

Cherwell District and South Northamptonshire Councils

Joint Commissioning Committee

15 September 2016

Indemnities for Members and Officers

Joint report of Head of Law and Governance and Assistant Director- Transformational Governance

This report is public

Purpose of report

To consider and recommend to full councils the adoption of a joint indemnities policy for members and officers.

1.0 Recommendations

The meeting is recommended:

- 1.1 To recommend to full Council that pursuant to the Local Authorities (Indemnities for Members and Officers) Order 2004 (“the Order”) an indemnity be granted to Members and to officers of the Council in the terms set out in Appendix 1, such indemnity to replace the existing one in place at SNC.
- 1.2 That the Chief Finance Officer secures insurance to cover the liability under the indemnity in the event that such cover is available and subject to him being satisfied that such action would be financially prudent.
- 1.3 That the appointment of a Member to a position with an organisation which comes within the indemnity shall be treated as appointment as a representative of the Council for the purposes of the SNC Members’ Code of Conduct, and as an appointment to a role which is deemed to part of the role of an elected member for the purposes of the CDC Members’ Code of Conduct.
- 1.4 That it be deemed that appointments of Members and officers to organisations (including those where the Council nominates and the organisation formally appoints) be deemed as “advancing the interest of the Council” for the purposes the Terms of Indemnity.

2.0 Introduction

- 2.1 Members and officers of the Council can incur personal civil and criminal liability as a result of their actions, both within the Council and on behalf of a wide range of

outside bodies or council owned/influenced company/organisations. Case law establishes that, in certain contexts such as planning, building control and food safety, where members or officers may be taking decisions and exercising discretions on behalf of the Council as part of its regulatory functions, civil legal liability to individuals or businesses affected by those decisions does not exist save for deliberate and malicious (as opposed to negligent) acts/omissions due to the lack of a legal “duty of care”. In addition, in non-regulatory contexts, members and officers enjoy statutory immunity from civil liability where they act within the powers of the Council in good faith and without negligence. However this immunity does not apply where they go beyond the powers of the authority or act in bad faith, negligently, or where they are acting on outside bodies or council owned/influenced companies/organisations to which they may have been nominated or appointed by the Council, and it does not protect them from criminal liability.

- 2.2 Local authorities have a broad power to give officers an indemnity against such liability as part of their terms and conditions of employment. This enables the Council to take out insurance to cover this risk. The Order enables the Council to grant indemnities, and/or to take out insurance, to cover the potential liability of Members and officers in a wide range of circumstances.

3.0 Report Details

Indemnities for Members

Within the Council

- 3.1 As set out above, Members enjoy statutory immunity from civil liability where they act within the powers of the Council, in good faith and without negligence. This immunity may also cover the case where a Member acts within the overall powers of the Council, but in a situation where the particular power rests with some other part of the authority (for example if a Cabinet/ 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:

Where a Member purports to take a decision which is actually outside the powers of the Council, or outside the powers of the particular Member

- 3.2 It is recommended that the Council provide an indemnity for any liability which a Member may incur by inadvertently acting outside powers of the Council 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 Council, provided that he/she has acted in good faith, i.e. in the honest belief that the action was within the Council’s powers or the individual Member’s powers and having made due enquiry where he/she was in any doubt.

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

- 3.3 Whilst there is no 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, a third party may question whether a Member has acted in such a manner and this 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 that they have taken in good faith. Accordingly the Council 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).

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

- 3.4 There is no public interest in providing an indemnity to a Member who has acted in a manner which constitutes a criminal offence. But 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 Council 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).
- 3.5 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.

Where a Member is sued for defamation

- 3.6 The law 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.
- 3.7 Where a Member is acting in his/her capacity as a Member of a local authority and makes a statement that 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 Council, 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 Council would be justified in providing an indemnity against the costs of defending defamation actions.

- 3.8 The Order specifically prohibits 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).

Repayment of Sums Paid Out

- 3.9 Where an indemnity is provided in respect of defending allegations 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 committed a criminal offence. In order to enable the Council 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 Council a contractual right to recover the sums in such circumstances.

Outside the Council

- 3.10 Members do not just work within the authority, but are frequently appointed to a wide range of other organisations (outside bodies and or council owned/influenced companies/organisations). Both councils only appoint to organisations which support and advance the broad objectives of the Councils. When they do work on such outside bodies, they are not working within the Council and therefore would not enjoy the statutory immunity from personal liability that they enjoy when they are acting as Members of the Council.

Manner of appointment

- 3.11 The manner of appointment of Members to such outside bodies varies:
- the Council itself makes the appointment.
 - the organisation asks the Council to make a nomination, but the actual power to appoint, or not to appoint, rests with the organisation itself.
 - the organisation 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 the member joins the organisation of his/her own volition.
 - a Member joins an organisation of his/her own volition.
- 3.12 There is no public interest in the Council providing an indemnity in respect of the last two categories. Indemnities should extend only to appointments made by the Council, or in consequence of a nomination by the Council, or where the Council has specifically approved the appointment as advancing the interests of the authority.
- 3.13 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 Council. This means 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 Council's reasons for appointing him/her to that outside body.

Corporate / unincorporated organisations

- 3.14 Where a Member is appointed to an organisation which has a separate legal identity, such as a company or statutory authority, he/she acts on behalf of the organisation, so that where he/she enters a contract on behalf of the organisation, it would be the organisation rather than the Member who actually enters the contract and incurs the liability. In contrast, where the organisation 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.

Solvent / insolvent organisation

- 3.15 When a company director acts on behalf of a company, he/she is only required to apply him/herself diligently to the job with the skills and experience that 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. A director is expected to bring to the job the minimum level of competence and experience that 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 and that he/she is kept fully informed of any impending financial problems.
- 3.16 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.

Insurance

- 3.17 In most cases, the organisation can (and it is anticipated in the case of council controlled/influenced companies/organisations will) take out insurance to protect its directors or members from any liability that 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.
- 3.18 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 appointed/nominated to or asked to join organisations should check whether the body is properly incorporated and whether it carries insurance for its members.

Scope for local authority indemnity

- 3.19 The Order applies the same restrictions on the power of the Council to provide indemnities for Members acting on organisations 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.
- 3.20 However, unlike actions which are outside the Council's own powers, the indemnity cannot cover liability for any action which is outside the powers of the organisation, even if the action was taken in the honest belief that it was within the organisation's powers.

Conflicts of interest

- 3.21 Where a Member is also a member of an organisation, it is important to be alert to the dangers of conflicts of interest.

Indemnities for Officers

Within the Council

- 3.22 As set out above, case law establishes that, other than for deliberate and malicious acts/omissions, officers are immune from civil legal liability when acting in a regulatory context and they also enjoy statutory immunity from civil liability generally where they act within the powers of the Council, 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.
- 3.23 However, where a third party does suffer such loss in a non-regulatory context 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 Council, rather than the individual. This is normally to the advantage of the claimant because of the authority's greater resources and insurance cover. But 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 often 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 than for it to meet the insurance premiums of each employee taking out his/her own professional indemnity insurance. It is recommended that the Council should give such an undertaking to its officers.
- 3.24 The immunity referred to above only covers actions which are within the officer's employment, and therefore does not cover actions which prove to be outside the powers of the authority. The Council may grant 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 Council at the

time when he/she took it. As for Members, it is therefore recommended that the Council provides an indemnity to cover any liability which an officer may incur by inadvertently acting outside powers of the Council, and in respect of any legal and other costs in defending a claim that he/she has exceeded the powers of the Council, provided that he/she has acted in good faith, i.e. in the honest belief that the action was within the Council's powers and having made due enquiry where he/she was in any doubt.

- 3.25 The Order applies the same restrictions on the power of the Council 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.

- 3.26 It is also necessary to ensure that when the Chief Executive and other officers are acting in the capacity of Returning Officer, Electoral Registration Officer and other associated capacities for the purposes of the conduct of elections, any indemnity expressly applies to them. This is because, when acting in such a capacity, the officers are not working directly for the Council.

Outside the Council

- 3.27 Officers also act outside the Council in a wide range of organisations, from professional associations to partnerships and community organisations to council owned/ influenced companies/ organisations. Such participation in organisations can assist in the discharge of the Council's functions and objectives. Officers are required to declare to the Council any conflict of interest, and should seek the approval of the Council before taking up any outside interests that potentially conflict with the performance of their obligations to it. That requirement for the Council's approval can provide a simple mechanism for defining those outside appointments to which an indemnity should apply. Accordingly it is suggested that the Council provides an indemnity which extends to all outside appointments of officers where the Council, normally through the Head of Paid Service or her deputy, has approved the appointment as likely to advance the interests of the Council, either at the time of the original appointment or otherwise.

Insurance

- 3.28 Where the Council has a power to grant 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 legislation does not permit it to provide insurance in respect of any action which is beyond the powers of the Council, or beyond the powers of the individual member or officer.
- 3.29 It is suggested that the Chief Finance Officer secures such insurance to cover the Council's liability under this indemnity in so far as he is of the opinion that such insurance would be financially prudent, and that such cover is available. The Council's current insurer does provide cover for the majority of situations intended to be the subject of the indemnity.

4.0 Conclusion and Reasons for Recommendations

- 4.1 The proposals in this report are designed to ensure that the councils have in place appropriate safeguards for members and officers.

5.0 Consultation

- 5.1 Informal consultation on the principle of an indemnity has taken place with councillors and officers who have been nominated to serve on council owned/influenced companies/organisations and the Chief Finance Officer who represents the council's shareholding interest. Nominees and the Chief Finance Officer have expressed a very clear their desire to see an indemnity in place.

6.0 Alternative Options and Reasons for Rejection

- 6.1 The following alternative options have been identified and rejected for the reasons as set out below.

Option 1: To agree the recommendations as set out in the report

Option 2: To amend the recommendations as set out in the report

Option 3: To reject the recommendations as set out in the report. This is not recommended, as members and officers are currently exposed to an element of risk through appropriate indemnities not being in place.

7.0 Implications

Financial and Resource Implications

- 7.1 There is a cost to the Councils in ensuring insurance is in place to cover the liability under the indemnity in the event that such cover is available and it is financially prudent to obtain it such costs can be met from the councils existing insurance budgets. The council has risk contingency reserves in place to ensure that the councils can meet any excess arising from a claim against a member or officer and/or any liabilities where the councils are unable to procure suitable insurance cover.

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Legal Implications

- 7.2 This is a joint report and the Head of Law and Governance has been fully involved in the preparation of the report and all legal implications are contained in the report.

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Risk Implications

- 7.3 The proposals set out in this report mitigate risk to the officers, members and the councils through ensuring that appropriate indemnities are in place.

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8.0 Decision Information

Key Decision

Financial Threshold Met: No

Community Impact Threshold Met: No

Wards Affected

All

Links to Corporate Plan and Policy Framework

None directly

Lead Councillor

Councillor Ian McCord, Leader of the Council, SNC
Councillor Barry Wood, Leader of the Council, CDC

Document Information

Appendix No	Title
Appendix 1	Terms of Indemnity
Background Papers	
None	
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