



South Somerset District Council

The Roles and Responsibilities of Councillors appointed to Outside Bodies

Guidance to Councillors appointed to Outside Bodies

This guidance has been produced in an effort to achieve good practice and to support Councillors who are appointed to serve on outside bodies by outlining their responsibilities and obligations in that role.

Service on outside bodies has always been an established part of a Councillor's role. An appointed Member on an outside body will be able to use their knowledge and skills as a Councillor to assist the organisation to which they are appointed.

The Council is now increasingly working in partnership with outside bodies and greater clarity is needed as to the role of Members appointed to these bodies. In situations where funding streams may benefit outside bodies and be channelled through the Council as the accountable body, or where the Council funds the outside body directly (e.g. CAB), questions of accountability and governance will arise.

SSDC definition of an outside body:

“An outside body (also known as an organisation), shall have formal governance, and shall not have been established, or be administered, by SSDC or have SSDC officers as the primary point of contact.”

Introduction

1. This guidance sets out the main issues which councillors should consider when appointed by the Council to serve on outside bodies.
2. In the context of this guidance 'outside bodies' include trusts, companies, charities, industrial and provident societies and community associations. Councillors may be involved as a director, trustee, governor, member or observer (with or without voting powers).
3. Councillors who are involved in the management of outside bodies have responsibilities to that body that must be acted upon. Their role, responsibilities and potential liabilities will depend upon the legal nature of the organisation and the capacity in which they have been appointed. Failure to act in a proper manner may give rise to personal liability or liability for the Council.
4. With the increasing emphasis on partnership working, councillors, as community leaders, have an important role to fulfil in supporting and advising outside bodies. However, this can give rise to conflicts of interest, particularly where the organisation is seeking or receiving funding from the Council. Councillors always need to be clear about their roles and alert to potential conflicts of interest in order to ensure transparency and public confidence in local democracy.
5. This guidance seeks to help councillors discharge their responsibilities on outside bodies clearly and effectively. It covers, primarily, the position of councillors appointed by the Council to serve on outside bodies, though much of the advice applies equally to councillors who are involved with outside bodies in a private capacity. Councillors who are members of an outside organisation in a private capacity or in a Parish Council role, and not appointed by SSDC will not be covered by SSDC insurances.
6. Membership of an outside body does not include representing a political party.

7. Appointments made to any outside body should be drawn from current serving District Councillors only.
8. Training on the legal responsibilities, including declarations/conflicts of interest of Councillors appointed to outside bodies will be included in the initial induction programme of training for new Councillors. Councillors may also seek advice from the Monitoring Officer at any time.
9. This guidance is general and councillors should contact the Monitoring Officer for further advice if they have any particular issues of concern.
10. The remainder of this guidance includes the following:
 - issues to consider before appointment;
 - application of the Code of Conduct for Councillors;
 - legal status of outside bodies, capacity of appointment, duties and liabilities;
 - insurance and indemnity;
 - criteria against which it can be judged whether to accept a new proposition from an outside body for Councillor representation.

Issues to consider before appointment

11. Before accepting an appointment to an outside body councillors should check the following information which will be supplied by Democratic Services relating to the outside body:
 - the legal status of the organisation e.g. company, trust, charity, unincorporated association;
 - the capacity in which the councillor is to be appointed e.g. director, trustee, member with voting rights or member with observer status;
 - the purpose of the organisation and how this relates to the Council's functions and objectives;
 - the relationship between the Council and the body and the likelihood and extent of any conflicts of interest (known to the individual councillor);
 - the requirements of the organisation's governing instrument (e.g. constitution; trust deed; memorandum and articles of association), both as a member and generally;
 - the financial status of the organisation;
 - the governance and decision making arrangements, including the management of risk;
 - any code of conduct for members;
 - potential liabilities;
 - the extent of any insurance cover for members.
12. Having checked the above matters, councillors should consider carefully whether they should be appointed to participate formally in the management of the external organisation e.g. as a director, trustee or voting member, or whether their role as a representative of the Council may be more effectively discharged as a non-voting member with observer status only. **Bearing in mind the potential liabilities that may be incurred through formal involvement in an organisation councillors are generally advised to seek appointment as members with observer status only, unless there are exceptional reasons for more formal participation.**

13. Councillors are encouraged to seek advice from the Monitoring Officer where any of the above issues are unclear.

Application of the Code of Conduct for Members

14. The Council's Code of Conduct for Members in Part 5 of the Constitution places specific obligations on councillors when acting in that capacity in their dealings with outside organisations. The Code will, in particular, apply where a councillor is acting as a representative of the Council on an outside body.
15. Apart from the general duty to promote and support high standards of conduct the following duties of the Code are particularly relevant in this context:
- act solely in the public interest and never improperly confer an advantage or disadvantage on any person or act to gain financial or other material benefits for yourself, your family, a friend or close associate;
 - avoid placing yourself under a financial or other obligation to outside individuals or organisations that might seek to influence you in the performance of your official duties;
 - make all choices, such as making public appointments, awarding contracts or recommending individuals for rewards or benefits, on merit;
 - declare any private interests, both pecuniary and non-pecuniary, that relate to your public duties and take steps to resolve any conflicts in a way that protects the public interest;
 - comply with the statutory requirements on the registration and declaration of interests.
16. Councillors who have a disclosable pecuniary interest in any business at a meeting of the Council e.g. award of a contract, must not participate in any discussion of the matter or vote on it unless a dispensation has been obtained. Failure to comply with these requirements without reasonable excuse may result in prosecution.
17. Councillors that serve on more than one body, in particular, need to be mindful of potential conflicts of interest and always act in an open and transparent manner in carrying out their respective roles. For example, where a councillor is at a council meeting considering an application for a grant or a community asset transfer request from a parish council or other public body of which they are a member they should declare the existence and nature of their interest. Having done so, they may, generally, take part in the discussion of that item and vote, unless there are particular reasons why this would not be appropriate. It is also advisable as a matter of transparency to include details of the interest in their register of interests.
18. Councillors appointed to serve on outside bodies should be mindful of their legal obligations regarding disclosure of confidential information and in case of doubt should seek advice from the Monitoring Officer.
19. Councillors also need to comply with the duties and requirements of the Equality Act 2010 in their appointment to any outside body as well as their role as a District Councillor (see Appendix E).

Predetermination and Bias

20. Aside from the Code of Conduct, under the common law councillors must be careful to avoid any pre-determination or bias in their decision making. Predetermination

occurs where someone has a closed mind so that they are unable to apply their judgment fully and properly to the issue requiring a decision. This can lead to legal challenges and decisions being set aside.

21. The Localism Act 2011 has clarified the rules on predetermination. It makes it clear that a councillor is not deemed to have had a closed mind on an issue just because they have indicated what view they have taken or may take before the issue is decided. A councillor is not, for example, prevented from participating in discussion of an issue or voting on it if they have campaigned on the issue or made public statements about their approach to it.
22. The general position, however, remains that, whatever their views, members must approach their decision-making with an open mind in the sense that they must have regard to all material considerations and must be prepared to change their views if persuaded that they should.
23. Councillors need to be aware that decisions may be challenged and set aside on the grounds of bias. Under the common law bias involves some element of partiality or personal interest in the outcome of a case, as a result of a close connection with the parties, or the subject matter of the dispute, or because of a tendency towards a particular shared point of view.
24. The relevant test for bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the decision maker was biased.
25. The risk of a successful challenge on these grounds may be overcome by proper observance of the requirements of the code of conduct and particularly the provisions set out in paragraph 14 above.

Legal status, capacity, duties and liabilities

26. The specific responsibilities of councillors will depend upon the legal status of the outside body and the capacity in which they have been appointed. The position of councillors in relation to various types of outside body is summarised in the appendices to this note as follows:

Appendix A - Director of Limited Liability Company

Appendix B - Trustee of Trust or Charitable Trust

Appendix C - Member of Unincorporated Association

Appendix D - Member of Steering Group, Joint Committee or Partnership Body

The key point to note is that where councillors are carrying out their duties as a trustee, director, or management committee member, they may take account of the wishes of the Council, but their primary duty is to act in the best interests of the organisation to which they have been appointed.

Liability, Insurance and Indemnity

27. Councillors can incur personal civil and criminal liability from formal participation in outside bodies.
28. However, under section 265, Public Health Act 1875 (as applied by Section 39, Local Government (Miscellaneous Provisions) Act 1976), councillors enjoy statutory

immunity from civil liability where they act within the powers of the authority, in good faith and without negligence.

29. But this immunity does not apply where they act beyond the powers of the council or act in bad faith (i.e. with dishonest or malicious intent) or negligently, and it does not protect them from criminal liability, for example for fraud or for corporate killing where they exercise managerial responsibilities.
30. South Somerset District Council has insurance provision to protect its assets and liabilities. Within these provisions the Council has cover to protect its elected and co-opted members when carrying out duties in connection with the business of the Council. Those afforded the protection are:
- elected Members of the Council or co-opted members of any Committee or Sub-Committee;
 - members of committees, schemes or associations formed to assist in the activities of the Council.

Appointments at Committee

31. All appointments to outside bodies will be made at the Annual Council meeting or at the relevant Area Committee meeting.

Criteria to accept a new proposition from an outside body for Councillor representation:

32. The following should be considered before accepting any request from a new outside organisation for representation by an SSDC Councillor:-
1. Relevance to Council Plan
 2. Benefit to SSDC
 3. Benefit to Outside Organisation
 4. Organisation's expectations of the Councillor representative
 5. Does the organisation need Councillor or Officer representation?

Information required prior to accepting a new outside body for Councillor representation:

33. The following information must be established by the Democratic Services team or relevant Area Development Manager prior to any Councillor appointment to an outside organisation, and, be made available to any interested Councillor prior to their appointment:-
- Identify an officer point of contact
 - Primary aims and objectives of the outside body
 - Justification for the appointment
 - Role of the appointed member
 - Set out any legal and/or financial implications
 - Indication of time commitment required
 - Skills and/or experience required from the council representative

Councillors representing outside bodies will be required to produce a small annual report or paragraph to be added to the members annual report. The report to include information on the activities and achievements of the outside body and the number of meetings attended.

Further Advice

34. Further assistance on the issues covered in this guidance may be obtained from the Council's Monitoring Officer.

Councillors appointed as Directors of Limited Liability Companies**Legal Status**

1. Upon incorporation a company becomes a separate legal entity, which can hold property in its own right, enter into contracts and sue and be sued in its own name. In the case of a limited liability company the liability of members of the company is limited to the amount they paid or agreed to pay when they joined the company. This can be as little as £1.
2. Companies limited by shares are those which have a share capital e.g., 1,000 shares of £ 1 each. Each member holds shares and receives a share in the profits made by the company according to the value of the shares held. Shares can be sold. Liability in the event of a winding-up is limited to the amount unpaid on the shares held.
3. Companies limited by guarantee do not have shares. Instead, each member agrees that in the event of the company being wound up they will agree to pay an agreed amount eg £ 1. This is most common in the public and voluntary sector, particularly where charitable status is sought.

Directors' Duties

4. The role of a councillor who has been appointed as a director will depend upon the company's Memorandum and Articles of Association (its constitution). A company's constitution will vest most of its powers in the board of directors and the board will exercise these either directly or through managers appointed by the board. Directors must understand the requirements of the Memorandum and Articles of Association in order to fulfil their responsibilities properly.
5. Directors will need to be aware of the requirements of the "Combined Code on Corporate Governance" to the extent that this has been adopted by the company, including general management of the company, rules on directors' remuneration, internal financial and operational controls and risk management.
6. Directors, as agents of the company, must:
 - act in good faith in what they believe to be in the best interests of the company as a whole (not the Council);
 - act with reasonable care, diligence and skill;
 - exercise their powers reasonably and for the purpose for which they are given;
 - keep an open mind when making decisions on company business; in particular a councillor director must exercise independent judgment and not simply follow Council policy when voting on company matters;
 - avoid placing themselves in a position where their private interests or their position as a councillor conflict with their duties to the company;

- be aware of the company's financial position through attendance at board meetings and reading the accounts, agendas and minutes; it is not sufficient to assume that the other directors are doing a good job.
7. Some directors may be given special responsibilities under the company's constitution, for instance a managing director or finance director. Those with special roles will be expected to have the personal and technical skills to perform the duties associated with that role, which may be onerous.
 8. The above duties apply to non-executive directors as well as executive directors.
 9. There are other statutory requirements which may be relevant depending on the company's business. Directors will need to be familiar with these. For example, if the company is an investment vehicle which engages in fundraising activity, financial services legislation will apply.

Observer status

10. The position of observer has no specific legal status in company or local authority law. Any person appointed as an observer should ensure that their role is clearly defined and avoid involvement in the management of the Company. If an observer acts beyond their remit and exercises real influence over the company's affairs and decision making the observer may be deemed to be a shadow director, with all the duties of an ordinary director.
11. Observers and others, such as professional advisors, may attend board meetings. Generally the minutes of the meetings will note the names of observers and the fact that they are "in attendance". 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 councillor described in board minutes as "in attendance" is a question of fact. They should, however, take care to avoid involvement in the management of the company so as to avoid being treated as a shadow director.
12. A director (or shadow director) may incur personal liability if they are in breach of the above duties. This may arise where:
 - 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;
 - following liquidation, a director is found liable for wrongful trading, i.e. allowing the Company to continue to trade at a time when the director knew or ought reasonably to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation;
 - the company commits a breach of the criminal law, for example, health and safety legislation;
 - a director acts negligently or in breach of their duty to the company (including the duty to maintain confidential any confidential information relating to the company that comes into their possession);

- a director knowingly causes the company to act beyond the activities authorised by its Memorandum of Association;
- there is a breach of trust, such as the misappropriation of company funds or property;
- a director uses their powers improperly or makes a personal profit from their position as director;
- there is a failure to comply with the requirements of companies legislation, such as the making of returns to the Registrar of Companies.

Insurance

13. Councillors appointed as directors should find out if the company maintains appropriate insurance cover against directors' liability. If this is not in place this should be requested, but this is a matter entirely for the board and the Council cannot insist upon this. It will be necessary to ensure that the company has the resources to maintain payment of the insurance premiums.

14. Further guidance on the responsibilities of company directors is available on the websites of the Institute of Directors and Companies House:

<https://www.iod.com/Home>

<http://www.companieshouse.gov.uk>

Appointment of a Trustee to a Trust or Charity

Legal Status

1. Trustees will be appointed under a 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.
2. It is quite common for companies to be set up as trusts with charitable objects. In this case the trustees will also be directors of the company and will have the obligations set out in Appendix C as well as the obligations set out in this section. Councillors involved with charitable companies should ensure that they understand the capacity in which they have been appointed.

Duties

3. The role of a trustee is generally to fulfil the objects of the trust and apply the income and, if appropriate, the capital of the trust in accordance with the provisions of its governing documents.
4. Trustees are subject to various duties, including the duty to:
 - act for the benefit of the charity and its beneficiaries;
 - 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);
 - make sure income is spent only on the things authorised in the governing documents;
 - invest the capital only in authorised investments, having first taken professional advice;
 - produce annual accounts;
 - act with reasonable care and skill in administering the trust;
 - to act unanimously (unless the trust deed allows majority decisions); and
 - comply with the Charities Acts and other legislation affecting the charity.
5. The Charity Commission’s website - www.charitycommission.gov.uk - contains useful guidance, in particular Publication CC3 - “Responsibilities of Charity Trustees” which outlines the basic principles that should guide trustees when administering their charity:
 - the income and property of the charity must be applied for the purposes set out in the governing document and for no other purposes;
 - 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 prejudice affect their conduct as trustees;
 - 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

- 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

6. Trustees are jointly and severally liable to the charity for breaches of trust. They may incur personal liability for losses incurred if they:
 - act outside the scope of the trust deed;
 - fall below the required standard of care;
 - make a personal profit from the trust assets;
7. Trustees will incur personal liabilities under contracts they enter into in the name of the charity. They are, however, entitled to be reimbursed from the charity's funds for all liabilities and expenses properly incurred by them, provided this is authorised by the trustees in accordance with the trust deed.

Observer Status

8. The Council may appoint a councillor to a trust or charity simply in the role as an observer. A councillor acting as an observer should avoid exceeding this role by becoming directly involved in the management of the charity or by being part of the formal decision making process as they may be deemed to be a trustee for the purposes of determining liability.

Insurance and Indemnity

9. An indemnity can be given from the trust fund provided the trustee has acted properly and within their powers. Trustees may take out insurance to protect themselves against personal liability except criminal liability. Payment of the premiums must be authorised by the trust deed if they are to be met from charitable funds.
10. Accordingly, a Trustee will usually only be liable for his/her own activities or for losses arising from his/her "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. It would be no defence that the Trustee was unaware of what was contained in the governing documents and was thus unaware of whether something was in breach of duty or not.
11. Officers will advise you whether the Charity has taken out any relevant insurance that covers you as a Trustee in the carrying out of your responsibilities as such. However where insurance is not provided you should raise this as an issue and ask the Charity to take out and maintain appropriate insurance against Trustees' liability. Councillors should be aware that the effectiveness of such insurance will depend on the Charity having the resources to maintain the insurance, which it may not if it becomes insolvent and ensuring that it is both regularly reviewed in terms of cover and renewed. Councillors can also rely on the limited immunity from legal proceedings provided by Section 265 Public Health Act 1875. The principles set out earlier apply equally to Members serving on Trusts, namely that the Councillor must be performing a statutory function and must be acting in good faith. It will not apply if there has been dishonesty by the Councillor.

Unincorporated Associations

Legal Status

1. Most societies, clubs and similar organisations (other than companies, industrial societies and trusts), are unincorporated associations. This is an informal organisation, which may arise where several people join together, with the intention of creating legal relations, to carry out a mutual purpose otherwise than for profit.
2. There is no statutory definition of an unincorporated association but it has been described by the court as “an association of persons bound together by identifiable rules and having an identifiable membership”. Unlike a company it does not have a separate legal status distinct from its members.
3. The rules of an unincorporated association are found in its constitution, which sets out the roles and responsibilities of its members.

Duties

4. An unincorporated association will typically have an executive or management committee with its powers and composition defined by the constitution. Key decisions will usually be made by the members at general meetings. The day to day administration of an association is usually undertaken by the officers and members of the executive or management committee.
5. Broadly executive or management committee members must act within the constitution and must take reasonable care in exercising their powers.
6. Where an unincorporated association is a registered charity the members of the executive or 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 Appendix B.

Observer Status

7. The Council may appoint a councillor to the executive or management committee of an unincorporated association as an observer. A councillor acting as an observer should avoid exceeding this role by becoming directly involved in the management of the association as they may be deemed to be an ordinary member for the purposes of determining liability.

Liabilities

8. Members of the management committee are generally liable, jointly and severally, 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 insufficient funds the members are personally liable for the shortfall.
9. Particular care should also be taken when entering into contracts on behalf of the association. If the individual lacks the authority to do so, they may find themselves personally liable for the performance of the contract.

Insurance

10. Insurance may be available, but payment of the premiums must be authorised by the constitution if they are to be met from the association's funds.
11. If the association is a trust, as will be the case with any registered charity, the position with regard to indemnities will apply as explained earlier. Councillors can also rely on the limited immunity from legal proceedings provided by Section 265 Public Health Act 1875.
12. Officers will advise you whether the association has taken out any relevant insurance that covers you as a Councillor in the carrying out of your responsibilities as such. However where insurance is not provided you should raise this as an issue and ask the association to take out and maintain appropriate insurance against members' liability. As mentioned earlier Councillors should be aware that the effectiveness of such insurance will depend on the association having the resources to maintain the insurance, which it may not if it becomes insolvent and ensuring that it is both regularly reviewed in terms of cover and renewed.

Steering Groups, Joint Committees and Partnership Bodies

Duties

1. If a Councillor 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.
2. Despite the fact that Officers from the Legal & Democratic Services' Team will be providing an overview of the body, it would still be sensible if the Councillor's role is still unclear 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 Councillor of the Council.
3. 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 Councillor becoming a Trustee or a Director will need to consider his/her duties as set out elsewhere in this guidance.

Indemnities, Immunities and Insurance

4. Councillors appointed to a committee or partnership body can rely on the limited immunity provided under Section 265 Public Health Act 1875 unless they are there in an independent role. Officers will advise you whether the body has taken out any relevant insurance that covers you as a member in the carrying out of your responsibilities as such. However where insurance is not provided you should raise this with Legal & Democratic Services for further guidance and advice.

Equality Act 2010**Public sector equality duty**

- (1) A public authority must, in the exercise of its functions, have due regard to the need to:-
 - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
- (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:-
 - (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
 - (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
 - (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
- (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
- (5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:-
 - (a) tackle prejudice, and
 - (b) promote understanding.
- (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
- (7) The relevant protected characteristics are:-
 - age;
 - disability;
 - gender reassignment;
 - pregnancy and maternity;
 - race;
 - religion or belief;
 - sex;
 - sexual orientation.
- (8) A reference to conduct that is prohibited by or under this Act includes a reference to:-
 - (a) a breach of an equality clause or rule;
 - (b) a breach of a non-discrimination rule.