

Guidance Note for Councillors and Officers on Outside Bodies

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1. General

- 1.1 Serving on outside bodies has always been an established part of a Council Member or officer's role. The Council encourages Councillors and officers to participate in the wider community in this manner. They will be able to use their knowledge and skills to help the organisation to which they are appointed. It brings the benefit of enabling the Council to participate in partner organisations, and also means that Councillors and officers can bring back knowledge and experience which are of value to the Council.
- 1.2 The Council is now increasingly working in partnership with outside bodies, and clarity and understanding of the roles that Members and officers play is important. This note aims to help you understand the main implications. It is not a fully comprehensive guide, so if you have any queries, you can obtain further advice from Legal and Democratic Services.

2. What sort of roles does this apply to?

- 2.1 You may be appointed to an outside body by the Council, or by the Executive, or an Area Committee. It can involve being a director of a company in which the Council has an interest, being a member of another authority such as the National Park Authority, or a trustee of a charity, a member of the management board for an unincorporated body, or a school governor.
- 2.2 The various roles will bring responsibilities to the organisation, and to the Council in so far as you are fulfilling a role for the Council, and also potential conflicts.
- 2.3 Your responsibilities will depend on the type of body in which you become involved. The main types are as follows:
 - (a) **Companies:** Companies are separate legal entities. They are set up by their members, who may be either shareholders or guarantors. Liability of company members is limited to the value of their shares or by guarantee. Directors of companies have a duty to the company to act properly and in good faith. If not, they can incur personal liability, particularly if the company becomes insolvent. The activities and operation of companies are regulated by their Memorandum and Articles of Association, and also by company law.
 - (b) **Charities:** Some companies and unincorporated associations are also charities. To be a charity, they must be established for charitable purposes only and are subject to stricter regulation by the Charity Commission, to ensure that they are properly managed and that their resources are used properly on the relevant charitable objects. Charities may carry on trading activities which contribute directly to the furtherance of their charitable objects or where the purpose is to raise funds for the charity which do not involve significant risk. Although charities may qualify for a number of tax exemptions and reliefs on income, gains and on profits for some activities, charities do pay tax on trading profits and on some charity income unless specifically exempt. Additionally VAT rules apply as they do for any other business if the charity has business activities however, the charity may qualify for certain VAT reliefs and exemptions.

- (c) **Unincorporated Associations:** Unincorporated associations are informal organisations. The members regulate their relationship by agreement, such as a membership agreement or the rules of the club or association. Because the association has no legal existence separate from its members, the liability of the members is not limited. Each member can incur personal responsibility for liabilities incurred on behalf of the association, and relies on the membership agreement to be able to recover his/her costs from the other members.
- (d) **Statutory Corporations:** These are bodies which are set up under statute. They include, for example universities, and some quangoes. The membership and powers of a statutory corporation, and how they are appointed are set out in the statute. The statute will also set out the responsibilities and liabilities of members of the corporation.

3. Some other key points to consider at the outset

- 3.1 Firstly, make sure you are given a clear statement of what is expected of you if you are going to be nominated. A list of questions to ask about the organisation is attached at Appendix 1. The Council should be able to obtain this from the organisation involved.
- 3.2 Being on an outside body can bring many benefits to the Council, the organisation and the community, but it will sometimes create conflicts with your work as a Councillor or officer. For Council Members, it may have to be included as one of your interests in the Members' Register of Interests and you may have an interest in Council business referring to it (as detailed in the Members' Code of Conduct). You will need to be sure that involvement with the organisation will not prevent you from fully participating in your work as a Councillor or officer, particularly in areas that interest you, or, where you need to represent the community who elected you. This will depend on the nature of the body and type of involvement.
- 3.3 On the other hand, you will also need to make sure that you are able to commit enough time and attention to the organisation. You will want to make a meaningful contribution to their work too. If you cannot attend meetings very often, or are often conflicted out of participating, you will not be able to give the support that the organisation needs, and this will reflect badly upon the Council and upon you. It is best not to be appointed if you cannot participate fully.
- 3.4 As a member of the organisation's management committee, as a director of a company, or as a trustee, you will not only be representing the interests of the Council, but you will also owe duties and responsibilities towards the organisation. You will have to exercise your own best judgement in the best interests of the outside body and you cannot just take instructions from the Council although you may take account of the Council's wishes.

4. Duties and Responsibilities of Councillors and Officers on Outside Bodies

- 4.1 The following is a summary of the main duties and responsibilities of Councillors and officers who are nominated by the Council to the most common types of outside body. The main principles of the obligations applying to company directors also apply to trustees and members of management committees. If you are in doubt about your

duties and responsibilities, seek advice from the Assistant Chief Executive Legal and Democratic Services, or the advisers to the body involved.

5. Companies

- 5.1 A company is a separate legal entity which can hold property in its own right, enter into contracts, employ staff and sue and be sued in its own name. The company is distinct from its members, who may be either shareholders or guarantors. The Council itself may be a member of the company, either a shareholder or guarantor.
- 5.2 If the body is a limited company, and you are asked to be involved, it is likely that you will be appointed as a company director. The duties of a company director are now set out in the Companies Act 2006. The management of a company is usually the responsibility of the Board of Directors. Directors' powers are usually set out in the company's Articles of Association. Another important document is the Memorandum of Association, which sets out the Company's objectives and powers.
- 5.3 The duties of a company director are not the same as your responsibilities as a Councillor or officer. Basically, the company must come first. Directors must act in the interests of the company, and not in the interests of other parties, including shareholders.
- 5.4 The Companies Act 2006 codifies the existing common law and equitable principles relating to the duties of directors. Most provisions of the 2006 Act took effect from October 2007. The provisions reflected in the paragraphs below marked with an asterisk will take effect at a later date. The principles however remain relevant to the responsibilities of a director.
- 5.5 **Directors' Responsibilities** are:
- (a) To **promote the success of the company**, which includes having regard to the likely long term consequences of decisions, the interests of employees, fostering relationships with suppliers and customers and others, the impact of operations on the community and environment, maintaining a reputation for high standards of business conduct, and acting fairly between members of the company.
 - (b) To **exercise care, diligence and skill**, using your own knowledge, skill and experience, together with the care, skill and diligence which may reasonably be expected of a person who is carrying out the functions of a director. So a director with significant experience must exercise the appropriate level of diligence in exercising their duties in line with their higher level of expertise.
 - (c) **Not to exceed powers**. A company director must act in accordance with the company's constitution, and exercise powers for the purposes for which they were given.
 - (d) **To comply with the Companies Acts** in relation to the keeping of accounts, and ensure that the relevant returns are made to the Registrar of Companies. Failure to do so incur fines and persistent default can lead to disqualification as a director.
 - (e) **To avoid conflicts of interest**. A director must avoid a situation in which they have, or may have, a direct or indirect interest which conflicts, or could

conflict, with the interests of the company. This duty applies particularly to transactions between a director and a third party in relation to the exploitation of any property, information or opportunity.

- (f) **To exercise independent judgement.** A director nominated by the Council cannot, for example, simply vote in accordance with the Council's instructions. To do so would be a breach of duty. The director must act in the company's interests.
- (g) **Not to accept benefits from third parties.** A company director must not accept any benefit from a third party (whether monetary or otherwise) which has been conferred because of the fact that they are a director. This is based on the established principle that a director must not make a secret profit as a result of being a director. This duty applies unless the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.
- (h) **To declare an interest in a proposed transaction or arrangement with the company*.** A company director who has either a direct or an indirect interest in a proposed transaction or arrangement with the company must declare the 'nature and extent' of that interest to the other directors before the company enters into the transaction.

5.6 **Directors' Liabilities:** If a director fails to carry out their duties, action can be brought for breach of duty, either by the company itself, or by a liquidator if the company goes into liquidation, or with the consent of the court, by a shareholder. Such actions are unlikely where the company is properly controlled by the directors.

5.7 Some important considerations are:

- (a) It is not always easy to reconcile the various factors which must be taken into account when reaching a major decision. The important thing as a director is to show that you are aware of and have taken account of the relevant factors, and have exercised due care and diligence in giving them all fair consideration.
- (b) It may be difficult to be certain whether benefits may be regarded as giving rise to a conflict of interest. If you are unsure take advice from the company's advisers.
- (c) Make sure you are aware of the company's constitution, its Memorandum and Articles of Association, so that you know what it can and cannot do. You must take this into account when making decisions, as well as any shareholder decisions that are relevant.
- (d) Be diligent, and make sure you are well informed about the company's affairs. Make sure you are well briefed when taking up the role, and that you receive regular briefings throughout your term of office.
- (e) Attend training and briefing sessions.
- (f) Ensure director and officer insurance is in place.
- (g) Some Board decisions may be reviewed on a future occasion. Make sure detailed minutes show that all necessary factors have been considered when

major decisions are being taken. Obtain expert advice where necessary e.g. regarding impact of a decision on the environment. Take legal advice where there are doubts about a director's duty in relation to a particular matter.

5.8 See Paragraph 9 below which deals with indemnities for Members and officers who are appointed to companies and other outside bodies.

5.9 **Local Authority Controlled and Influenced Companies:** There are special rules that affect companies in which councils have major interests. These are 'regulated' companies for the purposes of the Local Government and Housing Act 1989. They are in effect controlled by (more than 50% interest) or subject to a council's influence (20% interest plus business relationship) because of its level of interest, either individually, or with a group of other authorities. They will generally be subject to the local government capital finance regime and special propriety controls. However, so far as Members and officers who are involved are concerned, there are some additional requirements that need to be complied with as follows:

- (a) Remuneration that Councillors receive from the company should not exceed that received from a local authority for a similar role, and it should be declared. Officers should not receive any fee or reward other than their Council salary, unless so agreed with the Council;
- (b) To provide information to Councillors about their activities as required by the local authority (unless it is confidential); and
- (c) To cease to be a director immediately if disqualified as a Councillor, or on the termination of an officer's employment by the Council.

6. **Charities:**

6.1 A charity is an organisation which operates for the public benefit and exclusively charitable purposes, either:

- the relief of poverty and human suffering
- the advancement of education
- the advancement of religion
- another purpose for the benefit of the community.

6.2 A number of useful publications are available on the Charity Commission's website at www.charitycommission.gov.uk. Publication CC3 - 'The Essential Trustee- What you Need to Know' is a useful guide ([The essential trustee: what you need to know, what you need to do \(CC3\) - GOV.UK \(www.gov.uk\)](http://www.gov.uk)). Those who are responsible for the control and administration of a charity are referred to as its *trustees*, even where the organisation is a company limited by guarantee and even though they are not strictly trustees. A charity may also be unincorporated.

6.3 Trustees of a charity retain personal liability, and can only delegate to the extent that the constitution authorises them so to do.

6.4 **Charitable Trustees' Responsibilities** are:

- (a) To act in accordance with the charity's trust deed or governing document.

- (b) To protect the charity's assets.
- (c) To comply with the Charities Acts, and the Trustee Act 2000.
- (d) Trustees must not make a private profit from their position. They cannot receive remuneration without the sanction of the Charity Commission.
- (e) To perform their duty with the standard of care which an ordinary, prudent business person would show. Higher standards are required of professionals, and in relation to investment matters.
- (f) Charitable trustees must ensure that the information relating to the charity and trustees is registered with the Charity Commissioners and that annual accounts, reports and returns are completed and sent.
- (g) Trustees are under a duty to ensure compliance with all relevant legislation (e.g. in relation to tax and land matters).

6.5 **Charitable Trustees' Liabilities:** Generally, a trustee may incur personal liability if they:-

- act outside the scope of the trust deed
- fall below the required standard of care
- act otherwise than in the best interests of the charity, in a way which causes loss to the charity fund
- make a personal profit from the trust assets

6.6 In such circumstances the trustee will be in breach of the trust, and will incur personal liability for losses incurred. If in doubt, always consult the Charity Commissioners. You may avoid personal liability for breach of trust if you act in accordance with their advice.

6.7 Trustees can incur personal liabilities for contracts they enter into in the name of the charity. They will normally be entitled to be reimbursed from charitable funds for liabilities and expenses properly incurred by them. If the charity is a company, the trustees will be protected from liabilities incurred in the day-to-day running of the charity in the normal course of events, but will be personally liable if they commit a breach of trust, as stated above.

6.8 See Paragraph 9 below which deals with indemnities for Members and officers who are appointed to charitable bodies and other outside bodies.

7. Unincorporated Associations

7.1 Groups which are not charitable trusts or companies are "unincorporated associations" and have no separate identity from their members. The rules governing the members' duties and liability will be set out in a constitution, which is simply an agreement between the members as to how the organisation will operate. Usually the constitution will provide for a management committee to be responsible for the everyday running of the organisation. Management Committee members must act within the constitution, and must take reasonable care in exercising their powers. An unincorporated organisation may be charitable and may register as a charity.

- 7.2 If you are involved in a decision making capacity or have a position of general control or management on an unincorporated body, as the body has no separate corporate status, any liabilities will fall upon you personally. Councillors or officers appointed to such bodies should familiarise themselves with the Constitution to understand the nature of their role responsibilities and liabilities, and should assess the risk of personal liability, and the extent to which it has been covered by insurance.
- 7.3 See Paragraph 9 below which deals with indemnities for Members and officers who are appointed to unincorporated associations and other outside bodies.

8. Non Council Appointments

- 8.1 Councillors and officers may become members of or be appointed to voluntary organisations *in their private capacity*. If you are appointed to a body in these circumstances, you will need to make sure that there is no conflict of interest with your position as a Councillor or officer. Your role and responsibilities will be governed by the organisation's constitution, or governing document, as it is with Council nominations. You will not however be entitled to any indemnity from the Council in relation to such an appointment.

9. Indemnities

- 9.1 Councillors and officers who participate in external bodies may be indemnified in relation to liabilities they incur in that capacity, though this is subject to certain limitations.
- 9.2 Indemnity by the outside body:
- (a) **Directors:** Directors cannot be indemnified by the company against liability for negligence, default, breach of duty and trust. Companies can however purchase insurance to protect directors against claims of negligence, default, breach of duty and trust. Those appointed as directors should ensure that appropriate insurance is in place. Companies can, if their Articles of Association allow, provide for directors to be indemnified for the costs of defending such a claim if they are granted relief by the court or acquitted.
 - (b) **Trustees:** Provided a charitable trustee acts properly, and within their powers, indemnity can be given from the trust fund. Trustees can take out insurance to protect themselves from personal liabilities, but not for criminal acts such as fraud. If the premiums are to be paid out of the charitable funds, the consent of the Charity Commissioners will be needed.
 - (c) **Unincorporated Associations:** Members may be entitled to an indemnity if they act in accordance with the constitution of the association, and are not at fault. However, regard must be had to the terms of the constitution. The constitution will determine whether insurance can be paid for by the organisation.
- 9.3 **Indemnity by the Council:** The Council has decided to adopt a specific policy relating to indemnifying Councillors and officers. If you are appointed to an outside body you should have regard to the detail in the policy relating to those activities.
- 9.4 The Council can provide an indemnity where Councillors and officers are acting on an outside body at the request of the Council, and provided:

- the appointment was made by the Council,
- the nomination was made by the Council,
- the appointment was specifically approved for the purpose of the indemnity.

9.5 The indemnity the Council can provide is subject to limitations. In general terms, if a Councillor or officer is acting properly, within their powers and in good faith, the power to indemnify will usually apply. However, the Council cannot, for example, provide an indemnity in relation to any action or failure by any Member or officer which constitutes a criminal offence, or for any action or failure by any Member or officer which is the result of fraud, or other deliberate wrongdoing or recklessness on the part of the Member or officer. When you are serving on an outside body, the Council's indemnity will only apply after any indemnity or insurance from the body itself. There are further limitations and it is advisable to be clear about the scope of the Council indemnity that may be available to you. You can seek further advice on indemnity from the Assistant Chief Executive Legal and Democratic Services.

10. Code of Conduct – Councillors' Interests

- 10.1 **Code of Conduct:** All Councillors are subject to the Council's Code of Conduct for Members. You will find a copy of the full Code in the Constitution. The Code sets out the standards of behavior required of you whenever you are acting in your official capacity as a Councillor. When Councillors act as the Council's representative on any other sort of outside body, they must comply with the Council's Code of Conduct unless it conflicts with the lawful obligations of the other body.
- 10.2 Councillors may have to include their appointment to outside bodies in their register of interests, and must advise the Monitoring Officer of any change to registered interests within 28 days. Councillors may have an interest in any matter to be considered at a meeting arising out of such registered interests.
- 10.3 This means that if you are present at a meeting when a matter is to be considered or is being considered, in which you have an interest precluding participation (as set out in the Members' Code of Conduct), you must declare that you have an interest, you may speak if permitted under the Code but you may not participate in the discussion or vote and you must leave the meeting room (subject to the granting of a dispensation by the Standards and Governance Committee or Monitoring Officer).
- 10.4 **Bias:** Where you might be inclined to the view that you have no interest which might preclude your participation in the discussion and vote, your duties as a director, or trustee, or member of a management committee may well be regarded, on an objective appraisal, as giving rise to a legitimate fear of lack of impartiality, especially having regard to the desirability of maintaining public confidence. Participation in the decision making at a Council committee meeting by a Councillor who is biased potentially invalidates the decision. The Members' Code of Conduct specifically provides that Members involved in making a decision on particular Council business must always bear in mind the rules relating to bias and predetermination and must not participate in, or seek to influence, Council business where their interests may prejudice, or appear to prejudice, their views.
- 10.5 Where membership of the outside body is on an advisory or consultative basis, bias will not be assumed from mere membership. However, once the outside body has a line which is being advocated by you, this could potentially be viewed as bias, and the Council's decision on the issue could be vulnerable to challenge if you participate

in those circumstances. It will depend on the facts, and in such circumstances advice should be sought from the Assistant Chief Executive (Legal and Democratic Services).

11. Officers - Registration and Disclosure of Outside Interests

- 11.1 **Declaring Officer Interests:** Section 117(1) of the Local Government Act 1972 requires that, if it comes to the knowledge of an officer of a local authority, that the Council has entered or proposes to enter into any contract in which the officer has a pecuniary interest, whether or not they would actually be a party to the contract, they must give notice in writing to the Council. This is interpreted as any circumstance in which the officer or a member of their immediate family stand to gain or lose financially as a result of the contract.
- 11.2 **Registration of Interests:** Under the Council's Standards of Conduct Policy for Officers, officers must declare to their Assistant Director any outside interests which they have, both upon appointment and as those interests change. Officers at Grade Band K and above are also required to make a declaration of interests in a register kept by the Monitoring Officer. This information is not available to the public but is accessible by other officers who have a "need to know".

12. Gifts and Hospitality

- 12.1 Councillors and officers must not accept gifts or consideration as an inducement for doing or not doing something in their roles as Members or officers of the Council. Where officers accept inducements from anyone who has or is seeking a contract with the Council, the gift or consideration is deemed to have been accepted corruptly unless the officer can prove to the contrary. It is therefore very important to be completely open about any significant gift or hospitality, to avoid the suspicion of misconduct.
- 12.2 Members are required to register electronically, via the Council's committee management software, any gift or hospitality received by/offered to them because of their office with a value of £25 or more. This Register of Members' Gifts and Hospitality is maintained by the Monitoring Officer. Every directorate holds a similar register of Gifts and Hospitality for Officers, and the Monitoring Officer maintains a central Register of Officers' Gifts and Hospitality.
- 12.3 A particular issue arises for officers seconded to work on behalf of outside bodies, as Section 117(2) of the Local Government Act 1972 provides that an officer shall not, under colour of their office or employment, accept any fee or reward whatsoever other than their proper remuneration. It is therefore essential that, where an officer is to be seconded and might be in receipt of any payment from the authority to which they are to be seconded, that the Council agree that their proper remuneration shall include any payment to the officer by the body to which they are seconded.
- 12.4 A revised legal framework to deal with bribery was introduced in The Bribery Act 2010 which introduced new bribery offences, the main offences relating to bribing another person, being bribed, bribing a foreign official and the failure of commercial organisations to prevent bribery.

Matters for you to check – questions to ask

If you are appointed to an outside body, you should be clear about the answers to the following questions. The organisation should be able to respond to these questions:

1. What is the nature of the organisation and its main activities? Is it a company, and if so is it limited by shares or by guarantee? Is it unincorporated? Does it have charitable status?
2. In what capacity do I serve on the outside body? Is the effect of my appointment to make me a member of the company, a director or a charitable trustee?
3. Do I have a copy of the body's governing instrument (this may be a trust deed, a constitution, or memorandum and articles of association)?
4. Does the organisation have a Code of Conduct that I need to comply with? Have I been supplied with a copy?
5. Am I aware of the identity of the other directors, trustees and committee members?
6. Is there an officer of the organisation, such as the secretary or clerk to whom I can refer for advice and information?
7. Are written minutes kept of the meetings, and have I seen the minutes?
8. Are meetings conducted in accordance with the governing instrument?
9. Am I aware of the financial position of the organisation to which I have been appointed? Is it regularly reported to the governing body?
10. Am I aware of any contract between the organisation and the Council?
11. Have I seen the last annual report and accounts?
12. Have I been advised of the main risks the body faces and what steps are taken to deal with such risks?
13. Have I been informed of the main insurances/indemnities held by the organisation?