

Outside Bodies Protocol for Kent County Council

Part One - General

1. Introduction

- a) This protocol has been produced to support the Selection and Member Services (SMS) Committee in its responsibility for “making appointments and nominations on behalf of the Council to serve on outside bodies (except those needing to be made by the Leader in connection with a delegation by them of their functions, the list of those appointments to be agreed between the Leader and the Committee from time to time)” (section 17.39 (j) of the Constitution).
- b) The list of outside bodies to which this responsibility applies, and covered by this protocol, are set out in the Appendix. This list will change from time to time and the Clerk of the SMS Committee should be contacted for the current list.
- c) The nature of the role, responsibilities and potential liabilities of appointees will depend upon the legal nature of the outside body concerned, as well as the role to which they have been appointed. Failure to act in a proper manner may give rise to personal liability or liability for the Council.
- d) It is not meant to be a comprehensive guide. If Members or Officers have queries, then they should contact the Monitoring Officer for advice.

2. The List of Outside Bodies

- a) There are different reasons an organisation may be on the outside bodies list, including:
 - The organisation has made the request for a nomination or appointment.
 - There is a requirement under statute for the Council to make an appointment.
 - The Council is a member of the organisation and has the power to make appointments.
 - The organisation is under a duty to consult/engage with the Council.
 - The outside body was established as a means for undertaking a statutory duty involving the Council.
- b) It is not necessarily the case that the Council knows in detail the organisation of the outside bodies to which the Committee makes appointment/nominations, as these are independent bodies of varied types.
- c) Each year the SMS Committee will review the list of outside bodies and the appointments. Where appointments are made annually to an outside body, this will provide the opportunity to confirm/change these appointments.

- d) Where the Council has discretion in adding or removing an organisation from the list of outside bodies, the SMS Committee will consider the following before making a final determination:
- i. Whether the proposed appointment would be consistent with the Council's strategic objectives.
 - ii. Whether the proposed appointment would add value to the Council's activities.
 - iii. The time commitment of the proposed appointment.
 - iv. The cumulative impact of the number of outside bodies on Member time and Council resources.

3. Appointments and Nominations

- a) Depending on the organisation, the SMS Committee may be asked to appoint the following:
1. A currently elected Member.
 2. An Officer of KCC.
 3. An individual who is neither an elected Member, nor a KCC Officer.
- b) Where there is to be an Officer appointment, the relevant Director or Corporate Director will make a recommendation to the Committee.
- c) An individual who is neither an elected Member nor a KCC Officer may only be nominated/appointed when the following all apply:
- i. The role is to represent the best interests of the outside body solely and is in no way a representative of the Council.
 - ii. There is no bar to such an appointment, i.e., through statute, articles of association, etc.
 - iii. The outside body has been contacted prior to the nomination/appointment and they have confirmed that they are content.
- d) With both elected Member and Officer appointments, the appointment will cease as soon as the appointee ceases to be an elected member or employed as an Officer as applicable. An Honorary Alderman may not be nominated in place of a Member.
- e) All nominations/appointments are subject to confirmation of acceptance by the appointee/nominee and are only provisional until this is received.
- f) Where an appointed individual chooses to resign from an outside body appointment, they will notify the relevant outside body and also inform the Clerk of the SMS Committee. The Committee will then be able to make a replacement

appointment where there is a vacancy at the next appropriate meeting of the Committee (unless a delegation is in place – see section 4).

- g) Before accepting any appointment, all individuals are responsible for ensuring they are fully aware of the nature and role of the organisation and understand the obligations and responsibilities they are being asked to take on.

4. Authority and Delegations

- a) The authority for making these nominations/appointments rests with the Committee. This includes making changes to appointments. In other words, while a Member is entitled to resign from any appointed position, a replacement cannot be appointed without a decision from the Committee, unless there is a delegation in place.
- b) The Committee may choose to delegate the authority to make one or more nominations/appointments to the Monitoring Officer, or another appropriate Officer, including replacements where there is a vacancy. All instances of this delegated authority being exercised should involve relevant consultation with the Chair of Selection and Member Services Committee and will be reported to the Committee at the following meeting.

Part Two – Responsibilities and Indemnity

5. Introduction

- a) It should not be assumed by any appointee that their involvement with an outside body will be covered by the indemnity offered by KCC to Members and Officers. The liability offered is subject to limitations and will only apply in some circumstances. See section 7 for more on indemnity.
- b) Individuals who are appointed to outside bodies may be indemnified in relation to liabilities they incur in that capacity by that body, though this is subject to certain limitations, depending on the nature of the organisation and the role. See section 7 for more on indemnity.
- c) Where the appointed individual is neither a Member nor an Officer, they will not be covered in any way by the indemnity offered by KCC to Members and Officers.

6. Duties and Responsibilities

- a) The following is a summary of the main duties and responsibilities of Councillors who are nominated by the Council to the most common types of outside body. The main principles of the obligations applying to company directors also apply to trustees and members of management committees. If a nominee is in doubt about their duties and responsibilities, they may seek advice from the Monitoring

Officer. In many cases, however, it will be more appropriate to seek advice from the advisers to the body involved, as they will have access to the rules and protocols of the body.

6a. Companies

- a) A company is a separate legal entity which can hold property in its own right, enter into contracts, employ staff and sue and be sued in its own name. The company is distinct from its members, who may be either shareholders or guarantors. The Council itself may be a member of the company, either a shareholder or guarantor.
- b) The duties of a company director are set out in the Companies Act 2006, which codifies the existing common law and equitable principles. The management of a company is usually the responsibility of the Board of Directors. Directors' powers are usually set out in the company's Articles of Association. Another important document is the Memorandum of Association, which sets out the Company's objectives and powers.
- c) The duties of a company director are not the same as the responsibilities as a Member or Officer. Basically, when involved in company business, the company must come first. Directors must act in the interests of the company, and not in the interests of other parties, including shareholders.
- d) Directors' Responsibilities are:
 - i. To promote the success of the company, A director's primary duty is to act in good faith, in the best interests of the organisation and its objects. All directors owe a fiduciary duty to their company, which means they owe loyalty to the company and a duty of care to act in the best interests of the company, having regard to the interests of the members or shareholders of the company, the company's employees, and creditors. This includes having regard to the likely long-term consequences of decisions, the interests of employees, fostering relationships with suppliers and customers and others, the impact of operations on the community and environment, maintaining a reputation for high standards of business conduct, and acting fairly between members of the company.
 - ii. To exercise care, diligence, and skill, using one's own knowledge, skill and experience, together with the care, skill and diligence which may reasonably be expected of a person who is carrying out the functions of a director. So, a director with significant experience must exercise the appropriate level of diligence in exercising their duties in line with their higher level of expertise. Although directors are not bound to attend all meetings of directors, attendance should be as frequent as possible, and directors should ensure that they are reasonably informed at all times.

- iii. Not to exceed powers. A company director must act in accordance with the company's constitution, and exercise powers for the purposes for which they were given.
 - iv. To comply with the Companies Acts in relation to the keeping of accounts and ensure that the relevant returns are made to the Registrar of Companies. Failure to do so will incur fines and persistent default can lead to disqualification as a director.
 - v. To avoid conflicts of interest. A director must avoid a situation in which they have, or may have, a direct or indirect interest which conflicts, or could conflict, with the interests of the company. This duty applies particularly to transactions between a director and a third party in relation to the exploitation of any property, information, or opportunity.
 - vi. To exercise independent judgement. A director nominated by the Council cannot, for example, simply vote in accordance with the Council's instructions. To do so would be a breach of duty. The director must act in the company's interests.
 - vii. Not to accept benefits from third parties. A company director must not accept any benefit from a third party (whether monetary or otherwise) which has been conferred because they are a director. This is based on the established principle that a director must not make a secret profit as a result of being a director. This duty applies unless the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.
 - viii. To declare an interest in a proposed transaction or arrangement with the company. A company director who has either a direct or an indirect interest in a proposed transaction or arrangement with the company must declare the 'nature and extent' of that interest to the other directors before the company enters into the transaction.
- e) Directors' Liabilities: If a director fails to carry out their duties, action can be brought for breach of duty, either by the company itself, or by a liquidator if the company goes into liquidation, or with the consent of the court, by a shareholder. Such actions are unlikely where the company is properly controlled by the directors.

6b. Unincorporated Associations

- f) "Unincorporated associations" have no separate identity from their members. The rules governing the members' duties and liability will be set out in a constitution, which is simply an agreement between the members as to how the organisation will operate. Usually, the constitution will provide for a management committee to be responsible for the everyday running of the organisation. Management committee members must act within the constitution and must take reasonable care in exercising their powers. An unincorporated organisation may be charitable and may register as a charity.
- g) If an appointee is involved in a decision-making capacity or have a position of general control or management on an unincorporated body, as the body has no

separate corporate status, any liabilities will fall upon them personally. Councillors appointed to such bodies should familiarise themselves with the association's constitution to understand the nature of their role, responsibilities, and liabilities, and should assess the risk of personal liability, and the extent to which it has been covered by insurance.

6c. Charities

- a) A charity is an organisation which operates for the public benefit and exclusively charitable purposes, either:
- the relief of poverty and human suffering,
 - the advancement of education,
 - the advancement of religion, or
 - another purpose for the benefit of the community.
- b) Those who are responsible for the control and administration of a charity are referred to as its trustees, even where the organisation is a company limited by guarantee and even though they are not strictly trustees. A charity may also be unincorporated.
- c) Trustees of a charity retain personal liability and can only delegate to the extent that the charity's constitution authorises them so to do.
- d) Charitable Trustees' Responsibilities are:
- i. To act in accordance with the charity's trust deed or governing document.
 - ii. To protect the charity's assets.
 - iii. To comply with the Charities Acts, and the Trustee Act 2000.
 - iv. Trustees must not make a private profit from their position. They cannot receive remuneration without the sanction of the Charity Commission.
 - v. To perform their duty with the standard of care which an ordinary, prudent business person would show. Higher standards are required of professionals, and in relation to investment matters.
 - vi. Charitable trustees must ensure that the information relating to the charity and trustees is registered with the Charity Commissioners and that annual accounts, reports and returns are completed and sent.
 - vii. Trustees are under a duty to ensure compliance with all relevant legislation (e.g., in relation to tax and land matters).
- e) Charitable Trustees' Liabilities: Generally, a trustee may incur personal liability if they:
- act outside the scope of the trust deed,
 - fall below the required standard of care,
 - act otherwise than in the best interests of the charity, in a way which causes loss to the charity fund, or

- makes a personal profit from the trust assets.
- f) In such circumstances the trustee will be in breach of trust and will incur personal liability for losses incurred. If in doubt, trustees should always consult the Charity Commissioners.
- g) Trustees can incur personal liabilities for contracts they enter into in the name of the charity. They will normally be entitled to be reimbursed from charitable funds for liabilities and expenses properly incurred by them. If the charity is a company, the trustees will be protected from liabilities incurred in the day-to-day running of the charity in the normal course of events but will be personally liable if they commit a breach of trust, as stated above.

7. Indemnity

- a) Councillors who participate in external bodies may be indemnified in relation to liabilities they incur in that capacity, though this is subject to certain limitations.
- b) Indemnity by the outside body:
1. **Directors:** Directors cannot be indemnified by the company against liability for negligence, default, breach of duty and trust. Companies can however purchase insurance to protect directors against claims of negligence, default, breach of duty and trust. Those appointed as directors should ensure that appropriate insurance is in place. Companies can, if their Articles of Association allow, provide for directors to be indemnified for the costs of defending such a claim if they are granted relief by the court or acquitted.
 2. **Trustees:** Provided a charitable trustee acts properly, and within their powers, indemnity can be given from the trust fund. Trustees can take out insurance to protect themselves from personal liabilities, but not for criminal acts such as fraud. If the premiums are to be paid out of the charitable funds, the consent of the Charity Commissioners will be needed.
 3. **Unincorporated Associations:** Members may be entitled to an indemnity if they act in accordance with the constitution of the association, and are not at fault. However, regard must be had to the terms of the constitution. The constitution will determine whether insurance can be paid for by the organisation.
- c) Indemnity by the Council: The Council may provide an indemnity where Members or Officers are acting on an outside body at the request of the Council, subject to d below.
- d) The indemnity the Council can provide is subject to limitations. In general terms, if a Member or Officer is acting properly, within their powers and in good faith,

the Council will consider on a case by case basis giving an indemnity, providing that Member has complied with this protocol and undertaken the relevant training offered by the Council. However, the Council cannot, for example, provide an indemnity in relation to any action or failure by any Member/Officer which constitutes a criminal offence, or for any action or failure by any Member/Officer which is the result of fraud, or other deliberate wrongdoing or recklessness on the part of the Member or where they have not acted reasonably or in the Council's best interests. When a Member or Officer is serving on an outside body, the Council's indemnity will only apply after any indemnity or insurance from the body itself. There are further limitations and it is advisable to be clear about the scope of the Council indemnity that may be available.

- e) Each case is different, and all individuals are strongly advised to understand their potential liabilities before accepting any appointment to an outside body.
- f) Training in relation to the different types of role and the resulting liabilities is essential and before appointment, Members are strongly advised to obtain bespoke training organised by the Monitoring Officer to inform their decision who will also clarify the likelihood and extent of any indemnity in writing.

8. Conflicts of Interest and Codes of Conduct

- a) Members and Officers are reminded of the requirements of their respective Codes of Conduct.
- b) A Member appointed to an outside body is likely to have a declarable interest if they attend a council meeting where a matter relating to that body is included or arises. In that situation, they should disclose to that meeting the existence and nature of their interest at the commencement of the consideration of the matter; or as soon as the existence of the interest becomes apparent to them. Depending on the nature of the matter, the Member's interest may require them in addition to leave the meeting room without further participating in the discussion or in voting.
- c) Where there is no prejudicial interest in a matter, a Member's duties as a director or trustee or a member of a management committee may still mean that they should not participate in a decision because of a legitimate fear of lack of impartiality, or bias, which could potentially invalidate the decision. Bias will not be assumed merely on the basis of the Member's membership of an outside body. However, where the outside body has an approach which is being advocated by the Member, it is quite possible that, in the context of a legal challenge to the council's decision, the Court would find the Member had been biased on the issue. Therefore, the Member should consider very carefully whether to take part in a discussion or decision at a Council meeting on that matter. In such circumstances, it would be appropriate to seek advice from the Monitoring Officer, or other appropriate/legal governance Officer.

- d) Where an Officer has been appointed to an outside body by the Council and a conflict of interest arises, this should always be disclosed to the officer's immediate manager who should, in appropriate cases, seek advice from the Council's Monitoring Officer, or other appropriate /legal governance Officer.