



Leicester
City Council

WARDS AFFECTED
All Wards

Whips Meeting
Cabinet

27th April 2006
15th May, 2006

PERSONAL LIABILITIES OF OFFICERS AND MEMBERS

REPORT OF THE DIRECTOR OF RESOURCES, ACCESS AND DIVERSITY

1. Summary

This report reviews the current indemnity to Officers and Members originally approved for Officers by the Finance Sub-Committee on 12th November, 1997 and the additional indemnities now available to both Members and Officers in law. The report suggests a revised indemnity and discusses insurance and other arrangements.

As a result of the Local Authorities (Indemnities to Officers and Members) Order, 2004 the Council may now indemnify its Officers and Members for the following:

- a. Signing certificates of lawfulness under the Local Government Contracts Act, 1997.
- b. Exercising any functions as a Director of a company to which the Council has appointed or nominated him/her.
- c. Any act done at the request of, or with the approval of, or for the purposes of the Council (a clarification of existing provisions).

There is also a new statutory power, albeit limited, to indemnify against defence costs incurred in legal proceedings.

2. Recommendations

- 2.1 That, as an overarching principle, the Council should be prepared to give the maximum indemnity to those it asks to perform duties on its behalf, whilst recognising that by law this will have to be subject to some exceptions.
- 2.2 That the Cabinet approves the standard form of indemnity for Officers and Members in the form shown as **Appendix 1** to this report.

- 2.3 That insurance be effected for all Elected Members against costs incurred by them defending proceedings against them under Part III of the Local Government Act, 2000 which are subsequently dismissed.
- 2.4 In respect of Officers and Members serving on external organisations the procedure be adopted as set out in the body of the report.
- 2.5 That the Town Clerk be authorised to take all necessary action to implement the above.

3. Report

A suggested new form of indemnity for both Officers and Members is shown attached as **Appendix 1**. A comparison between this and the 1997 Finance Sub-Committee Resolution is shown attached as **Appendix 2**.

The indemnity includes a number of exceptions e.g. it does not cover any Officer or Member failing to act in good faith.

A summary of the legal position is shown attached as **Appendix 3**. Note, in particular, the Local Authorities Indemnities for Members and Officers Order, 2004, which enables the Council to provide indemnities or to secure insurance for Members and Officers.

It is proposed that insurance be affected for all Elected Members against costs incurred by them defending proceedings against them under Part 3 of the Local Government Act, 2000 (Conduct) but only in respect of proceedings which are subsequently dismissed. A Member would have to repay the expenditure if breach of the Code is established.

In respect of Officers and Members serving on external organisations a procedure is recommended in order to mitigate against risk because the Council would reasonably be expected to ensure that relevant provisions of its Constitution are followed and that appropriate checks are made with the relevant external organisation to assess if there are any unusual forms of risk. It is suggested that action be taken prior to any new appointments or as soon as practical in respect of current appointments as follows:

- Appointees must sign a statement as to the nature and scope of the appointment and provide an undertaking to follow the Council's Code of Practice for Participation in Partnerships.
- A risk/cost assessment be made, both as to the implications for the Council generally and as to whether there is a need to back off risks against insurance.
- In the case of companies, appointees should have the benefit of a briefing. This is because there are specific statutory provisions that affect directors personally, both in their dealings and in potential liabilities.

4. Financial Implications

Insurance cover for legal proceedings defence costs is available at approximately £29.50 per member (including co-opted members) plus IPT tax (minimum premium £1,300). Cover is for £50,000 per event and £500,000 annual aggregate. All Members have to be covered (no selective cover is available).

5. Legal Implications

See Appendix 3.

6. Other Policy Implications

OTHER IMPLICATIONS	YES/NO	PARAGRAPH REFERENCES WITHIN SUPPORTING INFORMATION
Equal opportunities	No	
Policy	No	
Sustainable & Environmental	No	
Crime and Disorder	No	
Human Rights Act	No	
Elderly/people on low income	No	

7. Background Papers

Bundle of research papers held on legal file 53695.

8. Consultation

Peter Nicholls, Service Director – Legal Services
Town Clerk
Chief Finance Officer
Corporate Risk Manager
Head of Audit

9. Author

Joanna Bunting
Head of Commercial and Property Law
Ext 6450 24th April 2006

DECISION STATUS

Key Decision	No
Reason	N/A
Appeared in Forward Plan	No
Executive or Council Decision	Executive (Cabinet)

PROPOSED INDEMNITY FOR OFFICERS AND MEMBERS

The Council provides the following indemnity for Officers and Members:

- (i) This indemnity applies:
 - (a) To any Officer of the Authority whose duties include signing a certificate within and for the purposes of the Local Government (Contract) Act, 1997, and
 - (b) To any Officer or Member of the Authority who accepts appointment or nomination by the Authority as a director of a company (within the meaning of the Companies Act, 1985, s.735), whether or not the Authority has any legal or equitable interest in that company, and whether or not the Authority has a right or a power to make the appointment or nomination and whether or not, in the case of an officer, he is required by the terms of his employment to accept the said appointment or nomination, and
 - (c) To any action of, or failure to act by any Officer or Member of the Authority, which is either authorised by the Authority or forms part of, or arises from, any powers conferred, or duties placed upon that Member or Officer, as a consequence of any function being exercised by that Member or Officer (whether or not when exercising that function he does so in his capacity as a Member or Officer of the Authority), at the request of, or with the approval of the Authority. For the avoidance of doubt this specifically includes any Officer appointed as a Case Progression Officer under Rule 3 of the Criminal Procedure Rules, 2005.
- (ii) The Authority shall, subject to the exceptions set out below, indemnify its Officers and Members against any claims made against them (including costs incurred by and awarded against them) and will not itself make claims against them for any loss or damage (other than claims falling within the cover provided to their officers under any policy of insurance taken out by the officer) occasioned by neglect, act, error or omission committed by such Officer or Member in the course of or in connection with
 - (a) signing a certificate within paragraph (i)(a), above , or
 - (b) exercising any functions as a director of a company to which the Authority has appointed or nominated him, or
 - (c) any action or failure to act as described in (i)(c) above
- (iii) The exceptions are:

- (a) Any amounts contrary to a formal or informal advice or report by the Chief Finance Officer or the Monitoring Officer or an Auditors Certificate.
 - (b) Any amount which results directly or indirectly from the commission of a criminal offence (or any civil liability arising as a consequence of any action or failure to act which also constitutes a criminal offence) of which the Officer or Member is convicted.
 - (c) Any amount directly or indirectly resulting from the fraud or dishonesty or other deliberate wrong-doing, unlawful act or recklessness of the Officer or Member or their failure to act in good faith.
 - (d) The taking of any claim in relation to an alleged defamation of that Member or Officer.
 - (e) In the case of acts, or failure to act which are *ultra vires* the Council or where the act or failure to act comprises the issuing or authorisation of any document containing any statement as to the powers of the Council or any statement that certain steps have been taken or requirements have been fulfilled save in cases where it was reasonable for the Member or Officer concerned to hold that belief at the time when he/she acted or failed to act, and in the case of any statement, believed that the contents of that statement were true.
- (iv) Where this resolution applies, an Officer or Member appointed or nominated as a director of a company with which the Authority has entered into, or is to enter into, a contract which is a certified contract within the meaning of the Local Government (Contracts) Act, 1997, shall be provided with a copy of the certificate and shall be entitled to rely on it when determining whether or not to accept the said appointment or nomination.
- (v) This resolution shall apply to present and former Officers and Members of the Authority.
 - (vi) This resolution shall not apply if an Officer or Member, without the prior written approval of the Authority, admits liability or compromises any claim falling within the scope of this indemnity.
 - (vii) This resolution shall not apply in any case where, before the Officer signs the certificate within paragraph (i)(a), above, or the Officer or Member accepts the appointment or nomination, the Council has resolved that it shall not apply.

- (viii) All references to statutory provisions in this resolution apply to such provision as it may be amended from time to time, or to any enactment which replaces it.

- (ix) In the case of any indemnity given to any Member or Officer in relation to the defence of any criminal proceedings or any proceedings under Part III of the Local Government Act, 2000 that Member or Officer shall reimburse the Authority for any sums expended by the Authority in relation to those proceedings pursuant to the indemnity if, as the case may be, the Member or Officer in question is convicted of a criminal offence and that conviction is not overturned following any appeal or, in the case of Part III proceedings, if a finding is made in those proceedings that the Member in question has failed to comply with the Code of Conduct and that finding is not overturned following any appeal or if the Member admits that he has failed to comply with the Code of Conduct. Any sums reimbursable under this paragraph to be recoverable by the Authority as a civil debt.

COMPARISON OF PROPOSED INDEMNITY TO EXISTING RESOLUTION OF FINANCE SUB-COMMITTEE – 12TH NOVEMBER, 1997

Note: the Finance Sub-Committee resolution appears in bold; the proposed changes are in normal type.

1. **Subject to the exceptions listed below, the Council will indemnify all its employees against any expenses, liability, loss, claim or proceedings whatsoever arising from their neglect, act, error or omission in the course of their employment whether they are acting for the Council itself or another person or body with the Councils consent.**

The Authority shall, subject to the exceptions set out below, indemnify its Officers and Members against any claims made against them including costs incurred and awarded against them and will not itself make claims against them for any loss or damage (other than claims falling within the cover provided to their officers under any policy of insurance taken out by the officer) occasioned by neglect, act, error or omission committed by such Officer or Member in the course or in connection with:

- a. Signing a certificate within and for the purposes of the Local Government Contracts Act, 1997
 - b. Exercising any functions as a director of a company to which the Authority has appointed or nominated him
 - c. Exercising any functions as a director of a company to which the Authority has appointed or nominated him.
 - c. Any action or failure to act by any Officer or Member of the Authority which is either authorised by the Authority or forms part of or arises from any powers conferred or duties placed upon that Member or Officer as a consequence of any function being exercised by that Member or Officer (whether or not when exercising that function he does so in his capacity as a Member or Officer of the Authority), at the request of, or with the approval of the Authority, or for the purposes of the Authority.
2. **In pursuance of this indemnity and subject to the exceptions shown below, the Council undertakes not to sue or join others in an action as co-defendant versus an officer of the Council in respect of any neglect, error or omission by the officer in the course of his employment.**

The Authority shall, subject to the exceptions set out below, indemnify its Officers and Members against any claims made against them (including costs incurred by and awarded against them) and will not itself make claims against them for any loss and damage (other than claims falling within the cover provided to their officers under any policy of insurance taken out by the officer) occasioned by neglect, act, error or omission committed by such Officer or Member in the course of or in connection with:

- a. Signing a certificate under the Local Government Contracts Act, 1997.
 - b. Exercising any functions as a director of a company to which the Authority has appointed or nominated him.
 - c. To any action or failure to act which is either authorised by the Authority or forms part of or arises from any powers conferred or duties placed upon that Member or Officer as a consequence of any function being exercised by that Member or Officer (whether or not when exercising that function he does so in his capacity as a Member or Officer of the Authority) at the request of, or with the approval of the Authority, or for the purposes of the Authority.
3. **This indemnity and undertaking apply retrospectively to any neglect, act, error or omission which may have occurred before this date and after the retirement or resignation of the employee concerned as well as during their employment with the Council.**

This resolution shall apply to present and former Officers and Members of the Authority.

4. **Exceptions. The indemnity will not extend to loss or damage directly or indirectly caused or arising from:**
- a. **Fraud, dishonesty or a criminal offence committed by the employee (except where the criminal offence is an offence under the Health and Safety at Work Act, 1974)**
 - b. **Any neglect, act, error or omission by the employee otherwise than in the course of his/her employment**
 - c. **In respect of surcharges made by the District Auditor or orders made under section 19 of the Local Government Finance Act, 1982**
 - d. **If any employee without the express permission of the Council admits liability or negotiates or attempts to negotiate a settlement of any claim falling within the scope of this resolution.**

- a. Any amounts contrary to a formal or informal advice or report by the Chief Finance Officer or the Monitoring Officer or an auditor's certificate.
- b. Any amount which results directly or indirectly from the commission of a criminal offence or any civil liability act arising as a consequence of any action or failure to act which also constitutes a criminal offence of which the Officer or Member is convicted.
- c. Any amount directly or indirectly resulting from the fraud or dishonesty or other deliberate wrong doing unlawful act or recklessness of the officer or member or their failure to act in good faith
- d. The taking of any claim in relation to an alleged defamation of that Member or Officer
- e. In the case of acts, or failure to act which are *ultra vires* the Council or where the act or failure to act comprises the issuing or authorisation of any document containing any statement as to the powers of the Council or any statement that certain steps have been taken or requirements have been fulfilled save in cases where it was reasonable for the Member or Officer concerned to hold that belief at the time when he/she acted or failed to act and in the case of any statement believed that the contents of the statement were true
- f. If an Officer or Member without the prior approval of the Authority admits liability or compromises any claim falling within the scope of the indemnity

5. Legal proceedings defence costs. **No provision.**

In the case of any indemnity given to any Member or Officer in relation to the defence of any criminal proceedings or any proceedings under part III of the Local Government Act, 2000 that Member or Officer shall reimburse the Authority for any sums expended by the Authority in relation to those proceedings pursuant to the indemnity if, as the case may be, the Member or Officer in question is convicted of a criminal offence and that conviction is not overturned following any appeal or, in the case of part III proceedings if a finding is made in those proceedings that the Member in question has failed to comply with the Code of Conduct and that finding is not overturned following any appeal or if the Member admits that he has failed to comply with the Code of Conduct. Any sums reimbursable under this paragraph to be recoverable by the Authority as a civil debt.

Note: Nothing in either indemnity affects the statutory indemnity under the Public Health Act, 1875 to Members and Officers for actions taken in pursuance of a statutory power or function in good faith.

LEGAL IMPLICATIONS: PERSONAL LIABILITIES OF OFFICES AND MEMBERS

1. When can personal liability arise?

The following is a summary of the various types of personal liability that Members/Officers could encounter, excluding general liabilities of a personal nature such as accident damage, fraud and deception can be summarised as follows.

Summary of potential heads of Personal Liability

(excluding general liabilities of a personal nature eg accident damage, deception etc)

as an Officer/Member:-

- negligence (in the absence of one member executive arrangements this would be relevant for officers only), a duty is owed not only to the Council as employer but also in some circumstances to third parties (for example advice to the public).
- criminal liability under various statutes (e.g. Health and Safety at Work).
- misfeasance in public office (this may extend to nonfeasance).
- defamation.
- recoupment proceedings for unlawful expenditure.
- the cost of “defending” proceedings e.g. before the courts, standards board or pursuant to a Chief Financial Officer report.

as a director of a company or Industrial and Provident Society:-

- negligence (breach of duty of skill and care).
- breach of fiduciary duty (e. g. disclosure of interests).
- vicarious liability (if the Director has participated in the “wrongdoing”).
- fraudulent or wrongful trading.
- criminal liability or fines under various statutes.
- defamation.
- unauthorised acts (this would cover breach of warranty of Authority and breach of governance requirements).
- the cost of defence.

as a trustee:-

- (if the trust is non corporate) the trustee is liable as a principal.

- a trustee can also be liable in negligence (breach of duty of skill and care – this would be at a higher standard than a company director).
- a trustee can also be liable for breach of fiduciary duty.
- the trustee can be liable to the trust and to third parties for unauthorised acts (for example breach of warranty of Authority).
- the trustee, because he is liable as principal, has vicarious liability to third parties for the wrongful acts of employees and agents.
- the trustee could also incur liability for defamation, criminal liability or fines under various statutes and for the costs of defence.

as part of the management committee of an unincorporated association:-

- as principal (if the appointee has actually acted as principal or agent – usually liability for the transaction concerned will fall on those Members who have authorised it).
- negligence (breach of duty of skill and care – like a trustee).
- breach of fiduciary duty.
- unauthorised acts.
- vicarious liability for employees and agents.
- criminal liability or fines under various statutes.
- the costs of defence.

2. Indemnities for Members

Members have a degree of immunity from personal liability under section 265 of the Public Health Act, 1875 as extended by ss39 and 44 of the Local Government Miscellaneous Provisions Act, 1976 for **actions taken in pursuance of a statutory power or function taken in good faith**. In the absence of indemnities given by resolution of the Council, this, and only this, is the exclusion of liability that will apply.

There are some specific statutory provisions giving a power of indemnity or guarantee for specific purposes e.g. section 22 of the Housing Act, 1996.

Indemnities may be given under section 111 Local Government Act, **1972 if to do so would be incidental or conducive to or would facilitate the discharge of a function of the Council**. Case law (*R. v Westminster City Council Ex p .Barry Legg 2000*) has held that a Council was entitled to indemnify two Officers and a Member in respect of legal costs incurred before the auditor in considering an objection to the accounts arising out of the sale of Council houses. The Authority were entitled to find that the Officers/Member were not “culpable” and so fell within the terms of the indemnity offered.

Difficulties arise as to whether an indemnity could be given and could apply in where members participate in community groups (often misnamed “partnerships”), charities, companies or other external bodies and where by their actions they could incur personal liability.

It may be possible for these external bodies to obtain personal indemnity insurance (however NHS trusts and “quango’s” are apparently unable to do this) or for the external body to attempt to limit potential liability through exclusion clauses in contracts (although this would probably be unacceptable to third parties). The external organisation itself could include an indemnity provision as long as this was covered by the governing instrument although this would be limited in the case of companies and not possible for Industrial and Provident Societies.

Otherwise Section 111 indemnities are only available where it is possible to “hang” the action on an underlying statutory function of the Council and do not apply where the activity in question is *ultra vires*. Doubts have also arisen where activities involve negligence although the better view is that an indemnity could cover cases where the Member concerned was not personally at fault, but in practice it may be difficult to demonstrate this. Furthermore the Council would no doubt be advised to ensure that the indemnity would not only exclude any *ultra vires* acts but also those that result from fraud, dishonesty, deliberate wrong-doing, recklessness or are otherwise unlawful or without good faith. Difficulties arise where the Member participating in the external body assumes a role beyond that of either the underlying function or even beyond the terms of the nomination although the nomination could be broadly drawn. Care, however, must be taken, in using section 111, not to exceed the scope of that section, the use must be secondary to a primary function not to a secondary use.

3. Indemnities for officers

Case law (*R. v Bedfordshire County Council, Ex p Gregory Comminos (2003)*) indicates that (in the case of officers at least) that (subject to the usual requirements of Local Authority decision making of rationality and propriety) Councils have the power in some cases to fund libel proceedings and pay the costs of such an action.

The position on indemnities to Officers is much the same as for Members except that indemnities can be given under section 112 Local Government Act, 1972 and this Council has given a general indemnity to officers under this section, although it needs updating in the light of current law/practice.

4. The Local Authorities Indemnities for Members and Officers Order 2004

The new legislation enables the Council to provide indemnities or to secure insurance for Members and Officers in relation to any action or failure to act by the Member or Officer in question, which

- a. authorised by the Council; or
- b. forms part of or arises from any powers conferred or duties placed upon that Member or Officer as a consequence of any function being carried on by that officer or member (whether or not he does so in his capacity as a Member or Officer of the Council) where this is either at the request of or with the approval of or for the purposes of the Council.

Indemnities will not be available or insurance secured for any action which constitutes a criminal offence or which is the result of fraud, deliberate wrongdoing or recklessness, or in respect of the taking of defamation actions.

There is a limited power to provide an indemnity (or insurance) where the action or inaction complained of is outside the powers of the authority or outside the powers of the Member or Officer who acts. It also covers cases in which a Member or Officer makes a statement that certain steps have been taken or requirements fulfilled where it later becomes clear that this is not the case. The limitation on this power is to cases where the person indemnified either reasonably believed that the matter in question was within powers, or where a document has been issued containing an untrue statement as to the Authority's powers, or as to the steps taken or requirements fulfilled, where the person making the statement reasonably believes that the statement was true when it was issued or authorised.

Furthermore any indemnities/insurance in relation to the defence of any criminal proceedings or any proceedings under Part III of the Local Government Act, 2000 (Conduct) are qualified in that the terms of the indemnity/provision of insurance require re-payment of sums expended by the Council or the insurer in cases in which a Member has been found to be in breach of the Code of Conduct applicable to him, or if a Member or Officer is convicted of a criminal offence.

5. Specific issues arising from the new legislation

5.1 Who can indemnify?

Indemnities under the new Order can be given, for example, by County and District Councils, the Fire Authority, Police Authorities and any joint Authorities established under the Local Government Act, 1985. It does not apply, in particular, to Local Authority Companies, or, for that matter to "quango's".

Representatives on these organisations may therefore need to rely on the powers of their nominating organisation or separate insurance will have to be arranged by the Body concerned. The

Order would permit the Council to indemnify Officers or Members who are exercising a function and doing so in a capacity other than as a Member or Officer of the Council. This would permit an indemnity, for example, in a case where the Member or Officer acts as a Director of a Company at the request of the Council, and therefore is acting in his or her capacity as a Director. This may however be difficult to describe/maintain/police in practice.

5.2 Who can the Council indemnify?

The Council can indemnify anyone who is an Officer or Member at the time of the indemnity (this would include elected Mayors by virtue of the Local Authorities (elected Mayors) (England) Regulations, 2004). However third party nominees are not covered, for example academic experts, officers of other Council's, Members and Officers engaging in "outside" work which is unconnected with the work of the authority or third parties to whom any Member/Officer Directors assigns their position on an outside body (for example in the case of alternate Directors). Council Members or Officers acting as a Director of a Company at the request of the Council can be indemnified, and this would also, for example, extend to acting as Trustees of charities or other Trusts where the Member or Officer concerned has taken on that position pursuant to his or her role with the Council, or at the request of the Council. Care will, however, need to be taken if, for example, a Member or Officer requested to take up position as a Director on a Company subsequently takes up an enhanced role (for example Executive Director) which is not within the scope of the original authorisation.

5.3 What liabilities would an indemnity cover?

Indemnities under the new Order cover cases where the Member or Officer concerned has acted or failed to act. For example where the individual becomes personally liable for contract debts or where the individual incurs costs defending himself or herself against proceedings brought by a third party in relation to their duties as a Member or Officer. There may be a difficulty in the case of Members/Officers on external bodies and who may find themselves vicariously liable for the acts of others (e.g. agents, employees) although in some cases it may be possible that vicarious liability could have arisen because of a failure to supervise or monitor.

5.4 What other restrictions should be placed on an indemnity under the Order?

As with other decisions, the Council would have to weigh up the respective advantages and disadvantages of purchasing

insurance or meeting the cost of indemnities from their own resources.

In cases where Officers or Members participate in external bodies are likely to be given under the powers in the Order rather than under existing provisions but the Council should ensure that the indemnity excludes any acts outside the power of the outside organisation and also those that are not reasonable, honest, done in good faith and without negligence.