

MEMBERS ON OUTSIDE ORGANISATIONS: LEGAL IMPLICATIONS

1. INTRODUCTION

The Council is represented by elected Members on a number of outside organisations. There are often benefits from these arrangements and problems rarely arise in practice. However membership of an outside organisation carries with it various duties and potential liabilities. It is important that the extent of these duties and liabilities are properly understood.

2. LIABILITY

Members will generally always be responsible for their own actions. They may also be responsible for the actions of the outside organisation.

If the Council is itself a member of the organisation (for example the Local Government Association or South-East Employers), then ultimately the Council itself will pick up some responsibility if the organisation defaults on any of its obligations. With most voluntary organisations, however, the Council is itself not a member but is simply invited to nominate someone onto a management committee. In such cases if the organisation defaults on any of its obligations, the member is likely to carry a personal responsibility.

3. MAIN TYPES OF ORGANISATIONS

There are essentially four types of outside organisations – limited liability companies, unincorporated associations, charities and statutory corporations.

(a) Limited Liability Companies

There are companies limited by guarantee or by share capital. If the Council is a member of one of these companies, then the Council will be represented at general meetings, usually by a member. That member will act as a proxy for the Council, can be directed how to vote and will usually carry no personal liability. However, if at the annual meeting he/she is elected or nominated to serve as a member of the board or management committee and therefore becomes a director of the organisation, he/she then becomes an agent of the company and his or her prime duties are as follows.

Duties:

- (i) A fiduciary 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. The fiduciary duty of the director towards the company is very similar to the fiduciary duty of councillors to the Council tax payers.
- (ii) A general duty of care and skill to the company.
- (iii) A director is not deemed to be an expert but is expected to use due diligence and to obtain expert advice when necessary. A duty to exercise independent judgements and not to simply vote in accordance with a Council mandate.

- (iv) Not to make a private profit from his/her position.
- (v) To disclose actual or potential conflicts between his/her membership of the Council and his/her appointment as a director.
- (vi) To ensure compliance of the Companies Acts, in relation to the keeping of accounts and that the relevant returns are made to the Registrar of Companies.

Directors' Liabilities

Provide he/she meets the above obligations, a director will not have personal responsibility if a company then defaults on a contract or claim. However, he/she will have some liability if the company acts beyond the activities set out in the Memorandum of Association (the document which sets out the objects of the company) undertakes fraudulent trading i.e. continues to undertake business with intent to defraud, or it undertakes wrongful trading, which arises when a director knew or ought to have concluded that there was no reasonable prospect of the company avoiding insolvent liquidation, and yet he/she allows it to continue trading.

(b) **Unincorporated Associations**

Organisations which are not charitable trusts or limited liability companies or statutory corporations will generally be unincorporated associations. They have no separate legal identity and 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 day to day running of the organisation. An unincorporated organisation may be charitable and may register a charity.

Duties

Management committee members must act within the constitution and must take reasonable care in exercising their powers.

Liabilities

- (1) Generally, the management committee members 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.
- (2) 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.

- (3) Members of the committee of management will have personal liability if they act outside the authority given to them or if they do not comply with statute, e.g. the payment of employee's tax, etc.

(c) **Charities**

To be a charity an organisation must operate for a charitable purpose. There are four:

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

It must operate for the public benefit and have exclusively charitable purposes. An organisation which operates for political purposes will not qualify for charitable status.

To register as a charity the organisation must submit its trust deed to the Charity Commissioners for approval. If they are satisfied that the organisation is charitable it will be registered as such.

Those who are responsible for the control and administration of a charity are referred to as its trustees. They may also be called managing trustees, committee members, governors or directors.

Trustees of a charity retain personal liability, and can only delegate if the trust deed authorises them so to do.

Trustees' Duties

- (1) Trustees must take care to act in accordance with the trust deed and to protect the charity's assets. They are also responsible for compliance with the Charities Acts.
- (2) Trustees must not make a private profit from their position. They must also 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.
- (3) Charitable trustees must ensure that the information relating to the trust and trustees is registered with the Charity Commissioners and that annual accounts and returns are completed and sent.
- (4) Trustees are under a duty to ensure compliance with all relevant legislation (e.g. in relation to tax matters).
- (5) The Charity Commission have issued a useful publication about the responsibilities of Charity Trustees. A copy is attached (Appendix A). The principles apply equally to unincorporated associations and management committees.

Trustees' Personal Liability

(1) Generally, a trustee incurs personal liability if he/she:

- acts outside the scope of the trust deed
- falls below the required standard of care
- makes a personal profit from the trust assets

In such circumstances the trustee will incur personal liability for losses incurred.

(2) Trustees can be liable personally to third parties because unlike a company a trust has no separate identity from the trustees. Trustees are, however, entitled to an indemnity from the trust assets, provided they act properly in incurring the liability. Trustees remain personally liable once they retire (e.g. if they have entered into a contract on behalf of the trust) and should, therefore, seek an indemnity from their successors. If the charity is a company, however, the trustees for the time being will be responsible.

(3) Trustees may be liable to fines if they do not comply with the duty to make returns, etc.

(4) If in doubt, the Charity Commissioners should be consulted. A trustee who does so will avoid personal liability for breach of trust if he/she acts in accordance with any advice given.

Charitable Companies Incorporated by Guarantee

In a number of cases a charity may, in the first instance be formed as an unincorporated association and later, once established, replaced by a charitable company limited by guarantee. This vehicle is particularly suitable for widespread organisations employing significant numbers of staff and whose purposes involve them in risks of a commercial nature. Generally, the duties and liability of a director of a charitable company will be the same as for a director of a limited liability company.

(d) **Statutory Corporations**

These have a statutory base and the statute creating them will often contain specific provisions about the liability of members. Local Authority Joint Committees, for example, are covered by the Public Health Act provisions which grant a personal indemnity to Members who act in good faith.

4. SAFEGUARDS

The potential liabilities for assuming roles as a director trustee or member of a management committee are such that they should only be pursued if the representative believes that he or she has the time and capacity to undertake the roles and provided that those responsibilities are taken seriously on a continuing basis. The risks will of course vary depending on the nature of the organisation and its activities.

There are four elementary rules –

- (i) If the organisation occupies property, ensure that arrangements are in place to keep it in repair and that building contents and occupiers liability insurance is in place.
- (ii) If the organisation organised things, make sure that adequate public liability insurance is in place.
- (iii) If the organisation employs staff, make sure it has employees liability insurance and adequate resources to pay the staff.
- (iv) If the organisation enters into contracts, make sure that it has the financial resources to meet its obligations under those contracts.

5. DECLARATIONS AND CONFLICTS OF INTERESTS

This is a difficult area. If there is a potential conflict between the interests of the outside organisation and the interest of the Council, the representative appointed by the Council may be put in a difficult position.

At meetings of the outside organisation the representative should always put the body's interests first. When acting as a member of the Council e.g. at Committee meetings he or she should always put the interests of the Council first.

Under the Council's current Code of Conduct for Councillors where a matter comes before the Council and that matter relates to or is likely to affect any body to which a member of the Council has been appointed to, or nominated as a representative of, by the authority, the member will *only* have to declare a personal interest if the member is intending to address the meeting on that business.

If a member also has a "prejudicial interest" under the Code the interest has to be disclosed and the member must withdraw from the meeting. Each situation will need to be considered on its merits and further advice on this issue should be sought from the Monitoring Officer.

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