

report

meeting	NOTTINGHAMSHIRE AND CITY OF NOTTINGHAM FIRE & RESCUE AUTHORITY	
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REPORT OF THE CLERK TO THE FIRE & RESCUE AUTHORITY

GRANTING OF INDEMNITIES TO MEMBERS AND OFFICERS

1. PURPOSE OF REPORT

The purpose of this report is to inform the Fire Authority of the implications of the Local Authorities (Indemnities for Members and Officers) Order 2004 and to seek the approval of the Authority to a range of indemnities being extended by the Authority.

2. BACKGROUND

- 2.1 There has been uncertainty 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.
- 2.2 In the past, Local Authorities have relied on various statutory provisions that either exclude liability or permit some indemnities to be granted. Section 265 of the Public Health Act 1875, as extended by Sections 39 and 44(1) of the Local Government (Miscellaneous Provisions) Act 1976 provides a limited exclusion of liability. Taken together these provisions mean that there is already a statutory bar on liability of Members and Officers, if they are acting in pursuance of a statutory function or power of the Authority and they are acting in good faith. Nothing in these proposals affects that position. In addition, Section 111(1) of the Local Government Act 1972 provides ancillary powers that may permit the provision of an indemnity by an Authority, if to do so facilitates or is incidental or conducive to the discharge of a function of the Authority,
- 2.3 Doubts have arisen however, about the extent to which Authorities can provide indemnities, particularly where individuals incur personal liability for their actions on external bodies to which they have been appointed by their Authority, and the scope to cover actions that are ultra vires or involve negligence.
- 2.4 A High Court decision in April 2000 (R v Westminster City Council, ex parte Barry Legg (2000) 2 LGLR 961) has changed the position to some extent. The judgment made it clear that a reasonably wide ranging indemnity was lawful within the provisions of Section 111 in certain instances. Some uncertainty remains however, as to the extent of existing powers. Given the importance that the Government attaches to Local Authorities working in partnership with other bodies and using their powers in innovative ways in order to ensure delivery of high-quality and cost-effective services, it is important that these matters should be clarified.
- 2.5 In the Local Government Act 2000, the Government took order-making powers to allow the Secretary of State to provide Authorities with the ability to indemnify their Members

and Officers in respect of personal liabilities incurred in connection with their service on behalf of their Authority.

2.6 Section 101 of the Act is deliberately wide ranging and permits the Secretary of State to :

"make provision for or in connection with conferring a power on relevant Authorities in England and Police Authorities in Wales to provide indemnities to some or all of their Members and Officers".

2.7 The problem being addressed is essentially that Members and Officers may be left liable for costs arising from actions taken in relation to their duties, with Authorities unable to provide individuals with an indemnity. This can come about in two situations :

- i) Where an Authority concludes that it does not have the power to give an indemnity where it would wish to, and ;
- ii) Where an Authority has given an indemnity, but it is subsequently found that the Authority exceeded its powers when granting the indemnity.

In the first case the Member or Officer may decline to take on the work concerned and in the second may find that he or she becomes personally liable for a large sum of money, having believed that he or she was indemnified. This has the knock on effect that individuals and Authorities may be reluctant to be involved in some forms of particular work and that Authorities may find it difficult to recruit and retain Members and Officers.

2.8 As such there are financial risks to the individuals involved and risks around diminished capacity and reduced effectiveness for the Authorities. It is very difficult to quantify these risks and costs. The actual risk to the individual and the amount of cost incurred range from a need for brief legal advice to, in some cases, the risk of a long and expensive court case and a requirement to pay substantial damages if the case is lost. The extent to which individuals and Authorities may be reluctant to be involved in innovative or unusual work, or Authorities may find it difficult to recruit and retain Members and Officers is difficult to measure and so is any associated cost.

2.9 The current legal uncertainty about the extent to which indemnities can be lawfully granted gives rise to several different possible issues for Authorities and their Members and Officers.

Ultra Vires Actions and Commitments

2.10 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 or letter of comfort. As a consequence, sometimes individuals can become personally liable to pay very large sums.

2.11 The Government believes that the situations in which principal authorities might be deemed to be acting ultra vires has been greatly reduced by the introduction of the power to promote well-being, although this does not apply to Fire Authorities. In addition, the need for letters of comfort should also have been reduced by the Local Government (Contracts) Act 1997, which clarifies Authorities' powers to contract with the private sector

and allows for the contractor to be compensated if the contract is, nevertheless, deemed unlawful. However, while case law develops on these new powers in some cases, despite care on the part of Authorities and their Members or Officers, ultra vires action may still occur.

- 2.12 It is not common for individuals to be pursued personally for debts or costs arising from actions or letters of comfort that prove to be ultra vires the Authority. However, it is possible for this situation to arise. The case of Burgoine v. Waltham Forest LBC (1996) 95 LGR 520 illustrates that where the act is ultra vires any indemnity will also be ultra vires and thus void. In that case, the individuals who had acted as directors of a company that became insolvent became personally at risk for very substantial sums of money and were unable to call on the indemnity that they believed to be available.

Liabilities and Legal Costs in the Course of Duties

- 2.13 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. More common however, 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 on legal support. These proposals will enable Authorities to indemnify individuals against these costs.

Partnership Working and Innovation

- 2.14 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 these activities. Under current rules, the Authority may not be able to provide a reliable indemnity to the individual concerned because of the doubts about the position of those acting in outside bodies after the Burgoine case and any remaining uncertainties as to whether a particular arrangement is within the Authority's powers. At the time of the Local Government Act 2000 there was serious concern that individuals would not want to become involved in partnership working due to these concerns. This has not yet happened to the extent feared, but could potentially still do so in the future if the situation is not clarified.
- 2.15 Although relevant Authorities should clearly take due care when considering the powers for a particular action, there is a need to provide some re-assurance to individuals that the risks associated with more innovative approaches are capable of being covered. 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

- 2.16 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. At present the process is broken into two parts - investigation of an allegation, and, if the Ethical Standards Officer (ESO) concludes there is a case to answer, there may be a hearing to formally determine whether the Member has failed to comply with the Code of Conduct and if so what sanction should be imposed. Under the Local Government Act 2000 ESOs appointed by the Standards Board to conduct investigations may pay expenses and allowances to anyone furnishing information for the purposes of an investigation. This power is discretionary however, and does not cover the costs of legal advice or the Member's costs pertaining to the hearing stage of the process. The costs

involved in the hearing stage could vary substantially depending on 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.

3 REPORT

3.1 There are six issues that the new regulations address :

- i. the cases in which indemnity or insurance may be provided ;
- ii. the basic tests that must be met for an indemnity to be granted ;
- iii. whether insurance should be allowed and what it should be able to cover ;
- iv. whether indemnities should be provided to defend or pursue defamation actions ;
- v. what the position should be on ultra vires actions and letters of comfort ; and
- vi. what circumstances, if any, indemnities or insurance cover should be permitted in relation to the findings of Code of Conduct investigations.

3.2 The proposals on issues (i)-(iii) provide a clear power to provide indemnities in certain circumstances. Relevant Authorities do, in the main, already have the powers to cover these circumstances, but under a variety of existing powers, the extent of which are not clear as they have not been fully tested and the case law is not clear. With this power Authorities will have a single clear power which they can rely on.

3.3 In respect of item (iv) Government have opted not to increase existing powers.

3.4 Issue (v) is dealt with by an extension of existing powers which will enable Authorities to provide an indemnity in a situation where the Authority was found to have acted ultra vires, or where required preliminary steps subsequently prove not to have been taken, but at the point at which the Member or Officer acted he or she honestly and reasonably believed that the action or advice giving rise to the liability was intra vires the Authority.

3.5 The powers in respect of issue (vi) enable Authorities to cover the costs incurred by a Member in relation to defence of proceedings under the Code of Conduct, but limited to cases in which the Member is found not to have breached the code. There is no case law on the provision of indemnities in this area as yet so the effect of existing powers remains unclear.

3.6 The proposals on defamation (iv) - not to provide a new power to provide an indemnity to fund defamation actions - do not extend Authorities' power. In some circumstances Authorities have the power to make a decision to fund libel proceedings brought by its Officers and to pay the costs thereof by virtue of Section 111(1) of the Local Government Act 1972.

3.7 No indemnity may be provided, or insurance secured, under this Order in relation to any action by or failure to act by, any Member or Officer which :

- constitutes a criminal offence ; or
- is the result of fraud, or other deliberate wrongdoing or recklessness on the part of that Member or Officer

3.8 Taken as a whole this order permits (but does not oblige) Authorities to provide indemnities and insurance that would provide "cover" for a Member or Officer in the following circumstances :

- if the Member had acted honestly and in good faith when taking the action giving rise to the liability ;
- if the Authority was found to have acted ultra vires, but at the point at which the Member or Officer acted they honestly and reasonably believed that the action or advice giving rise to the liability was intra vires the Authority ;
- to cover the costs incurred by a Member in relation to defence of proceedings under the Code of Conduct, but limited to cases in which the Member is finally found not to have breached the code.

4. PROPOSED POLICY

4.1 The Fire Authority legal advisors have been consulted on this matter and have drafted a suggested form of indemnity which is reproduced in full as Appendix A.

4.2 In short this policy indemnifies each Member and Officer of the Authority against claims which arise from any action of, or failure to act by a Member or Officer which is authorised by the Authority, subject to certain conditions. It is not appropriate to summarise this indemnity as it is specific on a number of issues.

4.3 Fundamental to this policy however, is the issue of criminal liability. The policy is clear that the Authority may offer an indemnity in the event of either criminal prosecution or Standards Board investigation, but only to the extent that there is no conviction or finding against the Member or Officer. In the event of proven guilt or conviction the costs of the indemnity will fall to be met by the individual. This is a requirement of the law and not an area where the Authority has any discretion.

5. FINANCIAL IMPLICATIONS

The cost of offering indemnities is one which will be met from existing budgets in so far as these already provide the necessary insurance covers. Gaps in insurance for which there is no cover available relate to areas of discrimination and employment law generally for which no cover is available and for which the Authority already holds balances. Criminal prosecution is also only covered at present for prosecutions brought under the Health and Safety at Work Act.

6. PERSONNEL IMPLICATIONS

There are clearly gaps which remain in personal cover for both Officers and Members which the Authority cannot lawfully indemnify against. It falls therefore for Officers and/or Members to secure their own insurance for such matters. This is not a well known fact and therefore it is possible that recruitment of both Officers and Members may be affected.

7. EQUALITY IMPACT ASSESSMENT

An initial impact assessment has revealed there are no specific issues of equality arising from this report.

8. RISK MANAGEMENT IMPLICATIONS

There are no specific risk management implications for the Authority arising from this report, save for those which are already covered by existing risk management activity.

9. RECOMMENDATIONS

- 9.1 That Members support the adoption of the indemnities as set out in draft at Appendix A.
- 9.2 That Members approve that the matter be forwarded to the Standards Committee for detailed scrutiny and amendment.
- 9.3 That following the Standards Committee meeting, the matter is again presented to the Fire Authority for formal adoption.

10. BACKGROUND PAPERS FOR INSPECTION

None.

Tony Austin
CLERK TO THE FIRE & RESCUE AUTHORITY

APPENDIX A

NOTTINGHAMSHIRE AND CITY OF NOTTINGHAM FIRE AND RESCUE AUTHORITY STATEMENT OF OFFICERS AND MEMBERS INDEMNITIES

The Fire Authority shall indemnify each member and officer of the Authority against any claim, liability, loss and/or damage in relation to any action of, or failure to act by a member or officer 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, 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) –
 - (i) at the request of, or with the approval of the authority, or
 - (ii) for the purposes of the authority.

Such indemnity is subject to the following requirements and exclusions:-

1. Obligation to believe action to be within powers or that statements made were true

A member or officer relying upon an indemnity must –

- (a) have believed that the action or failure to act in question was within the powers of the authority, or
- (b) where that action or failure comprises the issuing or authorisation of any document containing any statement as to the powers of the authority, or any statement that certain steps have been taken or requirements fulfilled, believed that the contents of that statement were true,

and prove that it was reasonable for that member or officer to hold that belief at the time when he acted or failed to act.

For the avoidance of doubt, it is acknowledged that this indemnity may apply to an act or omission which is 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 believed that the act or omission in question was within his powers at the time which he acted.

2. Defamation

This indemnity may apply to the defence by a member or officer of any allegation of defamation made against him, but 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.

3. Repayment of Costs upon Criminal Conviction and/or Finding of Breach of the Code of Conduct

3.1 Where a member or officer relies upon this indemnity in relation to the defence of either any criminal proceedings; or any investigation, report reference, adjudication or any other proceeding pursuant to Part 3 of the Local Government Act 2000 ("Part 3 proceedings"); this indemnity shall be subject to the terms that:-

- (a) in the case of criminal proceedings, if the member or officer in question is convicted of a criminal offence and that conviction is not overturned following any appeal, and
- (b) in the case of Part 3 proceedings
 - (i) 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
 - (ii) if the member admits that he has failed to comply with the Code of Conduct,

that member or officer shall reimburse the authority for any sums expended by the authority in relation to those proceedings pursuant to this indemnity.

3.2 Where a member or officer is obliged to reimburse an authority pursuant to the terms of this indemnity, those sums may be recoverable by the authority as a civil debt.