

# Individual Decision

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<b>Title of Report:</b>	<b>Indemnities for Members and Officers</b>		
<b>Report to be considered by:</b>	Councillor Denise Gaines	<b>on:</b>	21 April 2005
<b>Forward Plan Ref:</b>	ID0959		

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**Purpose of Report:**

**To advise of new regulations which provide a specific power for the Council to grant indemnities or take out insurance to cover liability in certain circumstances.**

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**Recommended Action:**

- (1) To approve the terms of the draft Indemnity set out in the Appendix to this Report.
- (2) That delegated authority be given to the Chief Executive to approve the appointment of officers to outside bodies in so far as such appointments are likely to advance the interests of the Council in such circumstances and to enable such officers to rely on an indemnity from the Council.

**Reason for decision to be taken:**

To note the implications of the Local Authorities (Indemnities for Members and Officers) Order 2004 and to determine the way in which such indemnities will be applied

**List of other options considered:**

See Report

**Key background documentation:**

- The Local Authorities (Indemnities for Members and Officers) Order 2004

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## Supporting Information

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### 1. Background

- 1.1 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 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 Council in good faith and without negligence (Section 265 Public Health Act 1875). However this immunity does not apply where they go beyond the powers of the authority or act in bad faith or negligently.
- 1.2 Local Authorities have a broad power to give Officers an Indemnity against such liability as part of their terms and conditions of employment. Members however have no such contract of employment and the ability of the authority to grant such an indemnity is restricted. The Government recognised that these powers needed clarification and that potential liability of Members and Officers particularly when acting on outside bodies can act as a serious deterrent to participation.
- 1.3 New regulations have now been introduced which give a specific power to the Council whether to grant where appropriate indemnities or take out insurance. It is up to each authority to decide whether to grant such an indemnity or take out insurance and to decide the extent of such indemnities or insurance. This report outlines the content of the new regulations and the circumstances in which indemnities/insurance may be required and the suggested terms of an indemnity.

### 2. The 2004 Regulations

- 2.1 The Order enables Councils to provide indemnities for their Officers and Members in relation to any act or omission by the person in question which is
  - “(a) authorised by the Authority or
  - (b) forms part of or arises from any powers conferred or duties placed upon that person in consequence of the exercise of a function (whether or not the function is exercised as a Member or Officer of the Council) at the request of, with the approval of or for the purposes of the Authority” (Article 5).
- 2.2 Restrictions are imposed by virtue of Article 6 which prevents the provision of an indemnity in relation to any matter constituting a criminal offence or “is the result of fraud, or other deliberate wrong doing or recklessness on the part of that Member or Officer”. However by virtue of later provisions in the Order an indemnity may be provided to the defence of any criminal proceedings brought against the Officer or Member. The proviso is that if there is a conviction, which is not overturned on appeal, the Member or Officer will be under a duty to reimburse the authority or the Insurers, if the Council has taken out insurance, for any sums that the Council has had to spend in relation to the proceedings. Further Article 8 requires reimbursement by a member in proceedings under Part 3 of the Local Government Act 2000 (relating to appearances before the Adjudication Panel for England) in relation to Code of Conduct matters. In the latter case reimbursement will be necessary if there is a finding that the member in question failed to comply with the code of conduct or if that member admitted that he/she has failed to comply with the code.
- 2.3 Article 7 deals with matters that exceed the powers of the authority Member or Officer in that it allows an indemnity to the extent that the Member or Officer

- “(a) believes that the action or omission in question was within the powers of the Council or
- (b) the act or omission comprises the issuing or authorisation of any document containing any statement as to the powers of the Authority or any statement that certain steps have been taken or requirements fulfilled and the individual believed that the contents of that statement were true, in other words it must have been reasonable for the Member or Officer to hold that belief at the time the act or omission took place.”

2.4 The terms of any indemnity have to be agreed by the Council and the Appendix to this report sets out in draft the terms of an Indemnity for consideration.

### **3. Working with the Authority (Members)**

- 3.1 There are some areas where a Member could incur personal liability, for example, where a Member purports to take a decision, which is outside the powers of the Authority or outside the powers of the particular Member (as a Member of the Executive). The new 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 Council or reasonably believed that the action was delegated to the Executive Member. It is considered that there is a public interest in encouraging Members to be proactive and take prompt decisions when required, therefore it is appropriate for a Member to have an indemnity, which may be required by inadvertently acting outside appropriate powers.
- 3.2 Where a Member acts in bad faith, fraudulently, out of malice, for an ulterior purpose or as a deliberate or reckless act it is hard to see that there is a public interest in providing an indemnity. But there is a public interest in ensuring that Members are not put off taking necessary decisions by fear that they may be put to legal expense in justifying decisions they have made in good faith. Therefore it would be appropriate for the Council to provide an indemnity for the costs of representation provided that the member is ultimately cleared of the allegation.
- 3.3 If the Member acts in a manner that constitutes a criminal offence it is difficult to see that there is a public interest in providing an indemnity. However, where a Member is sued for defamation the new regulations provide that the Council can grant an indemnity. Such cases would occur 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 and can rely on the defence of “qualified privilege”, provided that he/she has not acted out of malice. In some instances however a third party may allege that the comment was made “out of malice” and therefore came outside the protection of qualified privilege. It is considered that there is a public interest in ensuring full and open debate of matters of current interest to the Council and that such open debate could be inhibited if Members were to feel constrained by fear of the legal costs of defending a defamation action, it would therefore appear appropriate to provide an indemnity against the costs of defending deformation actions. It should be noted however that the regulations specifically exclude an indemnity in respect of the costs incurred by a Member in pursuing a defamation action against a third party.

#### **4. Working outside the Authority (Members)**

- 4.1 Members are frequently appointed to a wide range of other organisations, many of which support and advance the broad objectives of the Council. When they do work on such outside bodies they are not working inside the Authority and therefore would not enjoy Indemnity as set out above.
- 4.2 The manner of appointment to such outside bodies varies. Sometimes the Authority itself makes the appointment and in others the outside body asks the Council to nominate a representative where the power to appoint rests with the outside body itself. Finally there are organisations which the member joins of his or her own volition. The regulations deal with this issue by providing that the Authority **may** grant a Member such indemnity against liabilities which they incur as Members of outside bodies but **only** when 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” (Article 5 (b) (i) and (ii)). Paragraph 3.2 of the draft Terms of Indemnity deals with this point. However, where a member joins an organisation of their own volition no indemnity may be provided.
- 4.3 The new regulations apply the same restrictions on the power of the Council to provide indemnities, namely that the indemnity cannot cover any criminal liability, liability arising from fraud or deliberate wrong doing nor cover the costs of pursuing a defamation action.

#### **5. Breach of the Code of Conduct for Members**

- 5.1 The new regulations enable Local Authorities to grant an indemnity to it's Members in respect of the costs 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. The regulations however provide that the indemnity must be subject to a requirement for the member to reimburse the Council in the event that there is a finding that the Member has failed to comply with the code (and that finding is not overruled on appeal or the Member admits failure to comply with the Code). It is considered that the regulations limit an indemnity to those proceedings before Case Tribunal as opposed to the Standards Committee. The power to grant an indemnity applies only to Members of this Council, so that Members of Town and Parish Councils who might be subject to an investigation by the Council's Monitoring Officer or the Standards Committee should seek an indemnity from their own Authorities.

#### **6. Acting within the Authority (Officers)**

- 6.1 Officers enjoy statutory immunity from civil liability where they act within the powers of the Council in good faith and without negligence, as a consequence a third party who has suffered loss as a result of the actions or inaction of a Council Officer would not normally sue the Officer directly.
- 6.2 The new regulations provide that an Authority may now 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 their powers at the time when he/she took it. A similar type of Indemnity to that suggested for members would be applicable and, as with members, the regulations apply the same restrictions, namely that the indemnity cannot cover criminal liability, liability arising from fraud or deliberate wrong doing and cannot cover the costs of pursuing a defamation action. Indemnities in this area will be required by Investigating Officers particularly as regards defamation actions resulting from the new Local Determination Regulations which were introduced in November 2004.

## **7. Acting outside the Authority (officers)**

7.1 Officers also act for the Council in a wide range of organisations and such participation in outside bodies can assist the discharge of the Authorities 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 which particularly conflict with the performance of their obligations to the Council. A requirement for the Council's approval can provide a simple mechanism for defining those outside appointments to which an indemnity could apply. It is suggested that the Council provide an indemnity which extends to all outside appointments of the Officers where the Council, normally through the Chief Executive, has approved the appointment as likely to advance the interests of the Council.

## **8. Insurance**

8.1 It must be understood that the terms indemnity and insurance are not interchangeable. If the Council grants an indemnity it may be some situations are insured and some are not – this should not influence a decision to grant an indemnity.

8.2 The Council's insurance covers provide an indemnity for third party claims for death, injury, property damage, libel and slander – there is no defect in the Council's insurance programme but it must be accepted that certain situations are not covered and would be to the Council's cost under the indemnity given to Members and Officers.

8.3 In addition, members of Standards Committee have raised concerns in that they may also face a claim when dealing with investigations particularly if they approve an investigating officer's report and the individual against whom the complaint was made then seeks to take action against the Committee members individually as opposed to the Council. Again it is appropriate that an indemnity should be made available. This is a good example of a situation that is not, and cannot, be covered by insurance and it seems appropriate that the investigating officer is indemnified.

## **9. Conclusion**

9.1 As appropriate insurance cover already exists, as outlined above, you are asked to approve the form of Indemnity attached to this report and confirm the relevant approvals set out above.

## **Appendices**

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Draft form of Indemnity

## **Implications**

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<b>Policy:</b>	New legislation requires establishing a new policy which must be formally adopted by the Council
<b>Financial:</b>	It is proposed that the current officials indemnity policy is extended to cover members, at no additional cost to the authority.
<b>Personnel:</b>	Will ensure protection of Members and Officers in certain circumstances through appropriate indemnity or insurance cover.

**Legal:**

The provisions of the Local Authorities (Indemnities for Members and Officers) 2004 requires formal adoption by the Council. Provisions do not come into effect automatically.

**Consultation Responses**

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**Members:**

**Leader of Council:** \*

**Select Committee Chairmen:** \*

**P&L Committee Chairman**  
(where appropriate):

**Ward Members:** \*

**Opposition Spokesperson:** \*

**Advisory Members:** \*

**Local Stakeholders:** \*

**Officers Consulted:** Nick Carter, Andy Day, Caroline Gray, Ian Priestley, Royston Peake

**Trade Union:** Copy report sent 18 February 2005 – comments awaited.

## Appendix

### Draft Terms of Indemnity

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.

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 will not extend to Part 3 proceedings where the allegation has been referred to the Monitoring Officer for local investigation and/or determination by the Standards Committee.
- 2.4 This indemnity shall not extend to any advice or representation in respect of any claim or threatened claim in defamation by or against the member or officer.
- 2.5 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 –
  - 2.5.1 the member or officer is convicted of a criminal offence in consequence of such proceedings, or
  - 2.5.2 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.

2.5.3 Where the authority arrange insurance to cover its liability under this indemnity, the requirement to reimburse in Paragraph 2.5 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.