

8. MAYORAL DEFAMATION CLAIM - MR GEORGE BALANI

Officer responsible Director of Legal & Secretariat Services	Author Peter Mitchell, DDI 941-8549
--	---

The purpose of the report is to advise the Council of a defamation claim bought by Mr George Balani naming the Mayor as a defendant and to seek Council approval to the expenditure of Council funds in relation to the defence of the claim.

BACKGROUND

In February this year the Mayor was served with a Statement of Claim by Mr George Balani alleging defamatory statements made by the Mayor with a conversation with two other persons in July 2002. These statements were related to the 2001 Mayoral election. The sum sought in the Statement of Claim is \$250,000 plus costs.

The litigation is clearly on the basis of the Mayor in his capacity as an elected member and not as an individual.

AUDITOR GENERAL'S REPORT

In his 2001 "Local Government: Result of the 1999–2000 Audit" report to Parliament the Auditor-General in a section on "Defamation Costs" provided guidance on whether a local authority could meet the costs of defamation action taken against or by a member or any employee of the authority.

He stated: *"In our view, a local authority can meet the costs of a defamation action taken by or against a member or employee where:*

- (a) the action is taken to protect the interests of the local authority member or employee in his or her capacity as an authority member or employee, as opposed to his or her interests as an individual; and*
- (b) the local authority is satisfied that it will be in the interests of the city, district or region for the action to be taken, or defended, at the authority's expense"*

He noted that the Local Government Act 1974 does not expressly authorise local authorities to meet the costs of defamation actions taken by or against authority members. However he believed that a local authority could meet, or contribute to, the costs of defamation action using the "unauthorised expenditure" provision contained in Section 223K of the Local Government Act which authorises this Council to spend up to \$50,000 on all unauthorised expenditure in a financial year.

He also noted that local authorities have the power by way of insurance to indemnify members and employees against personal liability for actions arising out of their duties as member or employees and that depending on the coverage of the particular policy, liability insurance could be called upon in the event that a member of any employee faces an action in defamation. Where liability insurance is available for a member he said the local authority would not be restricted by the limited nature of the expenditure of Section 223K, except to the extent that the policy required the authority to pay an excess.

PRESENT SITUATION

In the proceedings bought by Mr George Balani a claim has been made under the defamation extension of the Council's Professional Indemnity policy.

The Council for many years has paid for a professional indemnity policy which provides insurance cover for the Council in respect of negligent actions by Council staff. The policy has an excess of \$10,000. There is an extension to that policy in respect of defamatory statements brought against elected members by third parties.

With regard to the action bought by Mr Balani, the Council's Insurer, Riskpool, has accepted that the defence and otherwise of the allegations made against the Mayor fall within the indemnity provided by the wording of the policy and it has arranged for the necessary steps to be taken on behalf of the Mayor to defend the action, including the retention of legal representation by Heaney & Co, solicitors. At this stage a Statement of Defence has been filed and preliminary procedural steps have been taken.

However the policy has an excess of \$10,000 and that sum would need to be met by the Council if any payment, including legal fees, is to be made in respect of this matter.

SECTION 43 LOCAL GOVERNMENT ACT 2002

It is worth noting that as from 1 July 2003 all elected members have an indemnity from the Council contained in Section 43 of the Local Government Act 2002 which provides:

- “(1) A member of a local authority (or a committee, community board, or other subordinate decision-making body of that local authority) is indemnified by that local authority, whether or not that member was elected to that local authority or community board under the Local Electoral Act 2001 or appointed by the local authority, for—*
- (a) costs and damages for any civil liability arising from any action brought by a third party if the member was acting in good faith and in pursuance (or intended pursuance) of the responsibilities or powers of the local authority (or committee, community board, or other subordinate decision-making body of that local authority); and*
 - (b) costs arising from any successfully defended criminal action relating to acts or omissions in his or her capacity as a member.*
- (2) Subsection (1) does not apply to a member's liability for a loss under section 46.*
- (3) To avoid doubt, a local authority may not indemnify a director of a council-controlled organisation for any liability arising from that director's acts or omissions in relation to that council-controlled organisation.”*

Because the Balani litigation arose before 1 July 2003 that section does not apply. It is reasonable to take the view that if the action had commenced after 1 July 2003 then the Mayor would have been entitled to call upon the indemnity provided in Section 43. I would expect that even after 1 July 2003 the Council will continue to maintain the defamation extension in the Professional Indemnity Policy so as to provide insurance cover in respect of defamation or any other types of claims bought against elected members in the course of carrying out their business on behalf of the Council.

CONCLUSION

Given that this claim has been accepted by the Council's insurer, that it falls within the approach by the Auditor-General in his 2001 report and that if s.43 was in force when the claim was received it would be applicable then in my view it is appropriate for the Council to meet the insurance excess of \$10,000.

Staff

Recommendation: That the Council meet the costs of the defamation action bought by Mr Balani against the Mayor up to the sum of \$10,000.

Chair's

Recommendation: That the above recommendation be adopted.