

Management Committee 19 September 2017 Member and Officer Indemnities

For Recommendation To Council

Portfolio Holder(s)/ Briefholder

Cllr Ms Alison Reed

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Report Author:

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Statutory Authority

Public Health Act 1875; Local Government Act 1972; Local Government Act 2000; Localism Act 2011; Local Authorities (Indemnities for Members and Officer) Order 2004

Purpose of Report

- 1 To advise of indemnity powers relating to members and officers and recommend various provisions in relation to such powers.

Recommendations

- (1) The Council grant an indemnity to members and officers of the authority in the terms set out in the Appendix to this report and that the terms of the indemnity are incorporated within the Constitution.
- (2) In so far as it has not already been obtained, the Section 151 Officer be given the delegated authority:
 - (a) to secure insurance cover for members and officers in respect of the indemnities to which (1) refers and also insurance to protect the Council against such liabilities but in either case only to the extent that this is possible and that the Section 151 Officer considers to be financially prudent; and
 - (b) that any such insurance ensures that the insurance company agrees not to pursue action against an officer or member as a result of any liability arising in consequence of the Council's indemnity (i.e.

the insurer expressly agrees to waive all subrogation rights it might possess enabling it to take action against the member or officer).

- (3) That the Corporate Manager – Human Resources and Organisation Development be delegated power to agree with the recognised unions and then to implement any amendment:
 - (a) to Officer job descriptions as necessary to incorporate provision for Officers to work for external bodies subject to relevant agreement by or on behalf of the Council; and
 - (b) to Officer terms and conditions of employment to be amended as necessary to incorporate the indemnity as may from time to time be adopted by the Council.

Reason for Decision

3. To enable Members and Officers to fully and effectively perform their functions on behalf of the Council and avoid the need for such person(s) to secure their own insurance for such purposes and seek to recover such costs from the Council.

Background and Reason Decision Needed

4. Members and officers of local authorities can incur personal civil and criminal liability as a consequence of their actions within the Council and those carried out on behalf of a wide range of outside bodies.
5. Some limited statutory immunity exists in relation to certain liability where actions are in good faith and without negligence (e.g. section 265 of the Public Health Act 1875). This however does not therefore extend to matters such as negligent action, acting for outside bodies to which a person has been appointed by the Council, or criminal liability e.g. fraud.
6. Power exists to give officers indemnity as part of their terms and conditions of employment. This includes taking out insurance centrally to cover the risk rather than pay each officer individually to secure their own personal insurance. However, Members do not have contracts of employment and until 2004 any ability to provide indemnity has been very limited.
7. Legislation was brought into force in 2004 to enable the law to be clarified and provide capacity to offer protection against various liabilities, recognising that the absence of the same can act as a serious deterrent to participation. Such protection can take the form of both insurance and/or indemnities.
8. Both North Dorset and Weymouth and Portland Borough Councils have already previously agreed indemnities for their Officers and Members (although such agreements would benefit from some update); it is unclear if West Dorset has ever entered into such an indemnity.
9. Indemnities of a kind identified within this report have also already been put in to place by various other authorities around the country.
10. The Councils already have in place some insurance relating to these matters. The purpose of this report is therefore:
 - to confirm member's wish to maintain and secure appropriate insurance provision, to formalise the terms (and in the case of West Dorset the adoption) of relevant indemnities;

- in so far as the Section 151 Officer considers it financially prudent to do, secure additional insurance cover for existing gaps in the indemnity; and
- in so far as it is necessary so to do seek to update Officer job descriptions and terms of employment to reflect these arrangements.

MEMBER INDEMNITIES

Actions / inactions by members on behalf of the Council acting within the Council's powers

11. As identified above, existing statutory provision already exists to provide certain immunity. The 2004 regulations (regulation 5 to 7 inclusive of the 2004 regulations) make clear that a Council, subject to certain limitations, can provide indemnity to members in relation to actions, or failures to act on matters:
 - authorised by the Council; or
 - that form part of or arise from powers conferred or duties placed upon that member as a consequence of any function exercised by that member –
 - (1) at the request of, or with the approval of the Council; or
 - (2) for the purposes of the Council.
12. Regulations also clarify that notwithstanding any limitation on the powers of the Council, the indemnity can be applied to certain actions (or lack of action) outside the powers of the Council or the powers of the Member.
13. There is obvious public interest in enabling members so far as possible to undertake duties provided to them by the Council without fear of incurring potential significant legal cost to defend the exercise of those duties. In so far therefore as the law allows, it would therefore seem appropriate for the Council to provide such indemnity to members.

Acting fraudulently or as a deliberate (including malice and for an ulterior purpose) or reckless act of wrongdoing.

14. There is a clear difference between a member acting in malice etc, and being accused of such action. Whilst the former could not be condoned, a member should not be concerned about performing relevant duties on behalf of the Council for fear of being put to significant legal expense
15. It would therefore appear reasonable in the public interest to provide indemnity against costs of representation in such circumstances, provided that the member was ultimately cleared of the allegation (provision would be made for repayment if an allegation was substantiated).

Acting in a manner constituting a criminal offence.

16. As with malice above, a distinction can be drawn between acting in a criminal manner and an allegation of such behaviour. In public interest terms, a member should not be deterred from fulfilling their duties for fear of costly legal actions to justify their steps taken in good faith.
17. Again therefore, an indemnity for costs of legal representation in defending any prosecution would seem justifiable on such a basis, provided that the member was not ultimately found guilty of the alleged criminal conduct

(provision would provide for repayment in the event of conviction of a criminal offence, without the matter being overturned in any subsequent appeal (if any)).

18. It is possible that a criminal offence may also give rise to civil liability. In such circumstances although the indemnity in relation to the criminal matter would only cover legal representation, indemnity in respect of the civil action would extend to both legal representation and civil liability (subject to a finding of fraud etc as set out above).

Defamation

19. If a member, acting in their capacity as a member, makes a statement honestly believed to be true, in the absence of malice a defence of “qualified privilege” may exist. This does not stop a third party alleging defamation and it is in the public interest to ensure that there is honest debate by members of matters of interest to the Council without fear of incurring significant legal costs in defending a defamation action.
20. On this basis, there seems justification to providing indemnity to members in relation to this issue. Such an indemnity is however by regulation restricted to the defence of such proceedings; it is not suggested that the indemnity would in this instance include any damages that may be incurred should a case against a member be upheld.
21. The regulations also expressly exclude from their scope the power to provide indemnity for the costs of pursuing a defamation action against a third party where the member considers s/he has been defamed. Case law suggests that there may be existing power to grant such indemnity at least to an Officer. It is not however suggested that the indemnity should cover such a situation but rather, if such circumstances arose, it ought to be considered by the Council on a case by case basis.

Working outside the Council

22. Members often are appointed to a wide range of external bodies. Such appointments can arise in a variety of ways. The Council itself may appoint a member to an external body. A member may be invited to join an organisation that is seeking a link to the Council or perhaps the local community. The member may at their own choice opt to join an organisation.
23. The regulations allow for an indemnity to be provided where the appointment is:
“at the request of... with the approval of... or for the purposes of the authority”.
24. It can be seen to be in the public interest to have members of the Council acting as representatives on outside bodies. In order to facilitate the application of this position it is suggested that an indemnity be provided where appointments have been made by the Council, or in consequence of a nomination by the authority, or where the Council has specifically approved the appointment as advancing its interests.
25. This approach should mean that the indemnity is reasonably available whether or not any particular action is conducted at the request or with the approval of the authority although a few caveats would seem desirable. Therefore, once a member is appointed, the aim is that the indemnity will generally provide cover even where an action is not specifically related to

- the reasons for appointment to that outside body provided they are being performed as part of that member's participation with the organisation.
26. As is the case when undertaking Council functions, the regulations do not allow cover:
 - for any criminal liability;
 - for liability arising from fraud, deliberate wrongdoing or recklessness; and
 - for the costs of pursuing a defamation action.
 27. Furthermore, any indemnity would not cover liability for actions outside the powers of the outside body, irrespective of whether the member believed the body had the power.
 28. Members' risks of personal liability can vary depending upon the nature of the outside body and might differ according to whether that body is solvent or insolvent. In certain cases, the outside body can take out insurance to protect its members from liability whilst carrying out its activities. In a case where adequate insurance has been taken out for, and was available to, the member, it is suggested that the indemnity should not apply in such a circumstance.
 29. When determining whether to act for an outside body, a member should therefore have regard to his/her potential personal liability and might always like to determine whether a body is properly incorporated and if it carries insurance for its members.

Breach of Code of Conducts relating to Members

30. The regulations allow the Council to grant indemnity to members for legal representation costs in "Part 3 Proceedings" i.e. investigations, hearings or other proceedings for an alleged failure to comply with the Code of Conduct for Members. They do however require the reimbursement of sums expended should any legal action be unsuccessful.
31. The Code of Conduct provisions that existed at the time of the regulations have been abolished and replaced with a new system. The primary legislative sanction that now exists in relation to a breach is criminal prosecution. As such, following the principles of the regulations, it is suggested that the indemnity extend in accordance with the principles above; as such potential criminal liability would be covered (provided a member is not found guilty). The indemnity will not however extend to decisions or actions by the Council itself in relation to member code of conduct matters.

Co-opted Members

32. One of the previously adopted indemnities did seek to provide cover for co-opted members on to two specific committees (one being Standards Committee which is not a committee now operated by any of the Councils).
33. It is not clear whether it is even legally possible to extend such an indemnity to cover any co-opted member. It is not proposed to therefore automatically provide such cover to any co-opted member; however, the code does provide that in so far as the law allows, the Council can consider applying such an indemnity on a case by case basis.

OFFICER INDEMNITIES

Acting within the Council

34. If a third party suffers loss as a result of an officer's action, whether or not they can directly pursue the officer, they can potentially take action against the Council which would be vicariously liable for the actions or inactions of the officer in its employment. A Council that suffered such loss might then seek to sue its employee.
35. In practice, local authorities have provided indemnity for their officers against such losses not least because it is potentially far more cost effective for the Council to insure a risk centrally than cover the costs of each officer securing their own professional indemnity insurance.
36. Public interest suggests that its officers should be able to conduct the business of the Council which the Council can lawfully exercise without fear of legal action. This includes circumstances where an issue of negligence might arise. It would seem appropriate therefore to secure that the practice of providing indemnity in this respect be secured.
37. Indeed, as the Council looks to identify and develop opportunities available to it e.g. offering services to external bodies (such as community organisations), it becomes even more important to ensure that appropriate measures are in place to facilitate such initiatives.
38. The regulations enable indemnity to a certain extent to be extended to cover actions outside the power of the Council or outside the power of the Officer, provided the Officer reasonably believed that the action was within the power of the Council.
39. This is therefore similar to the powers now available for members. The public interest reasons for providing indemnity to members in such circumstances are equally relevant to cover any liability which an officer may incur by unintentionally acting outside the Council's powers, including legal and other costs in defending a claim that s/he has exceeded those powers.
40. The 2004 regulations provide the same restrictions on indemnifying officers as for members i.e. (in summary) 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.
41. Save for these exceptions however, the same public interest reasons identified above for providing various indemnities to Members are equally applicable to officers.
42. Although case law suggests that separate power might enable the Council to indemnify officers pursuing claims of defamation, it is not suggested that a general indemnity is provided, however this is available to consider on a case by case basis.

Acting externally to the Council

43. Like members, officers also can act for external bodies, and such participation can be of benefit to the Council in exercising its functions and responsibilities. As for members therefore, public interest appears to support the granting of indemnity. To enable this to be effectively managed, it seems appropriate to adopt a similar approach to that proposed for members, namely that such indemnity extends to those outside appointments of officers where the Council has made the

appointment, it arises through nomination by the Council, or where the authority has approved the appointment as advancing its interests. It would not however extend to circumstances where the organisation already had adequate insurance in place to protect the appointed officer.

Disciplinary action for acts or failure to acts

44. Although it might be appropriate for the Council to indemnify an officer in relation to a variety of his/her actions / omissions, it does not mean that the Council should not be able to undertake its own internal steps in relation to any such action or inaction. Accordingly, it is suggested that the indemnity should make clear that whilst the Council will provide an indemnity, such indemnity will not act to prejudice the Council in taking its own disciplinary action should it consider it appropriate to do so.

Insurance; Officer terms and other general provisions

45. The Council already has insurance provision relating to various actions by members and officers. This report gives power to the Section 151 Officer to secure that appropriate insurance is in place to cover such matters unless he considers it is not financially prudent to do so.
46. Initial investigations suggest that the adoption of these indemnities may not necessitate a formal change of officer terms and conditions but revisions to job descriptions may be required. The report therefore recommends power be given to the Corporate Manager – Human Resources and Organisation Developments to progress any changes that may be necessary.
47. It is also worth noting that the indemnity is only intended to apply to officers i.e. persons directly employed directly by the Council under a contract of employment. It is not therefore proposed that it should extend to agency workers/locums or external bodies/persons providing a service to the Council under a specific service contract.
48. For the purposes of clarity it is suggested that the terms of the indemnity be incorporated within the Council's constitution.
49. When a member or an officer uses his/her own car for Council business s/he should already have in place motor insurance. It is suggested therefore that in such circumstances this indemnity should not apply.
50. In addition to all the matters set out above, there are certain general provisions that it is considered would be sensibly incorporated into the indemnity. In particular these include the following.
 - It is possible that a claim against a member or officer might not actually be identified until after the member or officer had ceased such a role. It is therefore considered appropriate for the indemnity to extend its cover to issues arising during the time the person was a member or officer even if, by the time the claim is progressed, that role has ceased.
 - As the Council is potentially taking on a liability in providing the suggested indemnity, it is appropriate that the Council should be given suitable control in relation to any matter to which such liability might attach. It is therefore considered appropriate for the indemnity to contain relevant terms securing such control e.g. that the member or officer notifies the Chief Executive of the action as soon as reasonably practicable, the Council or its insurer has the right to

take over the defence of any proceedings and that the indemnity will not automatically apply if the member or Officer admits liability, attempts to negotiate a settlement or fails to reasonably follow relevant legal advice.

- If a claim or other proceedings went against a member or officer the temptation might be to appeal or challenge the decision irrespective of the prospects of success. It is therefore suggested that the indemnity be not extended to such further actions unless the Monitoring Officer felt there was a reasonable prospect of success.

51. It is self evident that some parts of this report and the indemnity inevitably has an impact on both Members and all Officers of the Council including the author of this report; to that extent therefore it should be noted that all Officers have an interest to a greater or lesser in the recommendations of this report and the indemnity proposed.

Implications

Corporate Plan

52. It is considered that the following corporate priorities are considered relevant to this report:
- Develop a modern, innovative workforce that is motivated and empowered to deliver lean and agile customer focused services;
 - Improve organisational effectiveness and ensure that the strategic priorities of the partnership are met;
 - Work with our partners across Dorset to reform and shape the future of local government to ensure that it is sustainable

Financial / Risk Management (including Health & Safety)

53. By providing the indemnities to which this report relates, the Council will undoubtedly be exposed to financial risk should liabilities arise in relation to the indemnity. However, this risk can and currently already is limited through insurance and in the case of Weymouth and Portland Borough Council and North Dorset District Council versions of the indemnity are already in place. Furthermore, any costs arising under such circumstances must be balanced against the consequences of not providing appropriate indemnities. This would include the potential impact upon the operation of the Council and the possible need for individuals to secure their own professional insurance, including individual Members and Officers.
54. The recommendations empower the section 151 Officer to secure a level of insurance that he considers financially prudent to minimise the Council's risk in any event.

Economic Development

55. The existence of an indemnity should reduce concerns of Members and Officers regarding their potential liabilities whilst performing their duties including working for and in partnership with other organisations.

Human Resources

56. The recommendations empower the Corporate Manager – Human Resources and Organisational Development to progress as necessary changes to Officer job descriptions and terms and conditions of employment to reflect the updated indemnity wording.

Consultation and Engagement

57. The Corporate Manager – Human Resources and Organisational Development will need to consult with Unions as necessary in order to facilitate the incorporation of any necessary changes to job descriptions and Officer terms and conditions.

Appendices

Proposed Member and Officer indemnity.

Background Papers

Previous indemnities adopted by Weymouth and Portland Borough Council and North Dorset District Council.

Footnote

Issues relating to financial, environmental, economic and equalities implications have been considered and any information relevant to the decision is included within the report.

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Appendix

TERMS OF INDEMNITY

INDEMNITY OF MEMBERS AND OFFICERS

1. INDEMNITY PROVIDED UNDER THE LOCAL AUTHORITIES (INDEMNITIES FOR MEMBERS AND OFFICERS) ORDER 2004, LOCAL GOVERNMENT ACT 1972; LOCALISM ACT 2011 AND ALL OTHER RELEVANT ENABLING LEGISLATION

(1) In this Indemnity:-

“Council”, means the Council that has resolved to adopt this indemnity;

“employee” means a person employed by the Council at the time of any neglect, act, error or omission, provided that for the avoidance of doubt this does not include a person undertaking work for the Council whilst engaged via an agency or a person performing a service for the Council pursuant to a contract entered into by or on behalf of the Council for the provision of that service (as opposed to a contract of employment relating to that person), and any reference in the plural shall be similarly construed;

“member” means an elected member of the Council at the time of any neglect, act, error or omission save to the extent provided for below in relation to co-opted members; and

“purposes of the Council” in the context of an employee for the avoidance of doubt includes circumstances where the employee can reasonably be regarded as exercising duties in the normal course of his/her employment whether such powers have been expressly delegated to that officer or otherwise.

- (2) (a) The Council hereby indemnifies its employees and members to the extent as set out in paragraph (3) below, subject to the exceptions set out in paragraph (4) below but only on the terms set out in paragraph (5) below. It will not itself make any claim or join in any action against them in relation to any matter by which they are hereby indemnified.
- (b) The indemnity contained herein shall continue to apply after the member or employee has ceased to be a member or employee of the Council as well as during his/her membership of or employment by the Council.
- (3) (a) Subject as provided in paragraphs (3)(b), (c) and (d) below, the indemnity shall extend to any actual or prospective claim (including a claim for damages) and/or any other proceedings against the member or employee together with any associated costs and expenses that arises from, or is in connection with, any action of, or failure to act by, the employee or member in question, which:-
- (i) is ,or has been, authorised by the Council; or
 - (ii) forms part of, or arises from, any powers conferred, or duties placed, upon that employee or member, as a consequence of any function being exercised by that employee or member (whether or not when exercising that function he or she does so in his or her capacity as an employee or member of the Council):-

- (A) at the request of, or with the approval of, the Council; or
 - (B) for the purposes of the Council.
- (b) Notwithstanding any limitation on the powers of the Council, this indemnity shall be construed as extending to where the employee or member in question:-
- (i) believed that the action, or failure to act, was within the powers of the Council; or
 - (ii) where the action or failure 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 fulfilled, believed that the contents of that statement were true,

provided that in either case it was reasonable for that employee or member to hold that belief at the time when he or she acted or failed to act.

- (c) To the extent that the indemnity would otherwise be available to a member or officer for the avoidance of doubt the indemnity shall also be construed as extending to:-
- (i) any action or omission by a member or employee that is subsequently found to be beyond the powers of the member or employee but only to the extent that the member or employee believed that the act or omission was within his/her powers at the time of the act or omission; and / or
 - (ii) any negligent act or negligent failure to act by an employee of the Council.
- (d) Additionally, to the extent that the indemnity would otherwise be available to a member or officer for the avoidance of doubt,
- (i) the indemnity shall extend to the defence by that employee or member of any allegation of defamation made against him or her; and
 - (ii) nothing in this indemnity shall prevent the Council from separately resolving to indemnify a member or officer for bringing a claim in defamation to the extent that the law allows.

(4) The exceptions are that:

- (a) subject as provided for below, no indemnity is given in relation to any action, or failure to act, by any employee or member which:-
 - (i) constitutes a criminal offence; or

- (ii) is the result of fraud, or other deliberate wrongdoing (including malice) or recklessness on the part of that employee or member.

Notwithstanding the provision above, but subject as otherwise provided herein, the indemnity does relate to –

- (iii) the defence of any matter to which paragraph 4(a) above relates that is brought against the member or employee; and
 - (iv) any civil liability arising as a consequence of any action or failure to act which also constitutes a criminal offence.
- (b) Where an act or failure to act occurs not in the discharge of the functions of the member or employee as a member or employee of the Council but as part of his/her participation with another organisation (whether as a member, employee or otherwise) as a person appointed to that organisation, then the indemnity shall only apply in relation to participation:
- (i) where his/her appointment to that organisation was made by or on behalf of the Council;
 - (ii) where his/her appointment was made as a result of his/her nomination for appointment to that organisation by or on behalf of the Council; or
 - (iii) where that appointment to that organisation was specifically approved by or on behalf of the Council,
- and in all cases only where:
- (A) such act or failure to act was within the power of that organisation; and
 - (B) that organisation has not itself secured adequate insurance for the benefit of the member or employee that is available to and would cover the member or employee for the act or failure to act.
- (c) No indemnity is given in relation to any actual or potential challenge to the exercise by or on behalf of the Council (including any determination relating thereto) of any of its arrangements pursuant to any code of conduct adopted by the Council in relation to its members or any subsequent action taken by the Council as a consequence of a determination under any such code.
- (d) The indemnity shall not extend to:
- (i) any loss or damage directly or indirectly arising from any motor vehicle claim in which an employee or member has used his or her own private vehicle on the Council's business; or

- (ii) an employee defending or resisting any potential or actual disciplinary action taken by the Council against that employee.
- (e) This indemnity does not apply to co-opted members of the Council, provided that, to the extent that the law allows, the Council may on a case by case basis at its absolute discretion determine that it should be so applied.

(5) The terms of the indemnity are as follows.

- (a) Where the indemnity has effect in relation to the defence of any:
 - (i) criminal proceedings; or
 - (ii) other allegation relating to fraud or other deliberate or reckless wrongdoing, including malice,

then if the employee or member in question is convicted of a criminal offence or found to have committed the fraud or other deliberate or reckless wrongdoing (as the case may be), and that conviction or finding is not overturned following any appeal, that employee or member shall reimburse the Council for any sums expended by it in relation to those proceedings pursuant to the indemnity, and those sums shall be recoverable by the Council as a civil debt.

- (b) The indemnity is subject to the employee or member notifying the Chief Executive as soon as reasonably practicable of any claim being made or intimated against him or her.
- (c) The indemnity will only extend to cover costs reasonably incurred in relation to any claim and/ or other proceedings together with any damages award loss and other expenses, evidenced by the employee or member to the satisfaction of the Monitoring Officer and Section 151 Officer. However, it does not extend to cover any actual award of damages in relation to a defamation action that is successfully taken against a member or employee.
- (d) The indemnity will not automatically apply if the employee or member without the written authority of the Chief Executive or, where appropriate, any appointed insurers:
 - (i) admits liability; or
 - (ii) negotiates or attempts to negotiate a settlement of any claim falling within the scope of this indemnity; or
 - (iii) fails to comply with any reasonable legal advice given by or on behalf of the Council (or its appointed insurers) in relation to proceedings to which the indemnity relates,

but may still be determined to apply should the Council so decide.

- (e) The indemnity will not automatically apply to any appeal or other challenge against the outcome of any claim or other proceedings unless in the opinion of the Monitoring Officer any such appeal or other challenge has a reasonable chance of success.
- (f) The Council or its insurers will be entitled to take over and conduct in the name of the employee or member the defence of any claim or other proceedings brought against the employee or member.
- (g) The indemnity shall not extend to any challenge or other claim against any decision of the Section 151 Officer and / or Monitoring Officer and / or the Council and / or the Council's insurers made pursuant to the provisions of the indemnity.
- (h) Where the Council arranges insurance to cover the whole or part of its liability under this indemnity, these provisions shall, in so far as it is appropriate so to do, apply as if references to the Council were references to the insurer.
- (i) The application of the indemnity shall not inhibit or prejudice the rights of the Council to take disciplinary action against an employee in respect of any act or failure to act in whatever circumstance.