



Briefing note

Title of Briefing: Committees and Outside Bodies – Personal Liability: Guidance to Councillors and Non-Elected Representatives

1. Members of local authorities and non-elected Council appointed representatives (non-elected representatives) can incur personal civil and criminal liability as a result of their actions, both within the authority and as a result of their actions carried out by participation in a wide range of outside bodies.
2. Under the provisions of Section 265, Public Health Act 1875 (as applied by Section 39, Local Government (Miscellaneous Provisions) Act 1976), Members and non-elected representatives enjoy statutory immunity from civil liability where they act within the powers of the authority, in good faith and without negligence.
3. This immunity may also cover the case where a Member or non-elected representative acts within the overall powers of the authority, but in a situation where the particular power rests with some other part of the authority, provided that s/he does so in the honest belief that he/she had the power to take that decision.
4. However, this immunity does not apply where they act beyond the powers of the authority or act in bad faith or negligently, and it does not protect them from criminal liability, for example for fraud or for corporate killing where they exercise managerial responsibilities.

Outside Bodies – How Liability Flows:

Incorporated organisations

5. Where the Member or non-elected representative is appointed to an outside body that has a separate legal identity, such as a company or statutory authority, the Member or non-elected representative acts on behalf of the outside body. This means that where s/he entered a contract on behalf of the outside body, it would be the outside body rather than the Member or non-elected representative who actually enters the contract and incurs the liability.

Unincorporated organisations

6. In contrast, where the outside body is unincorporated, such as a club, it has no separate legal identity. If the Member or non-elected representative enters a contract on behalf of the club, s/he actually enters the contract, individually or collectively, in a personal capacity and relies upon the membership agreement to secure reimbursement from the resources of the club or from other Members.

Solvent/insolvent organisations

7. When a Member or non-elected representative is a company director and s/he acts on behalf of the company or other incorporated body, s/he is only required to apply him/herself diligently to the job with the skills and experience that s/he happens to possess.
8. However, where the company becomes insolvent and is unable to pay its debts s/he has personal liability to any creditors of the company for any additional loss which they suffer if, once s/he knew or ought to have known that the company was insolvent, s/he failed to take every step to minimise those losses. S/he is expected to bring to the job the minimum level of competence and experience that might be expected of a director in such circumstances.
9. Accordingly, any director is expected to take reasonable care to ensure that the company is accurately recording its financial affairs and that s/he is kept fully informed of any impending financial problems.
10. In an unincorporated organisation such as a Members' club, the Membership agreement will normally limit the ability of any Member to call for reimbursement to any assets held by the club and to the subscription of any individual Member. However, if the club is insolvent, it will have no assets from which to reimburse the individual Member, so such a reimbursement provision is unlikely to be of any use in these circumstances and liability will fall on the Member or non-elected representative.

The extent of personal liability

11. The risk of personal liability depends upon the nature of the outside body and the application of Section 265 of the 1875 Act as explained above. This is a complex area. Members and non-elected representatives should take advice as to their potential personal liability before agreeing to participate in an external organisation.
12. The scope for such personal liability can however be significantly reduced by taking simple precautions.

13. In particular, Members and non-elected representatives who are asked to become members of outside bodies should check whether the body is incorporated and whether it carries insurance for its members.

Insurance

14. In particular cases, the outside body can take out insurance to protect its members from any liability they might incur in their activities on behalf of the organisation. This is particularly so for school governing bodies and charities (if their constitutions so provide). As a general rule NHS and central government bodies do not have such a power.

Statutory indemnity

15. In some cases, statute provides protection to Members and non-elected representatives. Thus, in the case of school governors, if the governing body acts in good faith and within the approved procedures and budget, the individual governors will not be liable for any losses arising from fraud or any discrepancy in the school's accounts.

Conflicts of interest

16. Where a Member is also a member of an outside body, it is important to be alert to the issues in relation to conflicts of interest.

Additional Indemnities for Members only

Working within the authority on Council Committees etc.

17. In the light of the above limitations to the extent of the provisions of the 1875 Act the Government has now introduced the Local Authorities (Indemnities for Members and Officers) Order 2004 (the '2004 Order').
18. The 2004 Order gives a specific power for authorities to grant indemnities to elected Members (and Officers) **ONLY**, and/or to take out insurance, to cover the potential liability of Members in a wide range of circumstances.
19. It is up to each authority to decide whether to grant such indemnities, or take out such insurance, and to decide the extent of such indemnities and insurance.
20. Additional areas where Members could incur personal liability and may have the benefit of the provisions of the 2004 Order are therefore:

Where a Member purports to take a decision that is actually outside the powers of the authority, or outside the powers of the particular Member.

21. The 2004 Order now allows the authority to provide an indemnity in so far as the Member believed that the action was within the powers of the

authority, or reasonably believed that the action was within the powers of the particular Member.

22. Issues relating to local authority powers can be very complex and it may be considered appropriate for the authority to provide an indemnity for any liability which a Member may incur by inadvertently acting outside powers of the authority or outside the powers of the individual Member, and in respect of any legal and other costs in defending a claim that s/he has exceeded the powers of the authority, provided that s/he has acted in good faith, i.e. in the honest belief that the action was within the authority's powers or the individual Member's powers and having made due enquiry where s/he was in any doubt.

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

23. It is unlikely to be considered to be in the public interest to provide an indemnity to a Member who has actually acted in bad faith, fraudulently, out of malice, for an ulterior purpose, or as a deliberate or reckless act of wrongdoing. However, the fact that the external auditor, a statutory regulator or a third party alleges that, or questions whether a Member has, or may have, acted in such a manner does not necessarily mean that the Member concerned has actually acted in such a manner. It is in the public interest to ensure that Members are not discouraged from taking necessary decisions by the fear that they may be put to considerable legal expense in justifying decisions they have taken in good faith.
24. Accordingly it may be considered appropriate to provide an indemnity for the costs of representation in these circumstances, provided that the Member is ultimately cleared of the allegation. A requirement for repayment if the allegation is eventually substantiated would also be appropriate.

Where a Member acts in a manner which constitutes a criminal offence.

25. Again, it is unlikely to be considered to be in the public interest to provide an indemnity to a Member who has acted in a manner that constitutes a criminal offence.
26. However it may well be in the public interest to ensure that a Member's case in respect of any such allegation (where it arises in the context of his or her role as a Member) is properly presented, again to ensure that Members are not deterred from acting by the potential legal cost of justifying their actions taken in good faith.
27. Accordingly the Council may consider it appropriate to provide an indemnity for the costs of legal representation in defending a prosecution, provided that the Member is ultimately cleared of the allegation of criminal conduct, and provided the Member undertakes to repay the costs should

s/he be convicted of a criminal offence and that conviction is not overturned on appeal.

28. As an allied issue, a single action or decision may not only constitute a criminal action but may also give rise to civil liability. Therefore despite the limitation of the indemnity to the costs of legal representation in respect of any criminal liability the indemnity in respect of any civil liability arising from the same action or decision would cover both legal representation and the civil liability.

Where the Member is sued for defamation.

29. The 2004 Order specifically includes a power to grant an indemnity to Members in respect of legal costs for defending a defamation action where it is alleged that the Member has defamed another person. It does not cover damages awarded against the Member.
30. Where a Member is acting in his/her capacity as a Member of a local authority and makes a statement s/he honestly believes to be true, s/he has always been able to rely on the defence of “qualified privilege”, provided that s/he has not acted out of malice. As a result, successful defamation actions against Members of local authorities are very rare.
31. Third parties may nevertheless allege that a comment was made out of malice and therefore came outside the protection of qualified privilege. There is a public interest in ensuring full and open debate of matters of current interest to the authority, and this could be inhibited if Members felt constrained from honest debate by the prospect of the costs of having to defend a defamation action. Accordingly, the authority would be justified in providing an indemnity against the costs of defending defamation actions.
32. The 2004 Order *specifically excludes* indemnity in respect of the costs incurred by a Member in *pursuing* a defamation action against a third party where the Member believes that s/he has been defamed by another person. Whilst there is case law to the effect that an authority has a pre-existing power to grant such an indemnity, at least to an officer, the authority may consider that an indemnity for the costs of pursuing a defamation action would be too open-ended.

Working outside the authority – On Outside Bodies etc.

33. Members do not just work within the authority, but are frequently appointed to a wide range of other organisations (“outside bodies”), many of which support and advance the broad objectives of the authority. When they do work on outside bodies, Members are not always working “within the authority” and therefore would not necessarily enjoy the statutory immunity from personal liability that they enjoy when they are acting as Members of the authority.

Manner of appointment

34. The manner of appointment of varies:

- the authority itself makes the appointment, for example where the LEA appoints a governor of a school;
- the outside body asks the authority to make a suggestion or nomination, but the actual power to appoint, or not to appoint, rests with the outside body itself;
- the outside body seeks to appoint someone who has connections with the local community and makes a direct invitation to the local Councillor to join the organisation; or
- local organisations that the Member as an individual joins of his/her own volition.

35. There is no arguable public interest in the authority providing an indemnity in respect of the last category.

36. The 2004 Order provides that the authority may grant a Member an indemnity against liabilities incurred as Members of outside bodies only where the appointment of the Member to the body is “at the request of, or with the approval of, the authority or for the purposes of the authority”.

37. Accordingly, it is recommended that any indemnity should only extend to appointments 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.

38. This approach has the advantage that the particular action from which personal liability arises does not have to be conducted at the request or with the approval of the authority. So that, once appointed to the outside body, the Member may participate fully in the activities of the outside body and an indemnity should cover them even where the particular action was not connected to the authority’s reasons for appointing him/her to that outside body.

Scope for local authority indemnity under the 2004 Order

39. The 2004 Order applies the same restrictions on the power of the authority to provide indemnities for Members acting on outside bodies as they do for Members acting within the authority, namely that the indemnity –

- cannot cover any criminal liability
- cannot cover liability arising from fraud or deliberate wrongdoing or recklessness on the part of the Member; and
- cannot cover the costs of pursuing a defamation action.

40. However, unlike actions which are outside the authority’s own powers, the authority’s indemnity cannot 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.

Breach of the Code of Conduct for Members

41. The 2004 Order enables a local authority to grant an indemnity to its Members in respect of the cost of legal representation in “Part 3 Proceedings”, which means in respect of any investigation, hearing or other proceedings for an alleged failure to comply with the Code of Conduct for Members. However, the Order provides 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 that he/she has failed to comply with the Code of Conduct

42. Members may consider that it is in the public interest to ensure that a Member’s case is properly presented where an alleged breach of the Code of Conduct is being considered by the Standards Board for England or the Standards Committee. It is suggested that the provision of an indemnity for this purpose is therefore appropriate.

North Tyneside Council’s Terms of Indemnity under the 2004 Order

43. A copy of the Terms of Indemnity adopted by the Council for Members and Officers is attached.

North Tyneside Council – Terms of Council’s Indemnity for Members and Officers

(as approved by the Cabinet on 15 February 2005)

- 1 The Authority will, subject to the exceptions set out below, indemnify each of its Members and employees against any loss or damage suffered by the Member or officer arising from his/her action or failure to act in his/her capacity as a Member or officer of the authority.

This indemnity will not extend to loss or damage directly or indirectly caused by or arising from:

- 1.1 any criminal offence, fraud or other deliberate wrongdoing or recklessness on the part of the Member or officer;
 - 1.2 any act or failure to act by the Member or employee otherwise than in his/her capacity as a Member or officer of the authority, or
 - 1.3 failure by the Member to comply with the authority’s Code of Conduct for Members.
- 2 The authority will, subject to the exceptions set out below, indemnify each of its Members and officers against the reasonable costs which he/she may incur in securing appropriate legal advice and representation in respect of any civil or criminal proceedings or Part 3 proceedings to which he/she is subject.
 - 2.1 “Criminal proceedings” includes any interview or investigation by the Police, and any proceedings before a criminal court, in the United Kingdom.
 - 2.2 “Part 3 proceedings” means any investigation or hearing in respect of an alleged failure to comply with the authority’s Code of Conduct for Members under Part 3 of the Local Government Act 2000.
 - 2.3 This indemnity shall not extend to any advice or representation in respect of any claim or threatened claim in defamation to be brought by a Member or officer, but will extend to defending a claim for defamation.
 - 2.4 Where any Member or officer avails him/herself of this indemnity in respect of defending him/herself against any criminal proceedings or Part 3 proceedings, the indemnity is subject to a condition that if, in

respect of the matter in relation to which the Member or officer has made use of this indemnity –

- 2.4.1** the Member or officer is convicted of a criminal offence in consequence of such proceedings, or
- 2.4.2** a Case Tribunal or Standards Committee determine that the Member has failed to comply with the Code of Conduct for Members and the conviction or determination is not overturned on appeal, the Member shall reimburse the authority for any sums expended by the authority pursuant to the indemnity.
- 2.5** Where the authority arrange insurance to cover its liability under this indemnity, the requirement to reimburse in Paragraph 2.4 shall apply as if references to the authority were references to the insurer.
- 3** For the purpose of these indemnities, a loss or damage shall be deemed to have arisen to the Member or officer “in his/her capacity as a Member or officer of the authority” where:
 - 3.1** The act or failure to act was outside the powers of the authority, or outside the powers of the Member or officer, but the Member or officer reasonably believed that the act or failure to act was within the powers of the authority or within the powers of the Member or officer (as appropriate) at the time that he/she acted or failed to act, as the case may be;
 - 3.2** The act or failure to act occurred not in the discharge of the functions of the Member or officer as a Member or officer of the authority but in their capacity as a Member or employee of another organisation, where the Member or officer is, at the time of the action or failure to act, a Member or employee of that organisation either –
 - 3.2.1** in consequence of his/her appointment as such Member or officer of that organisation by the authority; or
 - 3.2.2** in consequence of his/her nomination for appointment as such Member or officer of that organisation by the authority; or
 - 3.2.3** where the authority has specifically approved such appointment as such a Member or employee of that organisation for the purpose of these indemnities.
- 4** The authority undertake not to sue (or join in action as co-defendant) an officer of the authority in respect of any negligent act or failure to act by the officer in his/her capacity as an officer of the authority, subject to the following exceptions:
 - 4.1** any criminal offence, fraud or other deliberate wrongdoing or recklessness on the part of the officer; or

- 4.2 any act or failure to act by the officer otherwise than in his/her capacity as a Member or officer of the authority.
- 5 These indemnities and undertaking will not apply if a Member or officer, without the express permission of the authority or of the appropriate officer of the authority, admits liability or negotiates or attempts to negotiate a settlement of any claim falling within the scope of the resolution.
- 6 These indemnities and undertaking are without prejudice to the rights of the authority to take disciplinary action against an officer in respect of any act or failure to act.
- 7 These indemnities and undertakings shall apply retrospectively to any act or failure to act which may have occurred before this date and shall continue to apply after the Member or officer has ceased to be a Member or officer of the authority as well as during his/her Membership of or employment by the authority.