

## **Advice to Members Serving on Outside Bodies**

### **Introduction**

1. This guidance is designed to give members a general understanding of the roles and duties that arise out of appointments to outside bodies and explains in more detail the specific legal duties, responsibilities and liabilities that arise out of membership of the different categories of outside bodies.
2. Members appointed to outside bodies must take care and carry out their duties to the best of their ability. Such appointments cannot be regarded as mere "figureheads". Responsibilities that a member assumes cannot be passed on to others who may have particular functions within the outside body concerned. It is important for members to attend meetings on a regular basis, although some organisations will allow substitutes to attend on an occasional basis.
3. Members cannot be required to act as delegates and carry out their duties and vote in line with the instructions of the Authority. They must act in accordance with their own judgement and the duties and responsibilities set out below. A member's ultimate responsibility is to the terms of the trust, the objectives of an association, or the objectives of the company. The Authority can always terminate an appointment if it is unhappy with the performance of a member.
4. To summarise, a member of an outside body must:-
  - (a) get to know the aims and objectives of the organisation so that he/she can help to achieve them;
  - (b) check what his/her own personal tasks and responsibilities are;
  - (c) exercise due care, skill and diligence in performing them;
  - (d) act honestly;
  - (e) avoid conflicts of interest where possible but
  - (f) be guided by the interests of the organisation, its employees and beneficiaries;
  - (g) be aware of and take an active interest in the organisation's activities, especially its financial and trading position, at all times;
  - (h) raise any issues causing concern and not hesitate to seek advice if

required; and

(i) ascertain what insurance cover indemnities exist.

5. If, having read the guidance, there are issues about which members are unsure or if members encounter any problems and feel that, for instance, they cannot reconcile a conflicting interest, they should seek advice from the Authority's officers. Questions of a legal nature should be referred to the Head of Law. Other queries about, for example, the general operation or the constitution of the outside body should be raised with the Authority's link officer for the organisation or the secretary of the organisation.

### **Indemnity for Loss**

6. An outside body that is a separate legal entity should have its own insurance protection to cover the organisation, and its directors and officers. Members appointed to serve that organisation would then have "first line" insurance via the organisation with contingency cover from the Authority in the event that the first line cover did not protect them fully.

There will be bodies to which members are appointed that are partnership arrangements or community based groupings. These are unlikely to have a legal identity and thus have no legal standing that would allow them to arrange cover. In these circumstances the Authority's cover will be the first line cover.

Some companies are able to indemnify directors who have suffered loss through no fault of their own, although the law prevents indemnity provisions which are too wide and attempt to exempt directors from liability in all circumstances.

Further information on the indemnities which can be provided by outside bodies is set out below. As part of familiarising yourself with the aims and objectives of the body, members appointed by the Authority to serve on outside bodies should check with the body concerned what indemnities and/or insurance cover, if any, is provided by the body.

### **Trusts**

7. A trustee should be fully aware of the status of trust property, of the terms of the trust deed and carry out his/her duties in accordance with the aim and objectives of the trust. Any breach of duty on his/her part may result in him/her being held personally liable. In addition he/she may be personally liable for the acts of his/her co-trustee(s) if his/her own neglect or default contributed to the breach. A trustee must not make use of the trust property or of his/her position as a trustee for his/her own private advantage. It is a general principle that a trustee must not profit from a trust and he/she must execute the trust with reasonable diligence and conduct its affairs in the same way as an ordinary prudent person of business.
8. As a general rule, a trustee is personally responsible for the exercise of his/her judgement and for the performance of his/her duty. He/she cannot escape

responsibility by leaving all decisions to be made by another person. Decisions concerning the trust must be taken by all the trustees acting together.

9. A trustee must usually act impartially and look at the interest of all those who may benefit from the trust. Like a company director, a trustee is expected to act with reasonable prudence and in good faith – the fiduciary duty – in the best interest of the trust and its objects. Trustees must keep an accurate account of trust property and trustees of charities are usually required to submit annual accounts to the Charity Commission. Furthermore, a trustee must usually invest promptly all trust capital and all income which cannot immediately be used for trust purposes.
10. The Charity Commissioners exercise powers of supervision and control of charitable trustees. A trustee who acts in accordance with advice given by the Charity Commissioners will avoid personal liability for breach of trust. Charitable trustees in breach of certain statutory obligations may be criminally liable e.g. if they recklessly supply misleading information to the Charity Commission, or default in providing the annual report. Also, certain persons are disqualified from acting as charitable trustees. Amongst these are persons with a criminal record for dishonesty, undischarged bankrupts and disqualified company directors.
11. 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 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 unless the trust deed allows it. Again you need to establish what the position is from the Trust itself.

### **Unincorporated Associations**

12. An unincorporated association consists simply of its members acting together for social reasons, the promotion of politics, sport, art, science or literature or for any other lawful purpose. The property and funds of the association generally belong to the members jointly. The business of the association is either conducted in a general meeting or delegated to committees under the constitution. The members of such committees are usually trustees whose duties and responsibilities are outlined above.
13. In most cases, an unincorporated association cannot sue or be sued and therefore questions frequently arise about a person's liability for goods supplied to an association, or contracts made on its behalf. The members of an association may be individually liable on contracts entered into by its executive or management committee as authorised by the constitution or because the members themselves specifically agreed to the particular transaction.
14. There is no limit on liability similar to that which exists for company directors. It is, therefore, essential that members carefully read the constitution of any associations with which they are concerned. Members must keep themselves

informed of all financial obligations entered into by the association and ensure that if they disagree with the proposed financial transaction, it is properly recorded in the minutes.

15. Having sounded this note of caution, many of the unincorporated associations with which Authority members will be concerned do not have their own budgets or become involved in transactions of any kind. Many are purely advisory or consultative bodies and it is most unlikely that any question of personal liability will ever arise.
16. Members will be entitled to an indemnity from the organisation if they act in accordance with the 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.

### **Companies**

17. The directors of a company have a duty to comply with specific business legislation e.g. concerning employment, health and safety at work, and the payment of taxes. They also have a duty to ensure that their companies comply with the law in general, e.g. if a company is proved to have committed a criminal offence with the consent or neglect of a director, the director as well as the company may be liable. A company or its shareholders can also sue a director for breach of duty and damages.
18. A director must not act outside the company's objects as set out in the Memorandum of Association prepared at the time of the formation of the company. Therefore, members appointed as directors should familiarise themselves with the Memorandum of Association concerned. A director is expected to act honestly and in good faith and in reasonable belief that he/she is acting for the company's benefit. In exercising this fiduciary duty to the company, and acting with due diligence, a director should obtain appropriate expert advice as necessary. A director must exercise independent judgement in relation to his/her responsibilities to the company, though it is permissible for him/her to take account of the interests of a third party which he/she represents. In such a case the director must disclose that position and tread a fine line between the interests of the company and the party represented (in this case the Authority). The director cannot vote simply in accordance with an Authority mandate. To do so would be a breach of duty.
19. While a director is not liable for making a genuine mistake, he/she is expected to perform his/her duty to the best of his/her ability. A director must also disclose any interest he/she may have in actual or proposed contracts involving the company. In addition, directors must ensure that proper accounting records are maintained and that annual audited accounts, which give a true and fair view of the company's financial position, are filed with the Registrar of Companies within certain time limits. A director should be satisfied personally with the company's accounts. Ignorance is no excuse.

20. Directors cannot be indemnified against liability arising out of negligence, default, or breach of duty or trust. However the company's Articles of Association may allow for directors to be indemnified by the company in respect of the cost of defending such proceedings if the director is granted relief by the Court or acquitted. It is lawful for companies to purchase insurance to protect its directors against claims of negligence, breach of duty, trust and default. Directors would be well advised to ensure that such a policy of insurance is maintained at all times.

### **Insolvent Companies**

21. Directors are, to a certain extent financially protected by limited liability. This means that, while company members may lose the share capital they contribute or, in a company limited by guarantee, have to pay the guarantee (usually £1) that is the limit of their risk. Provided the director has performed his/her duties honestly and in good faith he/she does not normally have any financial responsibility for the company's debts.
22. A director may be personally liable for the debts of a company which has traded fraudulently. If he/she is to avoid accusations of wrongful trading a director must recognise the moment when his/her company can no longer avoid insolvent liquidation (i.e. its assets are insufficient to pay its debts or other liabilities) and take immediate action to protect the interest of creditors. A director is unlikely to be liable if he/she has taken every step he/she can to minimise the potential loss to the company's creditors. In considering whether a director ought to have known that the company could not avoid going into insolvent liquidation and what steps a director ought to have taken, the court will look at a director's actual knowledge, skill and experience and that which might reasonably be expected of a person in that position.