



Cabinet
27 June 2016

**Report from the Strategic Director,
Resources**

Wards Affected:
ALL

**Indemnity for officers and Members when representing the
Council on outside bodies or carrying out special roles**

1.0 Summary

- 1.1 This report explains the Council's arrangements for the granting of indemnities to officers and Members to cover the risks of claims which may be made against them personally or other losses or liabilities they might incur when representing the Council on outside bodies or when carrying out special roles.
- 1.2 The aim for providing the indemnity is that officers and Members should not be deterred from seeking public office or participating in outside bodies or carrying out special roles by the personal liability they might incur while acting on behalf of the Council.

2.0 Recommendations

- 2.1 It is recommended that Cabinet approves:
- 2.1.1 the arrangements set out in this report for the granting of indemnities to officers and Members representing the Council in a decision-making capacity such as directors or trustees on the boards of outside bodies or as members of the management committees of outside bodies;
 - 2.1.2 the arrangements set out in this report for the granting of indemnities to officers and Members carrying out special roles which give rise to personal liability over and above the exercise of their other responsibilities;
 - 2.1.3 the wording of the indemnity as set out in **Appendix 1** to this report and that the Chief Finance Officer be authorised to make changes from time

to time provided they are consistent with the overall arrangements approved by Cabinet;

2.1.4 that the Chief Finance Officer be authorised to decide on a case by case basis whether it is appropriate to pay any sums upfront for the defence of criminal proceedings or await the conclusion of such proceedings before making any payment; and

2.1.5 that existing and future officer and Member appointments to outside bodies and special roles be in accordance with the arrangements set out in this report.

3.0 Detail

3.1 The Council customarily nominates Members and officers to a number of outside bodies which include private companies, organisations owned by various authorities across London for example Locata, or “in-house” companies such as BHP on which Brent’s employees serve ex officio. A non-exhaustive list of outside bodies that require a Council appointment can be found at **Appendix 2**.

3.2 Council Members and officers act as directors, trustees, members of the management committees of outside bodies and/or otherwise play an active role in the affairs of the body in question, often because such bodies’ constitutions require the Council to nominate officers or Members to act in such capacities.

3.3 Those who act as directors, trustees or members of the management committee owe various statutory duties and/or fiduciary responsibilities to the outside body(ies) in question. For example, a company’s director owes a duty to the company which he/she is a director, and a trustee has the fiduciary responsibility and liability to use the trust assets according to the provisions of the trust instrument.

3.4 In certain, very limited circumstances, they may be personally liable for the debts of the bodies on which they serve, or in relation to third party claims brought against those bodies.

3.5 Many outside bodies are companies which enjoy limited liability. Generally speaking, the directors of such companies will be personally liable only in exceptional circumstances, such as for deliberate or reckless breach of trust or knowingly causing the company to act beyond its powers or to trade whilst insolvent.

3.6 Company directors, trustees or members of the management committee can generally avoid personal liability by being careful to take appropriate professional advice before making decisions and/or by hiring other people to manage some of their responsibilities on a day-to-day basis for example, an accountant may file a company tax return however, officers and Members acting as such remain legally responsible for the discharge of their duties.

- 3.7 Council Members or officers appointed to act as directors, trustees or similar positions in outside bodies are exposed to different risks arising mainly from their role and nature of the body in which they act. For example, in the case of a trust, they may be liable (without limit) if they deliberately or recklessly take actions in breach of trust or without having taken appropriate advice; or in the case of a limited company, they may be personally liable for the company's business liabilities and be fined, prosecuted or disqualified as a company director if they do not discharge their directors' responsibilities. Officers and Members are increasingly concerned about the personal liability that may be attached to them from performing their duties.
- 3.8 In addition, from time to time the Council is required to make special appointments or assign special responsibilities to officers and Members which exposes them to additional risks of personal liability under a separate statutory or regulatory regime. For example, the premises licence held by the Council authorising it to sell alcohol or provide entertainment at Brent's Civic Centre requires an individual to be appointed as the designated premises supervisor (DPS). The DPS is personally responsible for ensuring that the requirements of the licence and the Licensing Act 2005 are complied with and a failure to do so can constitute a criminal offence.
- 3.9 It is not in the Council's interests to deter potentially suitable candidates from seeking election to the Council or seeking appointment to responsible posts supported by the Council because of concerns over possible personal liabilities. This report therefore recommends that the Council confirms its established practice of giving an indemnity in respect of such risks as it lawfully may to both officers and Members, and suggests practical steps designed to minimise the potential cost to the Council of meeting claims under the proposed indemnity.
- 3.10 Although there is a statutory form of protection under Section 39 of the Local Government (Miscellaneous Provisions) Act 1976 for individual Members and officers in respect of claims from third parties for acts and omissions committed whilst a Member or Officer is conducting council business, this does not afford protection where other than Council business is being conducted.
- 3.11 In order to fill the gaps identified above, the Council effects insurance cover under a professional indemnity policy. This gives protection to both: the Council, and to individual Members and officers in respect of claims resulting from their undertaking Council business. The insurance policy also covers Members and officers specifically appointed by the Council to an outside body. There is specific statutory power to effect such insurance under the Local Authorities (Indemnities for Members and Officers) Order 2004 (the Order). However, that policy does not cover officers appointed to an outside body, and required to act independently of Brent.
- 3.12 Furthermore, notwithstanding the existence of insurance cover, where a Member or officer is sued personally in respect of a matter in which he has been involved on behalf of the Council, he or she may still need to incur expense in defending the proceedings if for example insurers decline to take over the conduct of the action because they believe it is frivolous.

- 3.13 The Council's indemnity is designed to avoid such problems by underwriting individual Members' and officers' potential liabilities, though only to a limited extent in relation to Members and officers serving on outside bodies.

4.0 Background Information

Risk Management – Outside Bodies

- 4.1 Members and officers on outside bodies cannot be guarded against third party claims in all circumstances. The Order specifically prohibits local authorities from indemnifying their Members and officers in relation to deliberate wrongdoing or recklessness, and also charities are specifically precluded from buying insurance against deliberate or reckless breaches of trust by charity trustees.
- 4.2 Directors, trustees or members of management committees of outside bodies can best protect themselves against the possibility of personal liability by making sure they take appropriate professional advice, and also checking that outside bodies comply with their obligations relating to health, safety and welfare at work of workers, and/or any other activities which might give rise to third party claims. For example, outside bodies which have employees need to make sure they have contracts of employment in place, guidelines for resolving employment issues and that such guidelines are adhered to.
- 4.3 It is proposed that appointments of Members to outside bodies will continue to be administered by Executive and Member Services and those of officers by the Chief Executive or the Strategic Directors of the departments in which they work so they can discover the legal nature of the outside organisation and any protection or insurance that it would provide to any appointee. It is recommended that in the future no appointment should be made unless the insurance arrangements have been checked with the Council's insurance managers in the case of Members by the Head of Executive and Member Services or in the case of officers by the Chief Executive or the relevant Strategic Director.
- 4.4 Existing appointments will only henceforth have the benefit of the Council's indemnity if the insurance and risk management arrangements have been confirmed in the case of Members by the Head of Executive and Member Services and officers by the Chief Executive or the relevant Strategic Director (in consultation with the Council's insurance managers) though they may continue until he or she has made this determination. During the period until the determination is given, the indemnity will apply although this will mean that there is an additional risk for the Council during that period. It is considered that this additional risk is acceptable given the rarity of claims against Council Members and officers at that stage.
- 4.5 Before any appointment is made to an outside body, the Head of Executive and Member Services (in the case of Members) or the Chief Executive or the relevant Strategic Director (in the case of officers) will check to see whether the body concerned is on the list of outside bodies which the Council's insurers accept as

being covered by the Council's insurance policies, or that the Council's insurers have agreed the body in question may be added to that list and have accepted that the duties to be discharged are covered by those insurance policies or that the outside body has its own insurance which covers the Council's appointees.

- 4.6 In the case of Members the above will be subject to the appointment having been approved and the risk/insurance management arrangements reviewed by the Head of Executive and Member Services and the Council's appointee, if a Councillor, having been advised of the position and risk and having decided whether to accept the nomination. In the case of officers the Chief Executive or the relevant Strategic Director, who approves the appointment must be satisfied that sufficient insurance cover is in place either from the Council or by the organisation concerned. In the event that no insurance cover is in place, the Chief Executive or the relevant Strategic Director will determine if the appointment should be made and whether the proposed indemnity should be provided.

The wording of the Council's Indemnity

- 4.7 The proposed wording in **Appendix 1**, makes clear that:
- 4.7.1 the Indemnity would not apply to deliberate or reckless breaches of trust, any deliberate wrongdoing or recklessness, nor for the avoidance of doubt in respect of Members or officers serving on outside bodies in their private capacities.
 - 4.7.2 Officers and Members serving in a fiduciary capacity on outside bodies should be covered by the indemnity.
- 4.8 The proposed wording recommends that the Council's indemnity should cover the costs in defending Members and officers against criminal and civil proceedings arising from activities carried out on behalf of the Council. However, it is subject to the officer or Member having acted honestly and in good faith and not from his/her deliberate or reckless wrongdoing.

5.0 Financial Implications

- 5.1 Based on past experience, it is expected that claims against this indemnity will be rare. This combined with the changes the council is making to become more entrepreneurial make it difficult to estimate the average annual cost of the indemnity. In most years it would be hoped that the actual call on the indemnity would be nil, but it would in theory be possible for substantial claims to be made on it.
- 5.2 However, it is important to note that the granting of indemnities does not in and of itself create new risks. The indemnities envisaged in the report are for activities that council officers and Members already undertake and the council is therefore insured against many of these risks, which limit the council's possible exposure to any single insured claim to its excess (currently £0.3m). Where appropriate this risk could be

further controlled by encouraging any organisations to which Brent staff are appointed to put in place appropriate insurance.

6.0 Legal Implications

- 6.1 Section 112 of the Local Government Act 1972 enables the Council to appoint staff, and such officers "shall hold office on such reasonable terms and conditions, including conditions as to remuneration, as the authority appointing him think fit". Therefore an implicit power to indemnify or insure them as part of their terms and conditions of employment.
- 6.2 Prior to the enactment of the Local Government Act 2000, the powers of local authorities to indemnify Members and officers in respect of claims brought against them personally were severely limited mainly because of the case of Burgoigne -v- London Borough of Waltham Forest. In this case, the High Court indicated that local authorities could not indemnify Members and officers against personal liability for acts committed outside the powers of the local authorities in question.
- 6.3 Section 101 of the Local Government Act 2000 changed that position by conferring power on the Secretary of State to make an Order to provide authorities with the ability to indemnify their members and officers in respect of personal liabilities incurred in connection with their service on behalf of their authority. It is under this power that the Order already referred to was made.

The Order

- 6.4 Article 5 is the key provision in the Order. It states that an indemnity may be provided in relation to any action, or failure to act, which is (a) authorised by the authority or (b) forms part of, or arises from, any powers conferred, or duties placed, upon a member or officer, as a consequence of any function being exercised by that member or officer (i) at the request of, or with the approval of the authority or (ii) for the purposes of the authority.
- 6.5 Article 5 also makes clear that an indemnity may be given whether or not, when exercising the function in question, the member or officer does so in his capacity as a member or officer of the authority. Therefore, an indemnity can apply to powers or duties being exercised by Members or officers when carrying out functions pertaining to outside bodies not connected with the Council, as long as the functions in question are being exercised at the request of, or with the approval of, the authority or for the purposes of the authority.
- 6.6 When a member or officer is acting in a fiduciary capacity as a member of an outside body, it is unlikely that his or her actions could be said to be undertaken at the "request" of, or for the "purposes" of the Council. However the very fact that the member or officer will have been nominated to the outside body by the Council will mean that the action or failure to act will have been done whilst exercising powers or duties as a consequence of performing a function (i.e. serving on the outside body in question) with the approval of the Council and so can be indemnified by the Council.

- 6.7 Article 6 of the Order prevents the provision of an indemnity (or securing of insurance) in relation to criminal acts, any other intentional wrongdoing, fraud, recklessness, or in relation to the bringing (but not the defence of) any action in defamation. An indemnity may, however, be provided in relation to the defence of criminal proceedings.
- 6.8 Article 7 makes clear that an indemnity can be given in relation to actions which are beyond the powers of an authority, provided that the member or officer in question believes that the action, or failure to act, is within the powers of the authority.
- 6.9 Article 8 conditions that any potential indemnity given against the costs of defending any criminal proceedings must contain provisions for the re-payment of sums expended by the authority or the insurer if the Member or officer has been convicted of a criminal offence and that conviction is not overturned following any appeal. It is recommended that the Chief Finance Officer be authorised to decide on a case by case basis whether it is appropriate to pay any sums upfront for the defence of criminal proceedings and recover the sums in the event of a conviction, or await the conclusion of such proceedings before making any payment. It is suggested that there is a need for discretion to ensure flexibility, fairness and proper expenditure of Council funds.

7.0 Diversity Implications

- 7.1 There are no diversity implications arising from this report.

8.0 Staffing/Accommodation Implications

- 8.1 There are no staffing or accommodation implications arising from this report.

Contact Officers

Miguel Zavaleta

Contracts Lawyer

Chief Operating Officer's Department

Tel: 020 8937 1899

Miguel.Zavaleta@brent.gov.uk

FIONA ALDERMAN

Chief Legal Officer

Fiona.Alderman@brent.gov.uk

STEPHEN HUGHES

Strategic Director, Resources (Interim)

Appendix 1

INDEMNITY

1. The Council will, subject to the conditions, limitations and exceptions below, indemnify all members (which expression shall hereinafter be deemed to include co-opted members of any Council committees) or employees of the Council against any damages, costs or legal expenses which any such member or employee may be ordered to pay or may reasonably have incurred arising from activities carried out on behalf of the Council if the member or employee acted in good faith and honestly believed that the act or omission complained of was within his/her power and that his/her duty as a member or employee or (in the case of functions exercised otherwise than in the capacity of member or Council employee) performer of the function in question with the approval or at the request or for the purposes of the Council, required or entitled him/her to do or omit to do it. Such Indemnity shall apply to any liability of any member or employee as the Council's representative or nominee on an outside body and to any employee who in connection with his/her employment with the Council provides an administrative, technical, professional or other service to any person or body outside the Council.
2. For avoidance of doubt this indemnity will apply to existing and former member and employees in respect of acts and omissions whilst they were members or employees.
3. Subject as aforesaid the Council will not itself make any claim against any member or employee for any loss or damage occasioned by any neglect, act, error or omission committed by an individual arising from the pursuit of his/her duties on behalf of the Council (or on behalf of any outside body to which he or she has been appointed by or with the written approval of the Council and as representative or nominee of the Council) whilst acting within the scope of his/her authority.

Conditions and Limitations:

4. This indemnity will not extend to loss or damage directly or indirectly caused by or arising from:
 - a) Fraud, dishonesty, deliberate wrongdoing or recklessness, or any criminal offence on the part of a member or employee (except where the criminal offence is an offence under the provisions of the Health and Safety at Work Act etc 1974 or relevant statutory provisions within the meaning of that Act in which case the indemnity will continue to apply).
 - b) Any action, neglect, error or omission by an individual otherwise than in the course of his/her duty.
 - c) Activities which are ultra vires the Council, the body in question or the individual save to the extent that at the time of the activity concerned the individual bona fide and reasonably believed that the activity was intra vires.
 - d) Any activity carried out "outside" work, which is unconnected with the work of the Council.

5. Notwithstanding 4 above, the Council in its absolute discretion and subject to 6 below may decide to indemnify a member's or employee's costs of defending any criminal proceedings brought against him/her.
6. However if a member or employee is convicted of a criminal offence and that conviction is not overturned on appeal, the member or officer in question shall reimburse the Council (or the Council's insurer as the case may be) for any sums expended by the Council or the insurer in relation to those proceedings.

Appendix 2

OUTSIDE BODIES

List of bodies that require a Council appointment to be made

NAME OF OUTSIDE BODY ORGANISATION
Positive Ageing in London (formerly appointed to Age UK London)
Agreed Syllabus Conference
Brent Housing Partnership (BHP) Board
Brent Sports Council
Central and North West London NHS Foundation Trust
Chalkhill Community Centre
Chalkhill Community Trust Fund
Edward Harvist Trust
Energy Solutions (North West London)
Greater London Enterprise Board
Hillside Housing Trust
Historic Environment Champion (English Heritage)
Lewisham Shared Service
LGADigital
Local Government Association General Assembly
Local Government Information Unit Members' Assembly
London Councils Greater London Employment Forum
London Road Safety Council
London Youth Games Committee
Museums Association
Partners for Brent (Local Strategic Partnership)
Queen's Park Joint Consultative Group

NAME OF OUTSIDE BODY ORGANISATION
Reserve Forces and Cadets Association for Greater London
Standing Advisory Council for Religious Education (SACRE)
Tricycle Theatre
Wembley Educational Foundation
Wembley Eleemosynary Charities
West London Alliance
West London Partnership
West London Waste Authority
Willesden Consolidated Charities
Old Oak and Park Royal Development Corporation (OPDC)
Old Oak and Park Royal Development Corporation (OPDC) Planning Committee