

## **ANNEX 1**

### **Indemnities for Members and Officers Summary**

#### **1. Indemnities for Members**

##### **1.1 Acting on behalf of the Authority**

If a Member acts within the power of the Authority, in good faith and without negligence, then there is statutory immunity from civil liability.

Areas where a Member could incur personal liability are therefore:-

#### **1. Where a Member purports to take a decision which is outside the powers of the Authority, or outside the powers of the particular Member.**

The new regulations allow the Authority to provide an indemnity to cover such actions insofar as the Member reasonably believes that the action was within the powers of the Authority, or within their power as a Member.

#### **2. Where a Member acts in bad faith, fraudulently, out of malice, for an ulterior purpose, or as a deliberate or reckless act of wrongdoing.**

Allegations that a Member has acted in such a manner may be made with or without those allegations having good foundation. There is public interest in ensuring that Members are not put off taking necessary decisions by the fear they may be put to considerable legal expense in justifying the decisions which they have taken in good faith. Accordingly it would appear appropriate to indemnify the Member against any costs of representation, provided that the Member is ultimately cleared of that allegation. If the allegation is eventually substantiated repayment will be required.

#### **3. Where a Member acts in a manner which constitutes a criminal offence.**

Allegations of a criminal nature may be made either with or without good foundation. Accordingly it would appear appropriate to provide an indemnity for such costs of legal representation in defending any prosecution, provided that the Member is ultimately cleared of the allegation of criminal conduct. Repayment will be required if the Member is convicted of a criminal offence and that conviction is not overturned on appeal.

#### **3. Where a Member is sued for defamation.**

The Indemnities Regulations include a power to grant an indemnity in respect of the legal costs of defending any defamation action, but not in respect of any damages which may be awarded against the Member.

The usual situation is that where a Member is acting in his or her capacity as a Member and makes a statement which he or she honestly believes to be true, the Member would be able to rely on the defence of "qualified privilege". This is providing that the Member has not acted out of malice. As a consequence successful defamation actions against Members are rare. However it is possible a third party may allege that a comment was made out of malice and therefore falls outside the protection of qualified privilege. Therefore it would appear appropriate that the Authority would be justified in providing an indemnity against the costs of **defending** defamation actions, unless it is apparent that the Member was acting out of malice. Note that the regulations exclude providing an indemnity in respect of the costs incurred by a Member **pursuing** an action for defamation against a third party.

## 1.2 **Acting outside the Authority.**

The Authority's insurance policies provide an indemnity which reflects the terms of the order and draft indemnity. This extends to outside bodies which are not for profit organisations and it is not affected by cover that the outside body has itself.

### **1. Outside Bodies**

Members may be appointed to outside bodies in a variety of ways. However the Indemnities Order restricts the provision of the indemnity to those situations where the appointment to the outside body is "At the request of, or with the approval of the Authority or for the purposes of the Authority".

However this definition may also provide cover where a Member has chosen to join an outside body out of personal interest and that appointment is unknown to the Authority. It would therefore be appropriate to limit this indemnity to appointments that are made by the Authority, or in consequence of a nomination by the Authority, or where the Authority has specifically approved the appointment as advancing the interests of the Authority.

## 2. **Nature of Local Authority Indemnities**

### **1. Scope**

The Indemnities Regulations provide restrictions on the power to provide indemnities for Members acting both on behalf of their own Authority and on behalf of outside bodies. Mainly the indemnity cannot:-

- cover any criminal liability;
- cover liability arising from fraud or deliberate wrong doing or recklessness;
- cover the costs of pursuing a defamation action.

## **2. Breach of the Code of Conduct for Members**

The Indemnities Regulations enable a local Authority to grant an indemnity to its Members in respect of the cost of legal representation in "Part 3 proceedings". This means in respect of any investigation, hearing or proceedings and appeals for an alleged failure to comply with the Code of Conduct for Members. The regulations provide that any such indemnity must be subject to a requirement for the Member to reimburse the Authority in the event that:-

- There is a finding that the Member has failed to comply with the Code of Conduct and that finding is not overturned on appeal, or
- The Member admits failure to comply with the Code of Conduct.

## **3. Indemnities for Officers**

### **1. Acting on behalf of the Authority**

Officers have statutory indemnity from civil liability where they act within the powers of the Authority, in good faith and without negligence. Where a third party suffers loss as the result of an officer's actions or inactions or failure to act in the course of employment then the employer is vicariously liable for that loss. Therefore the third party can sue the officer and the Authority in respect of their loss. Case law has established that unless officers are acting completely beyond their ostensible Authority, then the Authority will be liable for their actions.

The new Indemnities Regulations provide that the Authority may now grant an indemnity in respect of actions which prove to be outside the powers of the Authority, but where the officer reasonably believes that the action was within the powers of the Authority at the time when it was taken. It is appropriate, and consistent with the indemnity offered to Members, for the Authority to offer an identical indemnity to officers in defending a claim that they have exceeded the powers of the Authority, provided that the officer acted in good faith.

The Indemnities Regulations apply the same restrictions on the power of the Authority to provide indemnities for officers as they do for Members, namely that the indemnity cannot:-

- cover any criminal liability;
- cover liability arising from fraud or deliberate wrong doing or recklessness;
- cover the costs of pursuing a defamation action.

Case law has established that the Authority does have the power to provide an indemnity for an officer against liability for legal costs arising out of either pursuing or defending a defamation action. However the Authority may only wish to consider granting such an indemnity to pursue a defamation action where it was satisfied that there was a clear public interest in so doing, and therefore that it would wish to judge such a proposal on its individual merits. Any such request would be considered outside of this recommended indemnity scheme.

## **2. Acting outside the Authority**

Officers may act outside the Authority in relation to a wide range of organisations. There may be a potential conflict of interest in performing such a role and indeed officers are obliged to declare any such conflict. It would be appropriate, and in accordance with the indemnity provided regarding Members' activities on outside bodies, that the indemnity relating to officers extends to all outside appointments where the Authority, through the Chief Executive, has approved the appointment as being likely to advance the interests of the Authority, either at the time of the original appointment or otherwise.

### **4 Insurance**

Where the Authority has the power to grant such an indemnity it may also provide insurance, either in place of or in addition to the indemnity. The Authority has relevant insurance policies that cover Members and officers for public and products liability, employer's liability, libel and slander, officials' indemnity, professional indemnity and fidelity guarantee. Additional insurance is recommended to cover Members' for Code of Conduct Investigations.

### **5 Repayment of Sums Paid Out**

The Regulations require that where an indemnity is provided to defend allegations of failure to comply with the Code of Conduct or of a crime, that indemnity must be subject to a requirement for repayment in the event that the Member is subsequently found to have failed to comply with the Code of Conduct or the Member or officer have committed a criminal offence. The Member or officer will be required to enter into an agreement which gives the Authority a contractual right to recover the sums in such circumstances.

The indemnity will only cover reasonable costs and expenses. Therefore the indemnified would not have the option to obtain whatever advice they chose, without restriction. The funding of the indemnity should cease once it becomes apparent that the basis for defending any proceedings are weak. Therefore the agreement entered into with Members and officers would oblige the individual receiving the benefit of the indemnity to inform the Authority as soon as the potential weakness in their case became apparent.