

# Crawley Borough Council

## Report to Overview and Scrutiny Commission 25 June 2018

### Review of Outside Bodies and Organisations Scrutiny Panel Final Report

Report by the Chair of the Review of Outside Bodies and Organisations Scrutiny Panel:  
Councillor C A Cheshire, **OSC/268**

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#### **1. Purpose**

- 1.1 The Review of Outside Bodies and Organisations Scrutiny Panel was established in January 2018 to evaluate the current system and to consider how and if, it adds value to the Council. This report presents the findings and recommendations. The key objectives of the review were:
- a) To assess the current position (identify strengths/weaknesses in the ways of working)
    - does the Outside Body representative have to be in their official Councillor capacity
    - how often meetings are held and attendance
    - does the Councillor provide feedback (eg HASC feedback to OSC)
  - b) Identify how the Link Officers liaise with the Organisations and Councillors
  - c) Identify how the Organisations liaise with the Councillors
  - d) Improvements to the current system
- 1.2 The Panel met 3 times between January and June 2018. The Members of the Panel were:  
Councillors C A Cheshire (Chair), M L Ayling, R G Burgess, R S Fiveash and A Pendlington.

#### **2. Recommendations**

- 2.1 To the Overview and Scrutiny Commission:

That the Commission considers the work of the Scrutiny Panel and the recommendations (further expanded upon in section 7), deciding what comments, if any, it wishes to submit to the Governance Committee at its meeting on 18 September 2018.

- 2.2 To the Governance Committee:

The Committee is recommended to approve:

- a) That an information sheet be prepared giving pertinent information relevant to the outside organisations to assist Councillors in agreeing nominations at group meetings which was trialled in advance of the 2018 AGM. (Further information is included in section 7).
- b) That it be highlighted that the nomination of Councillors to outside organisations is not predicated on their receipt of a Council grant or the need for scrutiny of its use, due to the stringent monitoring already in operation.

- c) That Councillors who sit on outside bodies must accept their obligations to maintain their responsibilities and that guidance/support should be provided to enable an effective service (be this from the Council, the outside organisation or that the Councillor initiate this themselves through effective liaison).

Request Full Council to approve:

- d) That nominations for Conservation Area Committees be defaulted to 'Ward Councillor(s)'.
- e) That 'Friends Groups' be removed from the official list of outside bodies list as there should be no formal Councillor representation.
- f) That where a response was not received to the evaluation, an appointment is no longer made by the Council (this is in line with other authorities undertaking a similar review).
- g) That there should be a mutual understanding between Councillors and organisations to maintain communication and effective liaison.

### **3. Reasons for the Recommendations**

- 3.1 To enable the Council to consider improvements to its current process (detailed in section 5) in appointing to Outside Bodies and Organisations as this is currently complex and confusing.
- 3.2 The review of outside bodies has been conducted to ensure that the Council activities in terms of outside bodies are more focused, that the information the Council holds is accurate and that Councillors have clear guidance on their role and responsibilities when appointed to an outside body.
- 3.3 To assist Councillors and Officers to continue to work in an efficient way. It is evident that the level of appointments to Outside Bodies has an impact on already busy Councillors' workloads. Whilst retaining links with Outside Bodies is an important aspect of community leadership, it is also important that the activities of the Council and Councillors are focused around corporate priorities and *where it can add most value to the Council or consider whether Councillor involvement could be undertaken differently.*

### **4. Background - The Panel's investigations and information gathering**

- 4.1 Outside bodies are external organisations which have requested that the Council appoint a representative to them. Outside bodies have separate governance structures to the Council. Appointments to outside bodies can be an important mechanism for community leadership, partnership and joint working. However in contrast, the evaluation concluded it is necessary that Councillors take a keen interest in the organisation and its management but in some instances knowledge, information sharing and joint working could be undertaken through other approaches.
- 4.2 It was agreed to review the appointment of outside bodies to ensure that Council activities in terms of outside bodies are more focused and actually add value to the Council. It was also necessary to ensure that Councillors have clear guidance on their role and responsibilities when appointed to an outside organisation.
- 4.3 Several local authorities have also reviewed their appointments to outside bodies. In many of these cases, a number of organisations did not respond to the evaluation and

it has been recommended that where a response was not received an appointment is no longer made by the Council.

#### 4.4 Appointments to outside bodies can include different roles:

- Trustee
- Committee Member
- Company Director
- Observer

*These different roles have different responsibilities and it is important that Councillors are aware of the nature of their appointment.* It is imperative that guidance and support be provided for Councillors who sit on outside bodies and there should be an understanding of their responsibilities under law. The Legal Implications Guidance (Appendix A) have been updated and will be circulated to Councillors to assist them in their outside body roles.

#### 4.5 As Councillors are appointed by the Council they must consider the code of conduct in terms of their actions on the outside bodies and adhere to the seven principles of public life and the general obligations under the code of conduct including acting with integrity and not bring the Council into disrepute.

### **5. Current Situation**

5.1 Each year the Council proposes representations to Outside Organisations to which the Council is invited to make nominations. In the year 2017-2018 there were 28 Outside Organisations and an associated Link Officer to each group, with usually at least 2-3 Councillors nominated to each Outside Organisation.

5.2 Once nominations are agreed, the Outside Body are informed by the Members' and Mayoral PA, of the details of the appointed Councillor(s) in an email. The email should ask the organisation to provide the Councillor with a clear statement of what will be expected of them. It should also state the Council's requirement for the Councillor to be indemnified, or for their involvement with the Body to be regularly risk assessed.

5.3 The Outside Body should be advised that they would be required to provide Councillors and Link Officers with timely agendas, papers and minutes of meetings.

5.4 The Link Officer are informed by the Members' and Mayoral PA, of the details of the appointed Councillor(s) and the Outside Body in an email that sets out the basis for their involvement in the Outside Body.

5.5 A Councillor, who is asked to take part on an outside body, should confirm with the outside organisation what will be expected of them. Councillors should be aware that the rules of the outside body and the Council might limit their ability to take an active part in discussions on particular topics within the Council.

5.6 The role of Councillors on outside bodies may give rise to occasional uncertainty and perhaps to conflicts of interest. In essence, if the outside body comes into conflict with the Council and the Councillor is a director, trustee or on the management committee of the outside body, it is likely that their prime duty would be to the outside body in the conduct of the outside body's affairs.

5.7 If there is a major dispute between the Council and the outside body, then the Councillor may be placed in an untenable situation. Ultimately, it is possible that the Councillor may find they are unable adequately to carry out their responsibilities properly, both as a Councillor and as a director, trustee or voting member on the

management committee of the outside body. In such circumstances there is no alternative but to resign from one of the positions. But this would be an exception, and should not deflect Councillors generally from being prepared to participate in and contribute to the outside organisation.

- 5.8 Councillors are urged to seek advice at an early stage if they are unsure of their responsibilities.
- 5.9 Councillors and officers on outside bodies are under a duty to exercise independent judgment in the interest of the organisation in which they are involved. Whilst it is recognised that Councillors and officers may have been appointed to represent the Council on the outside organisation, they must be aware that it is their responsibility to decide what view to take on any question before that organisation. Where a Councillor or officer is partaking in an outside organisation in a representative capacity, they must declare that fact to the organisation on taking up the appointment. If it is not possible to bring this to the attention of the organisation before the first meeting, then this should be done at the first meeting of the organisation in question. There will be a fine line to tread between the duty to the organisation and to the Council.
- 5.10 Ultimately, the Councillor or officer in acting as a director/trustee or member of a management committee of an outside organisation must act in accordance with the interests of that organisation. A mandate from the Council to vote one way or the other would put the Councillor or officer in breach of duty to the organisation. It is permissible to take account of the Council's wishes, but not to vote simply in accordance with them. The overriding duty in considering an item before the outside organisation is to vote in accordance with the interests of that organisation. If this is not possible then the Councillor/officer should absent themselves from the consideration of the item and not participate in the decision on the matter.
- 5.11 Councillors and officers on outside bodies must also ensure that avoidable loss is not incurred in managing the organisation. They cannot avoid this responsibility by not reading the papers or failing to ask for appropriate reports. They will be expected, where appropriate, to seek professional advice.
- 5.12 Under the Members' Code of Conduct, a Councillor appointed as the Council representative to a specific body has a personal interest which must be declared and forms part of that Member's Register of Interests held by the Council. This also requires the Councillor to disclose the existence and nature of the interest whenever the Councillor wishes to speak on the matter at a meeting of the Council. Councillors will also need to consider whether the personal interest also gives rise to a prejudicial interest in the circumstances.
- 5.13 Councillor duties as directors, or trustees or as members of a Management Committee may well be regarded, on an objective appraisal, as giving rise to a legitimate perception of lack of impartiality, especially having regard to the desirability of maintaining public confidence. Councillors will be aware that participation in the making of a decision by a Councillor disqualified by bias impairs the decision. In these circumstances legal advice should be sought prior to participating. If for example the Councillor simply participated in a decision making forum, bias is unlikely to arise. Similarly for membership of an advisory or consultative body a Court is unlikely to assume bias unless that body had determined a line which is being advocated by the Councillor.
- 5.14 The same rules do not apply to Councillors who attend meetings of outside bodies unambiguously as observers. Observers can participate in discussions of the outside body but will not have a right to vote.

## **6. Methods of Investigation and Evidence Gathering**

### **Witnesses**

- 6.1 The following officers have been involved in the Review, as the most appropriate stakeholder representatives that had been identified through the Scoping Framework:
- Craig Downs (Funding and Commissioning Officer)
  - Anthony Masson (Senior Planning Officer)
  - Ian Warren (Senior Planning Officer)
- 6.2 Both Senior Planning Officers provided information on the role, the support services provided together with the work carried out with the appointed Councillor(s) throughout the appointment to the Outside Organisations and the Organisations themselves.
- 6.3 Both officers work was planning based, and for the purposes of the scrutiny panel was in connection with the Conservation Area Committees where there was a historic or architectural interest or if there were comments required on a planning application. The majority of the committees were independent but worked with the Council. Attendance by Councillors tended to be by Ward members. With regards to the role and responsibilities, it was made clear that the officers do not attend every meeting and only do so if there is a specific issue or item of concern. However if/when a new Conservation Area Committee is established greater attendance may be required at the outset purely to assist in the arrangements and to provide guidance. It was confirmed that the officers act as advisors as the Councillors tend to have the local knowledge and provide the conduit between the Council and the Committee.
- 6.4 The Funding and Commissioning Officer confirmed information relating to the grants process. It was acknowledged that the role of the Link Officer was advisory and assisted in enabling communications between the Council and outside organisations or voluntary/community sector.
- 6.5 It is therefore noted that Officers' roles should be advisory and the Councillors nominated to outside organisations should be the conduit (link member) and assist the organisation with providing links to other services within the Council should other queries arise. It is paramount for the nominated Councillors to be the link between the organisation and the Council.

*All Link Officers are identified based on their specific knowledge of the service area and Outside Organisation.*

### **Link Officer Role -**

- To act in an advisory capacity.
- Assist in enabling communications between the Council and Outside Organisation / Voluntary Sector.
- To act as a local contact point if required between the Council and Outside Organisation / Voluntary Sector.

### **Desk Based Research**

- 6.6 Desk based research was undertaken to survey other authorities that had reviewed their appointments to outside bodies or recently updated their guidance. These included: London Borough of Sutton, Hertsmere Borough Council, London Borough of Southwark, Southampton City Council, Worcester City Council and Dartford Borough Council.

## **Consultation**

- 6.7 The Scrutiny Panel sought views from internal and external stakeholders (Councillors and Link Officers) and all 28 Outside Bodies through a consultation exercise (survey).
- 6.8 At the time of writing, 11 responses had been received from outside organisations.
- 6.9 Of the 28 surveys sent to Link Officers (one per organisation), 11 responses had been received from Link Officers.
- 6.10 Of the 56 surveys sent to Councillors (one for each organisation), 20 responses had been received from Councillors nominated on outside bodies, 36 surveys remain unreturned which the Panel felt was disappointing.

## **7. Findings, Actions & Supporting Recommendations**

- 7.1 Referring to the consultation analysis, it was clear that there were inconsistencies with regards to the survey responses.

### **Community Grants Programme**

- 7.2 It was evidenced that some responses linked the nomination of outside organisations to the receipt of community grants. It was highlighted that this was a misunderstanding. The nomination of Councillors to Outside Organisations should not be undertaken based on the provision of, or the scrutiny of, the Council awarding a Community Grant.
- 7.3 The provision of Community Grants is specifically administered by the Funding and Commissioning Officer within Community Development and applies stringent terms and conditions. Organisations awarded funding are required to sign a standard funding agreement, which includes certain undertakings - which includes providing regular detailed monitoring reports on the use of any funding within a specified period. The Grants Process is audited through the Council's Internal Audit. This is included in the Internal Audit Plan, submitted to the Audit Committee.

### **Recommendation:**

**That it be highlighted that the nomination of Councillors to outside organisations is not predicated on their receipt of a Council grant or the need for scrutiny of its use, due to the stringent monitoring already in operation.**

### **Survey Results**

- 7.4 At the time of writing, 11 responses had been received from outside organisations. Other local authorities had been strict in their approach to reviewing appointments to outside organisations. It is recommended to duplicate this approach and despite reminders being issued, where responses are not received it is proposed that an appointment is no longer made.

### **Recommendation:**

**That where a response was not received to the evaluation, an appointment is no longer made by the Council (this is in line with other authorities undertaking a similar review).**

- 7.5 The majority of those responses received from the outside organisations were positive in terms of the current relationship and how well this had worked over the last 12 months.

- 7.6 However, one organisation highlighted that they no longer wished for a Councillor appointment, whilst another stated that their organisation was purely a 'group of volunteers' and the Councillor 'acts voluntarily as contact point to the Council and its services'.
- 7.7 It is apparent from this response, that there are groups where there may be no need for an official Council nomination. The Councillor would not serve on the body as a representative of the Council but through a natural interest in local activity and the group would be removed from the official outside bodies list. A 'Friends Group', by default was resident led or by voluntary group. The largest park in the town has Councillor attendance but not in a nominated Councillor capacity and Councillors can still become a 'Friend' through other ways. There was strong support to remove 'Friends Groups' from the outside bodies list as there should be no need for formal Councillor representation. A Councillor can continue to liaise and provide guidance as part of their constituency duties or attend independently.

**Recommendation:**

**That 'Friends Groups' be removed from the official list of outside bodies list as there should be no formal Councillor representation.**

- 7.8 At the time of writing, 11 responses had been received from Link Officers. Unfortunately one Link Officer also responded to say that they did not know which organisations they were a Link Officer for.
- 7.9 Whilst 73% (8) of the respondents receive agendas for the meetings, only 27% (3) regularly attend the meetings. This supports the information provided at the witness sessions by the Planning Officers that officers only attended where there was a specific need.
- 7.10 With reference to the responses from Councillors, 36 surveys remain unreturned. *Based on the 20 responses received, only 55% correctly identified their Link Officer.*
- 7.11 There was a mixed response in terms of 'adding value' to the Council. 75% (15) of Councillor responses had positive comments regarding the process. It should be noted that other respondents included inaccurate reference to the Community Grants process.
- 7.12 More alarmingly, following the analysis that had been completed it was clear that *Councillors were unaware or unsure of the capacity in which they serve on the various outside organisations.* When comparing and contrasting the results from the organisations along with those from Councillors nominated for that organisation it was apparent that the majority of Councillors were not clear, or misunderstood the role.
- 7.13 Out of the 7 responses received from both the outside organisation and Councillor, 4 Councillors answered that they did not know in which capacity they served, whilst only 3 Councillors correctly identified the capacity. This potentially has implications with regards to voting rights and liabilities. Where an organisation stated that the nominated Councillor would serve as an observer, 1 Councillor correctly identified this to be their role, however another response incorrectly identified that they would be a committee member. This could prove problematic if the Councillor believes they serve in a decision-making capacity.
- 7.14 Interestingly, when comparing the responses to the individual Councillors' Register of Interest forms on the website, these had the correct organisations documented and yet survey responses were still inaccurate. One organisation stated that the nominated Councillor would be a trustee; the Councillor's survey response stated that they did not know in what capacity they would serve and yet in their Register of Interest form documented the organisation as a 'Trustee Board'.

- 7.15 There were responses regarding specific organisations, in particular Conservation Area Committees. Some Ward Councillors tended to be nominated to these as a matter of course. Some survey responses had incorrectly indicated that these Committees provided a way of being aware of activities within the ward. As documented via the witness sessions and the responses from the organisations themselves, the purpose of the Conservation Area Committees was planning based and dealt with historic and architectural interests or if there are comments required on a planning application.
- 7.16 Additionally, a response provided from a specific Conservation Area Committee questioned the need for a Councillor to attend every meeting.
- 7.17 Given this information, it is recommended that these be defaulted to 'Ward Councillor(s)'. In the rationale and grouping of organisations which have in the past had representation from the Council it is clear some groups require a liaison role. Therefore it would be possible for organisations to approach individual Councillors to provide advice and guidance as part of their constituency duties. However this would be at the discretion of the Councillor, rather than the Council.

**Recommendation:**

**That nominations for Conservation Area Committees be defaulted to 'Ward Councillor(s)'.**

- 7.18 As a result of the evidence collated, there is a need for Councillors to be better informed regarding the outside organisation to which they are appointed. Additional information giving pertinent information relevant to the outside organisations would assist Councillors in completing the nominations at group meetings. This would include information such as number of nominees required, frequency of meetings, time of meetings (daytime/evening) and location. It is therefore recommended that a detailed information sheet be compiled by Democratic Services as part of the nomination process (and this was trialled in advance of the 2018 AGM).

**Recommendation:**

**That an information sheet be prepared giving pertinent information relevant to the outside organisations. The aim is to assist Councillors in completing nominations at group meetings.**

- 7.19 That Councillors who sit on outside bodies must accept their obligations to maintain their responsibilities and support should be provided to enable an effective service (be this from the Council, the outside organisation or that the Councillor initiate this themselves through effective liaison).

**Recommendation:**

**That Councillors who sit on outside bodies must accept their obligations to maintain their responsibilities and guidance/support should be provided to enable an effective service (be this from the Council, the outside organisation or that the Councillor initiate this themselves through effective liaison).**

**That there should be a mutual understanding between Councillors and organisations to maintain communication and effective liaison.**

## **8. Legal Implications**

- 8.1 Legal Implications Guidance document providing Councillors with further information relating to their role has been updated (Appendix A).

**9. Background Papers**

[Scoping Framework](#)

[Review of Outside Bodies and Organisations Scrutiny Panel Notes 22.2.18](#)

[Review of Outside Bodies and Organisations Scrutiny Panel Notes 28.3.18](#)

**10. Panel Membership and thanks**

- 10.1 The Panel would like to thank all the Councillors and officers who gave up their time to attend the various Panel meetings, and for their valued comments, views and advice.

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## GUIDANCE TO COUNCILLORS WHO SERVE ON OUTSIDE BODIES – LEGAL IMPLICATIONS

### Introduction

This guidance is intended to help Councillors understand their duties when appointed to outside bodies, and how to handle the conflicts of interest that can arise. Councillors always need to be clear about their roles and alert to potential conflicts of interest, in order to ensure transparency and public confidence in local democracy.

#### 1. General

1.1 Membership on outside bodies can take various forms and it is prudent to establish the capacity in which you are appointed. The first question is whether you are appointed by the Council, or in some other capacity. If you are not appointed by the Council to a particular position, you do not owe the Council any duties in relation to the way in which you carry on your membership of the outside body. However, the normal rules on declaring interests apply, and you will need to consider whether your role gives you a personal or pecuniary interest under the Code of Conduct for Councillors in relation to any Council business. The remainder of this guidance covers the case where you are appointed by the Council.

1.2 If you are appointed by the Council, this may be either:

- a) as a member of the management committee, board of directors, or committee of as a trustee of the outside body. Here, you will not only be representing the interests of the Council, but you will also have duties to the outside body and a role in its governance. If you serve in a decision-making capacity or have a position of general control or management on the outside body, whether company, trust or other association, you owe duties and responsibilities to that body which are separate and distinct from your duties owed to the Council. On occasions, it is likely that duties owed to the outside body and to the Council, will conflict e.g. If you are the treasurer of an outside body who has applied to the Council for grant funding and the rest of this guidance gives more detail on this; or
- b) As an 'observer', or an ordinary member, or undertaking a monitoring role, facilitating exchanges of views or information as an extension of your Council duties, but taking no part in the outside body's management or governance, other than to attend and vote at annual or general meetings. Here, you will be mainly concerned with representing the Council and will not have responsibilities for governance of the body.

1.3 Before accepting an appointment to an outside body, you should check:

- the legal status of the organisation e.g. company, trust, charity, unincorporated association;
- the capacity in which you are to be appointed e.g. director, trustee, member with voting rights or member with observer status;
- the purpose of the organisation and how this relates to the Council's functions and objectives;
- the relationship between the Council and the body and the likelihood and extent of any conflicts of interest;

- the requirements of the organisation's governing instruction (e.g. constitution; trust deed, memorandum and articles of association), both as a member and generally;
- the organisation's governance and decision making arrangements, including the management of risk;
- the organisation's code of conduct for its members;
- the extent of the organisation's insurance/indemnity cover for its members;

It is your responsibility to obtain the answers to these matters.

1.4 Having checked the above matters, you should consider carefully whether you should be appointed to participate formally in the management of the external organisation e.g. as a director, trustee or voting member, or whether your role as a representative of the Council, may be more effectively discharged as a non-voting member with observer status only.

1.5 You are entitled to all reasonable assistance from Officers in support of your role as Council representatives on outside bodies. Such assistance will include the provision of information about the body and the identification of a link officer to be available for briefing purposes and to assist you in reporting back to the Council on the activities of the body.

## 2. What sort of roles does this guidance apply to?

2.1 This guidance applies where you are: a member of another authority; a trustee of a charity; or a member of the management board for an unincorporated body.

2.2 The various roles will give you responsibilities to the organisation, and to the Council in so far as you are fulfilling a role for the Council, and this can create potential conflicts.

2.3 Your responsibilities will depend on the type of body in which you become involved. In summary, the main types are as follows:

- a) **Companies:** Companies are separate legal entities. They are set up by their members, who may be either shareholders or guarantors. Liability of company members is limited to the value of their shares or by guarantee. Directors of companies have a duty to the company to act properly and in good faith. If not, they can incur personal liability, particularly if the company becomes insolvent. The activities and operation of companies are regulated by their Memorandum and Articles of Association, and also by company law.
- b) **Unincorporated Associations:** Unincorporated associations are informal organisations. The members regulate their relationship by agreement, such as a membership agreement or the rules of the club or association. Because the association has no legal existence separate from its members, the liability of the members is not limited. Each member can incur personal responsibility for liabilities incurred on behalf of the association, and relies on the membership agreement to be able to recover his/her costs from the other members.
- c) **Charities:** A charity is an organisation which
  - (i) is established for charitable purposes only, and
  - (ii) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities.

Some companies and unincorporated associations are established for charitable purposes. A charity gains relief from corporation tax, VAT and business rates, but is subject to stricter regulation by the Charity Commissioners, to ensure that it is properly managed and that it is spending its money properly on the charitable objects. As a trustee of a charity, you have a duty to act in the best interests of the charity and can be personally liable if you breach that duty.

### **3. Some other key points to consider at the outset**

- 3.1 Firstly, make sure you are given a clear statement of what is expected of you if you are going to be nominated. You should be able to obtain this from the organisation involved
- 3.2 **The duty to act in the interests of the outside body** - Being on an outside body can bring many benefits to the Council, the organisation and the community, but it will sometimes create conflicts with your work as a Councillor. For Councillors, it will have to be included as one of your interests in the Members' Register of Interests. You will have a personal interest in Council business referring to it, and sometimes a pecuniary interest where finances or regulatory matters are concerned. You will need to be sure that involvement with the organisation will not prevent you from fully participating in your work as a Councillor, particularly in areas that interest you, or, where you need to represent the community who elected you. This will depend on the nature of the body and type of involvement.
- 3.3 On the other hand, you will also need to make sure that you are able to commit enough time and attention to the organisation. You will want to make a meaningful contribution to their work too. If you cannot attend meetings very often, or are often conflicted out of participating, you will not be able to give the support that the organisation needs, and this will reflect badly upon the Council and upon you. It is best not to be appointed if you cannot participate fully.
- 3.4 **Conflict with your role as a Councillor** - As a member of the organisation's management committee, as a director of a company, or as a trustee, you will not only be representing the interests of the Council, but you will also owe duties and responsibilities towards the organisation. You will have to exercise your own best judgement in the best interests of the outside body and you cannot just take instructions from the Council although you may take account of the Council's wishes. Where the Council's wishes may conflict with the best interests of the outside body you must nevertheless, if taking decisions for that outside body, act in its best interests. **Therefore where the Council's interests and the outside body's interests conflict it is crucial not to involve yourself in the decision-making.**
- 3.5 **Indemnities** - Councillors who participate in external bodies may be indemnified in relation to liabilities they incur in that capacity, though this is subject to certain limitations, which are set out in more detail at paragraphs 8.1 to 8.4 below.

### **4. Duties and Responsibilities of Councillors on Outside Bodies**

- 4.1 The following is a summary of the main duties and responsibilities of Councillors who are nominated by the Council to the most common types of outside body. The main principles of the obligations applying to company directors also apply to trustees and members of management committees. If you are in doubt about your duties and responsibilities, you may seek advice as above. In many cases, however, it will be more appropriate to seek advice from the advisers to the body involved, as they will have access to the rules and protocols of the body.

## 5. Companies

- 5.1 A company is a separate legal entity which can hold property in its own right, enter into contracts, employ staff and sue and be sued in its own name. The company is distinct from its members, who may be either shareholders or guarantors. The Council itself may be a member of the company, either a shareholder or guarantor.
- 5.2 If the body is a limited company, and you are asked to be involved, it is likely that you will be appointed as a company director. The duties of a company director are now set out in the Companies Act 2006, which codifies the existing common law and equitable principles. The management of a company is usually the responsibility of the Board of Directors. Directors' powers are usually set out in the company's Articles of Association. Another important document is the Memorandum of Association, which sets out the Company's objectives and powers.
- 5.3 The duties of a company director are not the same as your responsibilities as a Councillor. **Basically, when involved in company business, the company must come first.** Directors must act in the interests of the company, and not in the interests of other parties, including shareholders.
- 5.4 **Directors' Responsibilities** are:
- a) **To promote the success of the company**, A director's primary duty is to act in good faith, in the best interests of the organisation and its objects. All directors owe a fiduciary duty to their company, which means they owe loyalty to the company and a duty of care to act in the best interests of the company, having regard to the interests of the members or shareholders of the company, the company's employees, and creditors. This includes having regard to the likely long term consequences of decisions, the interests of employees, fostering relationships with suppliers and customers and others, the impact of operations on the community and environment, maintaining a reputation for high standards of business conduct, and acting fairly between members of the company
  - b) **To exercise care, diligence and skill**, using your own knowledge, skill and experience, together with the care, skill and diligence which may reasonably be expected of a person who is carrying out the functions of a director. So a director with significant experience must exercise the appropriate level of diligence in exercising their duties in line with their higher level of expertise. Although directors are not bound to attend all meetings of directors, attendance should be as frequent as possible and directors should ensure that they are reasonably informed at all times.
  - c) **Not to exceed powers**. A company director must act in accordance with the company's constitution, and exercise powers for the purposes for which they were given.
  - d) **To comply with the Companies Acts** in relation to the keeping of accounts, and ensure that the relevant returns are made to the Registrar of Companies. Failure to do so will incur fines and persistent default can lead to disqualification as a director.
  - e) **To avoid conflicts of interest**. A director must avoid a situation in which he or she has, or may have, a direct or indirect interest which conflicts, or could conflict, with the interests of the company. This duty applies particularly to transactions between a director and a third party in relation to the exploitation of any property, information or opportunity.
  - f) **To exercise independent judgement**. A director nominated by the Council cannot, for example, simply vote in accordance with the Council's instructions. To do so would be a breach of duty. The director must act in the company's interests.

- g) **Not to accept benefits from third parties.** A company director must not accept any benefit from a third party (whether monetary or otherwise) which has been conferred because of the fact that he or she is a director. This is based on the established principle that a director must not make a secret profit as a result of being a director. This duty applies unless the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.
- h) **To declare an interest in a proposed transaction or arrangement with the company.** A company director who has either a direct or an indirect interest in a proposed transaction or arrangement with the company must declare the 'nature and extent' of that interest to the other directors before the company enters into the transaction.

5.5 **Directors' Liabilities:** If a director fails to carry out his/her duties, action can be brought for breach of duty, either by the company itself, or by a liquidator if the company goes into liquidation, or with the consent of the court, by a shareholder. Such actions are unlikely where the company is properly controlled by the directors.

5.6 Some important considerations are:

- a) It is not always easy to reconcile the various factors which must be taken into account when reaching a major decision. The important thing as a director is to show that you are aware of and have taken account of the relevant factors, and have exercised due care and diligence in giving them all fair consideration.
- b) It may be difficult to be certain whether benefits may be regarded as giving rise to a conflict of interest. If you are unsure take advice from the company's advisers.
- c) Make sure you are aware of the company's constitution, its Memorandum and Articles of Association, so that you know what it can and cannot do. You must take this into account when making decisions, as well as any shareholder decisions that are relevant.
- d) Be diligent, and make sure you are well informed about the company's affairs. Make sure you are well briefed when taking up the role, and that you receive regular briefings throughout your term of office.
- e) Attend training and briefing sessions.
- f) Ensure insurance is in place.
- g) Some Board decisions may be reviewed on a future occasion. Make sure detailed minutes show that all necessary factors have been considered when major decisions are being taken. Obtain expert advice where necessary e.g. regarding impact of a decision on the environment. Take legal advice where there are doubts about a director's duty in relation to a particular matter.

## 6. Unincorporated Associations

6.1 "Unincorporated associations" have no separate identity from their members. 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 everyday running of the organisation. Management Committee members must act within the constitution, and must take reasonable care in exercising their powers. An unincorporated organisation may be charitable and may register as a charity.

6.2 If you are involved in a decision making capacity or have a position of general control or management on an unincorporated body, as the body has no separate corporate

status, any liabilities will fall upon you personally. Councillors appointed to such bodies should familiarise themselves with the Constitution to understand the nature of their role, responsibilities and liabilities, and should assess the risk of personal liability, and the extent to which it has been covered by insurance.

## **7. Charities:**

7.1 A charity is an organisation which operates for the public benefit and exclusively charitable purposes, either:

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

7.2 A number of useful publications are available on the Charity Commission's website at [www.charitycommission.gov.uk](http://www.charitycommission.gov.uk). Publication CC3 - 'The Essential Trustee- What you Need to Know' is a useful guide. Those who are responsible for the control and administration of a charity are referred to as its trustees, even where the organisation is a company limited by guarantee and even though they are not strictly trustees. A charity may also be unincorporated.

7.3 Trustees of a charity retain personal liability, and can only delegate to the extent that the constitution authorises them so to do.

7.4 **Charitable Trustees' Responsibilities** are:

- a) To act in accordance with the charity's trust deed or governing document.
- b) To protect the charity's assets.
- c) To comply with the Charities Acts, and the Trustee Act 2000.
- d) Trustees must not make a private profit from their position. They cannot receive remuneration without the sanction of the Charity Commission.
- e) To 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.
- f) Charitable trustees must ensure that the information relating to the charity and trustees is registered with the Charity Commissioners and that annual accounts, reports and returns are completed and sent.
- g) Trustees are under a duty to ensure compliance with all relevant legislation (e.g. in relation to tax and land matters).

7.5 **Charitable Trustees' Liabilities:** Generally, a trustee may incur personal liability if s/he:-

- acts outside the scope of the trust deed
- falls below the required standard of care
- acts otherwise than in the best interests of the charity, in a way which
- Causes loss to the charity fund
- makes a personal profit from the trust assets

7.6 In such circumstances the trustee will be in breach of trust, and will incur personal liability for losses incurred. If in doubt, always consult the Charity Commissioners. You may avoid personal liability for breach of trust if you act in accordance with their advice.

7.7 Trustees can incur personal liabilities for contracts they enter into in the name of the charity. They will normally be entitled to be reimbursed from charitable funds for liabilities and expenses properly incurred by them. If the charity is a company, the trustees will be protected from liabilities incurred in the day-to-day running of the charity in the normal course of events, but will be personally liable if they commit a breach of trust, as stated above.

## 8. Indemnities

8.1 Councillors who participate in external bodies may be indemnified in relation to liabilities they incur in that capacity, though this is subject to certain limitations.

8.2 Indemnity by the outside body:

- a) Directors: Directors cannot be indemnified by the company against liability for negligence, default, breach of duty and trust. Companies can however purchase insurance to protect directors against claims of negligence, default, breach of duty and trust. Those appointed as directors should ensure that appropriate insurance is in place. Companies can, if their Articles of Association allow, provide for directors to be indemnified for the costs of defending such a claim if they are granted relief by the court or acquitted.
- b) Trustees: Provided a charitable trustee acts properly, and within his/her powers, indemnity can be given from the trust fund. Trustees can take out insurance to protect themselves from personal liabilities, but not for criminal acts such as fraud. If the premiums are to be paid out of the charitable funds, the consent of the Charity Commissioners will be needed.
- c) Unincorporated Associations: Members may be entitled to an indemnity if they act in accordance with the Constitution of the association, and are not at fault. However, regard must be had to the terms of the constitution. The constitution will determine whether insurance can be paid for by the organisation.

8.3 Indemnity by the Council: The Council may provide an indemnity where Councillors are acting on an outside body at the request of the Council, and provided:

- the appointment was made by the Council, or
- the nomination was made by the Council, and
- the appointment was specifically approved for the purpose of the indemnity.

8.4 The indemnity the Council can provide is subject to limitations. In general terms, if a Councillor is acting properly, within their powers and in good faith, the power to indemnify will usually apply. However, the Council cannot, for example, provide an indemnity in relation to any action or failure by any Member which constitutes a criminal offence, or for any action or failure by any Member which is the result of fraud, or other deliberate wrongdoing or recklessness on the part of the Member. When you are serving on an outside body, the Council's indemnity will only apply after any indemnity or insurance from the body itself. There are further limitations and it is advisable to be clear about the scope of the Council indemnity that may be available to you. You can seek further advice on indemnity from the monitoring officer.

## 9. Code of Conduct – Councillors' Interests

9.1 **Code of Conduct:** Under the Localism Act 2011 all Councillors are subject to the Council's Code of Conduct for Councillors. You will find a copy of the full Code in the Constitution and on the Council's web page. When Councillors act as representatives of the Council on another authority, they must comply with the other

authority's Code of Conduct. However, when Councillors act as the Council's representative on any other sort of outside body, they must comply with the Council's Code of Conduct unless it conflicts with the lawful obligations of the other body.

- 9.2 The Register of Members Interests requires Councillors to tell the Monitoring Officer in writing within 28 days of taking office, or within 28 days of any change to your interests, of any interests which fall within the categories set out in the Code of Conduct for Councillors. These categories include your membership or position of control or management in any other bodies to which you are appointed or nominated by the Council. It is your duty to keep this up to date.
- 9.3 This means that if you are present at a meeting when an item of business arises which relates to or affects an outside body to which you have been appointed, you must declare that you have a personal interest, and the nature of that interest, before the matter is discussed or as soon as it becomes apparent to you.
- 9.4 An exemption applies where your interest arises solely from your membership of, or position of control or management on:
- any other body to which you were appointed or nominated by the authority
  - any other body exercising functions of a public nature (for example another local authority).

In these exceptional cases, provided that you do not have a pecuniary interest, you only need to declare your interest if and when you speak on the matter.

- 9.5 You will also have a pecuniary interest in Council business affecting the outside body if:
- the matter being considered affects the financial position of the
  - outside body; or
  - relates to an approval, consent, licence, permission or registration
  - affects the outside body e.g. an application for planning permission.
- 9.6 If you have a pecuniary interest in a matter under discussion you must declare it. You must then leave the meeting room, unless members of the public are allowed to make representations, answer questions or give evidence about the matter. If that is the case, you can make your representations etc., but must leave the room immediately after doing so. The Code of Conduct for Councillors supports your role as a community advocate and enables you, even with a pecuniary interest, to represent your community and speak on issues that are important to them and to you.
- 9.7 **Bias:** Where you might be inclined to the view that you have no pecuniary interest, your duties as a director, or trustee, or member of a management committee may well be regarded, on an objective appraisal, as giving rise to a legitimate fear of lack of impartiality, especially having regard to the desirability of maintaining public confidence. Participation in the decision making at a Council committee meeting by a Councillor who is biased potentially invalidates the decision. If you find yourself in this position or are concerned please seek legal advice as above before meeting as the law is complex regarding bias, predisposition and predetermination. Overall the rules of natural justice must prevail.
- 9.8 Where membership of the outside body is on an advisory or consultative basis, bias will not be assumed from mere membership. However, once the outside body has a line which is being advocated by you and you take part in the Council's decision making process, this could potentially be viewed as bias, and the Council's decision on the issue could be vulnerable to challenge. It will depend on the facts,

and in such circumstances advice should be sought as above.

- 9.9 **Substitution:** Where you take no part in the outside body's management or governance, other than to attend and vote at annual or general meetings e.g. as an 'observer', or undertaking a monitoring role, facilitating exchanges of views or information as an extension of your Council duties, another Councillor may substitute for you on the outside body. However, if you have a role in the governance of the outside body i.e. you serve in a decision-making capacity or have a position of general control or management as director, trustee, etc., no other Councillor can substitute for you.
- 9.10 **Feedback:** Feedback is an excellent vehicle to communicate the Council's involvement in outside bodies to the wider community. It is important for the Council to receive feedback on issues affecting outside organisations where Councillors are nominated to represent the Council.
- 9.11 **Further Guidance:** Further advice or clarification can be sought from the Monitoring Officer.

Legal and Democratic Services

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