

ANGUS COUNCIL – 16 MAY 2017

**GUIDANCE TO MEMBERS ON APPOINTMENTS TO OUTSIDE
BODIES**

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ABSTRACT

The purpose of this report is to advise the Council of guidance which has been produced by the Head of Legal and Democratic Services regarding appointments of elected members to outside bodies.

1. RECOMMENDATIONS

The Council is asked to note the Elected Members Representation on Outside Bodies Guidance Note attached as Appendix I of this Report;

2. BACKGROUND INFORMATION

Item 10 on the agenda advises the Council of appointments which fall to be made to various partnerships and other bodies.

Prior to members being appointed to such bodies, members should be aware of their duties and responsibilities to such bodies.

Attached as Appendix I is a brief guidance note produced by the Head of Legal and Democratic Services which sets out members' duties and responsibilities when serving on such outside bodies. In addition there will be a training session arranged on duties and responsibilities within the next few weeks as well as specific training for certain bodies.

3. IMPLICATIONS OF BEING APPOINTED TO OUTSIDE BODIES

It should be noted that persons appointed to outside bodies take a certain individual responsibility in doing so. The key points to note are:

- persons appointed to a body with decision-making powers (such as directors on the board of a company) have their primary duty to the interests of that body and not to the Council, irrespective of being appointed as the holder of an office – eg a councillor; and
- decision-makers have a duty of care to act within basic standards of probity and accountability in terms of having sufficient information before them upon which to base their decisions, having collective decisions properly minuted and having regular financial reports made to them to ensure the continued financial solvency of the body (bearing in mind that, particularly for a limited company, allowing it to trade whilst insolvent can attract personal liability by the directors for the company's debts).

Members should contact the Head of Legal and Democratic Services if they require any further guidance regarding their rights and obligations when acting on outside bodies.

4. FINANCIAL IMPLICATIONS

There are no direct financial implications arising from this report.

NOTE: No background papers, as defined by Section 50D of the Local Government (Scotland) Act 1973 (other than any containing confidential or exempt information) were relied on to any material extent in preparing the above Report.

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Appendix 1 Elected Member Representation on Outside Bodies Guidance



**Elected Member Representation on
Outside Bodies Guidance Note**

May 2017

1. Introduction

Elected Members may be appointed to sit on 'outside bodies'. The term 'outside bodies' means any organisation independent from the Council in which Members may become involved as a result of their status as Councillors. Members may be appointed to these outside bodies in a number of ways:

1. by the Council
2. nominated by the Council but appointed by the outside body itself
3. otherwise than by way of an appointment or nomination by the Council.

Members' responsibilities and liabilities will be largely dependent on the type of organisation with which they are involved, and the role they are asked to play within that organisation. Members may be involved in a wide variety of organisations. These can be categorised as follows:

- Voluntary Organisations/Clubs;
- Companies Limited by guarantee or shares under the Companies Acts either with or without charitable status;
- Companies or their equivalent incorporated under different legislation;
- Trusts
- Charities

Members appointed/nominated to outside bodies will always be acting in a capacity distinct from their capacity as Elected Members of the Council. Although Members may be nominated to the outside body because of their role as Councillors, when dealing with the business or interests of the outside body Members must put the interest of that outside body first and act in its best interests. Members may also incur some liability in their role as representatives on outside bodies, for example, monetary liability. As a consequence, it is important that Members are fully aware of their role, responsibilities and liabilities and the issues of indemnity/insurance – these are detailed further below.

2. Councillors' Code of Conduct

Paragraph 3.18 of the Councillor's Code of Conduct states that *"You may be appointed or nominated by the Council as a member of another body or organisation. If so, you will be bound by the rules of conduct of these organisations and your responsibility for any actions taken by you as a member of such an organisation will be to the organisation in question. You must also continue to observe the rules of this Code in carrying out the duties of that body"*. Therefore, the same high standards are expected of Members when they are acting as appointees or nominees to outside bodies as in the Council chamber. Breaching the Code whilst operating as a Member of an outside body will carry the same consequences as it would if the breach occurred whilst performing Council business.

One of the areas where the Code may apply to Members on outside bodies is in relation to registration and declaration of interests. Before accepting an appointment or nomination, Members should always consider whether a conflict may arise. If it is anticipated that there may be frequent conflicts of interest then it may be safer to err on the side of caution and politely decline the appointment or nomination. If a situation arises where a Member feels that there is a conflict between the

interests of the Council and the interests of the outside body, then advice should be taken from the Head of Legal and Democratic Services. If a conflict does exist (or may appear to exist) then declarations of an interest and non-participation in Council debates may be required.

The Council must set up, maintain and make available for public inspection a Register of Interests. The outside body membership may be an interest which requires to be declared in relation to every item of business which affects that body. Compliance with the Code of Conduct is ultimately a matter for which Members themselves are responsible and advice can be requested/given, but the final decision is one for Members to take. Internal guidance has been adopted within Angus Council in the form of Committee Reports 389/02 and 518/03 and internal training is provided to Members.

In addition, some outside bodies have their own registers in interests and rules for dealing with declarations of interest.

3. Outside Bodies: Members' and Officers Responsibilities and Liabilities

(i) Voluntary Organisations/Clubs

Voluntary Organisations/Clubs will usually have a written constitution which governs what they can do. However, where they are run on an informal basis, without any written constitution or structure then, as a general rule, such organisations should be avoided.

This type of organisation does not have its own legal status. As a result, any contract or obligation taken on by this type of organisation will be in the names of the members of its management committee. Therefore, the management committee can be personally liable for actions taken by the club or for debts. As such, Members representing voluntary organisations/clubs should check the constitution and familiarise themselves with its content.

(ii) Limited Liability Companies

Limited companies differ from voluntary organisations in that they have a separate legal personality.

The most common type of company seen in local authority work is a company limited by guarantee. In the case of a guarantee company, the owners are known as members and they meet the liabilities of the company to the extent of their guarantee (normally £1).

It is important to note and understand the different roles within a company. The managers of the company are its board of directors. Once appointed as directors, they owe specialised and specified legal duties to the company and its shareholders and such duties are many and varied. Councillors are usually appointed to such bodies as directors.

4. Directors' Responsibilities and Liabilities

The director is a person who diligently manages the affairs of the company to ensure that it achieves its objectives and meets its liabilities to customers, creditors and employees.

A director has a responsibility to act in the best interests of the members of the company as a whole and the general duties of directors, as set out in the Companies Acts, are as follows:

- A director must act in accordance with the company's constitution and only exercise powers for the purposes for which they are conferred. Therefore, it is important that directors understand the limits of their powers.
- A director must promote the success of the company. This means that a director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. This will involve considering, amongst other factors: the likely long term consequences of a decision; the interests of the company's employees; relationships with the company's trading partners; the effect of the company's operations on the community and the environment; the desirability of maintaining the company's reputation for high standards of business conduct; and the need to act fairly as between members.
- Duty to exercise independent judgment.
- Duty to exercise reasonable care, skill and diligence.
- Duty to avoid conflicts of interest.
- Duty not to accept benefits from third parties.
- Duty to declare interest in proposed transaction or arrangement.

Even after a person ceases to be a director the person continues to be subject to the duty to avoid conflicts of interest as regards the exploitation of any property, information or opportunity of which he became aware at a time when he was a director and to the duty not to accept benefits from third parties as regards things done or omitted by him before he ceased to be a director.

If directors fulfil their duties diligently, then the question of personal liability should not arise. Members appointed or nominated to companies must ensure that they are familiar with their duties and responsibilities. Personal liability however comes into play when the company goes into insolvent liquidation and the directors knew or should reasonably have known that there was no reasonable prospect of the company trading its way out of insolvency. If information is known to the directors which lead them to believe that they cannot trade their way out of insolvency then the duty owed to the company is converted into a duty to protect the interests of the creditors. At this stage the directors should cease trading and call in an insolvency practitioner. If trading continues after this stage it could be viewed as "wrongful trading" or "fraudulent trading". In either of these situations, the director could be disqualified from acting as a director in the future. The personal liability provisions underline the duty of care and when assessing whether a director should be

personally liable the reasonableness of the director's actions and the director's personal level of skill will be taken into consideration.

(iii) Trusts

A trust is a legal relationship or contract whereby property is transferred from its owner into the hands of Trustees. Those Trustees are then required to hold the trust property and to administer it in accordance with the wishes of its former owner, i.e. according to the rules ("objects") set out in the document which constitutes the Trust. This document is called the Trust Deed. The Trustee has full legal ownership of the trust property. It should be noted that the use of the word "trust" in the organisation's title does not necessarily mean that the body is a trust. Many companies limited by guarantee which also have charitable status use the word "trust" as part of their name but the company is incorporated under the Companies Acts and governed by the rules set out above.

A number of matters relating to the general duties and liabilities of Trustees can be summarised as follows:

- Trustees must carry out the purposes of the trust as careful and prudent Trustees.
- If Trustees enter into legal relationships e.g. contracts with third parties, it is assumed they are undertaking personal liability.
- Powers may be included in the Trust Deed enabling the Trustees to take out insurance to cover them in the event of any personal liability arising. This insurance would, however, be subject to the Trustees having at all times acted in good faith and only with the authority given to them in terms of the Trust Deed.

(ii) Partnership working – public bodies

It is common for local authorities to enter into agreements for joint working or for joint projects with other local authorities and with other local or public bodies or even outside private bodies. If Members are appointed to such organisations then the same sort of considerations as mentioned for the various organisations above should be kept in mind. The documents constituting such partnership and working arrangements should be closely scrutinised before and whilst undertaking the role.

(iii) Charities

Charities can take a number of different forms. They can be a trust, a company limited by guarantee, a SCIO (Scottish Charitable Incorporated Organisation) and many other forms. If the outside body does have charitable status then there are additional layers of governance set down by the Office of the Scottish Charity Regulator (OSCR) and in law. If members are appointed to a charity, they should review the constitutional documents of the charity and ensure they understand their role and responsibility within the organisation.

5. Insurance for Personal Liability

The Council is unable to provide full insurance cover for Members involved with outside bodies. Members who have been appointed to serve on outside bodies with decision making powers should note that the Council is not legally liable for their actions and no insurance cover is available under the Council's insurance policies in respect of their actions as members of such bodies. Members of the Council who have been appointed to outside bodies should consider whether it would be appropriate in each individual case to act in the capacity of an adviser or observer rather than as person with decision making powers, which would ensure that Members would be protected against personal liability by the Council's own liability policies. It is recommended that Members seek assurances that such outside bodies have their own appropriate and adequate insurance cover which will indemnify individual members of the outside bodies. As noted above, in the absence of insurance cover, whether or not a Member appointed to an outside body is personally liable for the actings of that body is dependent on the legal status of the body concerned.

The outside body itself may have or be able to make arrangements for insurance cover. If not, personal arrangements may be possible. All of these are matters which should be investigated and understood before an appointment is accepted. Further advice on this matter can be obtained from the Council's Governance Team.

6. Conclusion

This guidance note is a very brief summary of the legal implications of which members should be aware when appointed to outside bodies. If members require further information, please contact the Head of Legal and Democratic Services.