
INDEMNITY FOR OFFICERS AND MEMBERS

Responsible Cabinet Member – Councillor John Williams, Leader

Responsible Director - Paul Wildsmith, Director of Corporate Services

SUMMARY REPORT

Purpose of the Report

1. To seek approval from Council for an indemnity to be granted to officers and members of the authority.

Summary

2. The Council, unlike many other authorities, has never had an indemnity for officers and members. The purpose of an indemnity is to reimburse officers and members for any personal financial liability they may suffer in carrying out their role for the Council. The indemnity is restricted to ensure that the officer or member was acting in good faith. The indemnity is covered by the Council's insurance except the proposed indemnity for defence of criminal proceedings. It is proposed that this indemnity is limited without further approval from Council.

Recommendation

3. It is recommended that :-
 - (a) The indemnity for officers and Members set out in **Appendix 1** be approved.
 - (b) Within the terms of the indemnity policy, the Chief Executive, in consultation with the Leader of the Council, the Director of Corporate Services, and the Borough Solicitor be authorised to endorse the payment of indemnity to any Member or officer up to a maximum of £50,000 where such indemnity is not covered by insurance, and that any sums in excess of that figure be referred to Council for approval.
 - (c) The indemnity provisions recommended in this report be extended to cover Council officers and external investigating officers and advisers appointed by the Monitoring Officer in relation to the defence of claims for defamation arising from LGA 2000 Part 3 proceedings up to appeal. Indemnity for sums greater than £50,000 is subject to approval by Council.

Reasons

4. The recommendations are supported to ensure that Officers and Members of the authority carrying out their duties in good faith, in accordance with the terms of their elected role or

employment, will not incur personal loss.

Paul Wildsmith
Director of Corporate Services

Background Papers

No Background papers were used in the preparation of this report.

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TAB

S17 Crime and Disorder	The report touches on possible criminal activity but is not relevant to the Council's duties under s17.
Health and Well Being	This report has no particular impact on the health and wellbeing of any individual
Sustainability	This report has no particular impact on sustainability.
Diversity	This report affects all employees and members equally. It has no impact on the wider community.
Wards Affected	This report affects all wards equally.
Groups Affected	Employees and Members of the council.
Budget and Policy Framework	This report does not affect the budget or policy framework.
Key Decision	This is a non-executive decision and is therefore not a key decision.
Urgent Decision	This is not an urgent decision.
One Darlington: Perfectly Placed	This report relates to the welfare of the employees and members of the Council, but makes no specific contribution to the delivery of the community strategy.

MAIN REPORT

Information and Analysis

5. Indemnities protect officers and members from personal liabilities, which might arise whilst carrying out their roles for the Council. Local Authorities have been able to offer indemnities for officers for sometime and many Councils provided this indemnity in the 1990s. This authority does not currently have such an indemnity in place. The Council has been able to offer indemnities to Members since 2004. At that time new regulations were introduced which now govern the indemnities that can be offered to Members and Officers. Many authorities extended the indemnity to officers to cover members in 2004. As this authority had no indemnity for officers, it was not extended to Members.
6. Section 265 Public Health Act 1875 provides a limited exclusion of liability. The exclusion in the 1875 Act does not extend to liability for the results of negligence but provides a statutory bar for the liability of member and officer if they are acting in pursuance of a statutory function or power of the authority and they are acting in good faith. Officers and Members in this authority are currently relying on this limited provision. Indemnities can be provided after an event which gives rise to the need for an indemnity but this will cause delay and may affect a member or officer having access to e.g. legal advice at a key stage in any proceedings or investigation.
7. The LGA 2000 made provision for the Secretary of State to make regulations to indemnify officers and members. The Order was made in 2004, which enables authorities to grant indemnities and to take out insurance to cover the potential liability of members and officers in a range of circumstances. The Order provides a number of limitations.
8. The Council can provide an indemnity:-
 - (a) Where a member or officer is carrying on any function authorised by the Council.
 - (b) Where an act or failure to act falls within their powers or duties as a result of any function being exercised by them at the request of, with the approval of or for the purposes of the, Council.
 - (c) Where a Member or officer exercising a function does so in a capacity other than that of Member or officer of the authority e.g. where the Member or officer acts as director of a company at the request of the Council, and is therefore acting in the capacity of director.
 - (d) Where an action is outside the powers of the Council or of the member or officer concerned, but where it is clear that the Member or officer reasonably believed that the matter was within their powers or within the powers of the Council.
 - (e) Where a Member or officer makes a statement that certain steps have been taken or requirements fulfilled and this is not the case, provided that the Member or officer reasonably believed that the statement was true when it was made.
 - (f) In respect of legal costs, to enable a Member or officer to defend criminal proceedings arising in the context of their role in the Council, subject to the condition that if they are convicted, they must reimburse the Council or the insurer any sums paid.
 - (g) In respect of the legal costs of defending an allegation or defamation (not in respect of damages). This does not cover the situation where an individual may wish to pursue a claim of defamation which is specifically excluded by the regulations.
 - (h) In respect of the cost of legal representation regarding any investigation or proceedings for an alleged failure to comply with the Members' Code of Conduct (LGA 2000 Part 3 Proceedings). In these circumstances the member must reimburse the Council (or the

insurers) if she/he admits a breach of the Code, or it is found that the Member has failed to comply with the Code. This authority does have this indemnity in place.

9. No indemnity can be provided in relation to an act or omission on the part of a Member or officer that :-
 - (a) Constitutes a criminal offence.
 - (b) Is a result of fraud, recklessness or other deliberate wrongdoing.

Indemnities in relation to Outside Bodies

10. The 2004 Order enables the Council to provide indemnities against liabilities incurred as members of outside bodies, but only 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. It is recommended that any indemnity should only extend to appointments made by the authority, or in consequence of nomination by the authority, or where the authority has specifically approved the appointment as advancing the interests of the authority. In relation to Members this is the list which appears in the Constitution of Appointments to Outside Bodies by Council and Cabinet. The 2004 Order applies the same limitations on the power of the Council to provide indemnities for Members or officers acting on outside bodies as apply when acting within the authority, namely that the indemnity :-
 - (a) Cannot cover criminal liability.
 - (b) Cannot cover liability arising from fraud, deliberate wrongdoing or recklessness on the part of the Member or officer.
 - (c) Cannot cover costs for pursuing a defamation action.
11. The Council's indemnity cover liability for any action which is outside the powers of the outside body, even if the action was taken in the honest belief that it was within the outside body's powers.
12. In order to ensure that Members and Officers acting on Outside Bodies have a better understanding of the risks and potential liabilities of their differing roles, a guidance note for Members and Officers which can be placed on the Intranet, in the Constitution and made generally available to Members and Officers if they are specifically appointed to an outside body is also recommended for approval and is attached as **Appendix 2** to this report.

Indemnities relating to Complaints against Members

The only indemnity which is currently available to members covers £50,000 of costs incurred by Members in defending an allegation that a Member has breached the Code of Conduct. The Council's current indemnity states that this must be paid back if the Member is found to have breached the Code. It does not allow for a delay while an appeal is pending. The regulations specifically allow for this and it is therefore recommended that this be incorporated within the Council's current indemnity to Members as set out in **Appendix 1**. There has been no claim on this indemnity to date and no complaints against Members of this authority have been upheld since the introduction of the Members Code of Conduct. The amount of the indemnity has therefore never been tested. There have been cases that have exceeded this amount nationally. In order to ensure that indemnity can be provided for Members whose legal representation exceeds the limit, it is recommended that the current indemnity for Members remain at £50,000 with the proviso that the Council can agree to extend this indemnity in individual cases. Any

increase to the insured indemnity would incur additional insurance costs, and the insurance history does not support that step.

Insurance

13. Where any authority has power to grant an indemnity, it may also cover any indemnity by securing the insurance of its officers and Members. Subject to the terms of the policy, this essentially means that the policy will provide an indemnity in respect of legal liability to pay damages for pure financial loss, together with the claimant's and defence costs. The insurance will cover legal liability arising from a negligent act or accidental error or omission, or breach of statutory duty that occurs as a result of the exercise of the Councils' statutory functions and powers in connection with the business of the Council.
14. The Council's insurers have recognised and provided the officials' indemnity liability insurance cover to indemnify any officer and Member who is acting at the request, order or direction of the Council on an outside body. This can be as Director, officer or trustee of or in any managerial or advisory capacity of any body corporate, trust, association or committee which is not under the authority and control of the Council. The cost of legal representation regarding any investigation or proceedings for an alleged failure to comply with the Code of Conduct for Members has been specifically provided for separately up to £50,000.
15. The Officials Indemnity Liability insurance will not apply to liabilities incurred arising from nomination or appointment to an outside body, where the body involved is a partnership with no separate legal status, and the authority's involvement in the partnership has not been approved through the Council's Partnership Toolkit.
16. It should be recognised that insurance is may not cover the costs of defence or any criminal proceedings which can be provided under the 2004 Order.

Financial Implications

17. It is anticipated that the need for the provision of any indemnity would be a rare occurrence. The Council's insurers already provide indemnity cover for officers, and there is no additional cost to the Authority in the indemnity being extended to cover Members.
18. The insurance may not cover criminal defence. The likelihood of a significant arising from the defence of criminal proceedings is low given past history. The cost of such proceedings will vary and will have to be assessed on a case by case basis. Provision of insurance to cover criminal defence is not available. The proposed policy enables such indemnity to be provided by the Chief Executive in appropriate cases, in consultation with the other statutory officers and the Leader of the Council. It is recommended that indemnity in excess of £50,000 be subject to approval by Council.

Paul Wildsmith
Director of Corporate Services

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FORM OF INDEMNITY FOR MEMBERS AND OFFICERS

Note : Items in bold may not covered by the Council's current insurance arrangements

Indemnity

1. Darlington Borough Council ('the Council') will indemnify ('the indemnity') each Member and officer of the Council against any costs 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 Council.
 - (b) Forms part of, or arises from any powers or duties placed on that Member or officer, as a consequence or any function being exercised by him/her (whether or not when exercising that function he/she does so in the capacity of Member or officer of the Council) and the function is being exercised at the request of, or with the approval of the Council, or for the purposes of the Council.
2. The terms of the indemnity shall be incorporated into the contract of employment of all Council officers.

Restrictions on Indemnities

3. The indemnity shall not apply in relation to any action by, or failure to act by, any Member or officer which constitutes a criminal offence.
4. This indemnity shall not apply in relation to any action by, or failure to act by, any Member or officer which is the result of fraud, or other deliberate wrongdoing or recklessness on the part of that Member or officer.
5. However the indemnity may be provided in relation to :-
 - (a) **The Defence of criminal proceedings arising in relation to the undertaking of functions (excluding motoring offences) brought against the officer or Member, subject to paragraph 10 of this indemnity below.**
 - (b) **Any civil liability arising as a consequence of any action or failure to act which also constitutes a criminal offence.**

(Within the terms of the indemnity policy, the Chief Executive, in consultation with the Leader of the Council, the Director of Corporate Services, and the Borough Solicitor is authorised to endorse the payment of indemnity to any Member or officer up to a maximum of £50,000 where such indemnity is not covered by insurance, and that any sums in excess of that figure must be referred to Council for approval.)

6. No indemnity is provided in relation to the pursuit by a Member or officer of any claim for alleged defamation of that Member or officer. The indemnity may be provided in relation to the costs of defending a claim of defamation made against a Member or officer.

Conditions of Indemnity

7. A Member or officer seeking the indemnity from the Council must :-
- (a) Where the act or failure to act falls outside the powers of the Council, he/she must have believed that the action or failure to act in question was within the powers of the Council.
 - (b) Where that 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, believe that the contents of that statement were true.

and it must be reasonable for the Member of office to hold that belief at the time when he/she acted or failed to act.

8. The 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 of officer reasonably believed that the act or omission in question was within his powers at the time when he/she acted.

Acting as Member or Officer

9. Where the Member or officer is acting on behalf of another organisation then the activities covered will be deemed to have arisen in the capacity as a “member or officer of the Authority” where :-
- (a) The appointment to that outside body was made by the Authority; or
 - (b) The nomination to that outside body was made by the Authority; or
 - (c) Such appointment to that outside body was specifically approved for the purpose of these indemnities.

Repayment of and Approval of Costs of Legal Representation

10. Where a Member or officer seeks the indemnity in relation to :-
- (a) The defence of any criminal proceedings; or
 - (b) The defence of an action for defamation; or
 - (c) The defence of any proceedings pursuant to Part 3 of the Local Government Act 2000 relating to alleged failure to comply with the Members’ Code of Conduct (“Part 3 Proceedings”).

the indemnity shall be subject to the terms that if :-

- (a) In the case of criminal proceedings, the Member or officer in question is convicted of a criminal offence and that conviction is not overturned following any appeal.

- (b) In the case of civil proceedings for defamation the Member or officer in question is found to have acted out of malice.
- (c) In the case of Part 3 proceedings :-
 - (i) A finding is made that the Member in question has failed to comply with the Code of Conduct, and that finding is not overturned following any appeal.
 - (ii) The Member admits that he has failed to comply with the Code of Conduct.

The Member or officer shall reimburse the Council for any sums expended by the Council in relation to those proceedings pursuant to this indemnity.

- 11. Where a Member or officer is obliged to reimburse the Council pursuant to the terms of the indemnity, those sums shall be recoverable by the Council as a civil debt.
- 12. The level of fees which will be reimbursed will be those which are deemed reasonable.
- 13. The Monitoring Officer must be consulted prior to any legal advice being sought under the terms of the indemnity, with regard to the prevailing level of fees that are deemed acceptable.

Relationship with Other Insurances

- 14. The indemnity shall not apply to the extent that an external body in respect of which the Member or officer is carrying out any function at the request of, or with the approval, or for the purposes of the Council, indemnifies or insures such Member or officer itself.
- 15. The indemnity will not apply in respect of claims falling within the cover provided to Members and officers under any insurance policy taken out by the Council or otherwise, or any motor insurance taken out by the Member or officer.

Notification of a claim, approval of expenditure etc.

- 16. The indemnity will have no effect if the Member or officer fails to :-
 - (a) Notify the Monitoring Officer as soon as reasonably practicable after the Member or officer is aware that a claim might be made.
 - (b) Take reasonable steps to mitigate the amount that might otherwise be claimed under the indemnity.
 - (c) Permit appropriate Council officers access to any information or advice, such as legal advice, relevant to the matter and comply with all other requests of the Council in the code of the matter.
- 17. The indemnity will not apply if a Member or officer, without the express permission of the Council or the Monitoring Officer acting on behalf of the Council, admits liability or negotiates or attempts to negotiate a settlement of any claim falling within the scope of the indemnity.

18. The indemnity is without prejudice to the rights of the Council to take disciplinary action against an officer in respect of any act or failure to act.

Insurance

19. To assist in discharging the indemnity, the Council may at its discretion, arrange insurance.
20. In any case where insurance cover is available, any Member or officer claiming to be indemnified by the Council shall use all reasonable endeavours to abide by any requirements of the insurer and to assist the Council in claiming and securing payment(s) under the insurance policy.

Lawfulness

21. The indemnity shall not extend to any situation where it would be unlawful for the Council to give an indemnity.