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Indemnity for Libel Counterclaim
Carmarthenshire County Council
Report in the Public Interest

Indemnity for Libel Counterclaim

This report in the public interest has been prepared in accordance with section 22 of the Public Audit (Wales) Act 2004.

No responsibility is accepted in relation to any officer, member or any other person in their individual capacity or any third party.

The Wales Audit Office team that assisted me in preparing this report comprised Richard Harries and Geraint Norman.

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This report is issued in the public interest under section 22 of the Public Audit (Wales) Act 2004. I have issued this report to draw the public's attention to a decision Carmarthenshire County Council made to indemnify the Chief Executive in respect of the costs of a libel counterclaim that, in my view, it was not authorised under statute to make. There were also inadequacies in the processes adopted by the Council when making this decision.

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Summary

1 This report has been issued in the public interest under section 22 of the Public Audit (Wales) Act 2004 (the 2004 Act). The 2004 Act requires me to consider whether, in the public interest, I should make a report on any matter which comes to my notice in the course of the audit, in order for it to be considered by the audited body or to be brought to the attention of the public.

2 I have issued this report to draw the public's attention to a decision Carmarthenshire County Council (the Council) made to indemnify the Chief Executive in respect of the costs of a libel counterclaim that, in my view, it was not authorised under statute to make. There were also inadequacies in the processes adopted by the Council when making this decision. I believe it is important that the public has a full and proper awareness of the events concerning the Council. I also consider it appropriate to give the Council an opportunity to explain the steps it has taken to improve arrangements and to ensure that the risk of such failures recurring is reduced to a minimum.

3 At a meeting of the Executive Board of the Council on 23 January 2012 it was agreed that the Council would grant an indemnity to the Chief Executive for the bringing of a libel counterclaim against an individual. The matter was considered as a matter of 'exempt urgent business' and did not appear on the published agenda. The Chief Executive was at the meeting but did not declare an interest or leave the room when the matter was discussed.

4 I have reviewed the decision made as part of my 2012-13 statutory audit and concluded that the decision by the Executive Board on 23 January 2012 to grant an indemnity to the Chief Executive for the bringing of a libel counterclaim is unlawful. Any payment made pursuant to that decision would give rise to an item of account which is 'contrary to law'. I have concluded that the decision taken by the Executive Board was unlawful for the following reasons:

- **a** The decision taken by the Executive Board was unlawful as, in view of the specific publications in Articles 6(3) of the Local Authorities (Indemnities for Members and Officers) (Wales) 2006 Order, the Council is not authorised by statute to grant an indemnity in respect of bringing a claim or counterclaim for defamation. The Council may not rely on section 111 of the Local Government Act 1972 (the 1972 Act) to avoid that limitation on it powers.
- **b** There were failings in governance arrangements and processes adopted by the Council.

5 In the 2012-13 financial year, the Council paid £23,217 in external legal costs under the decision to indemnify the Chief Executive to pursue the libel counterclaim. A further £3,209 of external legal costs has been paid under the decision in the 2013-14 financial year (as at 31 December 2013). The libel counterclaim is still ongoing and it is unclear what the final external legal costs to the Council will be.

6 I have shared my legal advice with the Council. I have received submissions from the Council, which does not accept that the decision to grant the indemnity to the Chief Executive is unlawful. These submissions sought to justify the decision taken but they have not altered my view on the lawfulness of the said decision.

Recommendation

Executive Board decision, 23 January 2012

R1 The Council should rescind the decision and withdraw the indemnity granted to the Chief Executive.

Background

7 Proceedings for defamation were brought by an individual against the Chief Executive of the Council. The Chief Executive in his personal capacity subsequently instituted a libel counterclaim against the individual claiming that she had defamed him.

8 At a meeting of the Executive Board of the Council on 23 January 2012 it was agreed that the Council would grant an indemnity to the Chief Executive in respect of the legal costs incurred in relation to the proceedings. The matter was considered as a matter of 'exempt urgent business' and did not appear on the published agenda. The Chief Executive was at the meeting but did not declare an interest or leave the room when the matter was discussed.

9 The Council's report presented to the Executive Board stated that Counsel's advice obtained in 2008 (in relation to a previous consideration) was that the Council had the legal power to fund the bringing of legal proceedings for defamation but that such power should only be exercised in 'exceptional circumstances'. Counsel had further advised the Council that further specific legal advice should be obtained and any decision to exercise such power as did exist could be subject to challenge by way of judicial review on conventional public law grounds.

10 There are some general principles to consider. The Council is a creature of statute and as such it may only do what it is empowered by statute to do. The Council has no express power to fund legal proceedings on its own behalf or on behalf of its employees. In common with all bodies created by statute, the Council has incidental powers of the type that have been recognised by the common law for many years but which are now enacted in section 111 of the 1972 Act. It is therefore necessary, in the absence of express provision, to consider whether the proposed activity could fall within this incidental power.

11 The principle that local authorities are empowered to undertake activities which are incidental to the discharge of their functions is given statutory force by section 111 of the 1972 Act. Section 111(1) provides that 'Without prejudice to any powers exercisable apart from this section and subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions'.

12 The position in relation to the funding of defence to legal proceedings by local authorities in relation to their members and officers is addressed by the Local Authorities (Indemnities for Members and Officers) Order 2004 in England and the Local Authorities (Indemnities for Members and Officers) (Wales) Order 2006. These orders provide that local authorities may grant indemnities to officers and members in certain specified circumstances.

13 The 2004 and 2006 orders also provide that indemnities may not be provided in relation to the making of claims of defamation by members or officers. Article 6(3) of the 2006 order reads 'No indemnity may be provided under this Order in relation to the making by the member or officer indemnified of any claim in relation to an alleged defamation of that member or officer but may be provided in relation to the defence by that member or officer of any allegation of defamation made against him'.

14 The Council remains of the view that section 111(1) of the 1972 Act and the judgement in *Comninos (R (OAO Comninos) v Bedford Borough Council* [2003] EWHC 121 (Admin)) provides the Council with authority to provide the indemnity. The provisions of the 2006 order on this, however, are very clear and were introduced to remove any uncertainty which existed prior to the new orders. The Council may indemnify the Chief Executive in respect of the claim against him but they cannot indemnify him in respect of bringing a counterclaim.

The decision taken by the Executive Board, to indemnify the Chief Executive in respect of the costs of a libel counterclaim, was unlawful and payments made as a result of that decision result in an item of account that is 'contrary to law'

The decision taken by the Executive Board was unlawful as, in view of the specific publications in Articles 6(3) of the 2006 order, the Council is not authorised by statute to grant an indemnity in respect of bringing a claim or counterclaim for defamation. The Council may not rely on section 111 of the 1972 Act to avoid that limitation on its powers

15 The report to the Executive Board sets out why it was considered by the Council that the alleged defamatory statements relate to the Chief Executive rather than the Council, and why it is considered that it is lawful and in the public interest to grant the indemnity.

16 As described above, the Council has the power by virtue of Article 5 of the 2006 order to grant an indemnity in respect of the defence of the claim for defamation brought against the Chief Executive. The issue of lawfulness arises in respect of the bringing of the counterclaim.

17 The existence of the express powers conferred on local authorities in Wales by the 2006 order represents an implied prohibition on the existence of any wider powers than those expressly conferred. Put another way, it is not possible to rely on incidental powers (section 111 of the 1972 Act) to extend, or avoid the limitations on, express powers.

18 The effect of the 2006 order is that local authorities have the power to fund, or indemnify the cost of, the defence by an officer to defamation proceedings brought against him/her but no power to fund, or indemnify the cost of, the bringing of defamation proceedings. Local authorities in Wales now have the limited powers conferred by the 2006 order in relation to the granting of indemnities to members and officers and cannot seek to avoid the limitation on those powers by relying on the incidental powers conferred by section 111(1) of the 1972 Act.

19 Counsel's advice to the Council in 2008 contended that the 2006 order did not have the effect explained above. Counsel advised the Council that 'it was arguable' that the power referred to in section 111 of the 1972 Act continued to exist to enable local authorities in Wales to fund defamation proceedings, but that such a power should only be exercised in 'exceptional circumstances'. Counsel came to that view based on the Explanatory Note to the Regulations and the then draft guidance issued by the Welsh Government. Counsel's

view was however expressed in very cautious terms, stating that it would be 'extremely rare' for a decision to grant an indemnity to fund defamation proceedings to be reasonable and that the existence of the power was merely arguable. Counsel also noted that case law suggested that 'common sense should warn all but the most litigious authorities from funding defamation proceedings'.

20 The cautious and reserved terms in which Counsel expressed his opinion to the Council are not reflected in the report to the Executive Board. Instead, the report represents his advice in unequivocal terms – that the indemnity can be granted but only in exceptional circumstances, although these were not defined.

21 The 2006 order provides a comprehensive statutory code to determine how and when indemnities may be granted by Welsh local authorities in respect of legal costs incurred by members and officers. It is my view that the 2006 order represented an intention on the part of the Welsh Government (and Parliament before it) to regulate the granting of indemnities and to expressly prohibit such indemnities in respect of the bringing of defamation proceedings. It is therefore my view that the decision taken by the Executive Board was unlawful.

There were failings in governance arrangements and processes adopted by the Council

The decision was unlawful as the Chief Executive participated in the decision-making process whilst having a disqualifying personal and pecuniary interest in the decision

22 A person is disqualified from participation in a local authority decision-making process if there is a real possibility that he or she would be influenced by a pecuniary or personal interest in the outcome of the decision.

23 The decision-making process is wider than the decision itself and includes the presence of officers at a meeting. A person is disqualified from participation in a decision-making process if there is a real possibility that he or she would be influenced by a pecuniary or personal interest in the outcome of the decision (see *R v Secretary of State for the Environment ex parte Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304; *Porter v Magill* [2002] 2 AC 357).

24 Any pecuniary or personal interest has to be declared and an individual having such an interest is not entitled to participate in the decision-making process unless that interest is too remote or insignificant to matter. In general, the participation in a decision-making process of a single individual with a disqualifying interest will vitiate the decision arrived at (see the *Kirkstall Valley* case and *R v Hendon RDC ex parte Chorley* [1933] 2 KB 696).

25 The Council disagrees with my view that the Chief Executive participated in the decision-making process and has notified us that:

a the Executive Board hold an hour long pre-meeting to prepare for its formal meetings;

b on this occasion the Director of Resources and the Head of Administration and Law attended the pre-meeting to address any issues with the report;

c the Chief Executive was not present at the pre-meeting;

d members were taken through the various advices received and asked lots of questions of the officers; and

e as a result members were in a position to take an informed decision in the formal meeting.

26 There is no formal record of this pre-meeting which does raise concerns over the openness and transparency of the decision-making process. The minutes of the Executive Board meeting on 23 January identify that the actual formal meeting took only 15 minutes (to consider three items of business). This suggests limited discussion of the matter in the formal meeting but the minutes disclose that the decision was taken at the formal meeting.

27 I have considered the views of the Council and based on the evidence provided, I am satisfied that the Chief Executive was present at the Executive Board meeting, did not declare an interest in the item on the agenda, and therefore in my view took part in the decision-making process whilst having a disqualifying financial interest in the outcome of the decision. In my opinion, the decision of the Executive Board is unlawful for this further reason.

The decision failed to take into account relevant material considerations (*Wednesbury* unreasonable)

28 Such powers as the Council has must be exercised reasonably taking all relevant considerations into account: see Associated Provincial Picture *Houses v Wednesbury Corporation [1948] 1KB 223*.

29 The possibility of the Chief Executive obtaining funding for his claim under a conditional fee agreement was not considered by the Council being ostensibly rejected on the basis that, as the Chief Executive's claim was to be made as a counterclaim, it was 'sensible, consistent and more cost efficient' to retain the same legal Counsel (as that used for defending the original claim). There is no explanation as to why the same legal representation could not be funded in a different way and no indication that the Council considered any other form of legal action that could have been taken to satisfy its duty of care towards its employee, such as an action for harassment.

30 There is also no indication that the Executive Board took into account Counsel's view as to the prospect of success. That was a relevant consideration that does not appear in the report and is not referred to in the minute that records the decision taken. Yet late receipt of Counsel's 2012 advice has been cited by the Council as justification for treating the matter as an item of urgent business (see further below).

31 The report also states that the views of the Wales Audit Office were being sought as to whether they had any concerns about the granting of an indemnity. From the minutes of the meeting there is no evidence that the Executive Board was informed of the views of the Wales Audit Office when taking their decision. This was a further material consideration that should have been taken into account when the decision was taken.

32 In my opinion, these matters above are such as to render the decision taken *Wednesbury* unreasonable.

A procedural breach occurred but this did not make a material difference to the outcome of the matter

33 The report was considered as an exempt urgent item at the Executive Board meeting on 23 January 2012. The matter was considered to be exempt by virtue of paragraph 16 of Part 4 of Schedule 12A to the 1972 Act. This exempts from the usual access to information requirements information in respect of which a claim for legal professional privilege could be maintained in legal proceedings.

34 The report does refer to the 2008 Counsel's opinion, and that content is inextricably linked with the remainder of the report. As such, the application of the exemption was reasonable.

35 The treatment of the matter as an urgent item is however questionable. The minutes of the meeting state that the Chairperson decided to take the matter as an item of urgent business because action was required to be taken before the next meeting of the Executive Board. The Council suggests that the item could not be included on the agenda as Counsel's advice as to the prospects of success of the counterclaim was received late on 17 January 2012 and that any counterclaim had to be issued by 24 January 2012.

36 Regulation 5 of the Local Authorities (Executive Arrangements, Decisions, Documents and Meetings) (Wales) Regulations 2001 (the 2001 Regulations) provides that at least three clear days' notice must be given to the public of meetings such as that of the Executive Board and of the items to be considered at such meetings. There were three clear working days available between the receipt of Counsel's advice and the meeting such that the matter could and should have been included on the agenda that was published for the meeting.

37 In any event, the Counsel's advice included in the report was that obtained in 2008. The report does not include any substantive content relating to the advice received as to prospects and it is that advice that was received late. The only reference to the more recent (2012) advice is a statement that Counsel had indicated that there were two actionable grounds on which a counterclaim would be based. No detail is provided as to what those grounds were or what Counsel's view was as to prospects of success.

38 Given that the exemption from publication was correctly invoked, the report would not have been published in advance of the meeting and, even if members of the public had been aware that the item was to be considered, they would not have been able to remain within the room when the matter was discussed. They could however have contacted their own councillors and sought to lobby them on the matter. Without any knowledge of the matter (save the uninformative title – 'Officer Indemnity'), it is difficult to imagine what, if any, meaningful lobbying could have taken place.

39 Regulation 5 of the 2001 Regulations allows dispensation from the three clear day rule only where justified 'by reason of special circumstances' which must be specified in the minutes. In the present case the justification given is not adequate and does not explain why three days' notice could not have been given. The Council suggests that it was not just the fact that action was required before the next meeting that necessitated urgent

consideration of the item it was principally that Counsel's advice on prospects was not received until late on 17 January 2012. However, as noted above, that advice did not appear in the report.

40 It is my view, however, that this procedural breach did not make a material difference to the outcome of the matter.

Next Steps

41 The Council is now required by section 25 of the 2004 Act to consider this report at a full meeting of the Council within one month of the date of this report. At the meeting, the Council must decide:

a whether the report requires it to take any action;

b whether the recommendation in the report is to be accepted; and

c what action to take in response to the report and recommendation.

Acknowledgements

42 I wish to express my appreciation to officers and members of the Council for their co-operation during the audit.

Anthony Barrett
Appointed Auditor
30 January 2014