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# BRIEFING

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

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## **A. Introduction**

1. This Briefing Note updates the guidance produced by the former Director of Legal Services in 1995. It is intended as a guide for Members and Officers to their obligations when acting on outside bodies. **If any Members or Officers have any further queries in relation to any of the subject matter of this Briefing Note they should contact Legal Services on the numbers listed at the end.**
2. The roles of Members and Officers nominated or appointed by the Council to the management of outside organisations will depend upon the legal nature of that organisation and the capacity in which they are appointed to act.
3. Similarly, the way in which nominated or appointed Members and Officers can be immune from or indemnified against personal liability for losses arising from their nomination depends on the nature of the organisation and the powers available to the Council.

## **B. Directors Appointed to Limited Liability Companies**

The Companies Act 2006 ("the 2006 Act") codifies the previous common law rules, equitable principles and statutes including the Companies Acts 1985 (as amended by the CA 1989") (the 1985 Act") relating to directors' duties. Unless otherwise stated section numbers referred to in this section B relate to the 2006 Act.

### **Duties**

4. 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 (its constitution) 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 managers appointed by them.

5. The Board of Directors of the Company may wish to consider whether they should instruct the Company Secretary or some other officer with sufficient understanding of the constitution of the Company to advise new Directors on the important provisions of the Memorandum and Articles of Association. This will be a matter for the Company and the City Council will not be able to insist upon the same.
6. A distinction needs to be made between roles as defined in the Company's Memorandum of Association and general legal responsibilities placed on Directors of companies. Whether or not a Director is simply a member of the Board or, in addition, occupies a particular office within the Company, such as a Managing Director or Company Secretary, s/he will have a number of duties in respect of that Company.
7. In particular, Directors have a duty to:-
  - a) **act within their power (S171).** They must act in accordance with the company's constitution and only exercise powers for the purposes for which they are intended. This means ensuring that the company does not act ultra vires i.e. outside of the provisions of its constitution.
  - b) **promote the success of the company (S172):** This is a new duty of good faith to act in the company's best interest and adds a wider corporate social responsibility into directors'

decision making process. Directors must act in a way they believe would be most likely to benefit the Company and its shareholders as a whole. In fulfilling this duty directors must have regard to:

- the long term consequences of any decision;
- the interests of the company's employees;
- the need to foster the company's business relationships with suppliers, customers and others;
- the impact of the company's operations on the community and environment;
- the desirability of the company maintaining a reputation for high standards of business conduct; and
- the need to act fairly as between members of the company;

This duty is subject to any duty to act in the interests of the company's creditors in certain circumstances (e.g. in contemplation of insolvency).

- c) **exercise independent judgement (S173):** Directors have a positive duty to exercise independent judgement. It would not be a breach of this duty to act in accordance with a contract between the company and a third party in a way which fettered directors' discretion to act in a way authorised by the constitution. If a City Council nominated director operates entirely in accordance with the instructions of the authority without exercising their

own judgement they will be in breach of his duty.

- d) **exercise reasonable care, skill and diligence (S174):** A director must use:

- the care, skill and diligence which would be exercised by a reasonably diligent person having the general knowledge, skill and experience that could be expected of a person carrying out the functions carried out by a director in relation to the company; and
- his/her particular knowledge, skill and experience.

People with specialist knowledge have a much greater duty than those that do not. It is, therefore, more important than ever for directors to keep up to date with the company's affairs and particularly its financial affairs. Ignorance of the company's position is not likely to be a defence against an action for negligence.

- e) **avoid conflicts of interest (S175):** Directors must avoid situations in which they have direct or indirect interests that conflicts or may conflict with the interests of the company e.g. where a director has an interest in a contract under consideration by the company. The duty is not breached if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest or if the matter has the authority of the non-conflicted directors in accordance with the company's constitution.

At times the obligations of a BCC nominated director may conflict with his/her duties to the company. A director must, in those

circumstances, declare an interest and the decision of whether to participate in the discussion of and vote on a particular matter is a matter for individual judgement although the said director should consult officers where necessary and act in accordance with applicable codes of conduct.

**f) not to accept benefits from third parties (S176):** Directors must not accept monetary or non-monetary benefits from a third party conferred by virtue of his being a director or his doing or not doing something as a director. There is no breach if the benefit cannot be regarded as giving rise to a conflict of interest. Since it is not always clear whether certain benefits will constitute a conflict, directors are advised to take advice when in doubt.

**g) declare an interest in a proposed transaction or arrangement (S177):** If a director is directly or indirectly interested in a proposed transaction or arrangement with the company he must declare 'the nature and extent of the interest' to the board. This simply extends requirements under the 1985 Act and continues to extend to any 'connected person'.

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

- 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 director's own and his partner's) and the director's parents);

- bodies corporate to which the director is connected (detailed rules determine when this will be the case);
- 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

a director's business partner.

8. In general Members and Officers should avoid taking executive or managerial responsibility for the Company's activities or any part of them because the duties of executive or managing directors can be onerous. This is because executive directors are directly responsible for aspects of the Company's affairs. For example, a finance director will have particular responsibility for the Company's financial position, which could give rise to liability for allowing the Company to trade while insolvent if the Company goes into liquidation (see further at paragraph 26 below).
9. However, the fiduciary duties described in paragraph 7 above apply to non-executive directors as well as executive directors. All Directors have a duty to exercise their functions with reasonable care, diligence and skill. All Directors including non-execs, therefore, should ensure that they are aware of the financial position of the Company and regularly attend Board meetings. **Ignorance of the Company's activities is unlikely to be a defence to any claim against a Director.** The obligations of non-executive directors are further considered in paragraphs 11 - 15 below.
10. The obligations in Paragraph 7 will also apply to non-Board members (e.g. senior managers, Company Secretaries) if they are authorised to act on the Company's behalf in which

case they may be "shadow" or "de facto" Directors (see further at paragraphs 20 - 24).

### **Corporate Governance**

11. To the extent it has been adopted by the Board of a Company, Directors should also be aware of the requirements of the **Combined Code on Corporate Governance ("the Combined Code")**. The Combined Code includes rules on Directors' remuneration, internal financial and operational controls and risk management and management generally. A copy of the Combined Code is available on the website of the Financial Services Authority ([www.fsa.gov.uk](http://www.fsa.gov.uk)) or alternatively from Legal Services (contact Sonya Clarke on 0121 303 3512).
12. The Combined Code also sets out principles and guidance relating to the appointment and duties of **non-executive Directors**, suggesting that non-executive Directors should make up at least a third of the Board.
13. Non-executive directors should be of sufficient calibre and number for their views to carry significant weight on the Board. Most should be independent of management and free from any business or other relationship that could materially interfere with the exercise of their independent judgement.
14. Non-executive Directors are expected to provide an outside view and help provide an ethical framework for the Company. 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. Again, in the case of doubt, the relevant Member or Officer is encouraged to seek guidance from the City Council's Chief Legal Officer.

15. Many companies linked with the Council are required to follow the Combined Code. Members and Officers on the Board of Directors of such a Company should also ensure that they keep up-to-date with its requirements.

### **Investment Vehicles**

16. There are other statutory requirements which may apply to Directors in certain circumstances. For example, if the Company is an investment vehicle which engages in fundraising activity, financial services legislation will apply. Any Members or Officers who have any concerns on this aspect should contact the Chief Legal Officer for guidance.

### **Council's Code of Conduct for Members**

17. The City Council's latest Code of Conduct for Members came into force on 1 October 2007. Guidance on the same is contained in Volume B – Part 3 (A&B) Members' Code of Conduct in the Council's Constitution which can be accessed on the Council's website. Briefly, it deals, amongst other things, with **personal and prejudicial interests**. There are also requirements to maintain confidence, to respect others and not to bring the Council into disrepute. In particular:-

a) A member must not:-

(i) disclose information given to him/her in confidence by anyone, or information acquired by him/her which he/she reasonably believes or ought reasonably to be aware is of a confidential nature except where:-

- he/she has the consent of a person authorised to give it;

- he/she is required by law to do so;
- the disclosure is made to a third party for the purpose of obtaining professional advice provided that the third party agrees not to disclose the information to any other person; or
- the disclosure is:-
  - reasonable in the public interest; and
  - made in good faith and in compliance with the reasonable requirements of Birmingham City Council.

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

c) A member must not conduct him or herself in a manner which could reasonably be regarded as bringing his/her office or the authority into disrepute.

18. Where a Company has a Code of Conduct for Directors, for example, the Combined Code, that Code will apply to the effective operation and discharge of the duties of a Director of that Company. Where there is conflict between the Director's Code and Birmingham's Code of Conduct for Members, then Birmingham's Code of Conduct makes it clear that the more onerous Code will apply for Members when transacting the business of the Company.

19. When dealing with Council business, therefore, Members should be aware of Birmingham's Code of Conduct for Members and ensure open, fair and transparent declaration of personal and prejudicial interests relating to the directorship of any Companies. Further guidance on these issues is given in the General Guidance referred to in Paragraph 16 and, in the case of doubt, the Chief Legal Officer's guidance should be sought at the earliest stage, as a serious breach of Birmingham's Code of Conduct for Members could disqualify the Councillor from Office.

### **Observer status**

20. It is common practice amongst some local authorities to appoint Members or Officers as "observers". The position of observer has no specific legal status in company or local authority law. Any person appointed to this role should ensure that the extent of their role as an observer is clearly defined and agreed and avoid involvement in managing, or directing the management of, the Company as s/he will then be seen as going beyond the remit of his/her "observer" role.

21. If the observer's role is extended so that the Directors of the Company are accustomed to act in accordance with his/her directions or instructions s/he may be a **shadow director** and as such could be held personally liable as if s/he were a formally appointed Director.

22. If the observer's directions or instructions are followed by the Directors of the Company to the extent that s/he is exercising real influence over the Company's affairs the observer will be a shadow director. The influence does not have to be over the entire field of the Company's affairs but it must be at the most senior management level and affect decision-making which is within the remit of the

Directors. It can include the giving of advice to the Board of Directors if the advice has a real influence over decision-making affecting the affairs of the Company.

23. If the observer is acting as and holding him or herself out as a member of the Board s/he may be a "**de facto**" **director** and as such may, like a shadow director, be held personally liable as if s/he had been formally appointed.
24. The Company will, of course, also need to consider how to deal with the giving (or, more probably, the withholding ) of confidential Company information to the observer and the observer's right to speak at or his/her exclusion from meetings convened to consider company business. If a Member or Officer is appointed as an "observer", s/he will have to abide by any terms attached to such appointment by the Council and/or the Company.

### **"In Attendance"**

25. "In attendance" is generally used in Board minutes to cover any person attending the meeting who is not a member of the Board, for example, the 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 the Directors where appropriate. Persons "in attendance" have no specific legal status and in itself the phrase does not indicate any particular level of participation in the Company's affairs. The extent of the participation of a Member or Officer described in Board minutes as "in attendance" would be a question of fact and circumstance. They should take care to avoid involvement in managing, or directing the management of, the Company as if

they do not they may be a shadow or de facto director.

### **Liability**

26. The liability of the members (i.e. 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 members, and its members will not, in the ordinary course of events, be liable for its debts.
27. A Director (or any person authorised to act on behalf of the Company) may, however, incur personal liability in a number of situations, including where:-
- a) the Company is found, in the course of winding up, to have been trading for fraudulent purposes. If a 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, for example, 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 any confidential information relating to the Company that comes into his/her possession).

### **Indemnities, Immunities and Insurance**

28. The Council has not exercised the very limited power under Section 33 Local Government and Housing Act 1989 for local authorities to grant their

Members indemnities. However, it has exercised the much broader power to give indemnities to Chief Officers serving on outside organisations through their contracts of employment. The powers in Section 33 are now considerably supplemented by the provisions in Section 101 Local Government Act 2000 and the Local Authorities (Indemnities for Members and Officers) Order 2004 which are explained in Section L below.

29. The Council's normal approach is to require all Companies and Trusts to which it appoints either Members or Officers to take out and maintain appropriate insurance against Directors' or Trustees' liability. Members and Officers should be aware that the effectiveness of such insurance will depend on the Company/Trust having the resources to maintain the insurance, which it may not if it becomes insolvent. Often this type of policy will have only short-term run-off cover, for example, for six or twelve months, and will be annually renewable, in which case it will not offer long term protection to Directors if the Company is no longer able to pay the premiums.

30. Further immunity from legal proceedings is given to appointed Members and Officers by Section 265 of the Public Health Act 1875, which states :-

*No matter or thing done, and no contract entered into by any Local Authority... and no matter or thing done by any member of any such Authority or by any officer of such authority or other person whomsoever acting up at the direction of such authority shall, if the matter or thing were done or contract were entered into bona fide for the purpose of executing this Act or any other Public General Act, subjects them or any of them personally to any action*

*liability claim or demand whatsoever; and any expense incurred by any such Authority member, officer or other person acting as last aforesaid shall be borne and repaid out of the fund or rate applicable by such Authority to the general purposes of this Act.*

31. In summary,

- the Member or Officer must be performing a statutory function. If the Council did not have the power to e.g. 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 s/he is held liable.
- The Member or Officer must be acting in good faith. It will not apply if there has been dishonesty by the Member or Officer.

### **C. Appointment of a Trustee to a Charitable Trust**

#### **Nature of a Charitable Trust**

32. Trustees will be appointed under the Trust Deed. The role and responsibilities of a Trustee will depend, therefore, upon the provisions of the trust deed and/or scheme (collectively referred to as its "governing documents") and the general law relating to Trusts and Charities. Members and Officers involved with charitable companies should ensure that they understand the capacity in which they have been appointed. They may be Directors as well as Trustees which means that the obligations set out in section B above as well as the obligations set out in this section will apply to them. It may be appropriate for the Trustees of a charity to consider whether one of their number should advise new Trustees on their duties and liabilities. This

would however be a matter for the Trustees and the City Council would not be able to require it.

### **Duties**

33. At its simplest, the role of a Trustee is to apply the income/expenditure and, possibly, the capital of the Trust in accordance with the provisions of its governing documents. However, in fulfilling this role Trustees are subject to a number of duties, the most significant of which are as follows:-

- a) to preserve the 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 under the Charities Act 1993);
- b) to make sure income is spent only on the things authorised in the governing documents;
- c) to invest the capital only in authorised investments and having first taken professional advice;
- d) to produce annual accounts;
- e) to act with reasonable care and skill in administering the Trust; and
- f) to act unanimously (unless the Trust deed allows majority decisions).

34. Charity Commission guidance entitled **“Responsibilities of Charity Trustees”** outlines the basic principles that should guide Trustees when administering their charity. These are:-

- a) the income and property of the charity must be applied for the purposes set out in the governing document and for no other purposes;

- b) the Trustees must act reasonably and prudently in all matters relating to the charity and must always bear in mind the interests of the charity. They should not let their personal views or prejudices affect their conduct as Trustees;

- c) Trustees should exercise the same degree of care in dealing with the administration of their charity as a prudent businessman would exercise in managing his or her own affairs or those of somebody else for whom he or she was responsible; and

- d) where Trustees are required to make a decision which affects a personal interest of one of their members that person should not be present at any discussion or vote on the matter.

### **Liability**

35. Trustees will be held jointly and severally liable to the charity for breaches of trust. However, the Charity Commission may relieve a Trustee of personal liability for a breach of trust or breach of duty if the Trustee acted honestly and reasonably.

36. Unlike the members of a Company the Trustees of a charitable trust do not enjoy limited liability. However, a provision of the Charities Act, 2006, which has still to come into effect, will allow charities to become charitable incorporated organisations (CIO) and the constitution of a CIO may provide that its members will not be liable on winding up of the CIO or will have limited liability on winding up.

37. As with members of unincorporated associations, Trustees will incur personal liabilities under contracts they enter into in the name of the charity. They will, however, be entitled to be reimbursed from the charitable funds

for all liabilities and expenses properly incurred by them. If the Trust does not have enough money to reimburse them, they will be liable for the deficit from their own resources. If the deficit was authorised by all the Trustees, the Trustee who has to pay the debt is entitled to be reimbursed by the other Trustees.

### **Indemnities, immunities and insurance**

38. All Trustees, however appointed, have the benefit of the statutory indemnity conferred by Section 30 of the Trustees Act 1925, which provides:

*A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects or defaults and not for those of any other trustee, nor for any banker, broker or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default.*

39. Accordingly, a Trustee will only be liable for his own activities as specified in Section 30, or for losses arising from his “wilful default”. The phrase “wilful default” has been held, in this context, as meaning knowingly committing a breach of duty or being reckless as to whether an act or omission is a breach of duty.
40. Members and Officers can also rely on the limited immunity from suit provided by Section 265 Public Health Act 1875 as explained in Paragraphs 30 and 31. The principles set out in Paragraphs 17 - 19, regarding Birmingham’s Code of Conduct for Members, apply equally to Members serving on Trusts. It is also possible for a charitable trust to

purchase insurance indemnifying Trustees against personal liability for a breach of trust or breach of duty committed by them in their capacity as Trustees. However, this indemnity does not extend to criminal fines or regulatory penalties nor can it cover conduct by a Trustee which the Trustee knew, or ought reasonably to have known, was not in the interests of the charity. A charity may only purchase this insurance if the Trustees decide that it is in the best interests of the charity to do so.

### **D. Unincorporated Associations**

#### **Nature of Unincorporated Associations**

41. Most societies and similar organisations, other than Companies and Trusts, are usually unincorporated associations. An unincorporated association is an informal organisation which may arise whenever several people join together, with the intention of creating legal relations, to carry out a mutual purpose otherwise than for profit.
42. There is no statutory definition of an unincorporated association but in one decided case the court described an unincorporated association as “an association of persons bound together by identifiable rules and having an identifiable membership”.
43. The rules of an unincorporated association are found in its “constitution” and it is this document which will set out the roles and responsibilities of members of the association.

#### **Duties**

44. Usually, an unincorporated association will have an executive/management committee. The powers and composition of executive/management committees will be set out in its

constitution. Important decisions relating to the running of the association will usually be left to the association members at its general meetings. The day to day administration of an association, however, will usually be under the control of the officers and members of the executive/ management committee.

Where an unincorporated association is a registered charity the members of the executive/management committee may also be charity Trustees. As such their role and responsibilities will be determined not only by the association's constitution but also by the general law relating to trusts and charities as set out in Paragraphs 32 - 40.

#### **Observer Status**

45. The Council may appoint a Member or Officer to the executive/ management committee of an unincorporated association as an observer. Any Member or Officer appointed as an observer should exercise caution if asked to become involved in the management or administration of the association, for reasons similar to those set out in Paragraphs 20 - 24.
46. Particular care should also be taken when entering into contract on behalf of the association. If the individual lacks the authority to do so, that individual may find him or herself personally liable for the performance of the contract. If in doubt, members and officers should seek advice from the Chief Legal Officer.

#### **Indemnities and insurance**

47. If the association is a trust, as will be the case with any registered charity, Section 30 Trustees Act 1925 will apply as explained in Paragraphs 38 and 39. . The association will also be able to take out insurance to indemnity

Trustees from personal liability, as explained in Paragraph 40.

### **E. Steering Groups, Joint Committees and Partnership Bodies**

#### **Duties**

48. Article 11.4 of the Council's Constitution and Volume A Part 2(G) External Appointments of the Council's Constitution sets out those appointment to outside bodies that are reserved to the full City Council to determine as it considers fit. All other appointment of members and officers to outside bodies shall, unless otherwise advised by the Chief Legal Officer, be within the remit of the Council's Executive to determine. If a Member or Officer who is nominated or appointed as a committee member or as an observer to a partnership body (e.g. the LGA), s/he will not be exposed to the same liability as a Director or Trustee. Ideally, the duties and obligations of the Member or Officer concerned will be set out in the agreement or other documents regulating the committee or partnership and in any Code of Conduct of the Council relevant to such activities, for example, the Council's Code of Conduct for Members described at Paragraphs 17 - 19.
49. If the Member's or Officer's 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 interests, even when the same may be in conflict with the policies and best interests of the Council whilst s/he is serving on the Committee or partnership but not whilst serving as a Member or

employee of the Council. Article 11.8 of the Council's Constitution provides that the Council's Code of Conduct for Members applies to Members serving on external bodies, Joint Committee, Strategic and other Partnerships. In the event of a personal interest, the relevant Member must declare the same at any meeting. If the personal interest is also a prejudicial interest, as defined by the Code of Conduct for Members, the Member must not act in the matter and must (in accordance with the requirements of the Council's Code of Conduct) leave the room at which any such matter is being determined. If the external body, Joint Committee, Strategic or other Partnership has a local code of conduct or other rules of governance and the same is more onerous than the Council's Code of Conduct for Members, then that more onerous code of conduct or other rules of governance must be followed. In the event of any conflict between the code, Members should obtain advice from the Monitoring Officer.

50. 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. Any Member or Officer becoming a Trustee or a Director will need to consider his/her duties as set out in this Briefing Note.

### **Immunity**

51. Members and Officers appointed to a committee or partnership body can rely on the limited immunity provided under Section 265 Public Health Act 1875 (see Paragraphs 30 and 31), unless they are there in an independent role.

### **F. Non Council Appointments**

52. 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. In relation to that organisation, the role and responsibilities of the member will be governed by the organisation's 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.

53. If a Member or Officer is appointed other than at the request or instruction of the Council, i.e. in a personal capacity, he or she will not, of course, be entitled to benefit from the indemnity as referred to in Paragraphs 30 and 31 not from an indemnity under the Local Authorities (Indemnities for Members and Officers) Order 2004 as explained in Paragraph 69.

54. Certain parts of the Code of Conduct for Members apply to them even when they are transacting private or non-Council business. They must ensure those relevant provisions are complied with at all times. Further details on the same are set out in Volume B – Part 3 (A&B) Members' Code of Conduct in the Council's Constitution which can be accessed on the Council's website.

### **G. Registers of Members and Officers serving on outside bodies**

55. The Corporate Director of Resources) keeps a full and up-to-date list of all companies that the Council has an interest in. This list will, during this year, be further developed by the Corporate Director of Resources and the Chief Legal Officer to incorporate details of all Members and Officers

serving on such companies. The Chief Legal Officer will also consider establishing a Council-wide register of declarations of interest by Officers, along the lines of the one introduced for Birmingham's Code of Conduct for Members.

#### **H. Secondments to outside bodies**

56. The Legal Services Office has issued a separate and detailed guidance note, by way of a Briefing Note on Secondments (August 2001). Following the changes made by the Transfer of Undertakings (Protection of Employment) Regulations 2006 the scope of TUPE has been widened and now includes "service provision changes". Further there is an express restriction on contracting out of the application of TUPE. Any Officer who is seconded to any outside body must read the Briefing Note and his/her Line Manager must put appropriate and clear line management and other secondment arrangements in place, so as to ensure the Officer is clear about his/her lines of accountability and responsibility. In the case of doubt, the Chief Officer concerned should obtain relevant guidance from the Chief Legal Officer well before any secondment arrangements are put in place.

#### **I. Standards of business behaviour**

57. Generally, an outside body's rules on hospitality and gifts will be more liberal than the local authority law and rules on such matters. The guiding principle, from the Chief Legal Officer is, therefore, that the more strict rules of conduct and behaviour should be followed on all occasions.

58. In order to ensure, open and transparent conduct of business, appropriate declarations should, in the case of Members, be made in the Statutory Register of Members Gifts and Hospitality; i.e. anything offered,

rejected or accepted that exceeds or is £25 in value.

59. In the case of Officers, a declaration should be made to the relevant Chief Officer or Chief Executive, as appropriate. As indicated in paragraph 55, in the case of Officers, the Chief Legal Officer will consider establishing a Council-wide register for such matters.

#### **J. Appointments / nominations to outside bodies**

60. The City Council, through its Members and Chief Officers, will ensure, so far as is possible, that only Members or Senior Officers who are unlikely to have potential conflicts of interest are appointed or nominated to serve on outside bodies, so as to ensure the smooth transition of business of the City Council and the outside body.

61. In order to ensure the effectiveness of such arrangements, the Chief Legal Officer and the Corporate Director of Resources will, every two years, undertake a review of the arrangements to satisfy themselves over the robustness of the procedures and to strengthen the same if improvements are needed. A database of companies has been established for such purposes.

#### **K. Potential conflicts of interest**

62. In the event of there being a potential conflict of interest between the City Council and the outside body, to which a Member has been appointed or nominated to by the City Council, the relevant Member will, as indicated above, be governed by the more strict Code of Conduct (See Paragraph 49 above). In the event of doubt, appropriate advice should be sought from the Chief Legal Officer.

63. Confidential information will need to be handled very carefully and compliance

with the more strict Code of Conduct will need to be observed by the relevant Member. In exceptional circumstances, the relevant Member may wish to avoid placing him or herself in positions of conflict by resigning, absenting or declining to accept any outside appointment or nomination that causes or is likely to cause conflict difficulties.

64. In the case of Officers, they are employees of the City Council and their primary duty is to the City Council, even when they are appointed or nominated to outside bodies, unless they are there in their private capacity. The outside bodies must understand this prior to accepting the Officer's appointment or nomination, as, in the event of a conflict of interest, the Chief Legal Officer's advice will, always be, to protect and safeguard the interests of the City Council. Article 12.8 of the Council's Constitution provides that officers must guard themselves against conflicts of interest and if they discover that they have a conflict they must inform their line manager/Chief Officer of the same at the earliest opportunity. Their line manager must record the interest and ensure appropriate steps are taken to ensure that the relevant employee is not involved in any decisions that may be the subject of the conflict. If an Officer is concerned about a possible conflict of interests he/she should contact the Chief Legal Officer in the first instance.

65. In exceptional circumstances, Officers are encouraged to avoid placing him or herself in positions of conflict by resigning, absenting or declining to accept any appointment or nomination. Officers are also advised, so far as is possible, to ensure that any positions they hold or accept in their private capacities do not bring them into conflict with the Council. For "politically restricted" Officers, under

the Local Government and Housing Act 1989, more stringent legal requirements apply to them in their private capacities and, as such, they must abide by the same.

66. 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 and, if applicable, prejudicial interest and may remain and vote on the matter unless the matter relates to the granting, withholding or withdrawal of Council funds or other assets (including land transactions) to or from the outside body. In such event, s/he must leave the room after declaring the personal and prejudicial interest.

67. If an Officer is present in similar meetings, s/he must declare such interest and must, if requested to do so by his/her Chief Officer or the Chairperson, leave the room whilst the matter is being discussed and voted upon.

#### **L. Indemnity under S101 Local Government Act 2000**

68. Section 101 Local Government Act 2000 gives the Secretary of State the power to confer on local authorities the ability to provide indemnities to some or all of their Members and Officers.

69. The Local Authorities (Indemnities for Members and Officers) Order 2004 ("the 2004 Order") enables local authorities to:-

a) provide indemnities to any of their members or officers;

b) insure their members or officers.

It is important to understand the capacity/role in which the member or officer is acting in order to ascertain whether the member or officer concerned can secure its benefit.

70. Such insurance or indemnity can only be provided in relation to any action or failure to act by the member or officer in question which is:-

a) Authorised by the authority; or

b) Forms a part of, or arises from any powers conferred, or duties placed upon that member or officer as a consequence of any function being exercised by that member or officer (whether or not when exercising that function he/she does so in his capacity as a member or officer of the authority):-

i) at the request of, or with the approval of the authority;

ii) for the purposes of the authority.

71. There are however restrictions on the scope of indemnities. No indemnity may be provided under the 2004 Order in relation to any action by or failure to act by, any member or officer which:-

a) constitutes a criminal offence;

b) is the result of fraud, or other deliberate wrongdoing or recklessness on the part of that member or officer;

but an indemnity may be provided in relation to:-

c) the defence of any criminal proceedings brought against the officer or member; and

d) any civil liability which arises as a consequence of any action or failure to act which constitutes a criminal offence.

Further no indemnity may be provided in relation to the making by the member or the officer indemnified of any claim in relation to the alleged defamation of that member or officer but may be provided in relation to the defence by that member or officer of

any allegation of defamation made against him or her.

72. Any indemnity granted may also cover the position where the action of the member or officer concerned exceeds the powers of the authority. The 2004 Order provides that the authority may provide an indemnity to the extent that the member or officer in question:-

a) believed that the action, or failure to act, in question was within the powers of the authority; or

b) where 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.

73. The terms of the indemnity (including any insurance secured) under the 2004 Order may be such as the authority agree. There is a limitation on the terms of any indemnity relating to the defence of:-

a) Any criminal proceedings;

b) Any investigation, report, reference, adjudication or any other proceeding pursuant to Part 3 Local Government Act 2000 ("**Part 3 proceedings**");

which is that the terms of such indemnity:-

c) in the case of criminal proceedings, if the member or officer in question is convicted of a criminal offence and that conviction is not overturned following any appeal; and

d) in the case of Part 3 proceedings –

i) if a finding is made in those proceedings that the member in question has failed to comply with the Code of Conduct and that finding is not overturned following any appeal; or

ii) the member admits that he/she has failed to comply with the Code of Conduct;

that member or officer shall reimburse the local authority or the insurer as appropriate for any sums expended by the authority or insurer in relation to those proceedings pursuant to the indemnity or insurance.

#### **M. District Auditor's Comments**

74. In keeping with best practice, the Chief Legal Officer previously consulted the District Auditor over an earlier version of this Briefing Note and the following additional points were “flagged up” for consideration as and when the relevant circumstances arise:-

- a) The Council should not appoint Officers and Members who hold key scrutiny roles as company directors;
- b) Directors of the relevant Sponsoring Department may not, in practice, be the most appropriate appointments for the Council because of potential concerns over conflicts of interest and professional embarrassment; and
- c) Companies in receipt of significant financial support from the City Council should be required, if considered appropriate, by the Corporate Directors of Resources and the Chief Legal Officer, to allow Members and/or Officers to

sit as observers on their Boards with the understanding that their sole duty would be to protect the City Council's interests.

75. The City Council will, therefore, be mindful of the above observations of the District Auditor as and when further appointments are considered appropriate.

#### **May 2008**

For further advice on any aspect of this Briefing Note, please contact either:-

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