

## **PROTOCOL - MEMBERSHIP OF OUTSIDE BODIES – ROLES AND RESPONSIBILITIES OF MEMBERS AND OFFICERS**

### Introduction

The role of Members and Officers nominated or appointed by the Council to the management of organisations outside the Council will depend upon the legal nature of that organisation and the capacity in which the Member or Officer is appointed to act. Similarly, the way in which nominated or appointed Members or Officers can be immune from or indemnified against personal liability for losses arising from their nomination depends on the nature of the organisation and the powers available to the Council.

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**A. Directors appointed to Limited Liability Companies**

Duties

1. The role of a Member or Officer who has been appointed as a Director will depend upon the Company's Memorandum and Articles of Association (its constitution) and whether or not the Member or Officer is appointed to the Board of Directors, as a Company's Articles will vest most of the Company's power in the Board of Directors and the Board will exercise those powers wither directly or through managers appointed by them.
2. The Board of Directors of the Company may wish to consider whether they should instruct the Company Secretary or some other officer with sufficient understanding of the constitution of the Company to advise new Directors on the important provisions of the Memorandum and Articles of Association. This will be a matter for the Company and the Council will not be able to insist upon the same.

3. A distinction needs to be made between roles as defined in the Company's Memorandum of Association and general legal responsibilities placed on Directors of companies. Whether or not a Director is simply a member of the Board or, in addition, occupies a particular office within the Company, such as a Managing Director or Company Secretary, s/he will have a number of duties in respect of that Company.
4. In particular, Directors:-
  - a) **must always act with reasonable care, diligence and skill** in their capacity as agents for the Company;
  - b) must always **act in good faith** in what they believe to be in the best interests of the Company (not the Council);
  - c) must not exercise the powers conferred upon them for purposes different from those for which they were conferred;
  - d) must not fetter their discretion as to how they shall act (for example, by following Council policy unquestioningly); and
  - e) must not, without the informed consent of the Company, place themselves in a position in which their personal interests, or duties to other person (including the Council) are liable to conflict with their duties to the Company.
5. In general Members and Officers should avoid taking executive or managerial responsibility for the Company's activities or any part of them because the duties of executive or managing directors can be onerous. This is because executive directors are directly responsible for aspects of the Company's affairs. For example, a finance director will have particular responsibility for the Company's financial position, which could give rise to liability for allowing the Company to trade while insolvent if the Company goes into liquidation (see further at paragraph 22 below).
6. However, the fiduciary duties described in paragraph 4 above apply to non-executive directors as well as executive directors. All Directors have a duty to exercise their functions with reasonable care, diligence and skill. All Directors including non-execs, therefore, should ensure that they are aware of the financial position of the Company and regularly attend Board meetings. **Ignorance of the Company's activities is unlikely to be a defence to any claim against a Director.** The obligations of non executive directors are further considered in paragraphs 8 - 11 below.
7. The obligations in Paragraph 4 will also apply to non-Board members (e.g. senior managers, Company Secretaries) if they are authorised to act on the Company's behalf in which case they may be "shadow" or "de facto" Directors (see further at paragraphs 16 – 20 below).

### Corporate Governance

8. To the extent it has been adopted by the Board of a Company, Directors should also be aware of the requirements of the **Combined Code on The Principles of Good Governance and Code of Best Practice ("the Combined Code")**. The Combined Code includes rules on Directors' remuneration, internal financial and operational controls and risk management and management generally.

A copy of the Combined Code is available on the website of the Financial Services Authority ([www.fsa.gov.uk](http://www.fsa.gov.uk))

9. The Combined Code also sets out principles and guidance relating to the appointment and duties of **non-executive Directors**, suggesting that non-executive Directors should make up at least a third of the Board. Non-executive directors should be of sufficient calibre and number for their views to carry significant weight on the Board. Most should be independent of management and free from any business or other relationship that could materially interfere with the exercise of their independent judgement.
10. Non-executive Directors are expected to provide an outside view and help provide an ethical framework for the Company. If Members' or Officers' obligations to the Council are given priority over these duties then their role as a non-executive Director may be compromised. Again, in the case of doubt, the relevant Member is encouraged to seek guidance from the Head of Legal Services.
11. Many companies linked with the Council are required to follow the Combined Code. Members and Officers on the Board of Directors of such a Company should also ensure that they keep up-to-date with its requirements.

### Investment Vehicles

12. There are other statutory requirements which may apply to Directors in certain circumstances. For example, if the Company is an investment vehicle which engages in fundraising activity, financial services legislation will apply. Any Members or Officers who have any concerns on this aspect should contact the Principal Solicitor, or Monitoring Officer for guidance.

### Council's Code of Conduct for Members

13. The Council's adopted its Code of Conduct for Members deals, amongst other things, with **pecuniary and other interests**. There are also requirements to maintain confidence, to respect others and not to bring the Council into disrepute.

14. Where a Company has a Code of Conduct for Directors, for example, the Combined Code, that Code will apply to the effective operation and discharge of the duties of a Director of that Company.

Where there is conflict between the Director's Code and the Council's Code of Conduct for Members, then the Council's Code of Conduct makes it clear that the more onerous Code will apply for Members when transacting the business of the Company.

15. When dealing with Council business, therefore, Members should be aware of the Council's Code of Conduct for Members and ensure open, fair and transparent declaration of interests relating to the directorship of any Companies.

In case of doubt, the Principal Solicitor, or Monitoring Officer's guidance should be sought at the earliest stage, as a serious breach of the Council's Code of Conduct for Members could disqualify the Councillor from Office.

### Observer Status

16. It is common practice amongst some local authorities to appoint Members or Officers as "observers".

The position of observer has no specific legal status in company or local authority law. Any person appointed to this role should ensure that the extent of their role as an observer is clearly defined and agreed and avoid involvement in managing, or directing the management of, the Company as s/he will then be seen as going beyond the remit of his/her "observer" role.

17. If the observer's role is extended so that the Directors of the Company are accustomed to act in accordance with his/her directions or instructions s/he may be a **shadow director** and as such could be held personally liable as if s/he were a formally appointed Director.
18. If the observer's directions or instructions are followed by the Directors of the Company to the extent that s/he is exercising real influence over the Company's affairs the observer will be a shadow director.

The influence does not have to be over the entire field of the Company's affairs but it must be at the most senior management level and affect decision making which is within the remit of the Directors. It can include the giving of advice to the Board of Directors if the advice has a real influence over decision-making affecting the affairs of the Company.

19. If the observer is acting as and holding him or herself out as a member of the Board s/he may be a "**de facto**" director and as such may, like a shadow director, be held personally liable as if s/he had been formally appointed.

20. The Company will, of course, also need to consider how to deal with the giving (or, more probably, the withholding ) of confidential Company information to the observer and the observer's right to speak at or his/her exclusion from meetings convened to consider company business. If a Member or Officer is appointed as an "observer", s/he will have to abide by any terms attached to such appointment by the Council and/or the Company.

### "In Attendance"

21. "In attendance" is generally used in Board minutes to cover any person attending the meeting who is not a member of the Board, for example, the Company Secretary and professional advisers. It may also include Council officers (whether appointed as "observers" or not) who have been asked to attend Board meetings and offer advice and guidance to the Directors where appropriate. Persons "in attendance" have no specific legal status and in itself the phrase does not indicate any particular level of participation in the Company's affairs. The extent of the participation of a Member or Officer described in Board minutes as "in attendance" would be a question of fact and circumstance. They should take care to avoid involvement in managing, or directing the management of, the Company as if they do not they may be a shadow or de facto director.

### Liability

22. The liability of the members (i.e. shareholders) of a Company is limited to the amount of capital contributed by them to the Company. A Company has a legal personality distinct from those of its members, and its members will not, in the ordinary course of events, be liable for its debts.
23. A Director (or any person authorised to act on behalf of the Company) may, however, incur personal liability in a number of situations, including where:-
- a) the Company is found, in the course of winding up, to have been trading for fraudulent purposes. If a Director has acted dishonestly this is also a criminal offence;
  - b) following liquidation, a Director is found liable for wrongful trading, i.e. allowing the Company to continue to trade at a time when there was no reasonable prospect that the Company would avoid going into insolvent liquidation;
  - c) the Company commits a breach of the criminal law, for example, health and safety legislation; and/or
  - d) a Director acts negligently or in breach of his/her duty to the Company (including the duty to maintain confidential any confidential information relating to the Company that comes into his/her possession).

### Indemnities, Immunities and Insurance

24. The Council has exercised its powers under Section 111 of the Local Government Act 1972 and the Local Authorities (Indemnities for Members and Officers) Order 2004 for local authorities to grant their Members and Officers indemnities.
25. The Chief Executive Officer is authorised to issue a Form of Indemnity and arrange insurance for Members and Officers in relation to work connected with Outside Bodies and in other circumstances where it is lawful to do so.
26. Further immunity from legal proceedings is given to appointed Members by Section 265 of the Public Health Act 1875, which states :-

*No matter or thing done, and no contract entered into by any Local Authority... and no matter or thing done by any member of any such Authority or by any officer of such authority or other person whomsoever acting up at the direction of such authority shall, if the matter or thing were done or contract were entered into bona fide for the purpose of executing this Act or any other Public General Act, subjects them or any of them personally to any action liability claim or demand whatsoever; and any expense incurred by any such Authority member, officer or other person acting as last aforesaid shall be borne and repaid out of the fund or rate applicable by such Authority to the general purposes of this Act.*

27. In summary,
  - the Member must be performing a statutory function. If the Council did not have the power to e.g. establish the Company, a Member serving as a Director will not be able to rely on the immunity if the Company fails and s/he is held liable.
  - The Member must be acting in good faith. It will not apply if there has been dishonesty by the Member.

**B. Appointment of a Trustee to a Charitable Trust**

Nature of a Charitable Trust

28. Trustees will be appointed under the Trust Deed. The role and responsibilities of a Trustee will depend, therefore, upon the provisions of the trust deed and/or scheme (collectively referred to as its “governing documents”) and the general law relating to Trusts and Charities.

Members and Officers involved with charitable companies should ensure that they understand the capacity in which they have been appointed. They may be Directors as well as Trustees which means that the obligations set out in Section A above as well as the obligations set out in this section will apply to them. It may be appropriate for the Trustees of a charity to consider whether one of their number should advise new Trustees on their duties and liabilities. This would however be a matter for the Trustees and the Council would not be able to require it.

Duties

29. At its simplest, the role of a Trustee is to apply the income / expenditure and, possibly, the capital of the Trust in accordance with the provisions of its governing documents.

However, in fulfilling this role Trustees are subject to a number of duties. The most significant of which are as follows:-

- a) to preserve the capital of the charity (unless the trust deed gives the Trustees the right to spend the capital or the charity is small and the Trustees have resolved to spend the capital under the Charities Act 1993);
  - b) to make sure income is spent only on the things authorised in the governing documents;
  - c) to invest the capital only in authorised investments and having first taken professional advice;
  - d) to produce annual accounts;
  - e) to act with reasonable care and skill in administering the Trust; and
  - f) to act unanimously (unless the Trust deed allows majority decisions).
30. Charity Commission guidance entitled “**CC3 The Essential Trustee: What you need to know**” outlines the basic principles that should guide Trustees when administering their charity. The Trustees must:-
- a) accept ultimate responsibility for directing the affairs of a charity and ensuring that it is solvent, well-run and delivering the charitable outcomes for which it has been set up;

- b) ensure that the charity complies with charity law and with the requirements of the Charity Commission as regulator; in particular, ensure that the charity prepares reports on what it has achieved and annual returns and accounts as required by law;
- c) ensure that the charity does not breach any of the requirements or rules set out in its governing document and that it remains true to the charitable purposes and objects set out there;
- (d) comply with the requirements of other legislation and other regulators (if any) which govern the activities of the charity;
- (e) act with integrity and avoid personal conflicts of interest or misuse of charity funds or assets;
- (f) ensure that the charity is and will remain solvent;
- (g) use charitable funds and assets reasonably, and only in furtherance of the charity's objects;
- (h) avoid undertaking activities that might place the charity's endowment, funds, assets or reputation at undue risk; and
- (i) take special care when investing the funds of the charity, or borrowing funds for the charity to use.

A copy of the guidance is available on the Charity Commission website.

### Liability

- 31. If Trustees act prudently, lawfully and in accordance with the governing document, then any liabilities (ie debts or financial obligations) that they incur as Trustees can normally be met out of the charity's resources. However, if Trustees incur liabilities or debts that amount in total to more than the value of the charity's assets they may not be able to cover themselves in full out of the charity's property, even if the liabilities have been properly incurred.
- 32. If the Trustees act imprudently, or are otherwise in breach of the law or the governing document, the position is different. Here, Trustees may be personally responsible for liabilities incurred by the charity, or for making good any loss to the charity. Since Trustees act collectively in running a charity, they will usually be collectively responsible to meet any such liability. Accordingly, unlike the members of a Company the Trustees of a charitable trust do not enjoy limited liability.

### Indemnity and Immunities

- 33. As referred to at paragraphs 24 – 25 above, the Council has exercised its powers to grant indemnities to Members and Officers in respect of their work in connection with Outside Bodies.
- 35. Members can also rely on the limited immunity from suit provided by Section 265 Public Health Act 1875 as explained in Paragraphs 26 - 27.

## **PART 27**

The principles set out in Paragraphs 13 – 15 regarding the Council's Code of Conduct for Members, apply equally to Members serving on Trusts.

**C. Unincorporated Associations**

Nature of Unincorporated Associations

36. Most societies and similar organisations, other than Companies and Trusts, are usually unincorporated associations. An unincorporated association is an informal organization which may arise whenever several people join together, with the intention of creating legal relations, to carry out a mutual purpose otherwise than for profit. There is no statutory definition of an unincorporated association but in one decided case the court described an unincorporated association as “an association of persons bound together by identifiable rules and having an identifiable membership”. The rules of an unincorporated association are found in its “constitution” and it is this document which will set out the roles and responsibilities of members of the association.

Duties

37. Usually, an unincorporated association will have an executive / management committee. The powers and composition of executive / management committees will be set out in its constitution. Important decisions relating to the running of the association will usually be left to the association members at its general meetings. The day to day administration of an association, however, will usually be under the control of the officers and members of the executive / management committee. Where an unincorporated association is a registered charity, the members of the executive / management committee may also be charity Trustees. As such their role and responsibilities will be determined not only by the association’s constitution but also by the general law relating to trusts and charities as set out in Paragraphs 28 – 33.

Observer Status

38. The Council may appoint a Member or Officer to the executive / management committee of an unincorporated association as an observer. Any Member or Officer appointed as an observer should exercise caution if asked to become involved in the management or administration of the association, for reasons similar to those set out in Paragraphs 16 - 20. Particular care should also be taken when entering into contract on behalf of the association. If the individual lacks the authority to do so, that individual may find him or herself personally liable for the performance of the contract. If in doubt, Members and Officers should seek advice from the Principal Solicitor, or Monitoring Officer.

Indemnities

39. As referred to at paragraphs 24 – 25 above, the Council has exercised its powers to grant indemnities to Members and Officers in respect of their work in connection with outside bodies.

**D. Steering Groups, Joint Committees and Partnership Bodies**

Duties

40. If a Member or Officer who is nominated or appointed as a committee member or as an observer to a partnership body (e.g. the LGA), s/he will not be exposed to the same liability as a Director or Trustee. Ideally, the duties and obligations of the Member or Officer concerned will be set out in the agreement or other documents regulating the committee or partnership and in any Code of Conduct of the Council relevant to such activities, for example, the Council's Code of Conduct for Members described at Paragraphs 13 - 15.
41. If the Member's or Officer's role is unclear, s/he needs to establish formally at the outset as to whether s/he is acting as a delegate/ representative of the Council to promote its interest, or if s/he has an independent role to fulfil on behalf of the committee or partnership. If it is an independent role, s/he will have to uphold the Committee's or partnership's interests, even when the same may be in conflict with the policies and best interests of the Council whilst s/he is serving on the Committee or partnership but not whilst serving as a Member or employee of the Council.
42. If the committee or partnership is seeking charitable status it will need to establish itself as a trust or incorporate to become a company limited by guarantee. Any Member or Officer becoming a Trustee or a Director will need to consider his/her duties as set out in this Briefing Note.

Immunity

43. As referred to at paragraphs 24 – 25 above, the Council has exercised its powers to grant indemnities to Members and Officers in respect of their work in connection with outside bodies.

**E. Non Council Appointments**

44. A Member or Officer may seek membership of, or appointment to, a voluntary organisation in a private capacity so long as there is no conflict of interest with his position as a Member or as an Officer of the Council. In relation to that organisation, the role and responsibilities of the Member or Officer will be governed by the organisation's constitution or governing document in the same way as for Council nominees.
45. If a Member or Officer is appointed other than at the request or instruction of the Council, i.e. in a personal capacity, he or she will not, of course, be entitled to benefit from the indemnity as referred to in Paragraphs 24 - 25. Certain parts of the Code of Conduct for Members apply to them even when they are transacting private or non-Council business. They must ensure those relevant provisions are complied with at all times.

**F. Register of Members and Officers serving on Outside Bodies**

46. The Democratic Services Manager will keep, on behalf of the Chief Executive Officer, a full and up-to-date list of all Members and Officers serving on outside bodies. The Council has also establishing a Council-wide register of declarations of Officer interests, along the lines of the one introduced for the Council's Code of Conduct for Members.

**G. Standards of business behaviour**

47. Generally, an outside body's rules on hospitality and gifts will be more liberal than the local authority law and rules on such matters.

The guiding principle, from the Monitoring Officer is, therefore, that the more strict rules of conduct and behaviour should be followed on all occasions.

48. In order to ensure, open and transparent conduct of business, appropriate declarations should, in the case of Members, be made in the Statutory Register of Members' Gifts and Hospitality; i.e. anything offered, rejected or accepted that exceeds, or is, £50 in value.

**H. Appointments / nominations to outside bodies**

49. The Council, through its Members and Chief Officers, will ensure, so far as is possible, that only Members who are unlikely to have potential conflicts of interest are appointed or nominated to serve on outside bodies, so as to ensure the smooth transition of business of the Council and the outside body. In order to ensure the effectiveness of such arrangements, the Monitoring Officer will review the arrangements to satisfy themselves over the robustness of the procedures and to strengthen the same if improvements are needed.

**I. Potential conflicts of interest**

50. In the event of there being a potential conflict of interest between the Council and the outside body, to which a Member or Officer has been appointed or nominated to by the Council, the relevant Member or Officer will, as indicated above, be governed by the more strict Code of Conduct. In the event of doubt, appropriate advice should be sought from the Principal Solicitor, or Monitoring Officer.
51. Confidential information will need to be handled very carefully and compliance with the stricter Code of Conduct will need to be observed by the relevant Member. In exceptional circumstances, the relevant Member may wish to avoid placing him or herself in positions of conflict by resigning, absenting or declining to accept any outside appointment or nomination that causes or is likely to cause conflict difficulties.
52. In the case of Officers, they are employees of the Council and their primary duty is to the Council, even when they are appointed or nominated to outside bodies, unless they are there in their private capacity. The outside body must understand this prior to accepting the Officer's appointment or nomination, as in the event of a conflict of interest, the Principal Solicitor, or Monitoring Officer's, advice will always be to protect and safeguard the interests of the Council.

If an Officer is concerned about a possible conflict of interest s/he should contact the Principal Solicitor, or Monitoring Officer, in the first instance.

53. In exceptional circumstances, Officers are encouraged to avoid placing themselves in positions of conflict by resigning, absenting or declining to accept any appointment or nomination. Officers are also advised, so far as is possible, to ensure that any positions they hold or accept in their private capacities do not bring them into conflict with the Council.

For "politically restricted" Officers, under the Local Government and Housing Act 1989, more stringent legal requirements apply to them in their private capacities and, as such, they must abide by the same.

54. If a Member is present at a meeting of the Council at which the business of the Outside Body, upon which he is appointed or nominated, is being discussed, s/he must declare his/her personal and, if applicable, prejudicial interest and may remain and vote on the matter unless the matter relates to the granting, withholding or withdrawal of Council funds or other assets (including land transactions) to or from the outside body. In such event, s/he must leave the room after personal and prejudicial interest has been declared.
55. If an Officer is present in similar meetings, s/he must declare such interest and must, if requested to do so by his/her Director or the Chair, leave the room whilst the matter is discussed and voted upon.

**J. Further Information and Assistance**

56. Should any Member require further information or assistance on any of the matters contained in this briefing note, they should contact the Principal Solicitor, or Monitoring Officer.