

MEMBER AND OFFICER INDEMNITY

**JOINT REPORT OF THE DIRECTOR OF FINANCE AND THE
DIRECTOR OF LAW AND PROPERTY**

1. PURPOSE

- 1.1. To consider whether officer and member indemnities should be provided under the Local Authorities (Indemnities for Members and Officers) Order 2004.

2. BACKGROUND

- 2.1. Until recently there has been great uncertainty about the legal ability of a local authority to indemnify members or officers particularly with regard to any legal liability that arises from their acts or omissions whilst sitting on outside organisations.
- 2.2. In order to address this problem the Local Authorities (Indemnities for Members and Officers) Order 2004 was introduced in November 2004.
- 2.3. The Order enables a local authority to provide indemnities for their members and officers in relation to any act or omission by the person in question which:-
- a) results from actions or activities with outside organisations authorised by the Council, or
 - b) is connected with the exercise of a function undertaken at the request of, with the approval of or for the purposes of the Council. This would permit an indemnity, for example, to cover a case where the member or officer acts as a director of a company at the request of the Council, and therefore, is acting in their capacity as a director.
- 2.4. There are a number of restrictions on the grant of indemnities as follows: -
- **Criminal Proceedings**
No indemnity may be provided in relation to any action or omission which constitutes a criminal offence or is the result of fraud, or other deliberate wrongdoing or recklessness on the part of the member or officer. However, an indemnity may be provided in relation to the defence of any criminal proceedings brought against the officer or member, but, if there is a conviction, the member or officer must reimburse any sums paid under the indemnity.
 - **Civil Liability**
An indemnity may be provided in relation to any civil liability arising as a consequence of any action or failure to act which also constitutes a criminal offence.

- **Defamation**
A member or officer who wishes to bring a claim of defamation cannot be indemnified but an indemnity may be provided in relation to the defence by a member or officer of any allegation of defamation made against them.
- **Alleged Breaches of Members' Code of Conduct**
An indemnity may be given to a member who is subject to any investigation or proceedings for an alleged breach of the Members' Code of Conduct. However, if a finding is made in those proceedings that the member has failed to comply with the Members' Code of Conduct or if the member admits that they have failed to comply with the code of conduct, the member must reimburse any sums paid under the indemnity.

2.5. Matters that Exceed the Powers of the Council or Member or Officer

2.5.1 Despite any limitation on the powers of the Council which grants an indemnity, the Council may provide an indemnity, to the extent that the member or officer in question: -

- believed that the action, or failure to act, in question was within the powers of the Council, or
- where that 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 member or officer to hold the belief at that time when they acted or failed to act.

2.5.2 In addition, an indemnity may be given in relation to any act or omission which is later found to be beyond the powers of the member or officer but only to the extent that the member or officer reasonably believed that the act or omission was within their powers at the time at which they acted.

2.6. Comment

2.6.1 Although the 2004 Order is welcome, there is still considerable room for doubt on the legality and enforceability of an indemnity. Ultimately these limitations will have to be tested in the courts but it is possible that a member or officer in particular circumstances may find that an indemnity is worthless.

2.7. Insurance

2.7.1 The Council's current liability insurance cover, arranged via Zurich Municipal can provide a personal indemnity to individual members and officers whilst undertaking their professional duties on behalf of the Council and whilst acting within the scope of their authority.

2.7.2 Where a non-statutory service is being offered and an external fee is being charged, a declaration must be submitted to the Risk Management and Insurance Section to enable specific Professional Negligence cover to be arranged for that service.

2.7.3 The insurance cover provided by Zurich Municipal, however, is restricted and only covers: -

“Activities of employees and members approved by the insured in connection with outside organisations but only where the insured is legally entitled to: -

- (a) approve such activities; and
- (b) indemnify such employees and members in respect of such activities”.

2.7.4 The cover specifically excludes indemnity to officers or members as a result of their own fraud, dishonesty or criminal act.

2.7.5 The libel and slander cover does provide for extending an indemnity to members provided that the member is not entitled to an indemnity from any other source. However, the cover is restricted to activities where the Council has the legal power to approve the activity and members have to pay 10% of all sums which the insurer may be called upon to pay for the claim.

2.8. Comment

2.8.1 It is apparent, therefore, that our insurance cover will not extend to all of the circumstances that could be covered by an indemnity under the 2004 Order particularly with regard to functions in connection with outside organisations.

2.8.2 For example, if an officer or member is acting as a director of a company, even though they may have been appointed to the Board by the Council, they will not be covered by the insurance. Accordingly, if a decision is taken to offer a wider indemnity to cover such liabilities, this will have to be funded by the Council.

2.8.3 Whilst it is difficult to measure the financial extent of such a risk, it is true to say that the Council does not have a history of claims against members or officers acting beyond their powers.

2.8.4 In order to limit potential risk, a central register will be maintained of all appointments to outside organisations. Before making or recommending such appointments, Directors will be required to consider whether there is any current need or justification for one or more representatives of the Council to serve on the organisation in question. In addition, the external organisations concerned will be asked to undertake regular risk assessments.

2.9. Form of Indemnity

- 2.9.1 If the Cabinet is minded to provide a broad indemnity for members and officers, a draft is attached at Appendix 1.

3. PROPOSAL

- 3.1. It is proposed that the form of indemnity set out in Appendix 1 be approved, that the relevant Directors consider whether there is any need or justification for an appointment to an outside organisation before any appointment is made or recommended; and that the external organisations concerned be requested to undertake regular risk assessments.

4. FINANCE

- 4.1. Provision has been made in the approved budget for the cost of the insurance cover referred to in Section 2.7.
- 4.2. The cost of providing additional indemnity would be a direct charge on the Council's General Fund. As paragraph 2.8.3 says, it is difficult to assess the likely costs, but depending on specific circumstances, these could be very significant.
- 4.3. In order to mitigate claims against the Council, the external organisations concerned should be asked to undertake regular risk assessments.

5. LAW

- 5.1. The power to provide indemnities to members and officers is contained in the Local Authorities (Indemnities for Members and Officers) Order 2004.

6. EQUAL OPPORTUNITIES

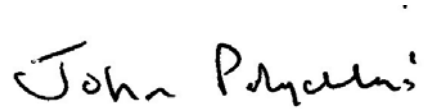
- 6.1. This report complies fully with the Council's policies on equal opportunities.

7. RECOMMENDATION

- 7.1. It is recommended that the form of indemnity set out in Appendix 1 be approved, that the relevant Directors consider whether there is any need or justification for an appointment to an outside organisation before any appointment is made or recommended; and that the external organisations concerned be requested to undertake regular risk assessments.



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MIKE S WILLIAMS
DIRECTOR OF FINANCE



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JOHN POLYCHRONAKIS
DIRECTOR OF LAW AND PROPERTY

BACKGROUND PAPERS

1. Report to Corporate Board on 3rd May 2005.

DRAFT RESOLUTION FOR FORM OF INDEMNITY

“(1) This resolution shall take effect from the date on which it is passed and in substitution for any previous indemnity resolution.

In this resolution:-

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

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

- (a) believed that the action, or failure to act, in question was within the powers of the Council, or
- (b) where that 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 elected member to hold that belief at the time when they acted or failed to act.

The indemnity is also effective in relation to any act or omission which is subsequently found to be beyond the powers of the employee or elected member in question, but only to the extent that he or she reasonably believed that the act or omission in question was within their 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 elected member in question, which:-

- (a) results from actions or activities with outside organisations authorised by the Council; or
- (b) forms part of, or arises from, any powers conferred, or duties placed, upon that employee or elected member, as a consequence of any function being exercised by that employee or elected member (whether

or not when exercising that function he or she does so in their 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 elected 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 elected 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 elected 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 elected member or officer indemnified of any claim in relation to an alleged defamation of that elected member or officer, but the indemnity does relate to the defence by that employee or elected member of any allegation of defamation made against them.

(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) then

- (i) in the case of criminal proceedings, if the employee or elected member or officer 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 elected member admits that he has failed to comply with the Code of Conduct,

the employee or elected 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 will only extend to cover actual loss and expense incurred and evidenced by the employee or member to the satisfaction of the Director of Finance.
- (c) The indemnity will not cover any loss or expense in respect of which the employee or elected member can obtain reimbursement from any other source, including any policy of insurance whether taken out by the Council or the employee or elected member by any other person.