

APPENDIX II**BRIEFING NOTE FOR MEMBERS APPOINTED TO OUTSIDE BODIES****INTRODUCTION**

The purpose of this briefing note is to provide a summary of issues and an overview.

This is not a comprehensive guide. It is an overview only to highlight some issues of which Members should be aware, particularly if they are appointed or nominated by the Council to an outside body. It does not apply to partnerships, which are covered by a separate Partnership Protocol.

Roles or positions Members may be appointed to include:

- Trustee/Charitable Trustee
- Director
- Voting Management Committee Member
- Adviser
- Observer

The main responsibilities for the different roles are set out in the table in Appendix I.

Regardless of the type of organisation or role, Members should:

- note their duty to exercise independent judgment in the interest of the external organisation;
- note the need to declare their representative capacity to the outside body, when appropriate;
- when acting as the Council's representative, note the obligation to comply with the Council's Code of Conduct, unless it conflicts with any legal obligations arising due to involvement with the outside body; and
- observe the rules concerning bias or predetermination, by not having a closed mind to other information. A firm commitment or mandate to vote a particular way, could amount to predetermination or bias

Nature of the arrangement:

- **Nomination:** the Member's main responsibility will be to the organisation to which they have been appointed.

- **Representative (i.e. observer):** depending on the circumstances and legal arrangements, the Member can present the Council's views and look after the Council's interests. In this role the Member will not vote nor be involved in the administration of the outside body.

CODE OF CONDUCT

Registration of Interests

The Code of Conduct says you have 'a personal interest in any business of your authority where it relates to or is likely to affect an interest that you must register.

You must register your membership or position of control or management in:

- any body to which you are appointed or nominated by your authority
- any body directed to charitable purposes

If you are a charity trustee, you must always register your interest in the charity whether you are appointed directly by the charity or nominated by your local authority'.

This requirement applies when you are a member and in a position of management over the charity [Standards for England's guidance 'Charitable Trustees and declarations of interest under the Code' - see Appendix II].

Interests should be registered with the Monitoring Officer **within 28 days**.

Declarations of Interest

Even if your interest is on the register of interests, you must declare it in the meetings where matters relating to that interest are discussed.

A **personal interest** arising because of membership of an outside body needs to be declared *only when you intend to speak* and where:

The business of your authority which relates to or affects the charity or outside body 'might reasonably be regarded as affecting your well-being or financial position' or that of people with whom you have a close association 'more than it would affect the majority of inhabitants of the ward or electoral division or authority's area affected by the decision'.

A **prejudicial interest** should be declared and you should withdraw from the room if:

A member of the public, who knows the relevant facts, would reasonably think your personal interest is so significant that it is likely to prejudice your judgement of the public interest and where the matter:

- *affects your financial interests (including the charity or outside body of which you are a director or trustee) or*
- *relates to a licensing or regulatory matter concerning the charity or outside body of which you are a director or trustee.*

CHARITIES

The Council can be involved with or make nominations to different types of charitable trusts. It is therefore important to establish what type of trustee role is held.

In addition to the information in Appendix I, it should be noted that there are different types of Trustee, but they must all act in the interest of the charity. The following publications provide more information about the requirements of charitable trusts and the responsibilities of Trustees:

- Appendix II: Standards for England – Charitable Trustees and Declarations of Interest
- Appendix IV: Charities Commission ‘Councillors’ guide to a council’s role as charity trustee’ – this guidance applies where the local authority is the sole trustee of the Charity

INDEMNITIES

The Council is not able to indemnify appointees to outside bodies, where the appointees are not exercising functions of the Council. The outside body should make the necessary arrangement for insurance or indemnity cover. However, cover is only usually available if the person does not act criminally, with improper motive or recklessly. Appendix III contains an extract from the Council’s Insurer’s advice to members and officers appointed to outside bodies.

Advisers and Observers

Persons appointed by the Council as advisers or observers will normally be covered by the Council Insurance Policy as long as they act within the scope of any authority given to them by the Council.

Company Directors

The Local Government Act 2000 enables the Council to purchase insurance to indemnify councillors who suffer losses through acting conscientiously as a director. However, the scope of SBC’s indemnity set out in Appendix III only covers advisory roles and not decision-makers.

Trustees

The Trust's Constitution may give Trustees an indemnity, but Trustees remain liable once they have retired so it is advisable to seek an indemnity from their successors. This should be established with the outside body.

Management Committees/Unincorporated Associations

An association can obtain insurance, which should be paid for out of its funds or from contributions from its members. If members of the association act within the terms of the Constitution, and within any authority given to them, they should avoid personal liability and should be indemnified by the association.

Monica Blades-Chase, Interim Head of Legal Services

1 June 2010

APPENDICES

- **Appendix I: Roles and Responsibilities**
- **Appendix II: Standards for England's guide**
- **Appendix III: Extract from Zurich Municipal's publication**
- **Appendix IV: Charity Commission and LGA 'Councillors' guide: to a council's role as charity trustee'**

Acknowledgements:

*Epping Forest District Council's Constitution; Thurrock Borough Council's Constitution
Milton Keynes Council's Constitution; the Charity Commission and Standards for
England – Guides to Code of Conduct and Charitable Trustees*

ROLES AND RESPONSIBILITIES

ROLE	RESPONSIBILITIES/ACTING IN WHOSE INTEREST
<p>Trustee/Charitable Trustee – for example where the Council is sole trustee</p>	<p>The Councillor’s main responsibility will be to the organisation to which they have been appointed.</p> <p>Unless the Trust is also a company it is not an separate legal entity, which means that trustees can be held personally liable for losses suffered by a third party. They may also be liable for any fines if they fail to submit returns.</p> <p>Trustees must, amongst other things:</p> <ul style="list-style-type: none"> ▪ use reasonable care and skill to ensure that the Charity is well run and efficient, and consider seeking professional advice if there is a material risk to the charity’s assets; ▪ act in accordance with the Trust Deed/ Charity’s Constitution and ensure that the charity fulfils its charitable purposes; ▪ act with integrity and avoid personal conflicts; ▪ act in the best interest of the charity/trust; ▪ not make personal profit; ▪ fulfil their duty to ensure compliance with all relevant legislation; and ▪ protect the Trust’s assets. <p>In some circumstances, breach of these requirements could result in personal liability.</p> <p>All trustees are equally responsible regardless of how they were appointed. They can still be bound by decisions of other trustees, when not present at meetings</p> <p>If appointed as Trustee to a charity, there will also be obligations to comply with the Charities Acts (esp. regarding tax and land transactions) and obligations imposed by the Charity Commission.</p> <p>For charities formed as companies, there will be obligations under company law – see below.</p>
<p>Director</p>	<p>The Company will be a separate legal entity and its Directors must comply with the requirements of the Companies Acts, and other legislation .e.g. Health and Safety Acts.</p> <p>As a director the Councillor’s main responsibilities will be</p>

Director – cont'd

defined by legislation and will be set out in the Articles and Memorandum of the organisation to which they have been appointed. The Memorandum of Association also sets out the activities of the Company, and should not be exceeded.

In particular, Directors:

- must take care of the company's assets and have a fiduciary duty to the company;
- owe a general duty of care and skill to the Company. They must use due diligence and obtain expert advice if necessary. However, if the company becomes insolvent the Director may be expected to bring an appropriate level of skill, competence and experience to the job;
- have a general duty to exercise independent judgement. This means that they cannot vote accord to the Council's mandate;
- must either choose to remain as a Director or a member the Council when facing a potential conflict between the Council and the Company;
- may be ordered to contribute to the company's assets on liquidation if they do not take all reasonable steps to minimise the loss to creditors;
- may still be personally liable for any losses if they;
 - breach trust;
 - are aware of a breach by a co-director and fail to act;
 - fail to act in the best interest of the company;
 - use power improperly;
 - make a personal profit;
- must ensure that, unless the Council agrees, any remuneration received does not exceed their allowance;
- must declare any remuneration received;
- must give information to other councillors about their activities; and
- must cease being a director immediately if disqualified as a Councillor.

If the company is also a registered charity, then there will also be obligations to the Charity Commission.

<p>Voting Management Committee Member</p>	<p>A group or body that is not a charitable trust or company will be an 'unincorporated association'.</p> <p>The organisation is not a separate legal entity so any property or assets will be held by individuals.</p> <p>The organisation should have a constitution that sets out its membership; duties; liabilities; and how the organisation should be run. This is likely to involve a Management Committee, and the individual committee members will be liable for the organisation's activities.</p>
<p>Adviser</p>	<p>Holds no position of control within the outside body and should be authorised by the Council to advise the body. The adviser must not exceed any authority given to them by the Council.</p> <p>Professional rules may apply to some advisers</p>
<p>Observer/ Representative</p>	<p>Holds no position of control within the outside body and should be authorised by the Council. The observer must not exceed any authority given to them by the Council.</p> <p>The observer can act in accordance with the Council's wishes, but must declare their role and relationship with the Council.</p>

Standards for England's Guidance "Charitable Trustees and declarations of interest under the Code"

Introduction

This guide is aimed at councillors who are trustees of charitable organisations. It explains the different types of charities that you may be involved in. It also aims to provide you with a better understanding of your role so that you know when to register and declare your interest under the Code of Conduct.

Any mention of a charitable organisation in this guide refers to a registered charity or an unregistered body which is directed to charitable purposes.

Understanding your charity

There are two main types of charities, incorporated charities and unincorporated charities.

An **incorporated charity** is a corporate body which has a legal existence that is separate from the individual persons that form it.

Most incorporated charities are limited companies registered with Companies House and the Charities Commission.

An **unincorporated charity** may be a 'trust' or 'association'.

An unincorporated charity cannot itself 'hold' the legal title to land or other forms of investment because it has no separate legal status. For this reason, its land or investments will be held on its behalf by:

- individuals or an incorporated body known as a custodian trustee;
- a holding trustee; or
- a nominee.

Appointment

A charity's governing document sets out your charity's purposes and how it is to be administered. It will also, usually, set out how trustees are to be appointed which can vary according to the individual charity.

The governing document may be:

- a trust deed;
- a constitution;

- memorandum and articles of association; or
- another document.

A trustee can be appointed directly by a charitable organisation or nominated by their local authority. He or she may be appointed to manage the charity or to only hold the title to the charity's land or investments. It is important to understand your role as a trustee in order to understand if you have an interest to register.

Charity trustees

Charity trustees serve on the governing body of a charity. They may be known as trustees, directors, board members, governors or committee members, or they may be referred to by some other title. For example, some charity trustees are known as 'officers' and have special responsibilities such as chair, treasurer or ex-officio trustee. An 'ex-officio trustee' is a type of charity trustee who is in that position because of their office, such as the mayor of a town or the head teacher of a school.

Whatever their title the principles and main duties of a charity trustee are the same. Charity trustees have and must accept ultimate responsibility for directing the affairs of a charity. They must ensure that it is solvent, well-run, and delivers the charitable outcomes for which it has been set up, for the benefit of the public. To act outside of their powers is a breach of trust.

Nominated trustee

Sometimes an individual is nominated by an organisation to be a charity trustee. For instance, a local authority may nominate its councillors onto the governing body of a charity that operates in its area and for which it has provided funding. Despite being appointed in a different way, nominated trustees (sometimes known as representative) have the same legal duties and responsibilities as any other charity trustee.

Other types of Trustee

There are three types of trustees who only hold the charity's land or investment; a custodian trustee, a holding trustee and a nominee.

A **custodian trustee** is a corporation, such as the treasury solicitor, limited companies, health authorities, local authorities or other types of organisations, whose main function is to hold the legal title to all investments and property on behalf of the charity. Note that an individual can never be one.

A **holding trustee** and a **nominee** can either be an **individual** or a **corporation**. They too hold the legal title to a charity's property or investments on behalf of the charity.

Corporate trustees

A corporate trustee is a corporation such as a local authority which has itself been appointed to act as a trustee of a charity. It may be appointed as a charity trustee or custodian trustee (holding trustee or a nominee) or both.

A local authority may act as the custodian trustee only if the charity is for the benefit of the people living in the whole or part of its area, and not an ecclesiastical charity or a local charity for the relief of poverty. For example, parish councils are often appointed custodian trustees of charitable village halls, recreation grounds and youth clubs.

If the corporation is appointed as a charity trustee it may be a “trustee for all purposes” acting on its own (a sole trustee) or one of a number on a body of charity trustees (a joint trustee). A corporation does not itself need to be charitable to be a trustee of the charity.

Many local authorities act as sole trustees of local charities – especially charities for recreational or educational purposes. This means the local authority as a corporate body both holds the property and oversees its application as a charity trustee.

If a local authority is itself the charity trustee, it decides within the scope of local government law, what structures should be used to reach decisions in its name as a charity trustee. For example, it may decide all the decisions are to be reached by the council or it may decide to delegate the decisions to a separate management committee. Whatever the structure employed, the individual councillors concerned are not themselves charity trustees and are not required to register their role in relation to the charity in their register of interests. When making charity decisions at the council or management committee meetings, they must only act in the best interests of the charity and independently of their local authority interests.

What personal interests should I register?

The Code of Conduct says you have a personal interest in any business of your authority where it relates to or is likely to affect an interest that you must register.

You must register your membership or position of control or management in:

- any body to which you are appointed or nominated by your authority; and/or
- any body directed to charitable purposes.

If you are a charity trustee, you must always register your interest in the charity whether you are appointed directly by the charity or nominated by your local authority. This is because you are a member and in a position of management over the charity.

An example of this would be paying the charity’s employees or making decisions on the organisation direction.

Are there circumstances when I do not have to register a personal interest?

Yes there are. A holding trustee or nominee who only holds the charity's land or investment will not have a personal interest and will not need to register an interest. This is because he or she will not be a member of the charity nor in a position of general control or management. This type of trustee can only act on the lawful instructions of the charity trustees and in accordance with any provisions contained in the governing document.

Please note: Holding the legal title to a charity's property is usually all that holding trustees do. However, occasionally a charity's governing document may confer additional powers and responsibilities on a holding trustee. If you are a holding trustee who has any decision-making powers in the way the affairs of the charity are managed – either solely or together with other trustees you will be acting as a charity trustee and must register your interest as explained above.

If you do not have any of these decision-making powers, then you will not need to register your interest as an individual holding trustee.

Personal interests that affect your well-being or financial position

It is important to remember that even when your role does not give rise to an interest that needs to be registered it may still be a personal interest that you need to declare. This is because a decision in relation to the business of your authority which relates or affects the charity might reasonably be regarded as affecting your well-being or financial position more than it would affect the majority of inhabitants of the ward or electoral division or authority's area affected by the decision.

For example, you might have a personal interest if you are on a local authority's management committee, a trustee of a non-charitable trust, or a holding trustee or nominee.

Case Example

Haven Parish Council ('council') is the custodian trustee of Haven Village Hall. Councillor Jones is a parish council member and has been appointed by the Council to the governing body of the Village Hall Trust ('Charity Trustee'). The village hall is in need of repairs and the Charity Trustee applies for a council grant for the repairs. The council meets to consider the surveyors report and agree the funding. Does Councillor Jones need to declare any interest at the meeting?

- As a custodian trustee the council holds the legal title to the Haven Village Hall. The council will be able to act as a custodian trustee if the charity is for the benefit

of the people living in the whole or part of its area. However the council can only act on the lawful instructions of the charity trustees of the Village Hall Trust. The council itself is not a charity trustee.

- Councillor Jones has been nominated on to the governing body of the Village Hall Trust by the council. Whether appointed directly by the trust or nominated by the council, Councillor Jones is a charity trustee. He must register this interest because he is a member and in a position of general control or management of a body to which he has been nominated by the council and also as it is a body which is directed to charitable purposes.
- When the matter relating to the grant application comes before the council, Councillor Jones will have a personal interest which he has registered and he must declare this interest at the meeting.
- As the matter affects the financial position of the trust, Councillor Jones may also need to declare a prejudicial interest and withdraw from the room if in his view an objective person would consider his interest as so significant that it is likely to prejudice his judgment of the public interest.

This guidance and other information on the Code of Conduct can be found on Standards for England's website. www.standardsforengland.gov.uk/Guidance/

APPENDIX III

This is an extract from a Zurich Municipal publication regarding insurance issues concerning this topic

Members and Officers on Outside Bodies

“Recent court decisions have provoked much debate and comment which has led to a review and clarification of insurance cover offered by insurance companies. The types of placements and the outside organisations involved vary considerably. It is important that everyone appreciates the terms under which they operate.

Scope of Indemnity

Legal opinion now appears agreed that authorities can provide an indemnity to individual members and employees in limited circumstances only.

Those circumstances are where:

- an individual acts solely on behalf of his or her authority, within the terms of reference laid down by the authority, and solely in pursuance of the local authority's statutory powers;
- the individual acts solely in an advisory capacity in connection with the local authority's functions;
- the individual occupies an observational role on the board or committee of an outside organisation, representing the local authority's interests (rather than in a decision making capacity);
- the individual acts on behalf of a joint committee established by two or more local authorities.

The authority is not able to provide an indemnity or incur any costs in respect of those activities where the individual acts:

- solely on behalf of an outside body, or
- outside his or her delegated powers, or
- outside the authority's statutory powers.

Members and Officers

A local authority may only delegate the power to exercise its functions to a committee or an employee. It may not delegate to an individual elected member. This means that members can participate on outside organisations as observers or facilitators in the exchange of views or information as an extension of their position as local authority

members, but they may not make any decisions which are binding on the authority. Members are therefore not permitted to serve in an executive capacity on an outside body.

A member's status as a local authority councillor does not prevent serving on an outside body in a personal capacity, provided this is not inconsistent with his or her duties as a local authority member.

Insurance position summary

The position of the Council's insurers is as set out below:

- local authority policy cover applies where the work involved for the outside body is in an advisory, rather than a decision-making capacity; and
- the outside body should effect cover in its own right, and local authority members and employees should ensure that adequate cover for them is in place before agreeing to the placement.”