

MAIDSTONE BOROUGH COUNCIL

**REPORT OF HEAD OF LEGAL SERVICES AND
CHIEF FINANCE OFFICER**

INDEMNITIES FOR MEMBERS AND OFFICERS

STANDARDS COMMITTEE

22 MAY 2009

1 Introduction

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 on behalf of 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. But this immunity does not apply where they go beyond the powers of the authority or act in bad faith or negligently, or where they are acting on outside bodies to which they may have been appointed by the authority, and it does not protect them from criminal liability, for example for fraud or for corporate killing where they exercise managerial responsibilities.

Local authorities have had a broad power to give officers an indemnity against such liability 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. However, members have no such contract of employment, and the ability of the authority to grant such an indemnity to members has so far rested on a single court judgment which only covers the instance of an authority agreeing to underwrite the member's legal costs in being represented before the District Auditor. It has been recognised that the extent of local authorities' existing powers to grant such indemnities needed clarification and that the potential liability of members and officers, particularly when acting on outside bodies at the request of the authority, can act as a serious deterrent to such participation.

The Government has introduced regulations which give 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. It is up to each authority to decide whether to grant such indemnities, or take out such insurance, and to decide the extent of such indemnities and insurance. This report sets out the range of powers available to the authority and recommends the terms of such indemnities and insurance.

2 Indemnities for Members

2.1 Working within the authority

As set out above, members enjoy statutory immunity from civil liability where they act within the powers of the authority, in good faith and without negligence. This immunity may also cover the case where a member acts within the overall powers of the authority, but in a situation where the particular power rests with some other part of the authority (for example where an Executive Member

purports to take a decision which can only be taken by full Council), provided that he/she does so in the honest belief that he/she had the power to take that decision.

The problem areas where a member could incur personal liability are therefore:

2.1.1 Where a member purports to take a decision which is actually outside the powers of the authority, or outside the powers of the particular member

The regulations allow the authority to provide such an indemnity in so far as the member believed that the action was within the powers of the authority, or reasonably believed that the action was within the powers of the particular member.

Local Government Law is very complex, and whilst all members must exercise caution to ensure that they are acting within the authority's powers, or within the individual member's powers, no member can be expected to understand exactly where those limits exist. I would suggest that there is a public interest in encouraging members to be proactive and to take prompt decisions when required. Accordingly, I would recommend that the authority provide an indemnity for any liability which a member may incur by inadvertently acting outside powers of the authority or outside the powers of the individual member, and in respect of any legal and other costs in defending a claim that he/she has exceeded the powers of the authority, provided that he/she has acted in good faith, i.e. in the honest belief that the action was within the authority's powers or the individual member's powers and having made due enquiry where he/she was in any doubt.

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

It is hard to see that there is a public interest in providing 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, the fact that the District Auditor, a statutory regulator or a third party alleges that, or questions whether a member has, or may have, acted in such a manner does not necessarily mean that the member concerned has actually acted in such a manner. There is a public interest in ensuring that members are not put off taking necessary decisions by the fear that they may be put to considerable legal expense in justifying the decisions which they have taken in good faith. Accordingly the authority would appear to be justified in providing an indemnity for such costs of representation, provided that the member is ultimately cleared of the allegation (i.e. with a requirement for repayment if the allegation is eventually substantiated).

2.1.3 Where a member acts in a manner which constitutes a criminal offence

Again, it is hard to see that there is a public interest in providing an indemnity to a member who has acted in a manner which constitutes a criminal offence. However, there may well be a public interest in ensuring that the member's case in respect of any such allegation is properly presented, to ensure that members are not deterred from acting by the potential legal cost of justifying their actions taken in good faith. Accordingly the authority would appear to be justified in providing an indemnity for such costs of legal representation in defending any prosecution, provided that the member is ultimately cleared of the allegation of criminal conduct (i.e. with a requirement for repayment if the member is convicted of a criminal offence and that conviction is not overturned on appeal).

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

2.1.4 Where the member is sued for defamation

The power to grant a member an indemnity under the Indemnities Regulations specifically includes a power to grant an indemnity in respect of the legal costs of defending a defamation action (but not in respect of any damages which may be awarded against the member), where it is alleged that the member has defamed another person.

Where a member is acting in his/her capacity as a member of a local authority and makes a statement which he/she honestly believes to be true, he/she will be able to rely on the defence of "qualified privilege", provided that he/she has not acted out of malice. As a result, successful defamation actions against members of local authorities are very rare, but it is possible that a third party may allege that a comment was made out of malice and therefore came outside the protection of qualified privilege. There is a public interest in ensuring full and open debate of matters of current interest to the authority, and such open debate could be inhibited if members were to feel constrained from honest debate by fear of the legal costs of defending a defamation action. Accordingly, the authority would be justified in providing an indemnity against the costs of defending defamation actions.

The power in the regulations specifically excludes an indemnity in respect of the costs incurred by a member in pursuing a defamation action against a third party (i.e. where the member believes that he/she has been defamed by another person). Whilst there is case law to the effect that an authority has a pre-existing power to grant such an indemnity, at least to an officer, the authority may consider

that an indemnity for the costs of pursuing a defamation action would be too open-ended.

2.2 Working outside the authority

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 such outside bodies, they are not working within the authority and therefore would not enjoy the statutory immunity from personal liability which they enjoy when they are acting as members of the authority.

2.2.1 Manner of appointment

The manner of appointment of members to such outside bodies varies. In some cases the authority itself makes the appointment (as where the Memorandum of Incorporation and Articles of Association of a Local Housing Company reserve the power of appointment of a director to the authority). In other cases, the outside body asks the authority to make a suggestion or nomination, but the actual power to appoint, or not to appoint, rests with the outside body itself. Then there are instances where the outside body seeks to appoint someone who has connections with the local community and makes a direct invitation to the local Councillor to join the organisation. And finally there are local organisations which the member joins of his/her own volition.

There is no public interest in the authority providing an indemnity in respect of this latter category. The way that the Regulations deal with this issue is to provide that the authority may grant a member such an indemnity against liabilities which they incur as members of such outside bodies only where the appointment of the member to the outside body is

“at the request of, or with the approval of, the authority or for the purposes of the authority.”

Unfortunately, this definition lacks practical clarity as, where the appointment was at the member’s own volition, the authority could not know whether a member has chosen to join the outside body out of personal interest in its activities or in order to advance the interests of the authority. Accordingly, I suggest that any indemnity should extend only 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.

This formulation has the advantage that the particular action from which such personal liability arises does not have to be conducted at the request or with the approval of the authority. So that, once appointed to the outside body, the member may participate fully in the activities of the outside body and an indemnity will cover them even where the particular action was not connected to the authority’s reasons for appointing him/her to that outside body. To illustrate, the Council might nominate a member to be a director of a local Housing Company, but the member would still be able to rely on the authority’s

indemnity where actual liability arose from a decision take by the Board of Directors, including the member, in respect of a development in another District.

2.2.2 The scope for personal liability

The risk of personal liability depends upon the nature of the outside body:

2.2.2.1 Corporate / unincorporated organisation

Thus, where the member is appointed to an outside body which has a separate legal identity, such as a company or statutory authority, the member would act on behalf of the outside body, so that where he/she entered a contract on behalf of the outside body, it would be the outside body rather than the member who actually enters the contract and incurs the liability. In contrast, where the outside body is unincorporated, such as a members' club, it has no separate legal entity. If the member enters a contract on behalf of the club, he/she actually enters the contract in a personal capacity and relies upon the membership agreement to secure re-imburement from the resources of the club or from other members.

2.2.2.2 Solvent / insolvent organisation

When a company director acts on behalf of the company, he/she is required to apply him/herself diligently to the job with the skills and experience which he/she happens to possess. However, where the company becomes insolvent and is unable to pay its debts, he/she has personal liability to any creditors of the company for any additional loss which they suffer if, once he/she knew or ought to have known that the company was insolvent, he/she failed to take every step to minimise those losses, and is expected to bring to the job the minimum level of competence and experience which might be expected of a director in such circumstances. Accordingly, any director is expected to take reasonable care to ensure that the company is accurately recording its financial affairs he/she is kept fully informed of any impending financial problems.

In an unincorporated organisation such as a members' club, the membership agreement will normally limit the ability of any member to call for re-imburement to any assets held by the club and to the subscription of any individual member. However, if the club is insolvent, it will have no assets from which to reimburse the individual member, so such a reimbursement provision is of little use in an insolvency.

2.2.2.3 Statutory indemnity

In some cases, statute provides protection to members. Thus, in the case of school governors, if the governing body acts in good faith and within the approved procedures and budget, the individual governors will not be liable for any losses arising from fraud or any discrepancy in the school's accounts.

2.2.2.4 Insurance

In particular cases, the outside body can take out insurance to protect its members from any liability which they might incur in their activities on behalf of the organisation. This is particularly so for School governing bodies and charities (if their constitutions so provide), but as a general rule NHS and central government bodies do not have such a power.

It will be apparent from the above that this is a complex area, where members should take advice as to their potential personal liability before agreeing to participate, but where the scope for such personal liability can be significantly reduced by taking simple precautions. In particular, members who are asked to become members of outside bodies should check whether the body is properly incorporated and whether it carries insurance for its members.

2.2.3 Scope for local authority indemnity

The Indemnities Regulations apply 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 the part of the member; and
- cannot cover the costs of pursuing a defamation action.

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.

2.3 Breach of the Code of Conduct for Members

The Indemnities Regulations enable 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 Regulations provide 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.

In respect of an investigation by an Ethical Standards Officer and a hearing before a Case Tribunal, a member could be suspended for up to one year or disqualified for up to 5 years, there would seem to be a real public interest in ensuring that the member's case is properly presented, and therefore in providing such an indemnity. In respect of an investigation by the authority's Monitoring Officer and a hearing before the authority's Standards Committee, the maximum sanction is 6 months' suspension. I still believe that there is a public interest in providing an indemnity, especially as under the new rules the majority of cases will be dealt with locally..

Note that the power to grant an indemnity applies only to members of this authority, so that members of Town and Parish Councils who might be subject to investigation by an ESO or by this authority's Monitoring Officer and the Standards Committee should seek an indemnity from their own authorities. However it should be made clear that the indemnities apply to Independent Co-opted Members and parish representatives on the Standards Committee.

3 Indemnities for Officers

3.1 Acting within the authority

As set out above, officers enjoy statutory immunity from civil liability where they act within the powers of the authority, in good faith and without negligence. So a third party who has suffered loss as a result of the actions or inaction of a local authority officer cannot normally sue the officer directly.

However, where a third party does suffer such loss as a result of the officer's actions or inactions in the course of his/her employment, his/her employer is vicariously liable for that loss, so that a person who has suffered loss as a result of the actions of an officer can sue the officer and/or can sue the authority, rather than the individual. This is normally to the advantage of the claimant because of the authority's greater resources and insurance cover. However, a local authority which has incurred such vicarious liability as a result of the actions or inactions of its employees could then sue its employee in order to recover that loss. In practice, local authorities have traditionally provided an undertaking that they will not sue their officers for recovery of such losses. The reason for this is that it is more cost effective for authorities to insure such risk centrally than for it to meet the insurance premiums of each employee taking out his/her own professional indemnity insurance.

Such an indemnity has only covered actions which were within the officer's employment, and therefore have not covered actions which proved to be outside the powers of the authority. The Indemnities Regulations provide that the authority may now grant such an indemnity in respect of actions which 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 he/she took it. As for members, I would recommend that the authority extend its current indemnity to cover any liability which an officer may incur by inadvertently acting outside powers of the authority, and in respect of any legal and other costs in defending a claim that he/she has exceeded the powers of the authority,

provided that he/she has acted in good faith, i.e. in the honest belief that the action was within the authority's powers and having made due enquiry where he/she was in any doubt.

The Indemnities Regulations apply 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 or deliberate wrongdoing; and
- cannot cover the costs of pursuing a defamation action.

Whilst case law has established that the authority does actually have the power to provide an indemnity to an officer against any liability for legal costs arising out of pursuing a defamation action, I suggest that the authority would only wish to consider granting such an indemnity where it was satisfied that there was a clear public interest in doing so, and therefore that it would wish to judge any such proposal on its individual merits rather than providing an open-ended indemnity.

3.2 Acting outside the authority

Officers also act outside the authority in a wide range of organisations, from the LGA and professional associations through to partnership and community organisations. Such participation in outside bodies can assist in the discharge of the authority's functions and objectives. Officers are required to declare to the authority any conflict of interest, and should seek the approval of the authority before taking up any outside interests which potentially conflict with the performance of their obligations to the authority. That requirement for the authority's approval can provide a simple mechanism for defining those outside appointments to which an indemnity should apply. Accordingly I suggest that the authority provide an indemnity which extends to all outside appointments of officers where the authority, normally through the Chief Executive, has approved the appointment as likely to advance the interests of the authority, either at the time of the original appointment or otherwise.

4 Insurance

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. The one exception to this is that the new Indemnities Regulations do not permit it to provide insurance in respect of any action which is beyond the powers of the authority, or beyond the powers of the individual member or officer.

I suggest that the Chief Finance Officer be instructed to secure such insurance to cover the authority's liability under this indemnity in so far as he/she is of the opinion that such insurance would be financially prudent.

5 Repayment of Sums Paid Out

As set out above, where an indemnity is provided in respect of defending allegations of a failure to comply with the Code of Conduct or of a crime, the Regulations require that the indemnity must be subject to a requirement for repayment in the event that the member is subsequently found to have failed to comply with the Code of Conduct or to have committed a criminal offence. In order to enable the authority to recover such sums, it will

be necessary to ensure that no such indemnity is given unless and until the member concerned has entered an indemnity agreement in which he/she gives the authority a contractual right to recover the sums in such circumstances.

6 The Operative Decision

The decision to provide such indemnity and to take out such insurance has not been delegated to the Standards Committee, but rests with the Cabinet (in respect of the executive functions of the authority) and with the Council (in respect of officers and the non-executive functions of the authority). Accordingly, I suggest that the Standards Committee recommend this report to the Cabinet and to the Council for approval.

7 Recommendation

I recommend –

- 7.1 that the Standards Committee recommend to the Cabinet and the Council that the authority grant an indemnity to members and to officers of the authority in the terms set out in the Appendix to this report and instruct the Chief Finance Officer to secure insurance to cover the authority's liability under this indemnity, in so far as he/she is of the opinion that such insurance would be financially prudent;**

Appendix One

Terms of Indemnity

- 1** The Authority will, subject to the exceptions set out below, indemnify each of its members (including co-opted Independent Members and Parish representatives of the Standards Committee) 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.

This 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 officer 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 officer against the reasonable costs which he/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 any 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 by the member or officer.
- 2.4** Where any member or officer 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.
- 3** 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 undertaking 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.