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## **THE LOCAL AUTHORITIES (INDEMNITY FOR MEMBERS AND OFFICERS) ORDER 2004**

### **1 SUMMARY**

- 1.1 The purpose of this report is to advise Members of the Local Authorities (Indemnities for Members and Officers) Order 2004 (the Order) which came into force on 24 November 2004 and provides for circumstances in which a Local Authority can provide indemnity to its Members and officers.

### **2 INTRODUCTION**

- 2.1 Despite increasing demands for Members to fulfil a role outside the traditional Council environment and increasing accountability under the statutory Code of Conduct, the powers available to authorities to indemnify Members and officers out of public funds for any personal liability arising from actions or decisions taken by them in the course of their official duties has been limited and questionable. This is particularly the case where individuals incur personal liability for their actions on external bodies to which they have been appointed by the authority, and the scope to cover actions that are ultra vires or involve negligence.
- 2.2 The Council has provided professional indemnity cover to officers since 1989. This relates to damages, costs or legal expenses incurred provided the officer acted in good faith, honestly believing the act complained of was within their power and that their duty as an officer required or entitled them to do it. To date no claim has been made.
- 2.3 A “Regulatory Impact Assessment”, undertaken by the Office of the Deputy Prime Minister, identified several different potential issues for Members and officers arising from such uncertainty and made proposals leading to the above statutory instrument.
- 2.4 **Examples from the Regulatory Assessment**

#### *“Ultra Vires Actions and Commitments*

*Bodies with which Local Authorities do business at times seek guarantees, opinion letters or letters of comfort as a way of protecting themselves against the possibility that the commitments being entered into by the authority are ultra vires. Should the transactions subsequently prove to be outside the powers of the authority and enforcement against the authority thus impossible, the other party may try to claim against the individual who provided the guarantee, opinion letter or letter of comfort. As a consequence, sometimes*

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*individuals can become personally liable to pay very large sums.*

*Liabilities and Legal Costs in the Course of Duties*

*A more likely situation is where a mistake has been made by an individual who has acted honestly and in good faith but who faces civil proceedings without the authority being able to cover the individual's legal costs. In some areas of work, notably childcare services, the potential liabilities of the individual may be very high. However, more common is the need for individuals to be indemnified against the legal costs that arise, whether or not any legal case is defended successfully. These costs would vary depending upon level of legal support. These proposals will enable authorities to indemnify individuals against these costs.*

*Partnership Working and Innovation*

*Authorities are increasingly entering into partnerships and developing innovative ways to carry out their functions, and the Government is encouraging them to do so. The Government is, however, aware that there are concerns about individuals becoming liable for debts relating to those activities. Under current rules, the authority may not be able to provide a reliable indemnity to the individual concerned ... These proposals would make it possible for the individuals involved to be indemnified, provided the Member had acted honestly and in good faith when taking the action giving rise to the liability.*

*Code of Conduct Investigations*

*Some Councillors have expressed concerns about the potential costs of defending an allegation of a breach of the Code of Conduct, particularly where it is later established that no breach has occurred... The costs in the hearing stage could vary substantially depending upon how much, if any, legal advice or representation was necessary. Numerous respondents to the public consultation raised the concern that without provision being made for legal expenses throughout the process, particularly in the hearing stage, this may be a disincentive for individuals to become, or continue being, Councillors".*

- 2.5 The Order seeks to address these issues and clarify the situation to enable authorities to provide indemnities in a much wider range of circumstances.

**3 MAIN CONSIDERATIONS**

**Scope of Indemnity Available**

- 3.1 An indemnity may be provided by the Council in relation to any action or failure to act by the Member or officer in question which:-

(a) is authorised by the authority;

- (b) forms part of, or arises from, any powers conferred or duties placed upon that Member or officer at the request of, or with the approval of, the authority;  
or
  - (c) arises in respect of the cost of defending any claim for an allegation of defamation by a Member or officer (but not in respect of any damages which may be awarded).
- 3.2 An indemnity may be provided in relation to an act or omission subsequently found to be beyond the powers of the Member or officer in question, but only to the extent that the Member or officer reasonably and genuinely believed that the act or omission was within his/her powers at the time when he/she acted.
- 3.3 The new regulations also provide that an indemnity can be granted to Members in respect of legal representation in “Part 3 Proceedings”, that is in respect of any investigation, hearing or other proceedings for an alleged failure to comply with the Code of Conduct for Members.
- 3.4 An indemnity can also be offered in the defence of any criminal proceedings brought against a Member or officer as a result of their authorised activity for the Council, including any civil liability that may arise.
- 3.5 The indemnity can be made available either directly by the Council or via an insurance policy obtained by the Council.
- 3.6 The regulations make the indemnity available to Members and officers who are carrying out any function at the request of, or with the approval of, or for the purposes of the authority. However, it also extends the availability of the indemnity to cases in which a Member or officer when exercising their official function do so other than as a Member or officer of the authority. This, for example, would permit an indemnity to be offered to a Member or officer who acts as a director of a company at the request of the Council.

#### **Restrictions on Indemnities**

- 3.7 No indemnity may be provided under the new Regulations in relation to any action by, or failure to act by, any Member or officer which:-
- (a) constitutes a criminal offence;
  - (b) is the result of fraud or other deliberate wrongdoing or recklessness;
  - (c) results in a Member admitting a breach of the Code of Conduct in any “Part 3 Proceedings”; or
  - (d) involves the alleged defamation of a Member or officer.

- 3.8 However, in respect of (a) and (c), an indemnity can be provided in respect of legal representation to defend a criminal conviction or a “Part 3 Proceeding” but, if the Member or officer is convicted of the criminal offence or a Member is found to have breached the Code of Conduct, and where an appeal is unsuccessful, then that Member or officer shall reimburse the authority or the insurer for their costs incurred in relation to those proceedings. The sum to be reimbursed is recoverable by the authority or insurer as a civil debt.
- 3.9 No indemnity can be made available to any Member or officer who voluntarily joins any external organisation.

**Current Insurance Provision**

- 3.10 The Head of Financial Services advises that the Council’s current insurance provides indemnity cover in the following circumstances:-
- (a) Under an Officials Indemnity Policy - cover for Members, officers and volunteers assisting the Council for all sums the Council becomes legally liable to pay as damages and claimants’ costs and expenses for financial loss as a result of a negligent act or accidental error or accidental omission in the consequence of their duties arising out of the business of the insured.

Following a review of insurances, “business” is now defined as any activity where the authority has the legal power to approve the activity and to support it with a personal indemnity.

Zurich Municipal, the Council’s insurers, advise that Members are only covered under the Officials Indemnity policy when representing the Local Authority on the board/committee of an outside body if:

- a) the individual acts solely on behalf of his or her Local Authority, within the terms of reference laid down by the authority, and solely in pursuance of the Local Authority’s statutory powers
- b) the individual acts solely in an advisory capacity in connection with the Local Authority’s functions
- c) the individual occupies an observational role on the board or committee of an outside organisation, representing the Local Authority’s interest (but not in a decision-making capacity)
- d) the individual acts on behalf of a joint committee established by 2 or more Local Authorities

Cover will not apply where the individual acts:

- a) solely on behalf of an outside body
- b) outside his or her delegated powers
- c) outside the authority’s statutory powers

- (b) Under a Libel and Slander Policy – cover for Members and officers arising out of the business of the insured authorised by the Council. This covers the cost of defending an action and damages, except punitive or exemplary damages, or arising from malicious falsehood or injurious falsehood.
- (c) There is no insurance cover for Code of Conduct investigations or for acts that are without authority and ultra vires.

### **Required Action**

- 3.11 Current insurance covers situations involving powers conferred or duties placed upon Members or officers at the request of, or with the approval of, the Council. From the above, it is debatable whether this would include representing the authority on an outside body in a capacity other than that of a Member or officer of the authority. The Council has the option to offer such an indemnity at its own risk.
- 3.12 The indemnity described in the Council's "Protocol for Outside Bodies" at page 5.15 of the Constitution does not provide for such an indemnity. If Members choose to extend the indemnity the Protocol will require amendment.
- 3.13 In its representations to Government on the new ethical framework, the Council expressed concern that no assistance was available to Members called to account by the Standards Board and this legislation provides an opportunity to address this concern.
- 3.14 For the avoidance of doubt, the Council should specify by resolution the extent of all indemnity available to Members and officers.

## **4 RISK IMPLICATIONS**

- 4.1 Zurich Municipal suggest that authorities take a managed approach to risk by vetting the activities of Members and officers, ensuring that Members only act following officer advice, that adequate training is provided with regard to liabilities and that no indemnity is provided for ultra vires acts.

## **5 RESOURCE IMPLICATIONS**

- 5.1 Indemnity cover may be provided to Members and officers through insurance or at the Council's own risk.
- 5.2 The Council's insurers will not provide indemnity cover for acts that are ultra vires or for the cost of defending a criminal conviction but does offer cover as

outlined at paragraph 3.10 for Part 3 Proceedings similar to that available within many household or car insurances that cover legal expenses. The Head of Financial Services advises that such additional cover is low cost and could be met from existing budgets.

- 5.3 To indemnify a Member for acts or omissions subsequently found to be beyond their powers, but in circumstances where the Member reasonably and genuinely believed that the act or omission was within his/her powers, will require cover at the Council's own risk.

## **6 LEGAL IMPLICATIONS**

- 6.1 The Members' role is changing, with an increasing level of personal responsibility even without Cabinet responsibility, as a result of partnership, joint working arrangements and appointment to outside bodies. Members and officers should not be put at personal risk for undertaking approved duties provided they act honestly and in good faith. The Order clarifies the powers available to indemnify Members and officers and the Council should take the opportunity to specify what indemnity is provided.

## **7 RECOMMENDATION**

- 7.1 It is proposed that the Committee **RECOMMENDS to Full Council**
- (1) That the Council provides an indemnity in relation to any action or failure to act by any Member or officer which:-
    - (a) is authorised by the Council;
    - (b) forms part of, or arises from, any powers conferred or duties placed upon that Member or officer at the request of or with the approval of the authority including acting as the Council's representative on an outside body;
    - (c) arises in respect of the cost of defending any claim for an allegation of defamation by a Member or officer acting in an official capacity (but not in respect of any punitive or exemplary damages or arising from malicious falsehood or injurious falsehood) or
    - (d) is in respect of any investigation, hearing or other proceedings for an alleged failure to comply with the Code of Conduct for Members but, if the Member is found to have breached the Code of Conduct, and where an appeal is unsuccessful, then that Member shall reimburse the authority or the insurer for their costs incurred in relation to those proceedings.

Such indemnity to include an act or omission subsequently found to be beyond the powers of the Member or officer in question, but only to the extent that the Member or officer reasonably and genuinely believed that the act or omission was within his/her powers at the time when he/she acted.

- (2) That no indemnity be offered for legal representation to defend a criminal conviction unless specifically approved by the Council and then on a similar basis to that relating to Part 3 proceedings with regard to reimbursement.
- (3) That the Protocol for Outside Bodies be revised to take these recommendations into account.

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**Background Papers:-**

None

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