

## **(5) Advice to Members Serving on Outside Bodies**

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#### **1. Introduction**

1.1 The point has already been made about the importance of such appointments as part of working in partnership with an increasing range of bodies. The guidance that follows is designed to help you act with confidence and diligence by spelling out your obligations to the organisation concerned. The intention is not to discourage you from seeking appointment but to ensure you understand the position and to reassure you that if you act with due diligence, as you would in relation to your duties as a councillor, then you should have little to fear and much to contribute.

1.2 Solicitors and Member Services staff in the Governance Services Directorate will be pleased to assist in resolving individual questions.

1.3 The duties of members appointed to outside bodies cannot be taken lightly and members who are so appointed must take care and carry out their duties to the best of their ability. Such appointments cannot be regarded as mere "figureheads". Responsibilities a member assumes cannot be passed on to others who may have particular functions within the outside body concerned. It is important for members to attend meetings on a regular basis, although some organisations will allow substitutes to attend on an occasional basis.

1.4 Members cannot be required to act as delegates and carry out their duties and vote in line with the instructions of the County Council; they must act in accordance with their own judgement and the duties and responsibilities set out below. A member's ultimate responsibility is to the terms of the trust, the objectives of an association, or the objectives of the company; the County Council can always terminate an appointment if it is unhappy with the performance of a member.

#### **1.5 Main Issues**

- The primary duty is to act in the interests of the outside body;
- Duties as a trustee (if applicable);
- Liabilities in respect of unincorporated organisations;
- Duties as a Company Director (if applicable);
- The application of the Council's Code of Conduct.

### 1.6 Matters to Check

Members are advised that in the event of being appointed to an outside body they should be clear about the answers to the following questions;

- What is the nature of the organisation and its main activities? Is it a company, if so what type of company is it (limited by shares or guarantee)? Is it unincorporated? Does it have charitable status?
- In what capacity do I serve on the outside body? Is the effect of my appointment to make me a member of the company, director or a charitable trustee?
- 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)?
- Have I been supplied with a copy of any code of conduct to which I am subject as a member of the body?
- Am I aware of the identity of other directors, trustees or committee members?
- Is there an officer of the body such as secretary or clerk to whom I can refer?
- Are written minutes kept of meetings and have I seen these minutes?
- Am I aware of the financial position of the organisation to which I have been appointed?
- Am I aware of any contracts between the body and the Council?
- Do the governing body of the organisation receive regular reports on the financial position?
- Have I seen the last annual report and accounts?
- Am I aware and have I been advised of the main risks the body faces and what steps are taken to deal with such risks?
- Have I been informed of the main insurances held by the body?
- Does the County Council's indemnity apply to my appointment?

1.7 If, having read the guidance, there are issues about which members are unsure or if members encounter any problems and feel that, for instance, they cannot reconcile a conflicting interest, they should seek advice from the County Council's officers. Questions of a legal nature should be referred to the Deputy Chief Executive or one of their staff. Other queries about, for example, the general operation or the constitution of the outside body should be raised with the County Council department involved or the secretary of the organisation.

## **2. Indemnity for Loss**

2.1 The County Council may indemnify members who are appointed to outside bodies where they are exercising a function on behalf of the County Council. However, the indemnity provided by the County Council acts as a back-stop, where the organisation to which the member has been appointed to by the County Council does not itself indemnify or insure the member against any loss or liability. The indemnity provided by the County Council is also subject to restrictions which include that the indemnity shall not apply to (i) criminal offences and fraud, (ii) any act where the member does not reasonably believe that the act or omission

in question was within the powers she/he had at the time when she/he acted, and (iii) does not extend to making claims for defamation.

2.2 Any member wishing to take advantage of the indemnity is required (amongst other things) to notify the County Council of this fact as soon as is reasonably practicable after the circumstances giving rise to a potential claim has come to his/her attention, and to take reasonable steps to mitigate the amount that might be claimed under the indemnity. Any request for assistance under the indemnity should be made to the Deputy Chief Executive to determine whether the indemnity will apply.

2.3 If a member serves on an outside body in a personal capacity, i.e. where he/she is not appointed, or is not doing so at the request of the County Council, then the indemnity will not apply.

2.4 Further information on the indemnities which can be provided by outside bodies is set out below. As part of familiarising yourself with the aims and objectives of the body, members appointed by the County Council to serve on outside bodies should check with the body concerned what indemnities and/or insurance cover, if any, is provided by the body.

### **3. Trusts**

3.1 A trustee should be fully aware of the state of trust property, of the contents of all the deeds and documents relating to the trust and carry out the terms of the trust in accordance with those documents. Any breach of duty on his/her part may result in him/her being held personally liable. In addition, he/she may be personally liable for the acts of his/her co- trustee(s) if his/her own neglect or default contributed to the breach. A trustee must not make use of the trust property or of his/her position as a trustee for his/her own private advantage. It is a general principle that a trustee must not profit from his/her trust. He/she must execute the trust with reasonable diligence and conduct its affairs in the same way as an ordinary prudent person of business, however, higher standards are required of professionals and in relation to investment matters.

3.2 As a general rule, a trustee is personally responsible for the exercise of his/her judgement and for the performance of his/her duty. He/she cannot escape responsibility by leaving all decisions to be made by another person. Decisions concerning the trust must be taken by all the trustees acting together.

3.3 A trustee must usually act impartially and look at the interest of all those who may benefit from the trust. Like a company director, a trustee is expected to act with reasonable prudence and in good faith – the fiduciary duty – in the best interest of the trust and its objects. Trustees must keep an accurate account of trust property and trustees of charities are usually required to submit annual accounts to the Charity Commission. Furthermore, a trustee must usually invest promptly all trust capital and all income which cannot immediately be used for trust purposes.

3.4 The Charity Commissioners exercise powers of supervision and control of charitable trustees. If in doubt always consult the Charity Commissioners. A trustee who does so will avoid personal liability for breach of trust if he/she acts in accordance with the advice given by the Charity Commissioners. Charitable trustees in breach of certain statutory obligations may be criminally liable eg if they recklessly supply misleading information to the Charity Commission, or default in providing the annual report. Also, certain persons are disqualified from acting as charitable trustees. Amongst these are persons with a criminal record for dishonesty, undischarged bankrupts and disqualified company directors.

3.5 An indemnity can be given from the trust fund provided the trustee has acted properly and within his/her powers. Trustees may take out insurance to protect themselves against personal liability. Provided that the trustees have authority, they are entitled to be insured against claims that may arrive from their legitimate actions as trustees and will be covered against liability as long as they have acted honestly and reasonably. Again you need to establish what the position is from the Trust itself.

### **4. Unincorporated Associations**

4.1 An unincorporated association consists simply of its members acting together for social reasons, the promotion of politics, sport, art, science or literature or for any other lawful purpose. The property and funds of the association generally belong to the members jointly. The business of the association is either conducted in a general meeting or delegated to committees under the constitution. The members of such committees are usually trustees whose duties and responsibilities are outlined above.

4.2 In most cases, an unincorporated association cannot sue or be sued and therefore questions frequently arise about a person's liability for goods supplied to an association, or contracts made on its behalf. The members of an association may be individually liable on contracts entered into by its executive or management committee as authorised by the constitution or because the members themselves specifically agreed to the particular transaction.

4.3 There is no limit on liability similar to that which exists for company directors. It is, therefore, essential that members carefully read the constitution of any associations with which they are concerned. Members must keep themselves informed of all financial obligations entered into by the association and ensure that if they disagree with the proposed financial transaction, it is properly recorded in the minutes.

4.4 Having sounded this note of caution, many of the unincorporated associations with which members will be concerned do not have their own budgets or become involved in transactions of any kind. Many are purely advisory or consultative bodies such as local interest groups, and it is most unlikely that any question of personal liability will ever arise.

4.5 Members will be entitled to an indemnity from the organisation if they act in accordance with the constitution and are not at fault. It is possible to obtain insurance but if the organisation is to pay the premium it must be permitted by the constitution. In many instances, for the sort of reasons given in the previous paragraph, the organisation may well not have insurance cover.

### **5. Companies**

#### **5.1 Directors Duties**

The Companies Act 2006 introduces a partial codification of the general duties of company directors.

##### **5.1.1 General statutory compliance**

The directors of a company have a duty to comply with specific business legislation e.g. concerning employment, health and safety at work, and the payment of taxes. They also have a duty to ensure that their companies comply with the law in general, e.g. if a company is proved to have committed a criminal offence with the consent or neglect of a director, the director as well as the company may be liable. A company or its shareholders can also sue a director for breach of duty and damages.

##### **5.1.2 Act within Powers**

A director must not act outside the company's objects as set out in the Memorandum and Articles of Association and/or Constitution prepared at the time of the formation of the company. Therefore, members appointed as directors should familiarise themselves with the Memorandum and Articles of Association concerned.

##### **5.1.3 Duty to promote the success of the company**

A director must act in the way that he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole.

##### **5.1.4 Duty to exercise Independent Judgement**

A director must exercise independent judgement in relation to his/her responsibilities to the company, though it is permissible for him/her to take account of the interests of a third party which he/she represents. In such a case the director must disclose that position and tread a fine line between the interests of the company and the party represented (in this case the Council). The director cannot vote simply in accordance with a Council mandate. To do so would be a breach of duty. A director must also disclose any interest he/she may have in actual or proposed contracts involving the company.

##### **5.1.5 Duty to exercise reasonable care, skill and diligence**

The duty imposes an objective standard on the director (the general knowledge, skill and experience to be expected of a person in his/her position), and a subjective standard (whereby he/she must exhibit the level of care to be expected of a director with his knowledge, skill and experience).

### 5.1.6 Compliance with Companies Acts

In addition, directors must ensure that proper accounting records are maintained and that annual audited accounts, which give a true and fair view of the company's financial position, are filed with the Registrar of Companies within certain time limits. A director should be satisfied personally with the company's accounts. Ignorance is no excuse.

5.2 Directors can be indemnified against liability to a third party other than the company or an associated company, for example to shareholders, or creditors in negligence, as long as the indemnity does not extend to criminal fines or penalties incurred, whether or not judgement is given against the Director. It is also lawful for companies to purchase insurance to protect its directors against claims of negligence, breach of duty, trust, default. Directors would be well advised to ensure that such a policy of insurance is maintained at all times.

5.3 Directors are, to a certain extent financially protected by limited liability. This means that, while company members may lose the share capital they contribute or, in a company limited by guarantee, have to pay the guarantee (usually £1) that is the limit of their risk. Provided the director has performed his/her duties honestly and in good faith he/she does not normally have any financial responsibility for the company's debts.

5.4 However, company legislation aims to weed out the dishonest. A director may be personally liable for the debts of a company which has traded fraudulently and if he/she is to avoid accusations of wrongful trading a director must recognise the moment when his/her company can no longer avoid insolvent liquidation (i.e. its assets are insufficient to pay its debts or other liabilities) and take immediate action to protect the interest of creditors. A director is unlikely to be liable if he/she has taken every step he/she can to minimise the potential loss to the company's creditors. In considering whether a director ought to have known that the company could not avoid going into insolvent liquidation and what steps a director ought to have taken, the court will look at a director's actual knowledge, skill and experience and that which might reasonably be expected of a person in that position.

### 5.5 Corporate Trusts

5.5.1 Corporate trusts are best described as a “hybrid” of a company and a trust so the principles of both apply if a member is appointed as a director of a corporate trust. A corporate trust is essentially a trust but instead of individuals acting as trustees, a company acts as the trustee. The company is a registered

company like any other company as set out above, but it is often incorporated with the sole purpose of acting as trustee.

5.5.2 In an unincorporated trust, the trustees are personally liable for the trust's liabilities. A corporate trust, however, limits the trustee's liability to the assets of the company. The individuals who would be trustees, instead become directors of the trust company. Any member appointed as a corporate trustee must act in accordance with the duties and responsibilities of the company as they would as a director of any other company.

### **6. Council's Code of Conduct**

#### **6.1 Register of Interests**

(a) The Council's Code of Conduct for Members (paragraph 8 (3)(a)) provides that you have a personal interest in any business of your authority where either it relates to, or is likely to affect, any body of which you are a member or in a position of general control or management, and to which you are appointed or nominated by your authority.

(b) As soon as you have been appointed you must take steps to have your appointment included in the Register of Interests. Any changes must also be notified within 28 days.

#### **6.2 Observance of Code**

The Council's Code of Conduct for Members (paragraph 2 (3)) requires that where you act as a representative or your authority:-

(a) on another relevant authority, you must, when acting for that other authority, comply with that authority's Code of Conduct; or

(b) on any other body, you must, when acting for that other body, comply with your authority's Code of Conduct except and in so far as it conflicts with any other lawful obligations to which the other body may be subject.

#### **6.3 Conflicts of interests**

Members appointed to an outside body will have personal interest in that body and will need to consider their position when they sit on a council committee or decision-making body which is considering a matter to which that interest relates. This may be prejudicial in certain instances, for instance, members participating in a planning or funding decision should declare a personal and prejudicial interest in respect of their membership of the outside body.