

Allerdale Borough Council

**THE ROLES AND RESPONSIBILITIES OF
MEMBERS AND OFFICERS APPOINTED TO
OUTSIDE BODIES**

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1. Introduction

Members are appointed and/or nominated annually by the Council and Executive to serve on a range of outside bodies. Officers may also be appointed to similar positions. This briefing note is intended as a guide for Members and Officers to their obligations when acting on outside bodies.

The type of outside bodies includes voluntary organisations, local government associations, and a range of companies including charities. The role of Members and Officers will be determined depending on the legal nature of that organisation and the capacity in which they are appointed to act.

In some cases, persons appointed will be Council representatives, i.e. they will be expected to represent the Council's views at meetings, and look after the Council's interests. On other bodies, where members are nominees they will be expected to represent the interests of the organisation to which they have been appointed.

In some cases, there may well be a connection between the activities of the organisation and the Council. Where this is the case Members and Officers need to be clear of their role and responsibility at the meeting of the outside body and declare any personal interest where appropriate to avoid any conflict of interest.

Regardless of which organisation is being represented Members are expected to behave ethically and in accordance with the guiding principles set out in Allerdale Borough Council's Code of Conduct. In the event of any conflict of interest between the Council and outside body the member will be governed by the more onerous code or rules of governance.

Members should adhere to the constitution rules and framework set by the outside body, and report back, where appropriate to the Council or relevant Committee and are guided by the Council's Constitution where applicable.

Officers remain bound at all times by the terms of their contract of employment with the Council and all applicable codes and policies.

Members and Officers should take an active and informed role in the management of the outside body's affairs at meetings and should not merely be there in name only. Members should not represent the political party to which members owe their political loyalty.

2. Appointments

The Council is working more through outside organisations. Members and Officers can therefore be appointed into any of the following categories:

- a) Those where appointees are regarded as Council representatives.
- b) Those which have links with Council activities where the appointees are nominees.

- c) Those where the Council is merely asked to appoint a nominee and has no further contact with the organisation.

3. Types of body corporate

Companies

- 3.1 Companies are regulated by their own constitutional documents (i.e. the articles and memorandum of association) and are governed by Statute and Legislation. They include but are not limited to companies limited by guarantee or by shares. Paid directors manage the day to day running of the company while unpaid directors have other responsibilities. Shareholders make the financial contribution.

Charities

- 3.2 The Trustees of a charity are the people who lead the charity and decide how it is run. The role and responsibilities of a Trustee will depend upon the provision of the trust deed, or articles and memorandum of association and/or scheme collectively referred as the governing documents. A Trustee may have a dual role as a director if the charity is a company which means that the obligations set out at clause 4 to 13 apply as well as clause 14. The charity will be regulated by its governing documents and governed by the Charities Commission and Charities and Trust legislation.

Unincorporated Associations

- 3.3 These are groups which are neither companies nor charitable trusts. They include management committees, residents associations and so on. The rules for this particular association fall within their own constitution, which normally provides for the appointment of a management committee. The management committee are responsible for the acts of the group.

4. Duties of Directors appointed to limited liability companies

- 4.1 A Director of a company must act in the best interest of the company. The role of a Member or Officer who has been appointed as a Director will depend upon the Company's Memorandum and Articles of Association and whether or not the Member or the Officer is appointed to the Board of Directors, as a Company's articles will vest most of the Company's powers in the Board of Directors and the Board will exercise those powers either directly or through the managers appointed by them.

4.2 The directors fiduciary duties set out under the Companies Act 2006 are mandatory and can be summarised as follows:

- a) **Act within their power (S171).** Not acting ultra vires.
- b) **Promote the success of the company** by acting in good faith and in the Company's best interest by having regard to the short, medium and long term consequences of any decisions made relating to the company (S172).
- c) **Exercise, independent judgement (S 173).** If a member is a Council nominated director, the company is paramount and any decisions made shall be free of Council influence.
- d) **Exercise reasonable care, skill and diligence (S174).** Individuals with specialist knowledge have a greater duty than those that do not. So it is essential to keep up to date with company affairs. Ignorance is no defence against an action for negligence.
- e) **Avoid conflict of interest (S175).** Where a director has a direct or indirect interest that conflicts or may conflict with the interests of the company. e.g. contract under consideration by the company, that a director must in those circumstances declare an interest and the decision of whether to participate in the discussion and or vote on a particular matter will depend on the company's constitution. This is a matter for individual judgement however consultation with officers and acting in accordance with the applicable codes of conduct is paramount.
- f) **Not accept benefits from third parties (S176).** These include monetary or non-monetary benefits from a third party conferred by virtue of, being a director or doing or not doing something as a director.
- g) **Declare an interest in proposed transaction or arrangement (S177).** Must declare the nature and interest to the board if a director is directly or indirectly interested and extends to any 'connected person'.

4.3 The duties set out above apply to executive, non-executive directors, non-board members, senior managers and company secretaries (if they are authorised to act on the Company's behalf in which case they may be 'shadow' or 'de facto' Directors). All directors should therefore ensure that they are aware of the company's financial position and regularly attend board meetings. Ignorance is no defence to any claim arising against a director.

5. Connected Persons

The Categories of connected persons have been broadened and now include:

- a) Family members (including spouse or civil partner, anyone with whom the director lives as a partner in an 'enduring family relationship', children and step children (both the directors own and his partner's) and the director's parents);

- b) Bodies corporate to which the director is connected (detailed rules determine when this will be the case;
- c) Trustees of a trust of which the director (or a family member or a body corporate with which he is connected) is a beneficiary; and
- d) A director's business partner.

6. Executive and Managerial Responsibility

6.1 Members and Officers should avoid taking executive or managerial responsibility for the Company's activities or any part of them. Duties of the Executive and Managing Directors can be onerous and require direct responsibility for Company's affairs. For example the Finance Director is responsible for the finances of the company and offences of trading while insolvent, which could give rise to liability.

7. Observer Status and In Attendance at Meetings

- 7.1 Members can be appointed as "Observers". They will have to abide by any terms attached to such an appointment by the Council and/or the company. The position of "observer" has no specific legal status in company or local authority law.
- 7.2 If a member goes beyond their remit as an "observer" i.e. directors of the company become accustomed to them managing, directing or exercising real influence over company's affairs they may be deemed a "shadow director" and could be held personally liable as if they had been formally appointed as a director. The influence must affect senior management level decision making or could involve the provision of advice to the Board if it affects the decision making and affairs of the company.
- 7.3 Likewise if an observer acts as a director or holds them self out as a director they may be a "de facto" director and may like a "shadow" director be held personally liable.
- 7.4 "In Attendance" is generally used to cover any person attending a board meeting who is not a member of the Board. For example; a company secretary and professional advisers, It may also include Council officers (whether appointed as observers or not) who have been asked to attend board meetings and offer advice and guidance to directors where appropriate.
- 7.5 Persons in attendance have no legal status. The extent of participation of a member or officer described "in attendance" at a board meeting would be a question of fact in the circumstances. Avoidance of management or directing the company should be a prerequisite if they do not want to be a "shadow" or "de facto" director.

7.6 The Company will need to consider how to deal with the giving or withholding of information to the observer, their right to speak and exclusion from meetings convened to consider company business. Any observer appointed will have to abide by any terms attached to such appointment by the Council and/or the Company.

8. Corporate Governance Combined Code and Non-Executive Directors in Listed Companies

8.1 Directors should be aware of the requirements of the Combined Code on corporate governance, which includes rules on Directors Remuneration. It considers internal financial and operational controls and risk management and management generally. It also sets out the principles and guidance relating to the appointment and duties of directors and the discharge of their duties and includes non-executive directors.

8.2 Non-executive directors (should be a third of the board), independent of management and free from any business or other relationship that could materially interfere with the exercise of their independent judgment. Non-executive directors should provide an outside view and ethical framework for the company to build upon.

8.3 If members or officers obligations to the Council are given priority over these duties then their role as a non-executive director may be compromised. Non-executive directors are board members without the day to day control of the company. They are selected for their prestige, experience, contacts or specialist knowledge and to assist with planning, strategy and policy of the company.

9. Councils Code of Conduct for Members

The Members' Code of Conduct is set out in the Council's Constitution. It deals with disclosable pecuniary interests and other registrable interests. The Code requires a Member to register details of any body of which that Member is a member, or in a position of general control or management and to which he or she is appointed or nominated by the Council. There are also requirements to maintain confidence and not bring the Council into disrepute. A member must not disclose acquired information or information given in confidence by any individual unless;

- a) the member has consent by the person authorised to provide it,
- b) required by law to do so,
- c) disclosure to a third party is required for the purpose of obtaining professional advice, (no further disclosure)
- d) that disclosure is reasonable and in the public interest; and made in good faith in accordance with any compliance requirements of the Council

A member must not prevent another person from gaining access to information to which that person is entitled by law.

10. Conflict of Interest

- 10.1 Where there is a conflict between the combined code for directors and the code for members, the more onerous code will apply for members when transacting the business of the company.
- 10.2 When dealing with Council business, Members shall be aware of the Council's Code of Conduct for Members and ensure open, fair and transparent declaration of disclosable pecuniary interests relating to the directorship of any Companies.
- 10.3 If in doubt, the Monitoring Officer's guidance should be sought at the earliest stage, as a serious breach of the code of conduct could disqualify the Councillor from office.

11. Remuneration

- 11.1 Part 1 of Schedule 2 of the Members Allowance Scheme sets out the list of approved duties where travel and subsistence may be claimed which includes:

The attendance at a meeting of the authority or any committee or subcommittee of the authority (to include working groups), or of any other body to which the authority makes appointments or nominations, or any committee or sub-committee of such a body;

12. Liability

The liability of the shareholders of a Company is limited to the amount of capital contributed by them to the Company. A Company has a legal personality distinct from those of its shareholders, and its shareholders will not be liable in the ordinary course of events for its company's debts.

A person authorised to act on behalf of the Company such as a Director may incur personal liability in a number of situations such as:-

- a) the Company is found, in the course of winding up, to have been trading for fraudulent purposes. If the director has acted dishonestly this is also a criminal offence;
- b) following liquidation, a director is found liable for wrongful trading, i.e. allowing the Company to continue to trade at a time when there was no reasonable prospect that the Company would avoid going into insolvent liquidation;
- c) the company commits a breach of the criminal law, in respect of health and safety legislation and/or
- d) a director acts negligently or in breach of his/her duty to the Company (including the duty to maintain confidential information that comes into their possession).

13 Indemnities, immunities and Insurance

- 13.1 The Councils general approach is that it requires all Companies and Trusts to which it appoints Members or Officers to take out and maintain appropriate Insurance against Directors or Trustees liability. Premiums are generally paid by the Company/Trust and should be renewed annually in order to offer long term protection for Directors/Trustees/Members.
- 13.2 There is limited power for the Council to grant their members indemnities.
- 13.3 There is a broader power to give indemnities to Chief Officers serving on outside organisations through their contracts of employment. The secretary of state can give the council power to provide indemnities to some or all of their Members and Officers and insurance. To secure this benefit the capacity and role in which the Member or Officer is acting needs to be determined. To secure such insurance or indemnity for any act or failure it has to be authorised by the Council or form part of the duties or powers placed upon that member or officer as a consequence of any function being exercised in his capacity as a member or officer of the Council at the request of or approval of the Council or for the purposes of the Council.
- 13.4 Further immunity from legal proceedings can be given to appointed Members and Officers.
- 13.5 For the Council to exercise its powers under clause 13.2 to 13.4 the Member or Officer must be performing an agreed statutory function. (If for example the Council did not have the power to establish the Company, a Member or Officer serving as a director will not be able to rely on the immunity if the Company fails and they are held liable). The Member or Officer must be acting in good faith. It will not apply if there has been fraudulent behaviour, dishonesty or criminal convictions. An indemnity may apply where a member or officer is defending criminal proceedings or civil liability arising from a criminal offence.
- 13.6 An indemnity may cover a member or officer where their action has exceeded the powers of the authority only to the extent that the member or officer in question a) believed that the action, or failure to act was within the powers of the authority; or b) that action or failure comprises the issuing or authorisation of any document containing any statement as to the powers of the authority, or any statement that certain steps have been taken or requirements fulfilled, believed that the requirements of the statement were true, and it was reasonable for that member or officer to hold that belief at the time when he acted or failed to act.

14. Duties of Charitable Trustees

- 14.1 Duties of trustees appointed by local authorities are the same as duties and responsibilities of other trustees. Trustees must act independently of the Local Authority which appointed them and only act in the best interest of the charity. Such trustees may be referred to as nominated, representative trustees. There may well be occasions where such trustees will have to act in a way that conflict's with Local Authority interests. The best interests of the charity always come first; this duty overrides all other considerations.
- 14.2 The role of Trustee is to provide leadership and to manage the income/expenditure and possibly, the capital of the Trust in accordance with the governing documents. There are various duties that underpin this role, which include but are not limited to the following:
- a) To preserve capital of the Charity unless the trust deed gives the Trustees the right to spend the capital or the Charity is small and the Trustees have resolved to spend the Capital.
 - b) To make sure income and Capital expenditure is authorised in accordance with the governing documents and where appropriate professional advice shall be taken in respect of capital investments.
 - c) Trustees shall produce annual accounts and act with reasonable skill and care in administering the trust. Trustees should also act unanimously (unless the trust deed allows majority decisions).
 - d) Charitable assets and the objectives of the charity need to be clearly identified and administered in accordance with their charitable purpose and the governing document/s of the charity.
 - e) There should be a clear line of responsibility for management of all charities for which the local authority is trustee. Officers and Councillors should follow guidelines about roles, responsibilities and decision making when administering charities.
 - f) There should be a clear process of identifying and managing conflicts of interest, where the local authority is the trustee of the charity, along with an audit trail of records and periodic review to minimise risk.
 - g) Where trustees are required to make a decision which affects a personal interest or one of their members that person should not be present at any discussion or vote on the matter in question.
 - h) Trustees should exercise the same degree of skill and care as a prudent business man would exercise in managing company affairs. Personal or prejudicial views should not affect their role as trustee at anytime.
 - i) The Charities Commission have documented detailed guidance by way of a toolkit. This sets out the principles of being a Trustee, conflicts arising, and the relationship between local authorities and trust bodies, which may need authority from the Charities Commission in some instances. This is contained on their website.

15. Liability

- 15.1 Trustees are held jointly and severally liable to the Charity for breaches of trust. The Charities Commission may relieve a trustee of personal responsibility for breach of trust if the trustee acted honestly and reasonably.
- 15.2 Trustees of a charitable trust do not generally enjoy limited liability unlike shareholders of a company. There is an exception to this the charity has to become a charitable incorporated organisation (CIO), which may provide its members with limited liability on the winding up of a CIO.
- 15.3 As with members of unincorporated associations, trustees will incur personal liabilities under contracts they enter into in the name of the charity. They will be entitled to be reimbursed from charitable funds for all liabilities and expenses properly incurred by them. If the charity doesn't have enough money to reimburse, they will be liable for the deficit from their own resources. If the deficit was authorised by all the trustees then the trustee who has to pay the deficit is entitled to be reimbursed by the other trustees.

16. Indemnities, immunities and insurance

- 16.1 All trustees however appointed have the benefit of the statutory indemnity. Essentially a trustee will only be liable for his own activities or for losses arising from his "wilful default". This phrase is defined as "knowingly committing a breach of duty or being reckless as to whether an act or omission is a breach of duty".
- 16.2 Members or officers can rely on the limited immunity provided they are performing a statutory function and are acting in good faith. The principles set out in paragraph 9 apply equally to members serving on trusts
- 16.3 It is possible for a charitable trust to purchase insurance if it is in the best interest of the charity to do so. This will indemnify trustees against personal liability for a breach of trust or duty committed by them in their capacity as trustees. It does not extend to criminal fines or regulatory penalties nor can it cover conduct by a trustee knew, or ought reasonably to have known, was not in the interest of the charity.

17. Unincorporated Associations

17.1 Organisations other than companies or trusts or charitable incorporated organisations are usually unincorporated associations. There is no statutory definition however it can be described as an informal organisation, which may arise when several people join together, with an intention to create legal relations to carry out a mutual purpose that is non-profit making. This association of persons are bound together by identifiable rules and membership. These rules are set out in its constitution which outlines roles and responsibilities of members of the association.

18. Duties

18.1 Usually an unincorporated association will have an executive/management committee. The powers and composition of these committees will be set out in its constitution. Important decisions relating to the running of the association will be left to the members at its general meetings. The day to day running will be under the control of the officers and members of the executive/management committees.

18.2 Where the unincorporated association is a registered charity the members of the executive and management committee may also be charity trustees. This dual role will be governed by the association's constitution and general law relating to trusts and charities as set out above in paragraph 14, 15 and 16.

19. Observer Status

19.1 The Council may appoint a Member or Officer to the executive/management committee of an unincorporated association as an observer. Caution should be exercised as set out at paragraph 7. Particular care should be taken when entering a contract on behalf of the association. Failure to obtain authority to act may well result in personal liability for performance of the contract. If in doubt members, officers should seek legal advice.

20. Indemnities and Insurance

20.1 The association will also be able to take out insurance to indemnify trustees from personal liability as set out in paragraph 16 above.

21. Duties of Steering Groups, Joint Committees, Partnership Bodies and Conflicts of Interest

21.1 The Council's constitution sets out how external appointments to outside bodies shall be determined. For example whether such appointments shall be reserved to the full Council, or executive to determine in accordance with the chief legal officer/monitoring officer.

- 21.2 If a member or officer is appointed as a committee member or as an observer to a partnership body s/he will not be exposed to the same liability as a Director or Trustee. The duties and obligations of the member or officer should be set out in the agreement or other documents regulating the committee or partnership and any code of conduct of the Council as described in paragraph 9.
- 21.3 If the members or officers role is unclear, s/he needs to establish formally at the outset as to whether s/he is acting as a delegate/representative of the Council to promote its interest, or if s/he has an independent role to fulfil on behalf of the Committee or partnership. If it is an independent role, s/he will have to uphold the Committee's or partnership's interest even when the same may be in conflict with the policies and best interest of the Council whilst h/she is serving on the Committee or partnership but not whilst serving as a member or employee of the Council.
- 21.4 The Council's constitution provides that the Councils Code of Conduct for Members applies to members serving on external bodies, joint committee, strategic and other partnerships.
- 21.5 Members must declare disclosable pecuniary interests or any other registrable interest as defined by the Code of Conduct for Members at any meeting of the Council or a Committee. Where the interest is a pecuniary interest that member shall not act in the matter, leave the room where the matter is being determined in accordance with the Councils code of conduct. If the external body, joint Committee, strategic or other partnership has a local code of conduct or other rules of governance which are more onerous than the Councils code those other rules of governance must be followed. In the event of any conflict between the code members should obtain advice from the monitoring officer.
- 21.6 If the Committee or partnership is seeking charitable status it will need to establish itself as a trust or incorporate to become a company limited by guarantee or charitable incorporated organisation. Any member considering becoming a trustee or director will need to carefully evaluate his/her duties as set out in this briefing note.

22. Immunity

- 22.1 Members and Officers appointed to a committee or partnership body can rely on the limited immunity provided in accordance with paragraph 13 unless they are there in an independent role.

23. Non-Council Appointments

- 23.1 A member or an officer may seek membership of, or appointment to, a voluntary organisation in a private capacity so long as there is no conflict of interest with his position as a Member or as an Officer of the Council. The role and responsibilities of the member will be governed by the organisations constitution or governing document in the same way as for Council nominees. Before accepting such appointment Members and Officers are well advised to find out about the voluntary organisation, its activities, its constitution, its financial position so that they can make an informed decision before accepting such appointment.
- 23.2 If a Member or Officer is appointed other than at the request or instruction of the Council i.e in a personal capacity, s/he will not be entitled to benefit from the indemnity referred to in paragraph 13 or in accordance with the governing statutory regulations.
- 23.3 Certain parts of the Code of Conduct for Members apply even when Members are transacting private or non-Council business.

24. Standards of Business Behaviour

- 24.1 Generally outside body's rule on hospitality and gifts will be more liberal than the local authority law and rules on such matters. Therefore the more strict rules of conduct and behaviour should be followed on all occasions.
- 24.2 To ensure open and transparent conduct of business, appropriate declarations should be made by members and recorded in the statutory register of member's gifts and hospitality i.e. anything offered, rejected or accepted that exceeds or is £25 in value.
- 24.3 Likewise council officers need to ensure that any declarations should be made to the relevant chief officer or chief executive as appropriate and recorded accordingly.

25. Appointments and Nominations to Outside Bodies

- 25.1 The local authority will ensure, so far as possible that only members or senior officers who are unlikely to have potential conflicts of interests are appointed or nominated to serve on outside bodies, so as to ensure the smooth transition of business of the council and outside body.
- 25.2 To ensure the effectiveness of such arrangements, the Monitoring Officer will review the robustness of such arrangements and strengthen the same if improvements are needed.

26. Potential conflicts of interest

- 26.1 As indicated throughout this guidance document where there is a conflict of interest the more strict code of conduct applies. Where there is any doubt members and officers should seek legal advice in the first instance.
- 26.2 Confidential information will need to be handled carefully and compliance with the more strict code of conduct will need to be observed.
- 26.3 In exceptional circumstances, it may be appropriate for the relevant member to consider resigning, absenting or declining to accept any outside appointment or nomination that causes or is likely to cause conflict difficulties.
- 26.4 Officers as employees of the Council have a duty to the Council, even where they are appointed or nominated to outside bodies, unless they are in their private capacity. The outside body must understand this prior to accepting the officer's appointment or nomination.
- 26.5 Where there is a conflict of interest in these circumstances the Chief Legal Officer and Monitoring Officer's advice will take precedence to protect and safeguard the interests of the Council. This provides that officers must safeguard themselves against conflicts of interest and notify their line manager/chief officer at the earliest opportunity so they may record the interest and ensure that the relevant employee is not involved in any decisions that may be the subject of a conflict of interest. If in doubt the council officer should seek advice from the chief legal officer/monitoring officer in the first instance.
- 26.6 Council officers are encouraged to avoid placing themselves in a compromising position in relation to conflicts of interest by resigning, absenting or declining to accept any appointment or nomination in exceptional circumstances.
- 26.7 Council officers are also advised to ensure any positions held in their private capacity do not bring them into conflict with the Council.
- 26.8 More stringent legal requirements apply to Council employees holding Politically Restricted posts within the Council consequently the above considerations apply.

- 26.9 If a member is present at a meeting of the Council at which the business of the outside body, upon which he is appointed or nominated is being discussed, s/he must declare his/her personal interest and, if applicable, disclosable pecuniary interest and may remain and vote on the matter unless the interest is a disclosable pecuniary interest in which case s/he must leave the room after declaring the disclosable pecuniary interest in accordance with the Council's Code of Conduct.
- 26.10 Likewise Council officers must declare an interest and leave the room whilst the matter is being discussed and voted upon where the same position applies in accordance with clause 26.9.