

8. Guidance to Councillors: Membership of Outside Bodies

An important part of the role for many Councillors is the oversight or management of outside bodies. In the majority of cases things work well and there are benefits to the Council, the outside body and the individual Councillor. However, there are pit falls and this guidance note has been produced to help avoid risks which may arise, particularly when things do not work out.

What to do when nominated to an outside body

- Satisfy yourself as to the type of body it is. For example is it a joint committee, an informal association or a legally constituted company or trust?
- Clarify the role you have been appointed to. Are you a Trustee, Company Director, Member of a Committee or just an observer?
- Be aware of the risks and pit falls. Check what indemnities are available from the Council and the body if things go wrong. Check your duties and be clear on anything that you may be personally liable for.

What types of bodies are there?

Incorporated Associations

- A club, group or society may be an incorporated association. This can be an informal organisation existing where several people joint together to carry out a mutual purpose other than for profit. If appointed as a member, a Councillor will have responsibilities to other members of the organisation which should be set out in the association's Constitution. This is simply an agreement between members of the association as to how the organisation will operate.
- If you are appointed to the management committee of such an association, you must act within its Constitution and use reasonable care. If the association holds any property or has any accommodation that needs to be held by one or more individuals as the organisation does not have a legal existence of its own.
- As a member of the management committee you will be personally liable for acts of that organisation but are entitled to an indemnity from the funds of the organisation as long as you act properly. If the organisation does not have enough funds then Committee members are personally liable for the shortfall.

- Care is needed where one person is appointed by the Constitution of an association to act as agent of the organisation for certain purposes. That person acts as agent for all members of the organisation who all have joint responsibility for the agent's actions.
- Members of a Committee of Management will have personal liability if they act outside the authority given to them or if they do not act within the law, for example if there is non-payment of tax and National Insurance for any employees of the association.
- Members of Management Committees are entitled to an indemnity 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. The Council cannot pay the cost of an insurance policy or give an indemnity for circumstances where the Councillor is acting in the capacity as a member of the Management Committee and not in their capacity as a Councillor.

Observers

- If appointed as an observer to an outside body, you will just be watching what happens. The position of an observer has no legal status and you have no special duty to the outside body. You are simply there to represent the Council's interests and will be covered by the Council's indemnities and insurances.
- It is important that you do not become involved unofficially in running the body as that could take you outside of these indemnities. For similar reasons you should avoid appearing to take part in decision making or accepting work or tasks on behalf of the body.

Consultative or Advisory Bodies

- You could be appointed to an external Committee which advises the Council on various issues. Your prime role will be as a representative of the Council. Difficulties can arise if you champion a position taken by the external Committee but that is likely to cause difficulties in taking part in council business rather than giving rise to financial liabilities.

Steering Groups, Joint Committees and Partnerships

- You may be appointed as a member or observer to a steering group or partnership body. You need to establish at the outset whether you are acting as a delegate/representative of the Council to promote the Council's interests or whether you have an independent role to fulfil on behalf of the group or partnership.
- You should avoid committing yourself on behalf of the Council or holding yourself out to be able to do so where you do not have any authority.

Company Directors

- Companies are legally constituted bodies and there is a range of legislation which regulates the conduct and responsibilities of Companies and Company Directors. If you are appointed as a Company Director, you will have the following duties.
 - When acting as a Director you own a fiduciary duty to act honestly and in good faith and in a way you consider most likely to promote the success of the company for the benefit of its members as a whole.
 - You are under a duty as a Director to exercise independent judgement, although it is permissible to take account of third party interest you may represent. You cannot simply vote in accordance with the Council's mandate as to do so would be a breach of your duty to the company.
 - You have a general duty of care and skill to the company. As a Director you will not be deemed to be an expert but you should be diligent and obtain expert advice when necessary.
 - You will have to have a duty not to create conflict – where there is conflict between the interests of the Council and the interests of the company you should not take part in discussions upon such topics both as a Councillor and as a Director. If the conflict is serious or one which repeatedly presents itself, the most appropriate course of action would be for you to resign as a Director of the company.
 - You have a duty not to make a private profit from the position. Any interest you or your family may have in relation to the company's contracts must be declared. Whether or not you can vote following declaration will depend upon the Articles of Association of the Company.
 - As a Director you must ensure compliance with relevant company legislation in relation to keeping of accounts and making relevant returns to the Registrar of Companies. Failure to do so incurs fines for which you are personally liable and persistent default can lead to disqualification as a Director.
 - You have a duty to ensure the company complies with other legislation, for example health and safety legislation if the company employs staff or contractors to undertake work.

Liabilities attached to being a Company Director

- The Council cannot provide indemnities or insurance for liabilities a Councillor incurs whilst acting as a Director. It is lawful and common practice for companies to purchase insurance to protect Directors against claims of negligence, breach of duty, trust or default. You are advised to satisfy yourself that such a policy of insurance is maintained at all times you are a Director.
- You cannot be indemnified by either the Council or the company against liability when you are acting as a Director which arises out of negligence, default or breach of duty or trust. However, you should check the Articles of Association of

the company as this will often allow Directors be indemnified by the company for the cost of defending any proceedings where you are granted relief by the Court or acquitted.

- When a company becomes insolvent, unless Directors have given personal guarantees they will usually not be liable for losses generally or to creditors of the Company. This will not apply where wrongful trading can be proved, i.e.: if there is no possibility of avoiding liquidation, Directors should ensure that the company does not continue to trade otherwise you could be personally liable for losses due to creditors. Also, if a company trades fraudulently and carries on trading with an intent to default creditors, you may also be personally liable whether you were aware of the fraud or not.
- Directors can be personally liable if the company acts outside its permitted powers.
- Although company liability ceases on the dissolution of the company, the liability of Directors may still be enforced after that dissolution.

The position of Charitable Trustees

- The Council often has a right to appoint Councillors to charities or charitable trusts it may have set up or gives funding to or which operate generally in the area.
- Charities and charitable trusts are regulated by the Charity Commission which provides a range of useful information.
- As a trustee you will have the following duties:
 - The duty to act in accordance with the Trust Deed and to protect the charity's assets;
 - A duty to comply with the Charities Act and other legislation affecting the charity;
 - A duty not to make a private profit from the position;
 - A duty to act with a standard of care which an ordinary prudent business person would show. Higher standards are required of professionals and in relation to investment matters.
- Trustees must ensure that information relating to the trust and trustees are registered with the Charity Commission and that annual accounts and returns are sent;
- If the charitable income exceeds £5,000, there is a duty to ensure that letters, adverts, cheques, etc., bear a statement that the organisation is a registered charity.
- Trustees are under a duty to ensure compliance with all relevant legislation, for example in relation to tax and health and safety at work.

Trustees' Liabilities

- Many trusts do not have corporate status and have no separate identify from the trustees. If appointed as a trustee you should check whether this is the case as if it is you together with the other trustees are personally liable for losses on contacts or claims by third parties, although trustees are entitled to an indemnity from the trust's assets provided they have acted properly in incurring the liability.
- As a trustee you will also have the following liabilities:
 - A liability to make good any deficiencies where trust property is used for a trustees own benefit or for purposes not in accordance with the purposes of the trust;
 - Personal liability for losses or claims where a trustee has acted outside the scope of the Trust Deed;
 - Personal liability where a trustee has not shown the required standard of care;
 - Personal liability for fines if the trust does not comply with duties to make returns, etc.
- It is important to remember that often trustees remain personally liable even after they have retired, for example where they have previously entered into a contract on behalf of a trust. It is important that when you stand down from a trust you seek an indemnity from your successors. You do not need to do this if a charity is a company when the trustees for the time being will be responsible.
- An indemnity can be given from the trust provided the trustee has acted properly and within their powers. Trustees can take out insurance to protect themselves against personal liability but not for criminal acts and fraud. If the charity pays the premium you will need to check the Trust Deed as the consent of the Charity Commission will be needed unless the Trust Deed expressly does not require it.

The Council Code of Conduct

- If you are appointed to an outside body and take an active part in it, this may limit the extent to which you can take part in some debates or votes in your role as a Councillor. You will have to have regard both to the Council's Code of Conduct and any rules governing your role on the outside body. If there are regular conflicts of interest you should resign from the outside body.

Council Indemnities

- Since November 2004 it has been possible for an indemnity to be provided in relation to any action or failure to act as a Councillor which is authorised by the Council, or where the Councillor is carrying on any functions at the request of, or with the approval of, or for the purposes of the Council. However, it does not extend to situations where a Councillor is acting other than as a Councillor, e.g.: where the Councillor is fulfilling personal obligations as a company director or

trustee. Then you must ensure that the outside body provides the necessary indemnities.