

NEW FOREST NATIONAL PARK AUTHORITY

AUTHORITY MEETING – 15 JUNE 2006

PROPOSED INDEMNIFICATION OF MEMBERS AND EMPLOYEES

Report by: Kevin Gardner, Solicitor and Monitoring Officer

Summary

1. This report proposes that the Authority adopts a form of indemnification in certain circumstances to cover both its members and employees and any volunteers undertaking authorised tasks. It is considered that this is consistent with the actions of a responsible body and good employer, although it should be recognised that any incidents giving rise to formal indemnification are likely to be rare.
2. The report sets out several issues relating to the giving of indemnities and also sets out in **Annex 1** a detailed form of indemnification which it is suggested should be covered by obtaining satisfactory insurance cover.

Recommendation

That the Authority grant an indemnity to members and employees of the Authority in the terms set out in Annex 1 to this report and authorises the Chief Executive to ensure that the Authority's insurance arrangements make adequate provision to cover the Authority's liability under this indemnity.

Resources

The proposed indemnification provides protection for members and employees and ensures that they are not deterred from playing a full role in the Authority's business.

Other major considerations

None

Papers

NFNPA 95/06 : Cover paper
NFNPA 95/06 Annex 1 : Terms of indemnity

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1 Summary

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- 1.2 The report sets out several issues relating to the giving of indemnities and also sets out in **Annex 1** a detailed form of indemnification which it is suggested should be covered by obtaining satisfactory insurance cover.

2 Background

- 2.1 In practice, it will be unusual for a member or officer to incur any personal liability in the course of their dealings on behalf of the Authority. The Authority is a body corporate, and any liability that may arise as a result of the acts or omissions of members and officers will normally be borne by the Authority, providing that they have acted reasonably and within the scope of the responsibilities given to them by the Authority.
- 2.2 Further, Schedule 7 Paragraph 15 of the Environment Act 1995 applies to National Park Authorities a provision in Section 265 of the Public Health Act 1875, with appropriate amendments. The effect of this is that nothing done by a member or officer of a National Park Authority, or other person acting under the Authority's direction, shall, if the act was done bone fide for the purpose of carrying out the Authority's functions, subject them personally to any action, liability, claim or demand, and any expense incurred by any such person shall be borne by the Authority.
- 2.3 Nevertheless, various other pieces of legislation do provide for certain situations where personal liability may arise. One example is health and safety legislation, which provides that where an offence committed

by a body corporate is proved to have been committed with the consent of, or is attributable to the neglect of, any director, manager or other officer, that person may be personally liable for the offence. A similar provision in the Data Protection Act means that the same individuals may incur personal liability for offences under that Act. The Freedom of Information Act provides that any person who wilfully alters or conceals information sought under an information request commits an offence. In any of these cases, civil liability to pay damages to a third party who suffers loss as a result of the person's actions, could also arise. Financial loss could also take the form of expenses incurred in having to meet costs of independent legal advice and representation. This is because in any of the situations referred to, a conflict of interest would almost certainly arise meaning the Authority's own legal advisors could not also advise and represent the individual.

- 2.4 In these and other circumstances, some doubt has developed as to whether certain actions could be shown to be sufficiently clearly bone fide to come within the terms of the Section 265 Indemnity. This situation has prompted some public authorities to seek to put in place more explicit arrangements to indemnify their members and officers against personal liability. In the case of *R -v- Westminster City Council ex.p.Legg* (2000), it was held that a local authority was entitled in principle to grant an indemnity to members and officers in respect of legal costs incurred in responding to an objection made to an auditor, on the basis that to do so was calculated to facilitate or was conducive or incidental to the discharge of the local authority's functions within Section 111 of the Local Government Act 1972 (National Park Authorities have a similarly worded power to Section 111, by virtue of Section 65 (5) Environment Act 1995). In this case it was considered important for the proper discharge of the functions of a public authority that those seeking public office, whether by election as a member of the authority or by appointment to a post as an officer, should not be deterred from doing so by concern over personal liability.
- 2.5 However, the statutory indemnity under Section 265 of the 1875 Act, and any specific indemnity granted by virtue of Section 111 (or Section 65 (5)) still leaves some areas of uncertainty. In particular, it is unclear whether these arrangements would apply where members are appointed to sit on outside bodies, such as charities and informal partnerships. This can deter some members from wishing to play a full role in this respect. There is also lack of clarity where the decision giving rise to the liability has been determined ultra vires. Further, an issue arises in relation to members incurring personal costs of legal advice and representation where they are the subject of proceedings for an alleged breach of the Members' Code of Conduct.
- 2.6 For these reasons, the Local Government Act 2000 included a provision, Section 101, enabling the Secretary of State to empower relevant authorities (which includes National Park Authorities) to provide indemnities to some or all of their members and officers. The

relevant Order is the Local Authorities (Indemnities for Members and Officers) Order 2004 (“the Regulations”). It is considered advisable for the Authority to put such arrangements in place, in the interests of protection of members and officers, and to ensure that they are not deterred from playing a full role in the Authority’s business.

3 The proposed indemnity

3.1 There are a number of issues, which need to be considered, and a decision taken by the Authority as to whether or not the indemnity should apply in such circumstances or whether it should be limited.

3.1.1 Where a decision is taken which is in retrospect, held to be outside the powers of the Authority or the individual

The Regulations allow the Authority to provide an indemnity where the individual reasonably believed that the decision was within the powers of the Authority or the particular individual. It would appear reasonable for an indemnity to be given in these circumstances because although public authority law is complex and whilst legal advice is always available, circumstances may arise where it would be understandable for an individual not to appreciate precisely where certain limits exist.

3.1.2 Where an individual acts in bad faith fraudulently out of malice or as a deliberate or reckless act of wrong doing

It would be contrary to the public interest to provide an indemnity to an individual in such circumstances. However, the fact that such an allegation is made is not the same as it being objectively upheld by, say, a court. In these circumstances, it would appear reasonable to offer an indemnity even where such bad faith etc. is alleged providing that it is refuted by the individual concerned. Thus an indemnity could be offered if the individual was ultimately cleared of the allegation. However, if that were not the case, then it would be entirely appropriate for the Authority or the insurance company, as the case may be, to recover their costs from the individual concerned.

3.1.3 Where an individual acts in a manner, which constitutes a criminal offence

Again, it would not be appropriate to offer an indemnity in these circumstances and indeed would be contrary to the public interest. However, the Authority might consider that it would be entirely appropriate for it to ensure that the allegation against the individual is properly refuted. It would also be appropriate for the Authority to ensure that individuals’ actions when taken in good faith, were not deterred by the potential legal costs of cases threatened against them. However, any indemnity should be

conditional upon the individual being ultimately cleared of the allegation of criminal conduct. If the individual was convicted of the offence then the individual concerned under the indemnity policy should be clearly required to repay the costs incurred by either the Authority or the insurance company.

3.1.4 Where the individual is sued for defamation

The Regulations specifically include a power on the part of the Authority to grant an indemnity in respect of the legal costs of defending a defamation action (but not in respect of the award of any damages) but does not cover the situation where an individual may wish to bring such a claim.

However, the Authority should bear in mind that costs in defamation actions are notoriously expensive. It is therefore suggested that before any indemnity is actually offered in any particular case, it should be subject to the Solicitor and Monitoring Officer's review of the case and the imposition of any conditions, as he or she should see fit.

4 Work for outside bodies

- 4.1 The Regulations specifically provide for the Authority to give an indemnity to an individual against liabilities, which they incur as members of an outside body to which they have been appointed or nominated to by the Authority itself. This would appear entirely appropriate to do if, as is the case, the Authority is invited to nominate members to a range of outside bodies (members will recall that a number of such appointments were made at the Authority's meeting on 25 April 2006). In such cases the Authority should undertake a reasonable risk assessment of the body's insurances and indemnities prior to undertaking the duties.

5 Code of Conduct for Members

- 5.1 The Regulations enable the Authority to grant an indemnity to its members in respect of the cost of legal representation regarding any investigation, hearing or other proceedings for an alleged failure to comply with the Code of Conduct for Members. However, the Regulations also provide that if any such indemnity is given and accepted, the member must reimburse the Authority or, as the case may be, the insurance company in the event that it is found that the member has failed to comply with the Code of Conduct or the member admits that he or she has failed to comply with the Code of Conduct.
- 5.2 It would appear reasonable to offer such an indemnity in the case of a member who is investigated by the Standards Board for England and the Ethical Standards Officer then refers the complaint for hearing and determination to the Adjudication Panel for England. This is because

the Adjudication Panel for England has the ability to impose a sanction of disqualification from the office of member for a maximum period of five years.

- 5.3 However it is more questionable whether or not an indemnity for the costs of legal representation would be appropriate where any complaint is referred to the local Standards Committee for either investigation or hearing and determination because the Standards Committee can impose a maximum sanction of only three months suspension. Added to this is the fact that local hearings of the Standards Committee should be as informal as possible and it is debateable whether or not it would be necessary for a member in such circumstances to have separate legal representation.

6 Conclusion

- 6.1 This report recommends that the Authority formally adopt a form of indemnity for its members and officers in line with the terms outlined in **Annex 1**.

7 Recommendation

That the Authority grant an indemnity to members and employees of the Authority in the terms set out in Annex 1 to this report and authorises the Chief Executive to ensure that the Authority's insurance arrangements make adequate provision to cover the Authority's liability under this indemnity.

TERMS OF INDEMNITY

- 1 The Authority will, subject to the exceptions in paragraphs 1.1 – 1.3, indemnify each of its members and employees (which term shall include any volunteers undertaking authorised tasks) against any loss or damage suffered by the member or employee arising from his/her action or failure to act in his/her capacity as a member or employee 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 employee;
 - 1.2 any act or failure to act by the member or employee otherwise than in his/her capacity as a member or employee 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 paragraphs 2.1 – 2.6 indemnify each of its members and employees 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 will not extend to Part 3 proceedings where the allegation has been referred to the Monitoring Officer for local investigation and/or determination by the Standards Committee.
 - 2.4 Subject to the agreement of the Solicitor and Monitoring Officer in any case and to any conditions he or she may impose, this indemnity shall extend to any advice or representation in respect of any claim or threatened claim in defamation against the member or employee.

- 2.5 Where any member or employee 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 employee has made use of this indemnity:
- 2.5.1 the member or employee is convicted of a criminal offence in consequence of such proceedings, or
 - 2.5.2 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 or employee as the case may be, shall reimburse the Authority for any sums expended by the Authority pursuant to the indemnity.
- 2.6 Where the Authority arranges insurance to cover its liability under this indemnity, the requirement to reimburse in Paragraph 2.5 shall apply as if references to the Authority were references to the insurer.
- 3 For the purposes of these indemnities, a loss or damage shall be deemed to have arisen to the member or employee "in his/her capacity as a member or employee 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 employee, but the member or employee reasonably believed that the act or failure to act was within the powers of the Authority or within the powers of the member or employee (as appropriate) at the time that he/she acted or failed to act, as the case may be; or
 - 3.2 The act or failure to act occurred not in the discharge of the functions of the member or employee as a member or employee of the Authority but in their capacity as a member or employee or representative of another organisation, where the member or employee is, at the time of the action or failure to act, a member or employee or representative of that organisation in consequence of his/her appointment as such member or employee or representative of that organisation by the Authority.
- 4 The Authority undertakes not to sue (or join in action as co-defendant) a member or employee of the Authority in respect of any negligent act or failure to act by the member or employee in his/her capacity as a member or employee 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 member or employee; or

- 4.2 Any act or failure to act by the member or employee otherwise than in his/her capacity as a member or employee of the Authority.
- 5 These indemnities and undertaking will not apply if a member or employee, without the express permission of the Solicitor and Monitoring Officer, admits liability or negotiates or attempts to negotiate a settlement of any claim, that would otherwise fall within the scope of the indemnities.
- 6 These indemnities and undertaking are without prejudice to the rights of the Authority to take disciplinary action against an employee in respect of any act or failure to act.
- 7 These indemnities and undertaking 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 employee has ceased to be a member or employee of the Authority as well as during his/her membership of or employment by the Authority.