

**REPORT OF THE CLERK
TO THE
STANDARDS COMMITTEE – 2ND OCTOBER 2006
MODERNISATION WORKING GROUP – 9TH OCTOBER 2006
FIRE & RESCUE AUTHORITY – 30TH OCTOBER 2006
ON
PROVIDING INDEMNITIES TO MEMBERS AND OFFICERS**

1. PURPOSE OF REPORT

To invite members to consider and approve indemnities for members and officers..

2. THE REPORT

- 2.1 The ability of members and officers to take decisions and deliver services on behalf of the authority without the risk of personal liabilities where they have acted properly, is fundamental to the effective operation of the authority.
- 2.2 Authorities have long been able to give indemnities to their elected members and their officers but the changing environment of delivery of services, particularly by way of partnership working, have shown up weaknesses in the existing legislation. The Local Government Act 2000 allowed the National Assembly for Wales to make regulations giving additional powers to local authorities to grant indemnities in certain defined circumstances; those regulations have only just been made and this report explains what indemnities can be given in the light of those regulations, what are the restrictions that apply, and goes on to suggest a form of indemnity which could be accepted by members.
- 2.3 This report, and the suggested indemnity, has been prepared by the Association of Council Secretaries and Solicitors in Wales (ACSeS) and so what is being suggested in this report, is likely to be used by authorities across Wales.
- 2.4 The new rules apply to county/county borough councils, community/town councils, fire and rescue authorities and national park authorities. Police authorities in Wales are subject to separate regulations made in England, but those regulations are substantially the same as the regulations applying to other public authorities in Wales.
- 2.5 Powers for indemnities
- (a) Section 265 Public Health Act 1875 (extended by the Local Government (Miscellaneous Provisions) Act 1976.
- This Act provides a protection from liability, and an indemnity, for members or officers of local authorities acting under the direction of the authority acting under any Act of Parliament. The protection also applies to a person appointed as member of a joint committee of two or more local authorities.
- (b) Section 111 Local Government Act 1972 which provides powers to a local authority to do anything that is “incidental or conducive to the discharge of a function of the authority”.

Over the past 10 years or so there have been a number of court decisions which have reduced the circumstances in which an indemnity can be given, under the above, in

particular the 1972 Local Government Act. In particular the courts have prevented the 1972 Act power being used where there was negligent conduct or the power or the activity was outside the powers of the local authority (“ultra vires” decisions). These decisions came from a number of high profile cases where limited companies set up by local authorities to carry out specific projects failed, incurring significant debts. In those cases the creditors pursued the individual directors and the local authorities themselves for the debts of the limited company.

Although there has not been a ruling either for or against these, new methods of working involving partnerships, joint venture companies and charitable trusts may not be covered by the existing legislation and so the new regulations under the Local Government Act 2000 have been long awaited and are very welcome.

(c) Indemnities under Local Government Act 2000

The Assembly regulations help to remove the doubt about whether indemnities can be used for new methods of working such as partnerships but the guidance from the National Assembly stresses that the new powers supplement - they do not replace - the existing powers of indemnity, which are described above.

The new powers allow this Authority to grant indemnity, at its discretion to members (including independent and co-opted members on Standards Committees) and officers.

It is a matter for each authority to determine which members and officers should be granted indemnity and while it is a matter for each council to decide how widely to give the indemnities, the view of the ACSes members preparing this report for local authorities in Wales is that:-

- (i) for consistency the indemnities ought as far as possible to be the same for all authorities;
- (ii) so that officers and members can carry out their duties without fear of any personal liability, the indemnities should be as wide as possible.

The suggested form of indemnity appears as Appendix 1 to this report. It is important to stress that it does not extend to members or officers acting in a personal capacity, or where their personal activity has brought the Authority into disrepute.

2.6 Limitations

The current regulations set out limitations on giving indemnities, and these are reflected in the form of indemnity at Appendix 1:-

- (i) indemnities do not extend to liabilities arising from any action, or failure to act which constitutes a criminal offence;
- (ii) the indemnity will apply where the member or officer when taking the action which gave rise to the liability, acted honestly and in good faith. If the action was knowingly reckless then the indemnity will not apply;
- (iii) indemnity cannot be given to cover the cost of members or officers taking legal action for defamation. Indemnities can of course be given to individuals in order to defend any defamation proceedings taken against that individual in relation to their official functions;
- (iv) if any money is paid under an indemnity allowing a member to answer allegations of a breach of the code of conduct, that sum is repayable if there is a finding against the

councillor of a breach of the code of conduct and the councillor is suspended, partially suspended or disqualified as a result. Where there is a finding of a breach of the code of conduct but the penalty falls short of a suspension, partial suspension or disqualification the regulations provide that the Authority's Standards Committee will decide whether the costs involved in providing the indemnity should be repayable by the councillor;

- (v) in relation to criminal proceedings indemnities can be given to a member or officer to defend criminal proceedings. That sum is repayable in the event of a conviction for that offence;

3. FINANCIAL IMPLICATIONS

Much of the indemnity described in Appendix 1 will already be covered by the Authority's own insurance policy but there is potentially some expenditure on behalf of the authority in providing an indemnity where there is no insurance cover. Each case will depend on its own circumstances and so it is difficult to give any accurate forecast of what those sums might be. Clearly an authority could be exposed to significant expenditure were the member or officer involved allowed free rein in incurring "defence costs" and so the indemnity allows the authority through its Standards Committee to pre-approve the level of expenditure which may be incurred by a member or officer, always ensuring however that the level of protection afforded to the officer is not compromised by limiting the nature of that representation. This is detailed in the appendix to this report.

4. RECOMMENDATIONS

- (i) That members note the contents of the report;
- (ii) That the Authority approves an indemnity in the form contained in Appendix 1

FORM OF INDEMNITY TO MEMBERS AND OFFICERS

1. This indemnity is made under S.101 of the Local Government Act 2000 and the Local Authorities (Indemnities for Members and Officers) (Wales) Order 2006, and is supplementary to the provisions of S.265 of the Public Health Act 1875 as extended by S.39 and S.44(1) the Local Government (Miscellaneous Provisions) Act 1976.
2. The Mid and West Wales Fire and Rescue Authority indemnifies each member and officer of the authority against any claim liability loss and/or damage in relation to any action or failure to act by any member or officer which:-
 - (a) is authorised by the authority; 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 exercised by that member or officer (whether or not in exercising that function the member or officer does so in the capacity of member or officer of the authority)
 - (i) at the request of or with the express approval of the authority; or
 - (ii) for the purposes of the authority

Without prejudice to the generality of this indemnity (above) the indemnity extends to action:-

- (a) taken under delegated powers;
- (b) taken personally under any specific statutory provision such as Head of Paid Service, Chief Finance Officer, Monitoring Officer, Local Government (Contracts) Act 1997.
- (c) taken at Partnerships, informal joint working arrangements, charitable organisations, companies (however constituted) when the member or officer is serving as the Authority's representative on these bodies.

(For the purpose of this indemnity "member" includes independent members who sit on the Authority's Standards Committee).

3. **Conditions and Limitations applying to the Indemnity**

A. **Good faith**

A member or officer relying on the indemnity:-

- (i) must believe that the action, or failure to act, in question was within the powers of the authority
or
- (ii) where that action or failure to act comprises the issuing or authorising of any document containing any statement as to the powers of the relevant authority, or any statement that certain steps had been taken or requirements fulfilled, believed that the contents of that statement were true;

and

in either case that it was reasonable for that member or officer to hold that belief at the time when that member or officer acted or failed to act

the authority will provide the indemnity in relation to an act or failure to act which is subsequently found to be beyond the power of that member or officer in question, but only to the extent that the member or officer reasonably believed that the act or failure to act in question was within that member or officer's powers at the time at which that member or officer failed to act.

B. Repayment of cost

Where any indemnity is given to a member or officer in relation to the defence of criminal proceedings or proceedings alleging a breach of the code of conduct, then:-

- (i) in relation to criminal proceedings if the member or officer is convicted of a criminal offence then the sums expended by the authority or its insurers in relation to those proceedings must be reimbursed to the authority or to the insurers;
- (ii) where the proceedings relate to an allegation against a member of a breach of the code of conduct:-
 - (a) if a finding is made that finds that the member has failed to comply with the code of conduct (or the member has admitted that failure) and as a consequence the member is suspended, partially suspended or disqualified, then the sums expended by the authority or its insurer must be reimbursed to the authority or its insurers
 - (b) in the case of an allegation of a breach of the code of conduct and there is a finding that the member has failed to comply with the code of conduct (or the member has admitted that failure) and as a result the member is censured or has some penalty imposed other than suspension, partial suspension or disqualification then if the Authority's Standards Committee deems it appropriate the sums expended by the authority or its insurers must be reimbursed to the authority or its insurers.

C. Level of representation

In the case of professional representation of a member or officer under the terms of this indemnity the member or officer must obtain the prior approval of the authority through its Standards Committee of the nature and extent of that representation, provided always that the decision on the level or extent of representation will not unreasonably restrict the right of the individual member or officer to properly defend those proceedings.

D. Defamation

This indemnity does not extend to the **making** by a member or officer of any claim in relation to an alleged defamation of that member or officer

E. General Principles

- (i) The authority will provide the member or officer with reasonable and proportionate access to authority employees and authority resources and facilities to enable the

individual officer to properly respond to allegations of personal liability being advanced;

- (ii) The authority will allow legal representation for a member or officer separately from the authority's own legal advisers (and/or the authority's insurers' legal advisers) where the interests of the authority and the individual officer may conflict or in such other circumstances where it is agreed between the authority and the individual officer that separate legal representation is appropriate.
- (iii) the authority will not seek to recover from an individual member or officer any losses incurred by the authority as a result of an action or failure to act by the member or officer concerned except:-
 - (a) where the member or officer involved did not reasonably believe that the act or omission in question was within his powers at the time when that act or omission took place, or
 - (b) where the action or failure to act constituted a criminal offence.