

REQUEST FOR DMPC DECISION – PCD 71

Title: Management of Liability in Special Police Service (SPS) Agreements

Executive Summary:

This paper proposes the approval of an indemnity of £1,000,000 as the standard in Special Police Services (SPS) Agreements. Where a risk assessment indicates higher risk or the value of the SPS is greater than £7,500,000 the indemnity will be held at £7,500,000.

Recommendation:

That the Deputy Mayor for Policing and Crime (DMPC) approve of an indemnity of £1,000,000 in SPS Agreements excluding those Agreements assessed as higher risk or with an annual value of more than £7,500,000.

Deputy Mayor for Policing and Crime

I confirm I have considered whether or not I have any personal or prejudicial interest in this matter and take the proposed decision in compliance with the Code of Conduct. Any such interests are recorded below.

The above request has my approval.

Signature

Spence Henderson

Date

05/10/2016.

PART I - NON-CONFIDENTIAL FACTS AND ADVICE TO THE DMPC

Decision required – supporting report

1. Introduction and background

- 1.1. The provision of Special Police Services (SPS) is a discretionary service. The standard SPS Agreement template includes a Liability Clause with an indemnity of £7,500,000. The Clause protects the MOPAC and the Commissioner from claims from third parties during the provision of SPS.
- 1.2. Earlier iterations of the clause had made no reference to the monetary amount of the required indemnity. The inclusion of the £7,500,000 being the level of the MPS's general self-insurance excess, has raised some concern for third parties in that they have difficulty in obtaining insurance cover for the indemnity.

2. Issues for consideration

- 2.1. The evidence to date is that the likelihood of a claim under the clause is rare.
- 2.2. The Metropolitan Police Service (MPS) legal team advice is that an indemnity of £7,500,000 is not warranted as the standard in all SPS Agreements. It is proposed that an indemnity of £1,000,000 would be sufficient to protect the MOPAC from the legal cost of successfully defending a claim for damages even if the claim was significant or required the appointment of Counsel to represent the MOPAC on such matters.
- 2.3. The exceptions to this proposal are where the SPS Agreement : -
 - i. value is above £7,500,000 such as in the case of Palace of Westminster, Transport for London etc.;
 - ii. is in respect of sporting stadia where the potential for a claim, which although rare, is viewed as a higher risk due to the higher number of officers providing SPS and the volatility of public order situations; or
 - iii. is with regard to an event such as a music festival where a risk assessment has established that there is a higher risk of disorder due to the amount of patrons at the event, the availability of alcohol, the artists performing etc. thereby increasing the potential for a claim.
- 2.4. The proposal is that the level of indemnity in these instances cited above should remain at £7,500,000 in line with the MPS self-insurance excess limit. The level of indemnity will align with any future corporate changes to the excess limit.

3. Financial Comments

- 3.1. The indemnity of £1,000,000 is viewed as less onerous and provides greater opportunities to reach agreement with third parties on the provision of SPS in both the renewal of existing SPS Agreements and the management of future requests. It provides the necessary balance in ensuring the MOPAC has the appropriate protection if a claim arises and mitigates the potential for the MOPAC to lose contracts due to third parties being unable to obtain insurance cover.

4. Legal Comments

4.1. Section 3(6) of the Police Reform and Social Responsibility Act 2011 provides that the Mayor's Office for Policing and Crime must (a) secure the maintenance of the Metropolitan Police force, and (b) secure that the Metropolitan Police force is efficient and effective.

5. Equality Comments

5.1. There are no Equality and Diversity issues identified with this proposal.

6. Background/supporting papers

6.1. Appendix 1

Public access to information

Information in this form (Part 1) is subject to the Freedom of Information Act 2000 (FOIA) and will be made available on the MOPAC website following approval.

If immediate publication risks compromising the implementation of the decision it can be deferred until a specific date. Deferral periods should be kept to the shortest length strictly necessary.

Part 1 Deferral:

Is the publication of Part 1 of this approval to be deferred? NO

Part 2 Confidentiality: Only the facts or advice considered as likely to be exempt from disclosure under the FOIA should be in the separate Part 2 form, together with the legal rationale for non-publication.

Is there a **Part 2** form – NO

ORIGINATING OFFICER DECLARATION:

	<i>Tick to confirm statement (✓)</i>
Head of Unit: The Head of Strategic Finance and Resource Management has reviewed the request and is satisfied it is correct and consistent with the MOPAC's plans and priorities.	✓
Legal Advice: The MPS legal team has been consulted on the proposal.	✓
Financial Advice: The Strategic Finance and Resource Management Team has been consulted on this proposal.	✓
Equalities Advice: There are no equalities and diversity implication in this proposal.	✓

OFFICER APPROVAL

(Acting) Chief Executive Officer

I have been consulted about the proposal and confirm that financial, legal and equalities advice has been taken into account in the preparation of this report. I am satisfied that this is an appropriate request to be submitted to the Deputy Mayor for Policing and Crime.

Signature *R. Lawrence*

Date *05/10/2016*

Management of Liability in Special Police Service Agreements

Report by the Director of Commercial and Finance on behalf of the Commissioner

EXECUTIVE SUMMARY

The provision of Special Police Services (SPS) is a discretionary service. The standard SPS Agreement template includes a Liability Clause (Clause) with an indemnity of £7.5m. The Clause protects the MOPAC and the Commissioner from claims from third parties during the provision of SPS.

Earlier iterations of the Clause had made no reference to the monetary amount of the required indemnity. The inclusion of the £7.5m, that being the level of the MPS's general self-insurance excess, has raised some concern for third parties in that they have difficulty in obtaining insurance cover for the indemnity. This has placed into jeopardy the continuation of a number of existing SPS Agreements. The DMPC is therefore asked to agree to a change in policy that will facilitate easier negotiations with our third parties whilst keeping MOPAC, the Commissioner and the public purse suitably protected.

DLS advice is that an indemnity of £7.5m is not warranted as the standard in all SPS Agreements. It is proposed that an indemnity of £1m would be sufficient to protect the MOPAC from the legal cost of successfully defending a claim for damages even if the claim was significant or required the appointment of Counsel to represent the MOPAC on such matters.

The exceptions to this proposal are: -

- (a) where the value of the SPS Agreement is above £7.5m such as in the case of Palace of Westminster, Transport for London etc;
- (b) the SPS Agreement is in respect of sporting stadia where the potential for a claim, which although rare, is viewed as a higher risk due to the higher number of officers providing SPS and the volatility of public order situations; or
- (c) the SPS Agreement is with regard to an event such as a music festival where a risk assessment has established that there is a higher risk of disorder due to the amount of patrons at the event, the availability of alcohol, the artists performing etc. thereby increasing the potential for a claim.

The proposal is that the level of indemnity in these instances cited above should remain at £7.5m in line with the MPS self-insurance excess limit. The level of indemnity will align with any future corporate changes to the excess limit.

A. RECOMMENDATIONS - That

The Deputy Mayor for Policing and Crime to approve of an indemnity of £1m in SPS Agreements excluding those Agreements with an annual value of more than £7.5m; where the provision is at sporting stadia or an event such as music festival with an increased risk of disorder as identified through a risk assessment.

B. SUPPORTING INFORMATION

1. The Courts have considered the issue of Special Police Services (SPS) pursuant to Section 25 of the Police Act 1996. It is clear from their deliberations that they view SPS as a discretionary service that someone requests and the police have the discretion as to whether to agree to the request. In developing SPS Agreements with third parties, the discretionary nature is recognised with an emphasis on ensuring the public purse is protected.
2. This is reflected in the requirement for full cost recovery and the inclusion of a Liability Clause ("Clause") to safeguard MOPAC and the Commissioner from claims from third parties during the provision of SPS. The MPS in keeping with legislation, only charges for its costs of providing SPS and it is not possible to accurately calculate an additional sum to cover the costs of claims.
3. The inclusion of the Clause in the SPS Agreement template excludes circumstances where it would be unreasonable for a third party to indemnify the MPS against liability but it is reasonable for the MPS to receive the benefit of an indemnity in circumstances where it has acted properly but is potentially liable for costs. The current version of the Clause makes reference to third parties requesting SPS being required to indemnify the MOPAC from legal costs liabilities incurred in defending a claim from a third party for damages or declaratory relief.
4. The level of indemnity is limited to £7.5m. The £7.5m represents the excess limit in the MPS' current insurance policy below which the MOPAC self-insures and any legal costs would have to be met from its own funds. It should be noted that in earlier iterations of the Clause, there was no reference to the monetary amount as to the level of indemnity. The inclusion of the £7.5m has raised some concern for third parties seeking SPS in that there can be difficulties in obtaining insurance cover and this has placed into jeopardy the continuation of a number of existing SPS Agreements.
5. The application of the Clause is that the MPS will accept the costs of civil claims which are settled or lost even though they may be settled without clear fault of the police (e.g. to avoid reputational damage). The MPS will also accept such costs of claims arising from the death or personal injury of a third party through the negligence or from the criminal acts or omissions of MPS personnel providing SPS. The MPS reserves the right to defend itself against such claims and consequently may incur significant legal costs through the appointment of Counsel to act for it in the most serious of cases such as where a person has suffered a life changing injury (which may require long term care) where SPS had been provided.
6. In the successful defence of a claim the MPS will seek to recover its costs from the plaintiff in the first instance. It is only on those occasions where there is an inability to recover its costs from the plaintiff, that the MPS will seek such costs from the third party provided with SPS. DLS advice is that the standard position in terms of liability and indemnity in the SPS Agreements need not concern itself with the payment of damages, which are the largest head of cost, on the grounds that the MOPAC would not incur the cost of damages in a successful defence. Hence the specific reference to legal costs liabilities in the Clause.
7. The focus on legal cost liabilities highlights a potential discrepancy between the levels of indemnity that is necessary to protect the MOPAC as against the amount of indemnity currently referenced in the Clause of £7.5m. DLS have advised that the cost of employing Counsel to act in the defence of MOPAC in the most serious of cases could be up to £1m. The proposal is that the level of indemnity referenced in the SPS Agreement template should be limited to £1m rather than the £7.5m that is currently quoted. This is on the grounds that, unless there is an agreement with a third party to provide a higher level of indemnity, there would be never an occasion where a third party would be expected to reimburse the MOPAC for its legal costs above the £1m.

8. Members should be aware that in approving a recommendation to the DMPC to limit the indemnity to £1m, there remains a residual risk of £6.5m for the MOPAC i.e. the difference between the £1m and the £7.5m currently quoted. This should be balanced with the risk of proposed SPS Agreements with third parties not being progressed as the third parties cannot obtain insurance cover which would indemnify the MOPAC up to £7.5m. This was the case recently with the request for SPS from a key stakeholder with responsibility for the operation of the Queen Elizabeth Olympic Park for 1 PS and 6 PCs amounting to c. £450k annually.
9. There is additionally an issue with regard to the renewal of existing SPS Agreements such as has occurred in respect of a long term dedicated SPS Agreement with a shopping centre where the annual cost recovery is c. £193K for SPS. This is in jeopardy as the owners have been unable to obtain the necessary insurance cover to indemnify the MOPAC up to the £7.5m.
10. Third parties requesting SPS provision have sought to mitigate the issue of indemnity by suggesting that they would pay toward the MOPAC taking out a separate insurance policy to cover the indemnity. DLS have advised that it cannot take out such a policy. The excess limit of £7.5m ensures the cost to the MOPAC in having insurance is at an affordable rate within a market where there is limited competition due to the nature of our business. Additionally the insurance policies that the MOPAC has in place are designed to protect the MOPAC across the full range of policing responsibilities and not just SPS. SPS is about delivering those policing responsibilities, but under a set of circumstances which make them a "special service".
11. The provision of SPS to sporting events is viewed as sitting outside the proposals in this paper. This is because that, although the risk of a claim is rare, there remains a higher risk of a claim due to the higher number of officers providing SPS and the volatility of public order situations.
12. A similar view is taken with regard to the provision of SPS to events such as music festivals where a risk assessment believes there is an increased risk of disorder due to, for instance, the number of patrons attending the event, the availability of alcohol and the artists performing at the festival.
13. The advantage of limiting the indemnity to £1m is that: -
 - the third parties requesting SPS from the MOPAC are better able to obtain the necessary insurance cover as they believe necessary to allow them to proceed with requests for SPS;
 - the cost recovery that the MOPAC receives from the provision of SPS to third parties is maintained particularly those where there are long term dedicated SPS Agreements with shopping centres, universities etc.; and
 - if SPS Agreements are maintained with third parties, the level of funded posts that feature in the Agreements are maintained thereby supporting the overall MPS establishment.
14. The disadvantage of limiting the indemnity to £1m as standard across all Agreements is that it could compromise those Agreements with Transport of London, Palace of Westminster etc. where the contract values are such that more expansive liability terms have been agreed and the higher indemnity amount accepted.
15. It is recommended that the DMPC to approve an indemnity of £1m in SPS Agreement excluding those Agreements with an annual value of more than £7.5m; where the provision is at sporting stadia or an event such as music festival with an increased risk of disorder as identified through a risk assessment.

C. OTHER ORGANISATIONAL & COMMUNITY IMPLICATIONS

Equality and Diversity Impact

1. There are no Equality and Diversity issues identified with this proposal.

Financial Implications

Legal Cost Liabilities

1. DLS advice is that an indemnity of £7.5m is not warranted as the standard in SPS Agreements. This is because the Clause deals primarily with the need for the MOPAC to recover its legal costs in successfully defending a claim. If successful in defending a claim the issue of damages, which is the largest potential head of cost, can be disregarded when seeking recompense from a third party. The cost of damages would be a matter for cases where the MPS lost or settled a claim alone. In the successful defence of a claim the MPS will seek to recover its costs from the plaintiff in the first instance. It is only on those occasions where there is an inability to recover its costs from the plaintiff, that the MPS will seek such costs from the third party provided with SPS.
2. The evidence to date is that the likelihood of a claim under the Clause is rare. There has been only one occasion where a SPS Agreement has been in place where the third party provided with SPS has been considered liable for the cost of legal cost liabilities. The event that led to the claim was from 2008 and the case against the MOPAC was not concluded until 2014 where the matter was found in favour of the MOPAC.
3. The MPS pursued the plaintiff's solicitors for the costs in defending the claim, and after settlement, there was a small amount in the low thousands that remained outstanding and where the third party provided with the SPS became responsible for the outstanding amount. However, taken into account the passage of time since the original claim, the small amount that remained outstanding and the potential to incur further legal costs in recovering the outstanding amount, the decision was made to not pursue the third party. The frequency of such claims is not expected to increase in the future and therefore the potential for incurring significant legal costs is viewed as minimal.
4. DLS have advised that an indemnity of £1m for legal cost liabilities in SPS Agreements, excepting the circumstances set out in this paper, would provide the necessary cover for the MOPAC because the legal costs are unlikely to ever exceed £1m even if the value of the claim was significant and the claim was high profile or defending the claim required the appointment of Counsel.

Cost Recovery from Special Police Service Agreements

5. A level of indemnity of £7.5m as standard in SPS Agreements creates uncertainty for third parties as to their willingness to continue existing SPS Agreements or enter into negotiations to request new arrangements. The uncertainty is due to the difficulties in obtaining the necessary insurance cover to provide the indemnity that the MOPAC requires.
6. If they cannot obtain the cover, it is not possible for the MOPAC to agree to renew existing SPS Agreements or enter into new ones. This not only impacts on the funding that is received from SPS but would require a number of funded police posts to be withdrawn which impacts on the total MPS establishment. The table below illustrates the potential impact across a number of existing SPS Agreements and those currently in negotiation.

Table 1: Cost Recovery and Number of Posts – SPS Agreements

Third Party	Number of Posts	Rank	Annual Funding £'000s	Comment
Stratford Village Development Partnership	7	1 PS 6 PCs	480	In Negotiation.
Westfield London	6	1 PS 5 PCs	415	Renewal January 2017
Hammerson (Brent Cross) Limited	3	3 PCs	193	Renewal August 2016
Brunel University (Term Time)	0.74	PC	43	Renewal September 2016
Uxbridge College (Term Time)	0.74	PSCO	33	Renewal September 2016

Value for Money Statement

1. The indemnity of £1m is viewed as less onerous and provide greater opportunities to reach agreement with third parties on the provision of SPS in both the renewal of existing SPS Agreements and the management of future requests. It provides the necessary balance in ensuring the MOPAC has the appropriate protection if a claim arises and mitigates the potential for the MOPAC to lose contracts due to third parties being unable to obtain insurance cover.
2. An indemnity of £1m in all cases may not be appropriate in providing the necessary protection to MOPAC particularly when considering the major SPS Agreements in place with Palace of Westminster, Transport for London, with owners of sporting stadia or for specific events such as a music festival where a risk assessment considers there to be an increased risk of disorder. With regard to these Agreements it is considered appropriate to maintain the indemnity of £7.5m. This level of indemnity should apply in each case where the value of the Agreement is above £7.5m annually.

Legal Implications

1. Section 3(6) of the Police Reform and Social Responsibility Act 2011 provides that the Mayor's Office for Policing and Crime must (a) secure the maintenance of the Metropolitan Police force, and (b) secure that the Metropolitan Police force is efficient and effective.
2. The Commissioners duties under the 2011 Act are set out in section 4. He is responsible for the metropolitan police force, including the civilian staff and officers under his direction and control. The Commissioner must in accordance with Section 8(4) of the 2011 Act exercise his functions with regard to the Police and Crime Plan issued by the MOPAC.
3. Both the MOPAC and Commissioner may jointly agree to exercise powers under the Police Act 1996 to accept funds in return for the deployment of additional police resources where it does not detract from the provision of core policing or other statutory policing events. In law, both Commissioner and the MOPAC are not open to legal challenge unless they act irrationally or perversely.
4. In relation to the provision of special policing services, section 25 (1) of the Police Act 1996 provides "[The Commissioner as] the chief officer of police may provide, at the request of any person, special police services at any premises or in any locality in the police area for which the force is maintained, subject to the payment to the police authority of charges on such scales as may be determined by that authority".

5. Section 4.3 of the MOPAC Scheme of Consent and Delegation requires the DMPC to approve significant policies and strategies.

Consultation undertaken

1. This matter has been discussed at Management Board and with Assistant Director (Policy) DLS and the Insurance and Claims Manager in Strategic and Corporate Finance, Commercial and Finance.

Risk (including Health and Safety) Implications

1. The risk implications with regard to this matter have been set out in the main body of this report.

Environmental Implications

1. No environmental implications have been identified.

Background papers: