

TONBRIDGE & MALLING BOROUGH COUNCIL

OVERVIEW AND SCRUTINY COMMITTEE

6 March 2012

JOINT REPORT OF THE DIRECTOR OF FINANCE AND THE CHIEF SOLICITOR

Part 1- Public

Matters for Information

1 APPOINTMENTS TO OUTSIDE BODIES

Concerns have been raised regarding the potential liability of Members in instances where they have been nominated by the Council to serve on the board of an outside body. This report advises Members of the current statutory and insurance position.

1.1 Background

- 1.1.1 The Council receives requests from various organisations to nominate suitable representatives to serve on boards or to act in a Trustee capacity. To that end Members are often approached to fulfil these roles and in 2011/12 appointments were made to 45 outside bodies.
- 1.1.2 The duties and liabilities of Members participating in external bodies will depend both on the capacity of the Member concerned, and also the nature of the body itself. For example, members of unincorporated associations act as principals in their own right (as the association has no legal identity in its own right) and so incur personal liability for their actions. Trustees may also be personally liable for liabilities incurred which exceed the trust assets.
- 1.1.3 Members and Officers of local authorities may incur personal civil and criminal liability as a result of their actions within the authority and as a result of their actions carried out on behalf of an outside body.
- 1.1.4 However, Members and Officers enjoy statutory immunity from civil liability when they act within the powers of the authority, in good faith and without negligence. However this immunity does not apply in instances where Members and Officers go beyond the powers of the authority, act in bad faith or negligently, or when they are acting on behalf of an outside body to which they have been appointed..
- 1.1.5 The Local Authorities (Indemnities for Members and Officers) Order 2004 allows local authorities to provide indemnities to Members and Officers in respect of their personal liabilities whilst undertaking activities connected with their local authority.

1.1.6 The Order allows an indemnity to be provided in the following circumstances:

- When the action, or failure to act, by the Member or Officer in question is authorised by the local authority;
- When a Member or Officer is carrying out a function at the request of, with the approval of or for the purposes of, the local authority;
- Where, when exercising the above mentioned function, the Member or Officer does so in a capacity other than that of a Member or Officer of the local authority e.g. when acting as a director of a company at the request of the authority, but acting in their capacity as a director;
- When the action or inaction complained of is outside the powers of the local authority itself or outside the powers of the Member or Officer (*ultra vires*), provided the Member or Officer reasonably believed that the matter in question was not outside those powers;
- When a member or Officer makes an untrue statement as to the local authority's powers or to the steps taken or requirements fulfilled when reasonably believing that the statement was true when made .

1.1.7 There are however, some restrictions placed on this power, an indemnity cannot be provided for:

- Actions which constitute a criminal offence
- Actions that result from fraud, deliberate wrongdoing or recklessness
- Breaches of the Code of Conduct

1.1.8 An indemnity can be provided to defend criminal proceedings and against allegations of breaches of the Code of Conduct, provided that the indemnity requires, as a condition, re-payment of sums expended by the authority in the event that the Member or Officer is convicted or if the Member is found to have breached the Code.

1.1.9 Following the introduction of this Order the Council's insurer confirmed that insurance cover will continue to be provided for activities flowing from the 'business' of the insured. In connection with outside bodies this is defined as "activities of Members and Officers approved by the authority in connection with outside organisations but only where the authority is legally entitled to (a) approve such activities and (b) indemnify such Members and Officers in respect of such activities".

1.1.10 The Council's Chief Solicitor and Exchequer Services Manager arranged a meeting with a representative from the Council's insurers, Zurich Municipal, to discuss the insurer's stance on this issue. As expected the cover arrangements

had not altered and, for reference purposes, the relevant extract from the Council's liability policy wording is noted at **[Annex 1]** to this report.

- 1.1.11 The representative from Zurich Municipal confirmed that if our cover is to operate it is a requirement that the Member only provides the views of the Council and takes decisions that are approved by the Council whilst standing on the outside body and not their own views / decisions.
- 1.1.12 It is worth noting that the insurance arrangements **do not** provide cover in the following circumstances:
- Where the cause of a claim originates outside of the normal business activities of the Council.
 - Where a Member or Officer is acting as a director of a company at the request of the authority and a claim is received which is not capable of being made against the authority itself.
 - Contractual disputes / claims.
 - Criminal act defence costs except those brought under the relevant sections of the Health & Safety at Work Act.
 - Where a Member makes an error which is independent of Officer advice. Members should be aware that it is important to use the technical advice of Officers in the decision making process.
- 1.1.13 The issue of serving on outside bodies is also referred to on page 12 of the Members' Allowances Scheme which may be found in Part 6 of the Council's Constitution.

1.2 Legal Implications

- 1.2.1 As set out above.

1.3 Financial and Value for Money Considerations

- 1.3.1 Not applicable

1.4 Risk Assessment

- 1.4.1 Members and Officers could potentially find themselves being held personally liable for the actions of outside bodies on which they have been nominated to stand if they do not first fully consider the cover arrangements that have been arranged by the outside body.

1.5 Equality Impact Assessment

1.5.1 See 'Screening for equality impacts' table at end of report

1.6 Conclusion

1.6.1 Before accepting appointments to outside bodies Members are advised to enquire as to the role expected of them by the body and to check what insurance arrangements are in place.

1.6.2 Only when they have an appreciation of the role expected of them and have satisfied themselves that adequate cover arrangements are in force should Members decide whether or not to accept the nomination.

Background papers:

Nil

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Chief Solicitor

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Screening for equality impacts:		
Question	Answer	Explanation of impacts
a. Does the decision being made or recommended through this paper have potential to cause adverse impact or discriminate against different groups in the community?	Not Applicable	

Screening for equality impacts:		
Question	Answer	Explanation of impacts
b. Does the decision being made or recommended through this paper make a positive contribution to promoting equality?	Not Applicable	
c. What steps are you taking to mitigate, reduce, avoid or minimise the impacts identified above?		

In submitting this report, the Chief Officer doing so is confirming that they have given due regard to the equality impacts of the decision being considered, as noted in the table above.