

## **5.8 PART 5.8 - GUIDANCE FOR MEMBERS SERVING ON OUTSIDE BODIES**

Paragraph    Subject

<b>5.8 – 1</b>	<a href="#"><u>INTRODUCTION</u></a>
<b>5.8 – 2</b>	<a href="#"><u>GENERAL</u></a>
<b>5.8 – 3</b>	<a href="#"><u>COMPANY DIRECTORS</u></a>
<b>5.8 – 4</b>	<a href="#"><u>CHARITY TRUSTEES</u></a>
<b>5.8 – 5</b>	<a href="#"><u>MANAGEMENT COMMITTEES</u></a>
<b>5.8 – 6</b>	<a href="#"><u>OTHER PUBLIC BODIES</u></a>
<b>5.8 – 7</b>	<a href="#"><u>INTERESTS</u></a>
<b>5.8 – 8</b>	<a href="#"><u>INDEMNITIES</u></a>
<b>5.8 – 9</b>	<a href="#"><u>RELATED ISSUES</u></a>
<b>5.8 – 10</b>	<a href="#"><u>FURTHER INFORMATION</u></a>
<b>5.8 – 11</b>	<a href="#"><u>CHECKLIST</u></a>

### **5.8 – 1 INTRODUCTION**

**5.8 – 1.1** The Full Council receives nominations from among elected Councillors and appoints, normally at the Annual Council, Members and, less often, Officers of the Authority to serve on a wide range of outside bodies, including companies, charities and other public bodies. This is to be contrasted from the situation where outside bodies make their own direct appointments.

**5.8 – 1.2** The purpose of this guidance is to summarise the legal position of Councillors and Officers whom the Full Council appoint to serve on outside bodies. It is not intended to be an exhaustive explanation of the law and, if further advice is required, the Monitoring Officer should be contacted.

**5.8 – 1.3** Before appointment the Group Leaders will have carefully considered whether to put forward particular councillors by way of nomination to Full Council for appointment. Part of such deliberations should have centred on the impact of any successful nomination of that councillor's ability in practice to effectively and efficiently serve on the Council, the Cabinet, committees/sub-committees and other bodies, particularly from an actual or perceived conflict of interest viewpoint.

**5.8 – 1.4** Council will have considered the case whether to make, and if so the terms of, appointments to the particular outside body (including whether such appointments should be of members or

officers and the specific period of appointment, with it being made clear the right for Full Council to replace any appointee at will and without notice notwithstanding any such specific period of appointment). For example, any new appointment necessarily involves the replacement of any existing appointee unless the contrary is stated. Occasionally, this consideration of the appointment case may mean it is thought appropriate for the Council to have 'observer status only' e.g. where there is likely to be a major conflict of interest or a financial risk for the appointee. Indeed, it may be that no appointment in any capacity should be made (e.g. due to actual or perceived conflicts of interest).

**5.8 – 1.5** Representatives appointed by the Council on outside bodies do not hold merely by virtue of such appointment any authority on behalf of the Council or the Cabinet and shall not therefore bind the Authority without expressly being authorised to do so by the Authority and by law.

**5.8 – 1.6** The Council has not made any specific arrangements to provide officer support for members appointed to outside bodies. Members shall be required to report back to the Authority in appropriate cases. In this respect, members should refer to the relevant Executive Director for advice and guidance relating to the outside body to which they are appointed.

**5.8 – 1.7** Appointments by Full Council to outside bodies are not required to reflect political balance and appointments will therefore be made as the Council determines and having regard to these guidelines. Such appointments shall be deemed to be approved duties for the purposes of the Authority's Members' Allowance Scheme (unless the contrary is expressed).

## **5.8 – 2 GENERAL**

**5.8 – 2.1** Before accepting the directorship or trusteeship of an external organisation, the Member or Officer should consider how onerous the responsibilities are likely to be and should only accept the office if satisfied that they have the time and capacity to undertake them.

**5.8 – 2.2** Consideration should also be given to whether there is likely to be any significant conflict of interest between the role as a director or trustee and their role as a Councillor or Officer. If such a conflict is likely to arise to a significant degree then the role should not be taken on.

**5.8 – 2.3** Also, the Member or Officer should assess the risks of things going wrong which might raise the prospect of a personal liability. Matters to be taken into account are the nature of the functions of the outside body and the amount of money it holds or deals with. For example, some external companies handle considerable sums of money in the course of each year and have major functions. On the other hand, the risks associated with relatively small local

charities (e.g. educational charities) are much less.

**5.8 – 2.4** Members and Officers who serve on outside bodies must exercise independent judgement in the interests of the organisation in which they are involved. Whilst it is recognised that they may have a commitment to representing the Council on the outside organisation, they must also be aware that it is their responsibility to decide what view to take on any question before the organisation. Where a Member or Officer serves on the outside body in 'a representative capacity', this should be made clear to that body. There will be a fine line to tread between the duty to the outside body and to the Council.

**5.8 – 2.5** Ultimately the Member or Officer in acting as a director or trustee or member of a Management Committee of an outside body, must act in accordance with that body's interests, and not those of the Council or even the council tax payers at large. A mandate from the Council to vote one way or the other would put the member or officer in breach of the duty to the organisation. It is permissible to take account of the Council's wishes, but not to vote simply in accordance with them as to do so would surrender your decision-making responsibility. The overriding duty in considering an item before the outside body is to vote in accordance with the interests of that organisation.

**5.8 – 2.6** A Member or Officer serving on an outside body must also ensure that avoidable loss is not incurred in managing that body. Individual responsibility cannot be avoided by not reading the papers or failing to ask for appropriate reports. Professional advice should also be sought where appropriate.

**5.8 – 2.7** If there is a major dispute between the Council and the outside body then the Council's representative can be placed in an untenable position. In these circumstances, the appointee should take advice from either the Executive Director, the relevant Assistant Director or the Monitoring Officer.

**5.8 – 2.8** At the end of the day, it is possible that a representative on an outside body may find themselves unable to adequately carry out their responsibilities properly, both as a Member or Officer of the Authority and as a director/trustee committee Member of the outside body. That would be an exception, and should not deflect those appointed to outside bodies from being prepared to participate in the management and running of outside organisations.

**5.8 – 2.9** Finally, it is recommended that:-

- (a) Upon being appointed to an outside body, appointees obtain essential documents such

- as the outside body's governing document and the latest annual report and accounts
- (b) Appointees to outside bodies should take advice from the Executive Director (Resources) or the Monitoring Officer (as appropriate) if they have any financial or other concerns about the body to which they have been appointed.

### **5.8 – 3 COMPANY DIRECTORS**

#### **5.8 – 3.1** Company directors have the following duties:-

- A duty to the company (not individual shareholders) to act honestly and in good faith and in the best interests of the company as a whole. This means taking proper care of the assets of the company.
- A general duty of care and skill to the company. This means that directors must exercise a degree of skill as may reasonably be expected from someone with that individual's particular knowledge and experience. However, directors are not deemed to be experts, but are expected to use due diligence and to obtain expert advice if necessary.
- Directors must exercise independent judgement, although they may take account of the interests of any third party whom they represent. This may well require interests to be declared (see below). However directors cannot vote simply in accordance with the Council's mandate.
- Directors are not allowed to make a profit from their position. They must therefore disclose any interests they or their family may have in relation to the company's contracts. Whether they are then allowed to vote will depend on the company's Articles of Association.
- Directors must ensure compliance with the Companies Act in relation to the keeping of accounts and making of returns to the Registrar of Companies and the information to be shown on stationery.
- There is a duty to have regard to the interests of the company's employees, particularly, for example, in respect of health and safety.
- Directors also have a range of accounting and financial responsibilities, including the preparation of accounts for each financial year, ensuring accounting records are maintained sufficiently to demonstrate the company's day to day transactions, approving the annual accounts and laying them before a general meeting and ensuring that annual accounts and reports are sent to shareholders and anyone else entitled to receive them.

#### **5.8 – 3.2** Individual directors can also be liable in certain circumstances, including the following:-

- A company can only act within the scope set out in its Memorandum of Association, and those directors who knowingly cause the company to act beyond these activities will be liable personally.
- Directors may also be liable for breach of trust, if they misapply the money or property of the company. Directors may also be liable if they fail to take action to prevent the breach of a co-director of which they are aware.
- In the event of a failure to act in accordance with the best interests of the company, or if directors use their powers improperly or make a personal profit from their position as a director, then they may be personally liable for loss to the company and may be required to give to the company the personal profit made.
- If the level of skill and care shown by a director falls below that which could reasonably be expected and the company suffers loss, the director will be liable for the loss incurred. However, if it believes the director acted honestly and reasonably, a Court may excuse the Director from this liability.
- If a director knows or ought to know that there is no reasonable prospect of the company avoiding liquidation, the Court may require the director to contribute to the company's assets on liquidation if the company continues to trade. This is known as wrongful trading. No such order will be made if the Court is satisfied that the director took all reasonable steps to minimise the loss to the creditors.
- Directors will also be liable if to their knowledge the company carried on business with intent to defraud creditors or any other person, or for any other fraudulent purpose.
- Where a company fails to pay National Insurance contributions and this is due to fraud or neglect on the part of any director(s) of the company, they may be held personally responsible for the outstanding contributions.

**5.8 – 3.3** Finally, information (apart from confidential information held by the organisation) must be given to other councillors about their activities as required by the Council.

#### **5.8 – 4 CHARITY TRUSTEES**

**5.8 – 4.1** Trustees must acquaint themselves with the terms of the Trust. In the case of a charity which is also a company, these terms will be found in the Memorandum and Articles of Association. Other Trusts will be found in the document under which the charity was established, such as a will or deed of gift or constitution.

**5.8 – 4.2** Charity Trustees have the following duties:-

- Trustees must act in accordance with the terms of the Trust.
- The property of the charity must be used for the purposes for which the charity was set up. It must also be applied fairly between those properly entitled to benefit from it.

- Trustees have a duty to exercise such care and skill as is reasonable in the circumstances having particular regard to any special knowledge or experience that they have or holds themselves out as having. In addition, where a trustee acts in the course of a business or profession, particular regard must be had to any special knowledge or experience which it is reasonable to expect of a person acting in the course of that kind of business or profession.
- Trustees must always act in the interests of the charity and of its beneficiaries or potential beneficiaries and without regard to their own private interests. This means that Charity Trustees must not put themselves in a position where their interests and duties conflict.
- The work must generally be unpaid. Trustees may be paid for their expenses from the charity's income and, very occasionally, the Charity Commission may allow wider remuneration where this is in the interests of the charity.
- Trustees cannot benefit either directly or indirectly from the charity.
- They must act reasonably and prudently in all matters relating to the charity and must always bear in mind the interests of the charity. They should manage the charity as carefully as if they were running their own business. Although they may delegate certain of their functions under the Trustee Act 2000 and also under any powers in the trust document, they remain legally responsible and must supervise and control the work of officers.
- Trustees must act in accordance with all relevant legislation (e.g. the Charities Act 2011).
- They have a duty to provide information to the Charity Commission (see <https://www.gov.uk/government/organisations/charity-commission>). Most charities (except small ones with an annual income under £1000 a year) are required to register under the charities legislation. The Charity Commission rely on this information when making a decision about a charity, so it is very important that it is accurate. It is an offence to give the Charity Commission false or misleading information, or to alter, conceal or destroy charity documents which may be required by the Commissioners.
- All registered charities are subject to a number of accounting and reporting requirements, depending on their income and expenditure. These involve maintaining proper accounts, preparing the annual statement of accounts and an annual report and in some cases submitting them to the Charity Commission; and where the charity's gross income and total expenditure exceeds £10,000, making an annual report to the Charity Commission. Charity trustees are under a duty to ensure that these accounting and reporting requirements are carried out and to approve the annual report and accounts. The accounts of registered charities with a gross income or total expenditure exceeding £10,000 must, at the option of the trustees, be either audited or

independently examined. In addition if either income or expenditure has been more than £250,000 in either of the previous two financial years then accounts must be audited by a registered auditor. Retaining accounting records and statements of account for at least 6 years.

- Where a registered charity's gross income exceeds £10,000 in its last financial year, there are obligations to include a 'section 39' statement in official publications and various criminal offences can arise (see section 41 of the Charities Act 2011).

**5.8 – 4.3** There is a distinction between the situation where the Authority as a corporate body is 'the trustee' and the position where a Councillor or Officer is appointed to be an individual trustee. For example, the Authority is the trustee of The Ripley Recreation Ground (Registered Charity No. 520502). Thus the Council as a body of elected councillors is the trustee rather than any individual councillor. In this case, the Council must remain aware that it owes its duty to the particular trust when dealing with trust matters, and shall not act in the interests of the Authority.

## **5.8 – 5 MANAGEMENT COMMITTEES**

**5.8 – 5.1** Groups which are not charitable trusts or limited companies are "unincorporated associations" and have no separate legal identity from their members. The rules governing the members' duties and liabilities 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. An unincorporated organisation may be charitable and registerable as a charity (in which case the rules in paragraph 3 will apply).

**5.8 – 5.2** Broadly, management committee members must act within the terms of the constitution, and must take reasonable care in exercising their powers.

**5.8 – 5.3** Generally, members of management committees are liable for the acts of the organisation, but are entitled to an indemnity from the funds of the organisation if they have acted properly. If there are not enough funds, the committee members are personally liable for the shortfall. If one person is appointed by the constitution to act as the agent of the organisation for certain purposes, then that person acts as the agent of all the members, who have joint liability for the agent's actions. Members of the management committee will have a personal liability if they act outside the authority given them or if they do not comply with the law.

## **5.8 – 6 OTHER PUBLIC BODIES**

**5.8 – 6.1** There are bodies created by an Act of Parliament to carry out particular functions and whose constitution is set out in the legislation relating to that specific body. Examples include school governing bodies.

**5.8 – 6.2** The powers of the members of the body and duties and liabilities of those members individually and collectively depend upon the wording of the legislation in question. In general terms, however, the position of a member is similar to that of a councillor. It is therefore wise for a member of any of these bodies to obtain information for themselves from that body on its powers and duties, its Standing Orders and other procedures which they must follow and financial or other regulations which govern the conduct of its business.

**5.8 – 6.3** In addition, conflicts of interest can occasionally arise for such appointees. In this respect, the general provisions described in Section 2 will apply.

**5.8 – 6.4** Finally, there is the developing area of partnerships and partnership boards. Generally, these are not legal entities in their own right and members are appointed purely to represent the Council. In these circumstances the specific duties referred to above will not therefore tend to apply nor will there be a potential for a conflict of interest. On the other hand, the position may well be different if a separate legal entity is formed as part of the partnership working.

## **5.8 – 7 INTERESTS**

**5.8 – 7.1** If you have a Disclosable Pecuniary Interest in a matter to be considered at the meeting and that interest is on your Register of Interests you must not speak or vote on the matter. However, the effect of the Code of Conduct is that in most (but not necessarily all) cases a Member will not have a Disclosable Pecuniary Interest (and therefore need not make any declaration) if the matter relates to an outside body to which the Council have appointed the Member as its representative.

**5.8 – 7.2** If you do not have a Disclosable Pecuniary Interest you may nevertheless have another interest in a matter to be discussed if it affects:

- your well being or financial position
- that of your family or close friends
- that of a club or society in which you have a management role
- that of another public body of which you are a member to a greater extent than others in your ward.

If that is the case then you must declare such an interest but can speak and vote on the matter unless such personal interest is also a prejudicial interest.

**5.8 – 7.3** When members discuss at Council/Cabinet meetings matters relating to an outside body on which they serve, they may take account of that outside body's interest. However, they must



not vote simply in accordance with the mandate of that outside body. In short, the primary consideration is the public interest.

## **5.8 – 8 INDEMNITIES**

**5.8 – 8.1** Local Authorities now have express powers to indemnify members and officers who represent them on outside bodies. In exercise of these powers, the Council has agreed to indemnify all members and officers who represent the Council on outside bodies against claims made against them while serving on that body, subject to the following:-

- (a) The indemnity only applies to the extent that the outside body does not have in place relevant insurance cover.
- (b) The indemnity does not extend to criminal actions, any other intentional wrong doing, fraud, recklessness or the bringing of an action for defamation.
- (c) The appointment to the outside body must be approved by members or alternatively, in the case of an officer appointment, by the Executive Director.
- (d) The indemnity will not apply if the appointee, without the express permission of the Council, admits liability or negotiates or attempts to negotiate a settlement of the claim.
- (e) The indemnity is given on the condition that the Council may, at its discretion, take over the defence of any case to which the indemnity relates and to see any legal advice obtained by the member or officer concerned.

**5.8 – 8.2** As to the provision of indemnities by the outside body to which a member or officer has been appointed:-

- (a) Companies can now give their directors indemnities. However, such indemnities cannot cover:-
  - (i) the director's liability to the company itself or to other companies within the same group;
  - (ii) fines imposed on a director in criminal proceedings or in respect of a sum payable to a Regulatory Authority by way of penalty for noncompliance with any requirement of a regulatory nature; or
  - (iii) liabilities incurred by a Director in defending criminal proceedings where convicted, or in defending any civil proceedings brought by the company, or an associated company in which judgement is made against such director.

- (b) With regard to Charitable Trusts, an indemnity can be given from the Trust Fund provided the trustee has acted properly and within their powers.

Trustees may take out insurance to protect themselves against personal liability, but not for criminal acts, fraud etc. There will be no problem if the trustees themselves pay the premiums but if they are paid out of the Charitable Funds the trustees will need to consent to the Charity Commission unless the Trust Deed specifically allows it.

- (c) With regard to Management Committees, members will be entitled to an indemnity if they act in accordance with the Constitution and are not at fault.

It is also possible to obtain insurance but if the organisation is to pay the premium it must be permitted by the Constitution.

## **5.8 – 9 RELATED ISSUES**

Finally, there are three related issues:-

- (a) Occasionally, the Council will be represented on outside bodies by third parties, rather than members or officers. This guidance applies in principle to these representatives, although some parts of it will necessarily not apply e.g. Section 7.
- (b) From time to time, officers are, as a result of their position with the Council, appointed to serve on an outside body by the body itself, rather than by the Council. Examples include serving on the managing body of a professional association or appointment to a national body as a local authority representative. Again, most of the principles contained in this guidance will apply to that situation, depending on the nature of the outside body.
- (c) Finally, officers may from time to time be asked to serve in their private capacity on outside bodies funded by the Council. This can often give rise to a conflict of interest for the officer, particularly in the situation where the officer is employed within the funding department. In these circumstances, the Council takes the view that there will be circumstances where an officer should not serve on the outside body because of the potential for a conflict of interest.

## **5.8 – 10 FURTHER INFORMATION**

- 5.8 – 10.1** If you require any further information about the issues raised in these Guidance Notes please contact the Monitoring Officer.

## **5.8 – 11 CHECKLIST**

- 5.8 – 11.1** Checklist for protecting Members and officers appointed to external bodies. The Authority when appointing members and officers to external bodies can ensure the necessary protections are in place by applying the following checklist. It should:

- Ensure powers permit participation in the type of body and in the manner envisaged.
- Ensure internal policies are complied with and on-going decision-making will not be compromised by the individual members participating in the organisation.
- Train all members and staff on liabilities, for example by making a standard advice note available.
- Check every external company carries insurance cover for directors.
- Ensure individuals appointed to outside bodies have training on recognizing and addressing conflicts of interest.
- Ensure that the external body provides an indemnity and insurance for members appointed to it, or that the Council's indemnity insurance covers extended liability.
- Consider whether a resolution is required to indemnify all members and officers participating in external organisations.
- Take whatever steps are necessary to record the appointment in the members' register of interests

**5.8 – 11.2**

With regard to the appointment of officers, the Council should:

- Ensure job descriptions are extended to include work for external bodies (with the appropriate approvals, for example from the Executive Director (Resources)).
- Extend the standard indemnity to include approved outside work where it comes within the extended job description.
- Have regard to the remuneration ceiling applied by law to directors of local authority controlled or influenced companies.