

CONSULTATION PAPER ON INDEMNITIES FOR MEMBERS AND OFFICERS

1 SUMMARY

- 1.1 This report seeks comments from Members on the consultation paper and draft order put forward by the Office of the Deputy Prime Minister, which seeks to clarify the circumstances in which indemnities can be provided. The consultation document is on deposit in the Members' Library at Rayleigh.

2 BACKGROUND

- 2.1 A consultation document, including a draft order, seeks a response by 6 October.
- 2.2 There has been uncertainty for some years about the extent of the powers of authorities to indemnify their 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. This is particularly so where an action taken turns out to be ultra vires (beyond their powers).
- 2.3 Section 101 of the Local Government Act 2000 gave the Secretary of State power to make an order which in turn will give the relevant authorities the power to provide indemnities for some or all of their members and officers in certain circumstances.
- 2.4 The ODPM in making an order have to consider the following issues-
1. Which authorities can provide indemnities
 2. Who should be indemnified
 3. What liabilities can be indemnified
 4. Whether any restrictions on providing indemnities are appropriate
 5. Are there any other issues which could be clarified

3 PROPOSALS IN THE DRAFT ORDER

3.1 Which authorities can provide indemnities

- 3.1.1 All relevant authorities can provide indemnities. District councils, parish and town councils and county councils are all considered to be a relevant authority within the definition in the Local Government Act.

3.2 Who should be indemnified

- 3.2.1 The power is widely drafted and proposes that Authorities should be able to determine themselves whether all or only some of their member and officers should be granted an indemnity. It does not limit the class of member or officer to whom indemnities can be given.
- 3.2.2 It is however limited to cases where the member or officer is undertaking any function at the request of, with the approval of, or for the purposes of the Authority. It will not extend to members or officers acting in a personal capacity.
- 3.2.3 It will also cover officers and members who have been granted an indemnity, once they cease to be an officer or a member, in respect of action taken before they left office.

Views are sought from Authorities whether they are content to have discretion to determine who to grant an indemnity to.

Officer comment

The proposal to give the Council discretion to decide which member and officers can be indemnified would seem to be reasonable, is wide ranging and gives necessary flexibility. It would also seem fair to allow the indemnity to cover officers and members after they have left the service, for actions taken before leaving the Council.

3.3 What liabilities should be indemnified

- 3.3.1 The proposed Order envisages indemnifying individuals against any personal financial liability that they incur, arising from circumstances whereby the member or officer is acting for the purposes of the Authority.
- 3.3.2 The indemnity could be in terms of financial support or support in kind, such as legal advice and representation by an employee.
- 3.3.3 It would not, and need not, cover circumstances that are already covered by the statutory exclusion contained with Section 265 of the Public Health Act 1875.
- 3.3.4 The proposed order is wide enough to cover the situations where an individual becomes personally responsible for the debts or other liabilities of a body to which they have been appointed by the Authority, or where the individual incurs costs defending himself against legal proceedings brought by a third party in relation to their duties as a member or officer.

Views are sought on whether members agree that these circumstances as described are appropriate or are there other circumstances in which members would want to provide indemnities?

Officer Comment

The circumstances described again seem to be sensible and appropriate and cover all the situations for which an indemnity would be required. There is no need to cover matters already provided for in other legislation.

3.4 Restrictions on power to provide indemnities

- 3.4.1 The basic test is that an indemnity should not be available to cover any case in which an individual has acted fraudulently or recklessly or where any action or failure to act would constitute a criminal offence.
- 3.4.2 The proposal is therefore that members and officers should only be able to rely on indemnities funded directly by the authority if when taking the action they have acted honestly and in good faith, or have not been reckless in taking the action.
- 3.4.3 It is also proposed that Authorities are expressly prohibited from meeting the costs of members and officers taking legal action for slander or libel, either directly or through insurance. The Government does not believe that individuals should be funded at the public expense to bring proceedings against a third party, as it could stifle legitimate public debate.
- 3.4.4 Authorities will however be able to provide indemnities against the cost of defending such actions where the action relates to an official function. In any event a recent judgment indicated that authorities may already have the power in some cases to fund the bringing of defamation proceedings by its officers, by virtue of S111(1) Local Government Act 1972.
- 3.4.5 The Government also proposes that alongside the power to provide indemnities should be a power to arrange for insurance for members and officers against the risk that may be subject of an indemnity. Therefore Authorities will have to weigh up the respective advantages and disadvantages of purchasing insurance or covering the cost of the indemnity from their own resources.

Do members agree that the Government is right to:-

- i) Limit indemnities to situations where individuals have acted honestly and in good faith
- ii) Permit authorities to insure against the risk of indemnities being called on
- iii) Prohibit indemnities for the cost of starting defamation proceedings?

Are there any other express prohibitions members would like to see included?

Officer Comment

The limitations seem to be appropriate and fair and based on a common sense approach. It is also important that Councils will be allowed to insure against the risk of indemnities being called upon. Again the restriction on

indemnities for bringing defamation actions would also seem appropriate for the reasons given.

3.5 Acting Ultra Vires

- 3.5.1 There could be occasions when the local authority does business with bodies who 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. This is particularly so for local authorities who are entering into partnerships, and developing innovative ways to carry out their functions.
- 3.5.2 The Government believes that the circumstances in which authorities might be found to have acted ultra vires have been greatly reduced by virtue of the power to promote well-being under Section 2 of the 2000 Act. Therefore, it proposes that indemnities should cover cases where an individual is subject to proceedings in relation to a matter authorised by the indemnifying Authority, but which was later found to be ultra vires, if the individual honestly and reasonably believed that the actions he was taking was intra vires.

Do members consider that such an approach is reasonable?

Officer Comment

The approach seems to be fair and sensible to cover an officer or member in circumstances where they had acting honestly and reasonably, particularly as the instances in which it will apply will be limited in any event.

3.6 Code of Conduct

- 3.6.1 The Government proposes to only allow indemnities to be provided in respect of an allegation that the member has breached the code of conduct, where the a member is found not to have breached the code, or where a breach has occurred but no action has been deemed necessary.
- 3.6.2 Where an indemnity is provided and financial support is given, and a breach of the code of conduct is upheld against a member, then the member will have to reimburse the costs paid by the Authority.
- 3.6.3 It is also proposed that insurance should only be available in the same circumstances that indemnities are available.

Do members think that these limitations on the providing of indemnities AND insurance are appropriate?

Officer Comment

The restriction is made in an attempt to keep proceedings simple and uncomplicated and to avoid an over-reliance on legal representation. This approach would appear to be reasonable, and it is sensible to limit insurance in the same circumstances as indemnities.

4 RESOURCE IMPLICATIONS

- 4.1 The Council currently insures for Libel and Slander with a limit of indemnity of £250,000.00. The cover is limited to cover situations relating to the business of the Council and is restricted to Members to cover publications and meetings specifically authorised by the Council.
- 4.2 The proposals in the Order extend the circumstances in which indemnities can be provided and therefore, if members in the future resolve to grant indemnities, the provision of indemnities and/or insurance in respect of them will be a call on the financial resources of the Council.
- 4.3 The provision of indemnities or insurance is at the discretion of the Council, and as with all new situations, the Council will first need to look at its risk management before it grants new indemnities or seeks insurance of new risks.

5 LEGAL IMPLICATIONS

- 5.1 The Order does not affect the Council's current legal position, and any indemnity the Council offers is discretionary.

6 RECOMMENDATION

- 6.1 It is proposed that the Committee **RESOLVES**
- (1) That, subject to Members comments, the Officer comments outlined above be submitted as this Council's response.
 - (2) That copies of the Council's response are sent to the Local Government Association and both local M.P.'s.

Albert Bugeja

Head of Legal Services

Background Papers:

Consultation paper and draft Order (Copies placed in the Members' Library)

For further information please contact Catherine Nicholson on:-

Tel:- 01702 318169

E-Mail:- catherine.nicholson@rochford.gov.uk