



## WEST NORTHAMPTONSHIRE SHADOW AUTHORITY

### SHADOW AUTHORITY MEETING

23<sup>rd</sup> February 2021

<b>Report Title</b>	<b>Interim Period Appointments and Indemnity for Officers and Members</b>
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#### List of Appendices

#### **Appendix 1 Indemnity for Officers and Members.**

##### **1. Purpose of Report**

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- 1.1. This report asks the Shadow Authority to ensure that the appointment of members to the committee arrangements for the Interim Period (1 April 2021 to 10 May 2021 inclusive) is made so that members can continue to make decisions during the interim period.
- 1.2. The report also deals with the interim appointment of members and officers to outside bodies (as required). Existing appointments and future appointments will need to be the subject of a further report after the end of the interim period.
- 1.3. In the interim members will need to have a form of indemnity which covers them for the interim period which is in place.
- 1.4. The Interim Arrangements themselves are set out within Part 10 of the West Northamptonshire Council constitution, included within the agenda for this meeting.

##### **2. Executive Summary**

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- 2.1 The period between the establishment of the new West Northamptonshire Council on 1 April 2021 and 10 May 2021, at which point councillors elected on polling day (6 May 2021) shall become entitled to act, is known as the Interim Period.
- 2.2 During the Interim Period, the new Council shall be composed of those members of the Shadow Authority as defined in the Northamptonshire (Structural Changes) Order 2020 (The Order) and who are members of the Shadow Authority on 31 March 2021.

- 2.3 The Interim Arrangements are required so that any business that must be undertaken during the Interim Period can be managed. This report sets out the governance structure that shall apply during the Interim Period and asks the Shadow Authority to approve the appointment of members to the relevant committees and outside bodies.

### **3. Recommendations**

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- 3.1 It is recommended that the Shadow Authority:
- a) Note the governance structure that shall be in operation for the Interim Period and
  - b) Approve the appointment of members to committees, as set out in paragraphs 4.1 to 4.12;
  - c) Agree the appointment of members to outside bodies for the interim period, as set out in paragraph 4.13, including the delegation to the Monitoring Officer to make the appointments highlighted;
  - d) Approve the indemnity for officers and members as set out in **Appendix 1** to this report and that the Chief Finance Officer be authorised to make changes from time to time as necessary to reflect legislative change or recommended good practice;
  - e) 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
  - f) That existing and future officer and Member appointments to outside bodies and special roles be the subject of a future report.

#### 3.2 Reason for Recommendations

- a) The Shadow Authority has obligations under the Order and associated legislation to make arrangements for the successful operation of the new Council. This includes the operation of the new Council during the Interim Period.
- b) The successful operation of governance and decision making arrangements is essential to ensuring the proper oversight of service delivery during the interim period.
- c) Members and officers who serve on outside bodies require an insurance backed indemnity to continue to serve on outside bodies without fear of personal liability for carrying out their roles.

### **4. Report Background**

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- 4.1 As set out in paragraph 2.2, all members of the West Northamptonshire Shadow Authority as of 31 March 2021 will become members of the West Northamptonshire Council from 1 April 2021 until the end of the Interim Period.
- 4.2 The Chair and Vice-Chair of the Shadow Council will continue in place in the new Council. The Chair shall hold office until their successor becomes entitled to act, at the first Annual Meeting of the new Council

- 4.3 The Shadow Executive Committee will continue in place and the Leader of the Shadow Authority shall be the Leader of the West Northamptonshire Council, both until the end of the Interim Period.
- 4.4 The Overview and Scrutiny Committee will continue in place and shall be composed of those councillors who have been appointed to the Committee as at 31 March 2021.
- 4.5 The Standards Committee will continue in place and shall be composed of those councillors who have been appointed to the Committee as at 31 March 2021.
- 4.6 The Senior Appointments Committee will continue in place and shall be composed of those Councillors who have been appointed to the Senior Appointments Committee as at 31 March 2021.
- 4.7 In addition to these committees, the following committees will also be established for the duration of the Interim Period:
- 4.8 Development Management Committees
- 4.8.1 There will be three Development Management Committees which will be the same as, and cover the areas of the planning work of, the Development Management Committees of the Predecessor Councils. Each committee will be made up of those Councillors appointed by the Predecessor Councils as at 31 March 2021.
- 4.9 Licensing Committee (x3)
- 4.9.1 There will be three Licensing Committees which will be the same as, and cover the areas of the licensing work of, the Licensing Committees of the Predecessor Councils. Each committee will be made up of those Councillors appointed by the Predecessor Councils as at 31 March 2021. Each Committee shall determine any licensing matter in accordance with the policies, practices and scheme of delegation which applied to that committee at 31 March.
- 4.9.2 Membership of Licensing Sub-Committees will be selected by the Monitoring Officer or their nominated representative on a rota basis, taking account of experience, political balance and interests, and to reflect training on the relevant policies being applied to applications in respect of the Predecessor Council areas.
- 4.10 An Audit Committee will be convened if required by the Monitoring Officer consisting of the Chair or Vice-Chair of the Predecessor Councils' committees with audit functions as at 31 March 2021, with a minimum of three members.
- 4.11 An Appeals Committee will be convened if required by the Monitoring Officer, consisting of the Chair or Vice-Chair of the Predecessor Councils' appeals committees as at 31 March 2021.
- 4.12 Where applicable, each of the above committees shall be chaired by the Chair (or Vice-Chair) appointed by the Predecessor Councils as at 31 March 2021.

4.13 Those members appointed to outside bodies by the Predecessor Councils as at 31 March 2021 shall continue to be appointed to those bodies until the end of the Interim Period. The exceptions shall be:

4.13.1 The LGA; and

4.13.2 East Midlands Councils.

Once it has been confirmed how many appointees the new Council shall be entitled to make to the LGA General Assembly and to East Midlands Councils for the Interim Period, the Monitoring Officer shall be delegated authority to make those appointments.

## **5.0 Indemnities for Officers and Members**

5.1 The purpose of an indemnity is primarily 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.

5.2 Councils customarily nominate Members and officers to a number of outside bodies which include private companies, organisations owned by various authorities for example LGSS or the Children's Trust and a range of other organisations.

5.3 Members and officers will 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.

5.4 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.

5.5 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.

5.6 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.

5.7 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.

- 5.8 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 may be concerned about the personal liability that may be attached to them from performing their duties.
- 5.9 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 such as Returning Officer or Electoral Registration Officer. These two roles have been specifically provided for within the proposed Indemnity.
- 5.10 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 the well established practice of Councils giving an indemnity in respect of such risks as it lawfully may to both officers and Members.
- 5.11 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.
- 5.12 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.
- 5.13 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.
- 5.14 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.

- 5.15 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.

## **6.0 The wording of the proposed Indemnity**

The proposed wording in **Appendix 1**, makes clear that:

- a) 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.
- b) Officers and Members serving in a fiduciary capacity on outside bodies should be covered by the indemnity.

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.

## **7. Implications (including financial implications)**

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### **7.1 Resources and Financial**

- 7.1.1 There are no resources or financial implications arising from the proposals in relation to interim arrangements
- 7.1.2 There are is a small financial implication in relation to the possible payment of excess if a claim is made for which the indemnity is given. However, based on the experience of predecessor authorities, it is expected that claims against this indemnity will be rare. 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.
- 7.1.3 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.
- 7.1.4 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.

### **7.2 Legal**

- 7.2.1 The Shadow Authority has obligations under the Order and associated legislation to make arrangements for the successful operation of the new

Council. This includes the operation of the new Council during the Interim Period.

- 7.2.2 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.
- 7.2.3 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.
- 7.2.4 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 Indemnities Order already referred to was made.

### **The Indemnities Order**

- 7.2.5 Article 5 is the key provision in the Indemnities 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.
- 7.2.6 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.
- 7.2.7 Article 6 of the Indemnities 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.
- 7.2.8 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.
- 7.2.9 Article 8 provides that any potential indemnity given against the costs of defending any criminal proceedings must contain provisions for the repayment 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.

### **7.3 Risk**

- 7.3.1 There are no significant risks arising from the proposed recommendations in relation to the interim arrangements. In relation to the indemnity for Members and officers on outside bodies there may be a risk of third party. The Indemnities 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.
- 7.3.2 It is proposed that appointments of Members and Officers should be reviewed to ensure that they continue to be appropriate but in the meantime Members and Officers should be afforded insurance to provide them with protection whilst that review can be undertaken. The risk of a claim is felt to be relatively small and to be covered by the Council's insurance policies.

### **7.4 Consultation**

- 7.4.1 The arrangements set out in this report reflect the duties of the Council as set out in the Structural Changes Order or as otherwise set out in the Constitution. The Constitution was developed by a working group of Shadow Councillors and has been subject to consultation with the Overview and Scrutiny Committee and the Shadow Executive Committee.
- 7.4.2 There has been no consultation in relation to the proposed Member and Officer Indemnity, however the nature of the indemnity is consistent with Indemnities provided by local authorities.

### **7.5 Consideration by Overview and Scrutiny**

- 7.5.1 See 6.4.1

### **7.6 Climate Impact**

- 7.6.1 None specifically.

### **7.7 Community Impact**

- 7.7.1 The successful operation of governance and decision making arrangements is essential to ensuring the proper oversight of service delivery during the interim period.

## **8. Background Papers**

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- 8.1 None.

## 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.
2. 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.
3. 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.
4. The authority will indemnify its officer acting in his/her capacity as Electoral Registration Officer and Returning Officer in relation to local, or such other elections as falls within his/her function, the reasonable costs which he/she may incur in securing appropriate legal advice and representation in respect of any civil or criminal proceedings to which he/she is subject.

#### **Conditions and Limitations:**

This indemnity will not extend to

- a) Loss or damage directly or indirectly caused by or arising from: Fraud, dishonesty, deliberate wrongdoing or recklessness, or any 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.

