

**GUIDANCE NOTES FOR MEMBERS AND OFFICERS  
REPRESENTING THE CITY COUNCIL ON OUTSIDE BODIES**

**1. Introduction**

1.1 The city council's policy is to support and encourage participation by members and officers alike, in the activities of outside organisations which further the council's policies and priorities.

1.2 It is not essential for this purpose for appointments to be ratified formally by the full city council. Members and officers are expected to exercise their own judgements in deciding how important it is to offer their services to the organisation concerned for reasons explained below. However, appointments must be endorsed by the relevant executive member or strategic director, if full protection is to be given against personal liability and where the organisation concerned has no or limited insurance cover.

1.3 members and officers may receive requests from a large number of organisations to partake in their activities. Care should be taken to ensure that the objectives of such organisations do not clash with those of the city council. Involvement with outside bodies can take up a considerable amount of time and members and officers should take care that they do not commit themselves to too many organisations.

1.4 It is good practice for members and officers to report annually via the members' information service on the situation of the relevant organisation.

1.5 Personal liability of local authority nominees can arise through involvement in:

1. Limited companies

2. Charitable trusts
3. Other societies or organisations.
4. School governing bodies.

1.6 This guidance note has been produced to assist members and officers in understanding what their duties and liabilities are when they are appointed to such bodies. However, if members or officers are uncertain as to issues arising from particular appointments or situations, they should contact the city solicitor for specific advice.

## **2. General**

2.1 There are four main types of organisation to which members and officers may be appointed but there are some general provisions which will apply in all four situations.

2.2 members and officers appointed as voting representatives on outside bodies legally incur various duties or obligations which may expose them to personal liability and loss.

2.3 As a representative on an outside body, members and officers are under a duty to act in the best interests of that organisation. This can potentially result in a conflict between the interests of the organisation and those of the council. Not to act in the best interests of the organisation can lead to a personal liability for any losses which result. If there is a conflict between the member's or officers duty to an organisation, and the council, the member or officer must remember that their prime duty is to the organization when acting on its behalf. In certain

circumstances where the conflict is extreme or cannot be resolved, the member or officer should consider resigning from the organisation.

2.4 members and officers cannot be told by the council how to vote; members should not do so on political lines. It is possible to take account of the council's wishes, but not to vote simply in accordance with them.

2.5 members and officers need to find out whether the organisation is offering insurance cover for their actions. However, even where this is the case, it will not cover wilful or criminal acts.

## 2.6 National Code of Local Government Conduct

members must act at all times in accordance with the National Code of Local Government Conduct. Paragraph 12 of the code outlines where a member may speak, and sometimes vote, even where the member has declared a personal and prejudicial interest. Where a member is appointed by the city council as the council's representative to an organisation, the member may still speak and vote on all matters concerning the organisation, but not where the member has 'joined' without being appointed by the city council.

## 2.7 Code of Conduct for Employees

Officers must act at all times in accordance with the Portsmouth City council code of conduct for employees. In particular, officers must inform their manager if they are appointed to or join organisations as specified in paragraph 9 of the code.

## 3. Companies

3.1 Directors must be appointed by the company. Duties are imposed by the Companies Acts and members and officers may be personally liable if they fail

in those duties. The duties which are likely to be of most relevance to members and officers are as follows:-

- (1) A fiduciary duty to the company to act honestly and in good faith and in the best interests of the company as a whole. Directors are therefore in the position of 'quasi trustees' who must take proper care of the assets of the company.
- (2) A general duty of care and skill to the company, but a director requires no greater skill than might reasonably be expected of someone of that individual's particular knowledge and experience. A director is not deemed to be an expert, but is expected to use due diligence and to obtain expert advice if necessary.
- (3) The director is under a duty to exercise independent judgement. Where a member or officer is taking account of the interests of the council, that position must be disclosed when the decision is being made.
- (4) Directors are not allowed to make a private profit from their position. They must disclose any interests they or their family have in relation to the company's contracts.
- (5) 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 of the director.

3.2 There are also several main liabilities which apply to directors as follows:-

- (1) The company's identity must clearly be shown on its stationery. The company number, place of registration and registered office address must all appear. If

any of the directors' names are shown, then they must all appear. Non-compliance is an offence and the directors and company officers can be fined.

- (2) A company can only act within the scope set out in its memorandum of association (the document which sets out the objects of the company). Those directors knowingly causing the company to act beyond the activities set out in the Memorandum will be liable personally. In very limited circumstances it is possible for the actions of the directors to be ratified by the members of the company.
- (3) A director may also be liable for breach of trust, if he/she misapplies the money or property of the company. Directors may also be liable if they fail to take action or prevent the breach by a co-director of which they are aware.
- (4) In the event of failure to act in accordance with the best interests of the company, or if a director uses his/her powers improperly or makes a personal profit from his/her position as director, then the director may be personally liable for loss to the company and may be required to give to the company the personal profit made.
- (5) If the level of skill and care shown by a director falls below that which could be reasonably expected and the company suffers loss, the director will be liable for the loss incurred. However if it believes the director acted honestly and reasonably, a court may excuse the director the liability.
- (6) If a director knows or ought to know that there is no reasonable prospect of the company avoiding liquidation, a court may require that director to contribute to the company's assets on liquidation if the company continues to trade. This is known as wrongful trading. If a director has concerns about the company's

financial position, he/she could be well advised to inform the other directors and seek advice from the company auditors.

- (7) A director will also be liable if to his/her knowledge the company carries on business with intent to defraud creditors or any other person, or for any other fraudulent purpose. Fraudulent trading can also lead to disqualification from acting as a director.
- (8) All cheques and similar documents which purport to be signed on behalf of the company must bear the company name. Where they do not, the director signing on behalf of the company may be liable to a fine and may also be liable to the payee if the company fails to honour the cheque. It is therefore wise for directors to make sure that all documents they sign on behalf of the company states on it clearly that they act as agent for the company (eg director, for and on behalf of ...)
- (9) A third party who enters into a contract on the assumption that a director has power to bind the company may be able to claim damages against the director if it subsequently transpires that the director has no such power. Directors would be well advised to ensure that contracts are approved by the board and that the authority to enter into any contract has been properly delegated before signing
- (10) The liability of the directors (if any) may still be enforced after the company has been dissolved.

3.3 Directors cannot be indemnified by the company against liability arising out of negligence, default, or breach of duty or trust. Companies can purchase insurance to protect its directors against a claim of negligence, breach of duty, trust or default. (Also, the city council can provide an indemnity - see Section 7).

3.4 councillors who are directors of outside companies to which they have been nominated by the council are under the following obligations:-

- (1) That the remuneration they receive from the company should not exceed that received from the local authority, and should be declared.
- (2) To give information to other councillors about their activities as required by the local authority (save for confidential information).
- (3) To cease to be a director immediately upon disqualification as a councillor.

#### **4. Charities**

4.1 Trustees of charities are the people responsible for controlling the management and administration of the charity. As such, they have full responsibility for the conduct of the charity but are only personally liable for any debts or other liabilities if:-

- (1) they cause loss to the charity by acting unlawfully, imprudently or outside the terms of the charities governing document, or
- (2) commit the charity to debts which amount to more than its assets.

4.2 Provided the trustees act prudently, lawfully and in accordance with their governing document, any liabilities they incur as trustees will be met out of the charity's resources. Where trustees seek advice of professional officers, particularly with regard to legal and financial matters, they will be deemed to have acted prudently.

4.3 Trustees may not make a personal profit from the trust's assets.

- 4.4 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.
- 4.5 If charitable income exceeds £5,000, all letters, advertisements, cheques etc must bear a statement that the organisation is a registered charity.
- 4.6 Trustees are under a duty to ensure compliance with all relevant legislation.
- 4.7 An indemnity can be given from the trust fund provided the trustee has acted properly and within his/her powers. Trustees may take out insurance to protect themselves against personal liability or negligence but not for criminal acts, fraud etc. There will be no problem if the trustees themselves pay the premiums but if they are paid out of the charitable funds the trustees will need the consent of the Charity Commissioners.

## **5. Management Committees**

- 5.1 Such organisations usually have a constitution showing how they will operate.
- 5.2 Property has to be held by individuals as the organisation has no legal existence of its own.
- 5.3 Generally, the management committee members are liable for the acts of the organisation, but are entitled to an indemnity from the funds of the organisation if they have acted properly. If there are not enough funds, the committee members are personally liable for the shortfall.
- 5.4 members of the committee of management will have personal liability if they act outside the authority given to them or if they do not comply with a statute.

5.5 members or officers appointed to the Committee will be entitled to an indemnity from the organisation if they act in accordance with the organisations constitution and are not at fault. It is possible to obtain insurance but if the organisation is to pay the premium it must be permitted by the constitution.

## **6. School Governors**

6.1 Governing bodies have corporate status. This gives a governing body legal existence in its own right. The constitution of the governing body must be reviewed every four years. Corporate status will give governors protection from personal liability providing that they act in good faith in exercising their functions. An individual governor may only act on behalf of the governing body if he or she has been formally delegated the power to do so.

6.2 Governors could be fined by the criminal courts if their actions or negligence results in a claim against them. The governing body should take out insurance to protect governors in this position.

6.3 Governors' powers are extensive, particularly with local management of schools.

(1) Governors must provide information to the LEA and parents and call an annual parents' meeting.

(2) There must be consultation with the LEA over admission arrangements.

(3) A governing body can modify the LEA's curriculum policy to match its statement of aims.

(4) Governors must ensure that the LEA is aware of any pupils with special educational needs for whom it ought to consider making a statement.

- (5) Governing bodies decide how schools may spend their budgets within the terms of the LEA scheme. Accurate accounts must be kept.
  - (6) Governors have primary responsibility for staffing and disciplinary matters.
  - (7) Governors can control the use of school premises outside school hours subject to any directions from the LEA.
  - (8) Governors can decide whether to initiate the relevant procedures to apply for grant-maintained status.
- 6.4 Governors of independent schools will be charity trustees and the Charity Commissioners view is that governors are subject to the same control as trustees of unincorporated charities.

## **7. City Council Position**

### **7.1 Officials Indemnity for Officers**

The question of indemnity for officers was considered by the Administration Sub-Committee in 1989. This followed concerns raised by some officers about their personal position in the event of legal proceedings arising out of their duties. The committee resolved that officers would be indemnified by the city council against any damages, costs or legal expenses incurred in the course of an officer's official duties where the officer is acting on behalf of the council. The indemnity does not cover: -

- (a) Fraud, dishonesty or a criminal offence committed by the officer.
- (b) Neglect, error or omission by the officer otherwise than in the course of his/her official duties.

- (c) Liability in respect of surcharges made by the District Auditor or orders made under S.19 of the Local Government Finance Act 1982 (unlawful payments).
- (d) Any neglect, error or omission by the officer actuated by bad faith.

NB This is subject to review by Resources Management Committee and 7.1 will be amended in due course.

## 7.2 City council insurance provisions

The city council has in place various types of insurance cover which apply to members and officers. No positive action is required by members or officers in order for the insurance to be effective.

NB The scope of our insurance provisions is being reviewed in the light of recent case law. New insurance is being proposed and this guidance will be reviewed if necessary.

### (a) Public liability

This indemnifies members and officers for sums payable as a result of legal liability arising as a result of accidental injury or damage to third parties arising out of the function of a local authority.

### (b) Officials' indemnity

This indemnifies members and officers for sums payable as a result of legal liability arising from acts of negligence, error or omission committed in the pursuit of their duties on behalf of Portsmouth city council arising out of the function of a local authority.

### (c) Professional indemnity

This indemnifies members and officers for sums payable as a result of legal liability arising from acts of negligence, error or omission arising out of the conduct of business and as notified to insurers. There is an obligation on members and officers to inform the director of corporate resources & services of any work that could result in fee income.

(d) Personal accident

Benefit is payable to members and officers in the event of an accident or assault occurring whilst at or travelling to or from work.

(e) School governors

Governors are covered by insurance in some situations in the course of their approved duties. Full details can be obtained from the council's insurance officer. Legal assistance will also be paid for governors taken to court for any reason connected with their responsibility as governors.

(f) The city council in April 2006 agreed to indemnify members and officers against personal civil and criminal liability as a result of their actions in a wide range of circumstances. This is in respect of both city council functions and duties and appointment to a position with outside organisations. The report to the council sets out the terms of the indemnity.

### 7.3 Statutory Indemnities

The Public Health Act 1875 may give limited protection to members and officers from personal liability in respect of matters done in good faith for the purpose of executing any public, general or local act. This protection from personal liability may not apply if the member or officer is negligent.

7.4 Following recent case law, this section will not protect members and officers where the activity concerned is carried out on behalf of the local authority but is outside the local authority's powers (ultra vires).

## 8. Conclusion

8.1 Where members and officers are appointed by local authorities to organisations, legal relationships are created between the appointed individuals and the organisation, and those who have dealings with that organisation. It is very important that the members and officers appointed understand all the implications of their appointment and bear in mind that they may owe parallel duties to the organisation and to other parties as well as to the council. In practice, the safest course of action is for the individuals concerned to ensure that the organisation has taken out insurance covering their potential liability. Court cases have indicated that it is not possible for the city council specifically to take out insurance for these circumstances). However, it may be possible for the local authority to include in any grant payments to organisations a sum which could cover the purchase by that organisation of indemnity cover for all its directors/trustees/committee members as appropriate.

8.2 It is possible to avoid most difficulties by appointing council representatives to organisations on the basis of observer status only. However, such a role is very limited and it would not be possible for the member or officer to have voting rights. Such a role may prove to be unsatisfactory to both the member or officer and the organisation concerned.

## 9. **Final Word!**

The information contained in these notes may seem overwhelming to members and officers who wish to be appointed by the city council to outside bodies. However, members and officers are urged not to be daunted! Always check that adequate insurance is in place and act with caution, in the best interests of the organisation, before voting. Find out as much as you can about the organisation before agreeing to be appointed.

Remember that professional help from officers is always available and serving on outside bodies can prove to be both interesting and rewarding.