

Sandwell Metropolitan Borough Council

Guidance to Members Appointed to Outside Bodies

- 1** This guidance sets out the main issues which you, as a Councillor, should consider when appointed by the Council to serve on an outside body. In the context of this guidance, an “outside body” covers organisations such as Trusts, Voluntary Bodies, Charities, Community Associations, School Governing Bodies, Companies etc.
- 2** Service on outside bodies has always been an established part of a Councillor’s role. An appointed member on an external body will be able to use their knowledge and skills as a council member, and as a representative of their communities, to assist the organisation to which they are appointed.
- 3** Councils are increasingly working in partnership with external organisations. This means that it is important that everyone is clear exactly what the role of Councillors appointed to these bodies is. Questions of accountability and governance are likely to arise particularly as more funding may be channelled through the council to these outside bodies.
- 4** Membership of an outside body brings into play different considerations to those which relate to council membership. As a member of an outside body you will have different duties, obligations and liabilities depending upon the type of organisation involved. There will also be times when your responsibilities as a Councillor and your obligations to the outside body are pulling in different directions and this guidance seeks to help with these difficult situations.
- 5** If you have any queries on this guidance or on anything which relates to your involvement as a Councillor on an outside body, please do contact the Monitoring Officer for help and advice.

Things to consider before appointment

- 6** Appointment to an outside body can take various forms, and before taking up active membership it is always sensible to establish exactly in what capacity you are being appointed. This may be either:
 - As a member of the management committee, board of directors or committee of trustees of the outside body. Whilst you may have been appointed to the body by the council, your primary responsibility will be to the body itself, to advance the interests of the body or of the beneficiaries of the trust, as opposed to acting as a representative of the council. You will have detailed responsibilities which are outlined further in this guidance (See below); or
 - As a member of an outside body where you represent the council’s position as a ‘member’ of the outside body but take no part in its management or governance

- 7 It is important to make this distinction as it can affect what you need to do in terms of registration and declaration of interests – this is dealt with further below.
- 8 Other issues to think about before accepting an appointment are
- Will you have sufficient time to dedicate to the needs of the outside body? This is important as many outside bodies will be companies or trusts which bring legal responsibilities to those who agree to serve on them and the law is unsympathetic to people who don't, for example, spot forthcoming financial problems. Saying that you were too busy to read papers or to get to meetings is no excuse if the body gets into financial difficulties and creditors look to all the directors to ask why no action was taken to avoid the situation.
 - Will your membership of this body cause such conflicts and difficulties in relation to your role on the council that you can no longer act on such matters within the council and could add more value to the work of the body by declining the invitation to serve on their board? Sometimes outside bodies feel that inviting a Councillor to become, say, a Trustee, will ensure that the Councillor is able to “go in to bat” for them in council discussions on grants and budgets. The exact opposite may happen – because of the involvement and the need to declare a code of conduct interest (see below) the Councillor may not be able to participate in the debate at all.

Matters to Check – Questions to Ask

- 9 Other important things to check and clarify in relation to an appointment to an outside body are as follows:

9.1 What is the nature of the organisation?

Organisations can take many forms and it is important to be clear exactly what the organisation is as this will affect your role on it and also the potential risks of being involved. This is dealt with further below.

One of the most important things is to find out if the organisation is a separate legal organisation (i.e. a body which has an identity of its own such as a company) or whether it is simply a group of people coming together with a common purpose (an unincorporated organisation). An unincorporated organisation generally poses the biggest risk to those involved in it because if something goes wrong, personal legal action can be taken against everyone managing it.

If the organisation has a formal legal constitution and set up, find out exactly what it says.

For example, is it a company, and if so what type of company is it? It could be a company limited by shares (usually where it is of a commercial nature

and is trading in some way) or a company limited by guarantee (usually where it is a community body and often a charity).

You can tell if the outside body is a company by checking on its letterhead/paperwork – the company number should be stated there.

Is the body a charity? Charitable status brings tax and other benefits but also places important additional responsibilities on people involved in it. You can check if the body is a charity by looking for the number on its letterhead/paperwork shows it is registered with the Charity Commissioners.

The body might be a Trust of some kind. A trust arises where property is held by trustees for the benefit of the beneficiaries of the trust. So the trustees are directly responsible to the beneficiaries. Confusingly some companies might have “Trust” in their name so it is important to ask questions and be clear as to they type of organisation you are being asked to/are considering joining.

There are lots of other types of outside bodies, for example governing bodies of educational institutions and boards of Industrial and Provident Societies (most registered social landlords/Housing Associations are IPSs). If you have any queries, ask the Secretary or Clerk and speak to the Council’s Monitoring Officer.

9.2 In what capacity am I being asked to serve on the outside body?

As stated above, it is important to be clear whether you are being asked to play an important role in the day-to-day running of the body (e.g. as a Director of the company or as a charitable trustee) or are you simply being invited to join a general membership with no specific overall responsibilities.

One way of checking this is to look carefully at anything you are asked to sign when appointed. If you are being asked to become a company director you will have to sign a form which will be registered at Companies House. Similarly if you are becoming a charitable trustee, there will be formal papers to sign.

9.3 Do I know exactly what the organisation has been set up to do?

Ask for a copy of the body’s governing instrument (this may be a trust deed, a constitution or memorandum and articles of association). It is important that all organisations keep within their legal powers and work to achieve the objectives for which they have been set up – you will not be able to check this unless you have seen the details of this.

9.4 Do I understand the Governance of the organisation?

Make sure you know who else is on the board/trust. Also make sure you know who the Secretary or Clerk is – they will be an important person to get information from and to go to for advice, Ask for copies of the minutes of recent meetings and make sure you understand how the decision making of the body works.

Also check if you have been supplied with a copy of any code of conduct to which you might be subject as a member of the body.

9.5 Do I know what the financial position of the organisation is?

One of the main areas of risk for appointees on outside bodies is the financial stability and health of the organisation. Make sure you have seen, and if necessary got advice on, the last annual report and accounts. Check that the body receives regular reports on the financial position and also make sure the body looks regularly at any risks and the steps being taken to address them.

You should also check whether the body has insurance in place which covers your role on the body – not all organisations do this but it helps address any personal risk you might run in taking part in the outside body.

10 Once you have checked exactly what your role on the body will be and what it does, the key issues to be considered are

- The application of the council's code of conduct;
- The primary duty to act in the interests of the outside body;
- Duties as a company director (if applicable);
- Duties as a charity trustee (if applicable);
- Liabilities in respect of unincorporated organisations;
- Conflict with your role as a Councillor.

Code of Conduct – Register of Interests

11 The Council's Code of Conduct requires that:

“13 (2) Subject to paragraph 14, you must, within 28 days of becoming aware of any new personal interest or change to any personal interest ..., register details of that new personal interest or change by providing written notification to your authority's monitoring officer.

You must register a personal interest in:

“8 (1) (a) (i) any body of which you are a member or in a position of general control or management and to which you are appointed or nominated by the Authority”

12 So if you are appointed in that capacity to an Outside Body you must register that interest with the Monitoring Officer

Council's Code of Conduct – General Provisions

13 The council code of conduct requires that a member must observe the code of conduct whenever the member is acting as a representative of the authority.

14 The code of conduct also states:

“2(5) Where you are act as a representative of the authority:

- (a) *on another relevant authority, you must, when acting for that other authority, comply with that other authority's code of conduct; or*
- (b) *on any other body, you must, when acting for that other body, comply with the authority's code of conduct, except and insofar as it conflicts with any other lawful obligations to which that other body may be subject."*

- 15** The requirements of the code of conduct in respect of disclosure of personal interests and withdrawal for prejudicial interests are set out later in this guidance.
- 16** The following paragraphs look at what you must do if you are appointed to an outside body i.e. what responsibilities you owe to that body. This guidance concentrates on three main types of body which are the ones you are most often likely to come across -
- Limited Company
 - Charitable Trust
 - Unincorporated Association

Limited Company

- 17** If the outside body to which you are appointed is a limited company, it is likely that you will be appointed as a company director. You will need to complete a form giving your details for filing in the Register of Companies at Companies House. The secretary of the body should assist you with this.
- 18** A company has a separate legal personality to its shareholders (also described as company members or subscribers). One of the main advantages of acting through a limited company is that shareholders can claim the benefit of limited liability. In the case of a company limited by shares this means that they will not be liable for the debts of the company if the company makes losses over and above the amount which they have pledged to pay the company for their shares. In a company limited by guarantee this means that the shareholders 'guarantee' to contribute a specified sum if called upon to do so (usually a nominal amount of £1) in the event that the company goes into insolvent liquidation.
- 19** Duties of company directors are not the same as your responsibilities as a Councillor. These duties can be summarised as follows:
- A duty to the company, not to the individual shareholders or Members, to act honestly and in good faith and in the best interests of the company as a whole. Directors are, therefore, in a similar position to trustees who must take proper care of the assets of the company.
 - A general duty of care and skill to the company. A director is not deemed to be an expert, but is expected to bring a reasonable level of competence to the job and to use due diligence and to obtain expert advice if necessary.
 - Like a Councillor in respect of council decisions, the director is under a duty to exercise independent judgement, though it is permissible for him to take into

account the interests of the third party which he represents (such as the council). In such a case, you must disclose that position and tread a fine line between the interests of the company and the party represented. You cannot vote simply in accordance with the council mandate: to do so would be a breach of your duty to the company.

- You have a duty to avoid conflicts of interest arising between your duties to the company and your duties to the council. There may be actual or potential conflicts between the interests of the council and the interests of the company. For example, the company might be inflating a bid for a council grant. Where ever a conflict of interest arises, you will have to disclose that conflict to the company is very much the same way as you disclose a conflict of interest to the council. Where that conflict cannot be resolved, the only proper course is for the Councillor to resign either from the company or from the council.
- Directors are not allowed to make a private profit from their position. You must therefore disclose any interests you or your family have in relation to the company's contracts. Whether they are then allowed to vote will depend upon the company's Articles of Association.
- Directors must ensure compliance with the Companies Acts in relation to the keeping of accounts and that the relevant returns are made to the Registrar of Companies. Failure to do so incurs fines and persistent default can lead to disqualification as a director.
- You should also ensure compliance with other legislation such as health and safety and equalities legislation if the company employs staff or employs contractors to undertake works.

20 If you are in breach of any of the duties imposed on you as a director, you may be personally liable to reimburse to the company any profits made / losses incurred as a result (although this liability may be excused if you acted honestly and reasonably).

21 You need to be particularly careful when acting as a company director if there is any prospect of the company becoming insolvent i.e. not having sufficient assets to pay its debts. When a company becomes insolvent, or it is foreseeable that it will be insolvent, directors of the company have a higher duty of competence and attention to company business than when the company is still solvent. If they fail to take every possible step to minimise the company's debts, they may be personally liable for any additional losses suffered by creditors of the company ("wrongful trading"). A director may be found guilty of fraudulent trading (a criminal offence) if he /she allows the company to trade with an intent to defraud creditors.

22 If you become a company director there are some useful guidance documents to assist you on the websites of the Institute of Directors and Companies House as follows

www.iod.com
www.companieshouse.gov.uk

Charitable Trustees

- 23** Those who are responsible for the control and administration of a charity are referred to as trustees, even where the organisation is a company limited by guarantee, though they are not strictly trustees. A number of publications are available on the Charity Commission's Website at: www.charitycommission.gov.uk. and you should look particularly at Publication CC3 - "Responsibility of Charity Trustees" which is a useful reference document. A charity may also be unincorporated (see below).
- 24** The duties of charity trustees can be summarised as follows:
- Trustees must act for the benefit of the charity and its beneficiaries.
 - Trustees must take care to act in accordance with the charity's trust deed or governing document and to protect the charity's assets i.e. act to ensure that the people the trust is held for benefit. They are also responsible for compliance with the Charities' Acts and the Trustee Act 2000.
 - 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.
 - 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.
 - If charitable income exceeds £10,000, the letters, adverts, cheques etc must 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.

Unincorporated Organisations

- 25** Groups that are not limited companies or another form of separate legal body may be "unincorporated associations" which have no separate identity from their Members/Owners. The rules governing the Members/Owners' duties and liabilities will (or should) be set out in a constitution, which is simply a contract or agreement between 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 when exercising their powers.
- 26** If you become involved in the administration of an unincorporated body, you need to be aware that, as the body has no separate corporate status, any liabilities will fall upon the members personally. This means that if something goes wrong and the

organisation is sued, the members/owners personal assets are at risk – they cannot stand behind a company or other body which gives them some protection.

- 27** If you take on personal responsibilities for the organisation, such as buying equipment or renting premises, you are personally liable for the entire cost, and can only recover those costs from the organisation to the extent that it actually has the money to reimburse you, or from the other members of the organisation to the extent that the membership agreement gives you the right to be reimbursed by each if them.
- 28** You need to be very careful about the risk of personal liability and the extent to which this has been covered by insurance arrangements (either arranged by the organisation itself or by the Council or by indemnities (see below).

Conflicts of interests and bias

- 29** If you are appointed to an Outside Body you will have a personal interest in that body and will need to consider your position when you sit on council, cabinet, a council committee or other decision-making body which is considering a matter which relates to that body.
- 30** If you attend a meeting where there is an item of business which relates to or affects the outside body, you will need to disclose the interest at the meeting, regardless of whether or not you were appointed onto the outside body by the council, or by the outside body itself.
- 31** The next issue is to consider whether you also have a prejudicial interest which would require you not only to disclose it but also to withdraw from consideration of that item of business.

The Code of Conduct provides a three part test, as follows –

- First, do you have a personal interest in the item of business. Prejudicial interests can only arise if you first have a personal interest.
 - Second, the interest must be so immediate that “a member of the public with knowledge of the relevant facts would reasonably regard (it) as so significant that it is likely to prejudice your judgement of the public interest”. That means that it must be probable that you feel such allegiance or loyalty to the outside body on which you serve that you could allow that loyalty to affect the way that you would speak or vote on the matter - i.e. that you will act because a particular decision benefits the outside body rather than because it is in the genuine public interest.
 - Finally, the item of business must either affect the financial position of the outside body or relate to the determination of a planning or other application of the outside body.
- 32** If you do decide that you have a prejudicial interest, you must disclose this and leave the meeting room and not influence the debate or decision in any way. If the

council body making the decision has a policy of allowing members of the public to speak, you can use this avenue legitimately to speak to the meeting but you must follow the rules of the public speaking session and then leave the room as soon as you have spoken on the matter.

- 33** You should take advice from the Monitoring Officer if any situation arises where you think you might have a problem with an interest arising from your involvement with the outside body.
- 34** Whilst a failure by a Councillor to disclose a personal interest, or to disclose and withdraw for a prejudicial interest, may lead to sanctions against the individual Councillor, it will not of itself invalidate the decision of the authority in which the Councillor participated. However, where there is a real possibility that the decision of the Council might have been affected by bias or predetermination on the part of one or more Councillor, that decision can be held by a Court of Law to be invalid. You therefore need also to be careful about the possibility of bias and predetermination when you are dealing at the council with matters involving an outside body on which you serve.
- 35** Any Councillor who is about to take part in a decision, either collectively with other Councillors or as a sole executive member, must not allow him/herself to be unduly influenced by his/her allegiance to any outside body or individual, nor to give the impression that he/she might be so influenced. That is bias and apparent bias. It arises because of a connection to an outside body or person.
- 36** It also follows that, whilst a Councillor may have preferences and predispositions, he/she must not finish the decision-making process until he/she has received and considered all the relevant information relating to the matter. To do so would be predetermination. Whilst it is accepted that Councillors live in the real world and will discuss matters with colleagues and constituents, and bring the benefit of those discussions to the Committee Room, they must still listen to the arguments and be prepared to change their mind if the evidence so requires.

From this it will be apparent that particular difficulties arise where a Councillor is a member of an outside body such as a pressure group, which is seeking to influence the authority's decision on a particular matter, as such membership can readily be taken as evidence of bias and/or predetermination. On occasion, and particularly in respect of local, single-issue pressure groups, you may have to choose whether to be a campaigning Councillor, participating in a pressure group, or to remain outside the campaign but be able to vote on the issue when it comes before the council.

Confidentiality

- 37** You are likely to receive confidential information both in your capacity as a Councillor and as a member or member / trustee / officer / director of the outside body.
- 38** If you are given confidential information as a Councillor, you would be in breach of the Code of Conduct if you disclosed that information outside the Council except in the following very limited circumstances –

- Where the person to whom the information belongs agrees to disclosure;
- Where you are required by law to disclose it, for example by an order of a court of law;
- To take legal advice on the confidentiality of the information; or
- Where the disclosure is made in accordance with the Council's Whistle-Blowing Code

- 39** If you disclose confidential information which you have received as a trustee of a charity or as a director of a company, you can be removed from that position and will be personally liable to the charity or the company for any loss which you have caused.
- 40** If you receive confidential information as a Councillor which would benefit or disadvantage an outside body of which you are a member / trustee / officer / director, or if you receive confidential information as a member / trustee / officer / director of an outside body and that information would benefit or disadvantage the Council, that is clear evidence that there is a serious conflict of interest between those positions. Unless the outside body has acknowledged that you are there as a representative of the Council and will be reporting back to the Council, you should certainly not participate in any decisions where you have such relevant confidential information, and you should seriously question whether you can reasonably continue to hold both posts.

Gifts and Hospitality

- 41** As a Councillor, you must disclose to the authority's Monitoring Officer any gift or hospitality with a value in excess of £25 which you receive because in the course of your duties as a Councillor or as a consequence of being a Councillor. Whilst gifts and hospitality of relatively small value are normally not a problem, but can give rise to an impression that you may be open to improper influence, especially when they come from someone who has business with the Council, such as a contractor, someone who is bidding for a contract, or applying for planning permission. If you accept a gift or hospitality as an inducement or reward from anything that you do as a Councillor, knowing that to be improper, it can amount to the criminal offence of corruption.
- 42** As a trustee of a charity or a director of a company, you must not obtain any private benefit in connection with your position other than any proper salary or allowances received from the charity or the company. If you do receive such a gift or hospitality, you will have to disclose it to the charity or company, and may be liable to the charity or the company for any such private benefit.
- 43** If you receive any gift or hospitality in your role as a member / trustee / officer / director of an outside body which you have been appointed by the Council, strictly you receive that gift or hospitality as a member / trustee / officer / director of that outside body and not as a Councillor, and so you do not have to disclose it to the Monitoring Officer.
- 44** Where the trust or company has been established by the Council, for example in outsourcing property management of another function of the Council, the trust or company is not allowed to pay you any more as trustee or director than the special

responsibility allowance which you would have received had that function remained within the Council.

Indemnities

- 45** If you agree to act as a member / trustee / officer / director of an outside body, you can incur personal liability, as described in this advice note. The real danger areas are –
- as a director of a company which becomes insolvent;
 - as a member of an unincorporated association; or
 - if you fail to apply yourself as a trustee of a charity.

A company can take out insurance to cover any liabilities which its directors incur (except for criminal conduct). A charity and an unincorporated association normally cannot take out such insurance. So, if you are appointed to an outside body, you should ask them whether they have insurance to cover any liabilities which you might incur.

- 46** It is possible in some circumstances for the council to indemnify you in respect of any liabilities which you may incur in acting on behalf of the council on an outside body (other than liabilities arising from criminal activity on your part). If the council did so indemnify you, you would still be personally liable, but the council would then re-imburse any losses which you suffered. The council can then insure its liability to re-imburse you, or can provide you with insurance so that you can reclaim any losses which you suffer from the insurer. The council currently does not provide such an indemnity or insurance but may consider requests for such an indemnity or insurance on a case to case basis. Please speak to the Monitoring Officer if you have any cause for concern that an outside body with whom you are involved is getting into difficulty or you have any indication that you might be getting involved in potential personal liability.

Involvement and Reporting

- 47** Councillors appointed to an outside body should ensure that they take a proper role in the management and governance of that body. This will include attending meetings regularly and being familiar with issues relating to that body.
- 48** It is recommended that a Councillor appointed as the council's representative should consider the need to make reports to the council on the progress being made by that body and on any issues which the council should consider.

Further Advice

- 49** Relationships between the council, outside bodies and the council's representative can be complex. In any case of dispute or difficulty, you should seek advice from the Secretary or Clerk to the outside body, who can then take advice from professional advisors where necessary.
- 50** If you are concerned about the position you are finding yourself in as a Councillor on an outside body, please do contact the Monitoring Officer for further advice.

