

# HAMPSHIRE COUNTY COUNCIL

## Report

<b>Committee/Panel:</b>	Executive Member for Policy and Resources
<b>Date:</b>	9 March 2018
<b>Title:</b>	Indemnity for Members and Officers
<b>Report From:</b>	Director of Transformation and Governance – Corporate Services

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### 1. Recommendations

**It is recommended that the Executive Member for Policy and Resources:**

- 1.1. Notes the update in this report on key issues relating to indemnity arrangements for Members and Officers.
- 1.2. Approves the Updated Indemnity for Members and Officers at Annex 1.

### 2. Executive Summary

- 2.1. This report outlines the legal position in respect of the indemnification of Members and Officers of the County Council, including volunteers and representatives of the County Council on outside bodies while acting in their official capacity.
- 2.2. Having regard to additional specific legislation introduced since the existing indemnity for Members and Officers was approved, this report seeks to provide clarity as to when and in what circumstances an indemnity might be provided, including associated governance arrangements in determination of any grant of an indemnity.
- 2.3. Finally this report contains a suggested revised standing indemnity for approval by the Executive Member for Policy and Resources.

### 3. Contextual information

- 3.1. The existing Indemnity for Members and Officers was approved on 20 July 1997 (1997 Indemnity), under general enabling powers contained in the Local Government Act 1972. Since then there have been a number of changes in legislation and related regulations, and also some practical issues, which means it is now appropriate to review the 1997 Indemnity.

- 3.2. In addition, since the County Council now uses volunteer roles more widely it is considered that for good business reasons there should be specific reference to volunteers within an updated indemnity (Updated Indemnity).
- 3.3. It is also appropriate for the avoidance of doubt to make express reference to the position of the County Returning Officer/Deputy Returning Officer and Assistant Deputy Returning Officers in other Councils acting pursuant to the authority of the County Returning Officer.
- 3.4. Finally, the Updated Indemnity retains provision in respect of indemnification of Members and Officer introduced in the 1997 Indemnity, where the Member or Officer is acting by appointment of or at the request of the County Council as its representative in whatever capacity of a corporated or unincorporated outside body.
- 3.5. The proposed Updated Indemnity is attached at Annex 1. The existing 1997 Indemnity is attached at Annex 2.

## **4. Issues and Proposed Changes**

### **4.1. Regulatory Legislation**

#### **1997 Indemnity**

The 1997 Indemnity specifically excludes criminal offences save 'where the criminal offence is one under the Health & Safety at Work Act 1974 and related Regulations'. A number of issues arise. Firstly the Health and Safety at Work Act is not the only piece of legislation under which criminal liability might arise in respect of those carrying on the business of the County Council, a recent example being an investigation by Environmental Health Officers under the Food Safety Act 1990 in relation to the provision of school meals. This is particularly important in light of additional powers introduced in 2004 and discussed below. There could be other 'regulatory' legislation applicable in the future, and it is considered sensible for there to be more clarity in this regard. It is also considered that in cases where an indemnity in respect of criminal liability is given, that there should be for obvious reasons good governance arrangements around any grant.

### **4.2. 2004 Regulations**

In 2004, due to case law having raised a number of issues, in particular in respect of the extent of powers to indemnify Members, and the fact that there was a perceived lack of clarity, the Local Government (Indemnities for Members and Officers) Order 2004 (2004 Regulations) were made.

- 4.3. The 2004 Regulations prohibit indemnities made under the 2004 Regulations in respect of any action or failure to act by a Member or Officer which constitutes a criminal offence, or is the result of fraud, or other deliberate wrong doing or recklessness on the part of the Member or Officer. This is however subject to the proviso that an indemnity may be provided in respect of the defence of criminal proceedings brought against a Member or Officer (or civil liability arising as a consequence of any action or failure to act which also constitutes a criminal offence), but subject to repayment of any sums expended in the event of conviction of a criminal offence which is not overturned on appeal. The 2004

Regulations thus restrict the provision of an indemnity given under the 2004 Regulations, in a way which is not the case under the 1972 Act.

- 4.4. The explanatory note to the 2004 Regulations, however, states that the powers contained within the 2004 Regulations are (in addition to any existing powers Local Authorities may have (such as powers under Section 111 of the Local Government Act 1972). In fact the draft Explanatory Memorandum to the 2004 Regulations states 'no power was given to remove any existing powers to grant indemnities, and thus the instrument laid does not alter the existing powers (such as, for example, those under Section 111 of the Local Government Act 1972).
- 4.5. On this basis it is considered possible that the County Council might in the case of defence of criminal proceedings grant an indemnity relating to costs incurred in the defence of a criminal investigation, and not, where such an indemnity is granted necessarily require that any costs incurred pursuant to the indemnity be repaid in the event of conviction. Having said this it is considered that any exception to the 2004 Regulations in the event of conviction could be open to challenge, and therefore it is sensible that there be robust governance arrangements around the granting and extent of any indemnity granted.
- 4.6. Whilst there is no specific case law on this point there was however a district auditor dispute which was widely publicised within Carmarthenshire in 2014. Whilst the dispute related to libel, the application and extent of the Welsh version of the 2004 Regulations was considered in the dispute, the QC advising that any decision to grant an indemnity outside the Regulations should be confined to 'truly exceptional cases', and that Authorities should ensure that any decision to grant one can withstand Judicial Review on ordinary public law principles.

## **5. Defamation**

- 5.1. Under the 2004 Regulations it is unlawful to grant an indemnity in respect of the bringing by a Member or Officer for an action for defamation, in the same way it is unlawful at Common Law to defame a Local Authority. Since this is a question which is asked from time to time, the position is made clear in the Updated Indemnity.
- 5.2. It is however possible under the 2004 Regulations for an indemnity to be granted in respect of defence by a Member or Officer of an allegation of defamation. This is made explicit in the Updated Indemnity. Specific governance arrangements are included regarding the process.

## **6. General**

- 6.1. As indicated at Paragraph 4 of this report, provisions in respect of indemnities made under the 2004 Regulations are in addition to general powers of the County Council, for example under Section 111 of the Local Government Act 1972. From time to time circumstances might arise where it is proper for the good governance of the County Council to consider an indemnity in circumstances other than those set out in the draft standing indemnity at Annex 1. Such circumstances will be rare, and subject to the same governance arrangements set out in this report.

## **Updated Indemnity**

1. This indemnity is made pursuant to Section III of the Local Government Act 1972, Local Authorities (Indemnities for Members and Officers) Order 2004, and all other enabling powers.

For the purposes of this indemnity:

- 1.1. 'County Council' means Hampshire County Council.
- 1.2. 'Member' shall include all elected Members of the County Council and co-opted members and the Independent Person appointed under the Localism Act.
- 1.3. 'Officer' shall include:
  - a) all employees of the County Council,
  - b) the County Returning Officer, nominated deputies and staff engaged by them in County Council elections for the County Council and referenda,
  - c) volunteers and those on work placement whilst undertaking tasks authorised by and under the direct control of the County Council.
2. The County Council will indemnify all Members and Officers of the County Council against whole or part of any damages costs or legal expenses which any such Member or Officer may have been ordered to pay or may have reasonably incurred arising from duties performed by virtue of their being a member of, or being employed by the County Council, or being appointed to a County Council position, or volunteering or undertaking work experience for the County Council or by virtue of their being the County Council's nominated representative in whatever capacity on any incorporated or unincorporated body if such Member or Officer, in the opinion of the County Council, acted in good faith and honestly believed that the act or omission complained of was within their power and that his or her duty required or entitled him or her to do it.
3. Where an act or omission is subsequently found to be beyond the powers of the Member or Officer in question the indemnity is also effective but only to the extent that he or she reasonably believed that the act or omission in question was within his or her powers at the time which he or she acted.

4. This indemnity shall not extend to any loss or damage directly or indirectly arising from:
  - 4.1. Fraud, dishonesty or criminal offence (including prosecution for any of the offences included in Section 34 of the Localism Act 2011 in respect of non disclosure of Disclosable Pecuniary Interests on the part of the Member or Officer), except where the criminal offence is one under the Health and Safety at Work Act etc 1974, or other regulatory legislation, and the Member or Officer acted in good faith.
  - 4.2. In the case of criminal proceedings under the Health and Safety at Work etc Act 1974, or other regulatory legislation, if the Member or Officer is convicted of a criminal offence and that conviction is not overturned on appeal that Officer or Member shall reimburse the County Council or any insurer for any sums expended by the County Council or insurer in relation to those proceedings pursuant to this indemnity or any relevant insurance. Those sums shall be recoverable by the County Council or insurer as a civil debt.
  - 4.3. Where the criminal offence is one under the Health and Safety at Work etc Act 1974, or other regulatory legislation and the Member or Officer acted in good faith the Chief Executive may in exceptional circumstances, in consultation with the Monitoring Officer and Chief Finance Officer, decide at any time to waive the County Council's right to be reimbursed the sums referred to in the paragraph above. A decision to waive the requirement for repayment in the event of conviction shall be kept under review and can be revoked at any time (but such a revocation shall only apply in respect of costs incurred after the date of that decision).
  - 4.4. Any neglect, error or omission by the Member or Officer otherwise than in good faith in accordance with Paragraph 2 in the course of his or her duties.
  - 4.5. Any motor vehicle claims in which an Officer or Member using his or her own private vehicle on the County Council's business has been involved in an accident.
5. This indemnity will not automatically apply if the Member or Officer without the written authority of the Chief Executive admits liability or negotiates or attempts to negotiate a settlement of any claim falling within the scope of this resolution.

This indemnity will not cover the making by a Member or Officer of any claim in relation to an alleged defamation of that Member or Officer. This indemnity will however include an indemnity for the defence by a Member or Officer in any action for defamation in cases where the Chief Executive, in consultation with the Monitoring Officer and Chief Finance Officer, considers it appropriate to do

so.

6. This indemnity will not cover any loss or expense in respect of which the Member or Officer can obtain reimbursement from any other source, including insurance whether taken out by the County Council, the Member or Officer or by any other person or body.
7. This indemnity and undertaking shall be without prejudice to the right of the Council to take disciplinary action against the Officer in respect of any act or failure to act.
8. In furtherance of this indemnity the County Council undertakes not to sue (or to join any others in an action as a co-defendant) the Member or Officer in respect of any matter falling within the terms of the indemnity identified above.

## 1997 Indemnity

The County Council will indemnify all members and officers of the Council against whole or part of any damages costs or legal expenses which any such member or officer may have been ordered to pay or may have incurred arising from duties performed by virtue of their being a member of , or being employed by the County Council, or by virtue of their being the Council's nominated representative in whatever capacity on any incorporated or unincorporated body if such member or officer acted in good faith and honestly believed that the act complained of was within their power and that his or her duty required or entitled him or her to do it. This indemnity shall not extend to any loss or damage directly or indirectly arising from

- i) Fraud, dishonesty or criminal offence on the part of the member or officer except where the criminal offence is one under the Health and Safety at Work Act 1974 and related regulations
- ii) Any neglect error or omission by the member or officer otherwise than in the course of his or her duties
- iii) Liability in respect of surcharges made by the District Auditor.
- iv) The indemnity will not automatically apply if the member or officer without the written authority of the Chief Executive admits liability or negotiates or attempts to negotiate a settlement of any claim falling within the scope of this resolution.
- v) Any motor vehicle claims in which an employee using his or her own private vehicle on the County Council's business has been involved in an accident

In furtherance of this indemnity the County Council undertakes not to sue (or to join any others in an action as a co-defendant) the member or officer in respect of any matter falling within the terms of the indemnity identified above.

**CORPORATE OR LEGAL INFORMATION:**

**Links to the Strategic Plan**

This proposal does not link to the Strategic Plan but, nevertheless, requires a decision for the good governance of the County Council.

**Section 100 D - Local Government Act 1972 - background documents**

**The following documents discuss facts or matters on which this report, or an important part of it, is based and have been relied upon to a material extent in the preparation of this report. (NB: the list excludes published works and any documents which disclose exempt or confidential information as defined in the Act.)**

Document

Location

None



## **IMPACT ASSESSMENTS:**

### **1. Equality Duty**

1.1. The County Council has a duty under Section 149 of the Equality Act 2010 ('the Act') to have due regard in the exercise of its functions to the need to:

- Eliminate discrimination, harassment and victimisation and any other conduct prohibited under the Act;
- Advance equality of opportunity between persons who share a relevant protected characteristic (age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, gender and sexual orientation) and those who do not share it;
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

**Due regard in this context involves having due regard in particular to:**

- a) The need to remove or minimise disadvantages suffered by persons sharing a relevant characteristic connected to that characteristic;
- b) Take steps to meet the needs of persons sharing a relevant protected characteristic different from the needs of persons who do not share it;
- c) Encourage persons sharing a relevant protected characteristic to participate in public life or in any other activity which participation by such persons is disproportionately low.

1.2. **Equalities Impact Assessment:** There are no identified equalities impacts.

**2. Impact on Crime and Disorder:** Not Applicable.

**3. Climate Change:**

- a) How does what is being proposed impact on our carbon footprint / energy consumption?
- b) How does what is being proposed consider the need to adapt to climate change, and be resilient to its longer term impacts?

Not Applicable.