts or omissions committed by officers or members in the course of their duties. However, there are numerous exemptions. Examples are:

- (a) acts which are ultra vires the Council
- (b) acts by a member where the action was taken independently and was not based on erroneous advice from an officer (except for decisions made by executive members, which are covered)
- (c) acts performed other than in accordance with the Council’s normal business (this would be the case in respect of service on some outside bodies)
- (d) contractual failure by the Council.

3.3 The Council’s current policy therefore indemnifies officers and members beyond the scope of its insurance policy, so the Council has to bear out of its own funds the cost of indemnifying a member or officer for liabilities not covered by insurance.

4. THE SUGGESTED WAY AHEAD

4.1 There are some new provisions arising out of the new Regulations which the Council needs to address and these are specifically listed below.

4.2 Subject to members addressing the questions set out at section 5 below, it is proposed that the Council grants indemnities to members and officers in the form allowed by the new Regulations, and also, as far as the law permits, continues to indemnify former and existing officers in that area which is covered by the Council’s existing indemnity but is not included in the new Regulations – ie for loss or damage arising from Health and Safety at Work Act offences, specifically the cost of defending a prosecution without requiring the officer to repay the cost of his or her defence if found guilty. It is also suggested that this latter cover should extend to offences under Data Protection legislation. (It is necessary to rely on section 111 of the Local Government Act 1972 to justify an indemnity on these terms).

4.3 A proposed form of indemnity is attached as Appendix 2 to this report.

5. SPECIFIC ISSUES REQUIRING CLARIFICATION BY MEMBERS

5.1 The following questions need to be decided:

5.1.1 Should indemnities be provided to members for the defence of proceedings under the national Code of Conduct? It should be noted that such proceedings could take a considerable amount of time and defence costs for members could be significant. It should however also be noted that if a finding is made that the member did breach the Code, he or she would have to repay the amount of the indemnity. (There is no provision in the Regulations for permitting indemnities for the defence of a complaint that a local Code or Protocol has been broken – nor would such an indemnity appear to be permissible under section 111).

5.1.2 Should the Council continue to approve a provision indemnifying officers for the cost of defending criminal proceedings relating to Health and Safety at Work, Data Protection, and related provisions, without requiring them to repay the cost of their defence if found guilty? Although this is not permitted under the new Regulations, (which provide that defence costs have to be repaid on a guilty finding), and the points set out in paragraph 2.8 above need to be borne in mind, it would appear that it may still be possible to provide an indemnity on these terms under section 111. Further, provisions in the Council's current insurance policy may indemnify legal costs and expenses incurred for certain health and safety offences, subject to the insurance company's consent.

6. FINANCIAL IMPLICATIONS

6.1 The financial implications arising from the proposed amendments to the Council's indemnity policy do not differ from the current situation. That is, that there would be a cost to the Council if and when it was obliged to indemnify a member or officer under the terms of its indemnity policy, and reimbursement could not be obtained through existing insurance cover (see section 3 of this report). However, such occasions are likely to be very rare.

7. ENVIRONMENTAL AND CRIME AND DISORDER IMPLICATIONS

7.1 None.

8. EMPLOYEE SIDE COMMENTS

8.1 To follow

9. CONCLUSION

- 9.1 New Regulations help to clarify the terms on which indemnities can be granted to members and officers, and include some specific new provisions, but they still leave some areas of doubt. It is proposed that the Council adopts a scheme based on the new Regulations, but including wider powers to indemnify where these are currently part of the Council's policy, and appear still to be permissible under pre-existing legislation. Specifically, the wider powers could cover indemnities for the cost of defending proceedings where officers are accused of health and safety and related offences, without requiring the officer to refund those costs if found guilty.

10. RECOMMENDATION

- 10.1 That, subject to consideration of the issues set out in section 5 of this report, an indemnity policy as set out in Appendix 2 to this report be approved; and
- 10.2 That the Chief Executive, in consultation with the Finance and Support Portfolio Holder, Director of Resources and Head of Legal and Democratic Services, be delegated power to grant indemnities within the terms of the approved policy.

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Background papers:

Published material only

INDEMNITY OF MEMBERS AND OFFICERS

The Council will indemnify all members and officers of the Council against the whole or part of any damages, costs or legal expenses which any such officer may have been ordered to pay, or may have incurred arising from duties performed by virtue of their being a member of, or being employed by, the Council, or by virtue of their being the Council's nominated representative in whatever capacity of any incorporated or unincorporated body, if such member or officer acted in good faith and honestly believed that the act complained of was within the Council's and his or her power and that his or her duty required or entitled him or her to do it, regardless of whether in fact the act was within the power of the Council and/or him or her.

This indemnity shall not extend to any loss or damage directly or indirectly arising from –

- (i) Fraud, dishonesty or criminal offence on the part of the member or officer except where the criminal offence is one under the Health and Safety at Work Act 1974 and related regulations.
- (ii) Any neglect, error or omission by the member or officer otherwise than in the course of his or her duties.
- (iii) Liability in respect of surcharges made by the District Auditor.
- (iv) The indemnity will not automatically apply if the member or officer without the written authority of the Chief Executive admits liability or negotiates or attempts to negotiate a settlement of any claim falling within the scope of this resolution.
- (v) Any motor vehicle claims in which an employee using his or her own private vehicle on the Council's business has been involved in an accident.

In furtherance of this indemnity the Council undertakes not to sue (or to join any others in an action as a co-defendant) the member or officer in respect of any matter falling within the terms of the indemnity identified above.

SUGGESTED FORM OF INDEMNITY

1. INDEMNITY PROVIDED UNDER THE LOCAL AUTHORITIES (INDEMNITIES FOR MEMBERS AND OFFICERS) ORDER 2004

(1) In this Indemnity:-

“employees” includes any person employed by the Council and any other person engaged as or appointed to be an officer of the Council.

“members” includes the co-opted members of the Standards Committee or any Sub Committee of the Standards Committee.

(2) The Council hereby indemnifies its employees and members, whether appointed or elected at the date of this resolution or at any time thereafter, against the damages costs or expenses set out in paragraph (3) below, subject to the exceptions set out in paragraph (4) below, and on the terms set out in paragraph (5) below. It will not itself make any claim against them in relation to any damages costs or expenses for which they are hereby indemnified.

Notwithstanding any limitation on the powers of the Council, the indemnity is effective to the extent that the employee or member in question –

- (a) believed that the action, or failure to act, in question was within the powers of the Council; or
- (b) where the action or failure comprises the issuing or authorisation of any document containing any statement as to the powers of the Council, or any statement that certain steps have been taken or requirements fulfilled, believed that the contents of that statement were true,

and it was reasonable for that employee or member to hold that belief at the time when he or she acted or failed to act.

The indemnity is also effective in relation to an act or omission which is subsequently found to be beyond the powers of the employee or member in question but only to the extent that he or she reasonably believed that the act or omission in question was within his or her powers at the time at which he or she acted.

(3) The costs, claims and expenses are those which arise from, or in connection with, any action of, or failure to act by, the employee or member in question, which:-

- (a) is or has been authorised by the Council; or

- (b) forms part of, or arises from, any powers conferred, or duties placed, upon that employee or member, as a consequence of any function being exercised by that employee or member (whether or not when exercising that function he or she does so in his or her capacity as an employee or member of the Council) –
 - (i) at the request of, or with the approval of, the Council; or
 - (ii) for the purposes of the Council.
- (4) The exceptions are that:-
- (a) No indemnity is given in relation to any action by, or failure to act by, any employee or member which –
 - (i) constitutes a criminal offence; or
 - (ii) is the result of fraud, or other deliberate wrongdoing or recklessness on the part of that employee or member
 - (b) Notwithstanding paragraph (4)(a)(i), the indemnity does relate to –
 - (i) (subject to paragraph 5) the defence of any criminal proceedings brought against the employee or member; and
 - (ii) any civil liability arising as a consequence of any action or failure to act which also constitutes a criminal offence.
 - (c) No indemnity is given in relation to the making by the employee or member indemnified of any claim in relation to an alleged defamation of that employee or member but the indemnity does relate to the defence by that employee or member of any allegation of defamation made against him or her.
- (5) The terms of the indemnity are as follows:-
- (a) Where the indemnity has effect in relation to the defence of any criminal proceedings; or any Part 3 proceedings (meaning any investigation, report, reference, adjudication or any other proceeding pursuant to Part 3 of the Local Government Act 2000 (model Code of Conduct)) then
 - (i) in the case of criminal proceedings, if the employee or member in question is convicted of a criminal offence and that conviction is not overturned following any appeal, and
 - (ii) in the case of Part 3 proceedings –
 - (1) if a finding is made in those proceedings that the member in question has failed to comply with the Code of Conduct and that finding is not overturned following any appeal, or

- (2) if the member admits that he or she has failed to comply with the Code of Conduct

that employee or member shall reimburse the Council for any sums expended by it in relation to those proceedings pursuant to the indemnity, and those sums shall be recoverable by the Council as a civil debt.

- (b) The indemnity is subject to the employee or member notifying the Chief Executive immediately of any claim being made or intimated against him or her, and of any circumstances arising which may give rise to a claim
- (c) The indemnity will only extend to cover actual loss and expense incurred and evidenced by the employee or member to the satisfaction of the Director of Resources in consultation with the Head of Legal and Democratic Services
- (d) The indemnity will not automatically apply if the employee or member without the written authority of the Chief Executive and insurers, as appropriate, admits liability or negotiates or attempts to negotiate a settlement of any claim falling within the scope of this indemnity
- (e) The indemnity shall not extend to any loss or damage directly or indirectly arising from any motor vehicle claims in which an employee using his or her own private vehicle on the Council's business has been involved in an accident
- (f) The Council or its insurers will be entitled to take over and conduct in the name of the employee or member the defence of any proceedings brought against the employee or member

2. INDEMNITIES PROVIDED UNDER POWERS IN SECTION 111 OF THE LOCAL GOVERNMENT ACT 1972

Where an indemnity cannot be granted under the terms of section 1 above (indemnity provided under the Local Authorities (Indemnities for Members and Officers) Order 2004), the Council will indemnify all officers and members of the Council against the whole or part of any damages costs or legal expenses which any such officer or member may have been ordered to pay, or may have incurred arising from duties performed by virtue of their being a member of, or being employed by, the Council, or by virtue of their being the Council's nominated representative in whatever capacity of any incorporated or unincorporated body, where:

- (a) the member or officer acted in good faith and
- (b) where such damages, costs or expenses arise from a criminal offence under:
 - (i) the Health and Safety at Work Act 1974 and related regulations; or
 - (ii) the Data Protection Acts 1984 and 1998 and related regulations.

The provisions of paragraph (5) (b) to (f) of section 1 above apply in respect of indemnities provided under section 111 of the Local Government Act 1972.