

Report of the Head of Legal, Democratic Services & Procurement

Council – 14 March 2014

MEMBERS' INDEMNITY FOR CODE OF CONDUCT COMPLAINT HEARINGS

Purpose:	To consider recommendations by the Standards Committee that the indemnity for professional representation available to Members involved in defending breach of Code of Conduct matters be capped at a maximum figure of £20,000 per member per case.
Policy Framework:	The Ethical Framework in Place in Wales as set out in the Local Government Act 2000 and The Local Authorities (Indemnities for Members and Officers) (Wales) Order 2006.
Reason for Decision:	To provide a consistent approach to the issue of indemnities throughout Wales; and to ensure that there is a limit on costs paid under an indemnity.
Consultation:	Legal and Finance, Access to Services, Standards Committee.
Recommendation(s):	It is recommended that: 1) Council impose a cap of £20,000 per member per case for Members involved in breach of Code of Conduct matters; 2) That the Form of Indemnity attached at Appendix A and previously approved by Council is amended as highlighted to reflect the maximum indemnity.
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1.0 Introduction

- 1.1 Following the Local Authorities (Indemnities for Members and Officers) (Wales) Order 2006 coming into force, Council, on 25 January 2007, adopted the Form of Indemnity attached at Appendix 1 and Standards Committee agreed a Protocol on dealing with requests for an indemnity, which is attached at Appendix B. The indemnity provides that the Council will indemnify Members and Officers against any claim, liability, loss and/or damage in relation to any action or failure to act by any Member where the Member is

acting in the course of their Council duty or they reasonably believe that to be the case. This will include provision of an indemnity where a Member is facing an allegation of breach of the Code of Conduct.

- 1.2 Where there is an allegation of breach of the Code of Conduct and a Member requires professional representation to defend the allegation under the terms of the indemnity the Member must obtain the prior approval of the Standards Committee as to the nature and extent of that representation. There is at present no limit specified by Council as to the level of indemnity.
- 1.3 Concern has been expressed across Wales about the scale of indemnities provided by Local Authorities to Members when defending themselves against alleged breaches of the Code of Conduct. The current approach allows Members in some Welsh Local Authorities to access disproportionate and, occasionally, unlimited legal costs. There has been a recently reported breach of Code of Conduct case in Flintshire where the tribunal sat for 58 days and where the member was allowed to claim up to £225 per hour towards legal costs with the limit uncapped.
- 1.4 This has been a matter of concern which has been raised by the Welsh Local Government Association (the WLGA), the Public Services Ombudsman for Wales (the Ombudsman) and other groups representing public organisations. They have all recommended that a cap be introduced by Local Authorities and after some consultation it has been agreed that should Local Authorities introduce such a cap, it should be at a maximum sum of £20,000.
- 1.5 The following is an extract from the recent Ombudsman Annual Report 2012/2013:

“Standards Committee and Adjudication Panel for Wales Hearings - Indemnity Cap

I have previously made clear that I believe the situation in relation to the levels of indemnity enjoyed by Members who are accused of a breach needed to be addressed. This is particularly current in the context of the very difficult financial climate in which we are all working. By having unlimited indemnity, it is possible for cases before Tribunals to last four months or even longer, with Counsel being engaged at very considerable cost. I strongly believe that Members should be able to defend themselves, but the public expenditure on this must be proportionate. I proposed a maximum ceiling of £10,000 to reflect the costs ceiling in Employment Tribunals. In discussions with Monitoring Officers and the Welsh Local Government Association (WLGA), this ceiling was raised to £20,000, which I was prepared to support. However, while some Councils already have such a ceiling in place, and some Councils were prepared to introduce one, others have said that they do not intend to do so. In some instances, this is because the indemnity is backed by insurance. The former Local Government Minister indicated that he would address the matter through legislation if voluntary agreement could not be secured. I note that the WLGA have reported that Council Leaders support the introduction of an indemnity cap and I hope that voluntary agreement will be forthcoming. However, I would support the use of legislation if it is not”.

2.0 Current Position

- 2.1 Since the Ombudsman's Annual Report many Welsh Local Authorities are moving to a standardised procedure for considering indemnity requests and with consistent maximum financial limits of up to £20,000.
- 2.2 Standards Committee on 15 November 2013 resolved to recommend to Council that the Standards Committee continue to consider each application for a costs indemnity individually to decide whether an indemnity should be given at all, and that if an indemnity is to be given, the Standards Committee should decide on the amount of that indemnity up to a maximum of £20,000 per member per case. Standards Committee also recommended that the Form of Indemnity be amended to reflect those decisions.
- 2.3 Subsequent to the Standards Committee Resolution, the Ombudsman has confirmed in writing that the Ombudsman's own costs will not be allowed to exceed the level imposed by the proposed cap. Thus achieving equality of arms.

3.0 Financial Implications

- 3.1 The basis for adopting the cap on indemnities is to reduce potential unlimited financial exposure to cost. If the recommendation is approved, the Council will still have to find the money to pay up to the indemnity cap. There is currently no specific budget set aside for such occurrences.

4.0 Legal Implications

- 4.1 If Council did resolve to cap the indemnity at £20,000 it will still be necessary for Standards Committee to consider and approve any request for an indemnity (up to a maximum of the cap) on a case by case basis. The level of indemnity would depend on the nature of the case and level of representation sought.
- 4.2 It remains the case that where an indemnity is provided and the Member is not successful in the matter, the indemnity must be repaid as per the Form of Indemnity.

5.0 Equality and Engagement Implications

- 5.1 An Equality Impact Assessment screening has been undertaken and there are no equality and engagement implications identified.

Appendices:

Appendix A - Form of Indemnity

Appendix B - Protocol Agreed by Standards Committee for Requesting Indemnity.

Background Papers:

None

APPENDIX A

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 of 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) of the Local Government (Miscellaneous Provisions) Act 1976.
2. The Council of the City and County of Swansea 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 Council's representative on these bodies.

(For the purpose of this Indemnity "Member" includes independent and co-opted persons who sit on the Council'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 statements to the powers of the relevant Authority, or any statement that certain steps had been taken or requirements fulfilled, believed that the contents of the 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 Council 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 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 Council's Standards Committee, in consultation with the Council's Insurers, 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, in consultation with the Council's Insurers, 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. **The level of indemnity for defending an allegation of breach of the Member Code of Conduct shall not exceed £20,000 per member per case.**

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. Returning Officer

The work and functions of the Returning Officer are not covered by this Indemnity.

F. 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.

G. The Indemnity is limited to the amount of the Council's insurance cover for liabilities.

APPENDIX B

STANDARDS COMMITTEE - INDEMNITIES PROTOCOL

1. Introduction

- 1.1 The Indemnity adopted by Council provides that the Council will indemnify Members and Officers against any claim, liability, loss and/or damage in relation to any action or failure to act by any Member which:
- a) is 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 exercised by that Member or Officer at the request of or with the express approval of the Council or for the purposes of the Council.
- 1.2 The Indemnity covers any action by Members or Officers where the Member or Officer is acting in the course of their Council duty or they reasonably believe that to be the case. The Indemnity does not extend to liabilities arising from any action, or failure to act by a Member or Officer which constitutes a criminal offence but does extend to defending any criminal proceedings brought against an Officer or Member.
- 1.3 The Indemnity does not extend to Members or Officers acting in a personal capacity, or where their personal activity has brought the Council into disrepute.

2. Level of Representation

In the case of professional representation of a Member or Officer under the terms of the indemnity the Member or Officer must obtain prior approval of the Council through its Standards Committee, in consultation with the Council's Insurers, 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. Only Authority and/or Insurer approved representation will be acceptable.

- (i) A request must be made in writing to the Chair of the Standards Committee setting out the nature and extent of the representation. **The level of indemnity is capped up to a maximum of £20,000 per member per case for defending Breach of Code of Conduct allegations.** The choice of representation will be that of the Authority and/or its Insurers. The request must also set out that the Member or Officer understands the position in relation to repayment as set out in paragraph 2 below.
- (ii) The Clerk to the Standards Committee will inform the Council's Insurers of the request and obtain their view to put before the Standards Committee before any decision is made.
- (iii) The Standards Committee will consider the reasonableness of the level and extent of representation requested. This will be on the basis of the

written information before them, including the representations of the Council's Insurers.

- (iv) Requests must be made and agreed prior to incurring any costs and unless there are exceptional circumstances the Standards Committee will not give retrospective consent.

3. Repayment of Cost

- (i) In relation to criminal proceedings, Indemnities can be given to Members or Officers, to defend criminal proceedings but the sums paid must be reimbursed in the event of conviction for that offence. Members and Officers must confirm in writing that they accept and understand this prior to incurring any costs.
- (ii) 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 Member and the Member is suspended/disqualified. The Member must confirm that he/she accepts this prior to incurring any costs.
- (iii) If any money is paid under an Indemnity allowing a Member to answer allegations of a breach of the Code of Conduct and there is a finding against the Member but the penalty falls short of suspension/disqualification, that sum is repayable unless the Standards Committee in consultation with the Council's Insurers decide it is not appropriate to seek reimbursement.
- (iv) Any request not to seek reimbursement in the circumstances set out in (iii) above, must be made in writing to the Chair of the Standards Committee, setting out the reasons why the Member considers that repayment should not be made. The views of the Council's Insurers will be sought before any decision is made by the Standards Committee.