

# LONDON BOROUGH OF HAMMERSMITH & FULHAM

**Report to:** Full Council

**Date:** 01/11/2023

**Subject:** Review of the Constitution

**Report of:** The Leader of the Council - Councillor Stephen Cowan

**Report author:** David Abbott, Head of Governance

**Responsible Director:** David Tatlow, Monitoring Officer

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## SUMMARY

The Council's Monitoring Officer is required to review the Council's Constitution each year to ensure that its aims and principles are given full effect in accordance with Article 15 of the Constitution.

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## RECOMMENDATIONS

1. To approve the amended terms of reference for the Audit Committee attached at Appendix 1.
  2. To approve the amendments to the constitution related to Council owned companies detailed in Appendix 2.
  3. To note the amendments to the Economy and Environment Registers of Authorities outlined in the report.
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**Wards Affected:** All

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<b>Our Values</b>	<b>Summary of how this report aligns to the H&amp;F Values</b>
Taking pride in H&F	Ensuring a high standard of governance across the Council.

## Financial Impact

The recommendations in this report have no financial impact.

*Alex Pygram, Head of Finance, 18/10/2023*

*Verified by Andre Mark, Head of Finance – Strategic Planning and Investment, 18/10/2023*

## **Legal Implications**

The Local Government Act 2000 requires the Council to have and maintain a Constitution. The Monitoring Officer is satisfied that the Council's Constitution continues to fulfil its stated purposes, as set out in Article 1 of the Constitution.

*Grant Deg, Assistant Director, Legal Services, 18/10/2023*

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## **Background Papers Used in Preparing This Report**

None.

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## **DETAILED ANALYSIS**

### **Proposals and Analysis of Options**

1. Each local authority is required to publish the arrangements it has made to discharge its functions in a 'constitution' prepared in accordance with Section 37 of the Local Government Act 2000. The Constitution sets out how the Council operates, how decisions are made and the procedures that are followed to ensure business is conducted in an efficient, transparent, and accountable manner. Some of the content of the Constitution is required by law, the remainder is for the Council itself to determine.
2. The Constitution is reviewed at least annually to ensure it continues to promote timely, effective, transparent, and lawful decision making reflecting the arrangements Members have put in place for the running of the Council. The Constitution was last reviewed at the Full Council meeting on 24 February 2022.
3. In-year amendments were approved by Council to the Scheme of Delegation to Officers to reflect recent changes in organisational structure and changes to the responsibilities of Chief Officers.
4. The Monitoring Officer has a duty to keep the Constitution under review and has delegated authority to amend the Constitution where there has been a change in law, job title, structure, rearrangement of job responsibilities or for general administrative convenience. All extensive changes to the Constitution, however, must be approved by Full Council.

### **Amendments to the Audit Committee Terms of Reference**

5. The proposed amendments to the Audit Committee's Terms of Reference, detailed in Appendix 1, correct two references to ISA standards and regulations.

### **Updated Guidance on Council Owned Companies**

6. Appendix 2 details proposed changes to the guidance in the constitution on Council owned companies. The changes have been made to reflect updated

Government guidance on companies and is based on lessons learned from other local authorities.

### **Amendments to Registers of Authorities**

7. Council is asked to note recent updates to the Economy and Environment registers of authorities approved by the Monitoring Officer, reflecting changes to job titles, roles, and HR structures within the departments. The full registers can be found online on the following page:  
<https://democracy.lbhf.gov.uk/ieListDocuments.aspx?CIId=114&MIId=7494>

### **Reasons for Decision**

8. The Council's Monitoring Officer is required to review the Council's Constitution each year to ensure that its aims and principles are given full effect in accordance with Article 15 of the Constitution.

### **LIST OF APPENDICES**

- Appendix 1 – Audit Committee Terms of Reference (Amendments)
- Appendix 2 – Updated Guidance on Council Owned Companies

### Audit Committee Terms of Reference (Amendments)

*NOTE: Amendments are highlighted in yellow.*

**Members**

6 voting councillors

**Quorum**

3 Members of the Committee

**Political proportionality**

4 Administration members  
2 Opposition members.

**Co-opted Members**

The Committee may co-opt non-voting independent members as appropriate

**1. Membership**

- 1.1 The Chair will be drawn from one of the Administration Councillors; the Vice-Chair will be an Opposition Councillor.
- 1.2 The Committee may co-opt non-voting independent members as appropriate.
- 1.3 The Committee may ask the Director of Audit, Fraud, Risk and Insurance, a representative of External Audit, the Risk Management Consultant, and any other official of the organisation to attend any of its meetings to assist it with its discussions on any particular matter.

**2. Voting**

- 2.1 All Councillors on the Committee shall have voting rights. In the event of an equality of votes, the Chair of the Committee shall have a second casting vote. Where the Chair is not in attendance, the Vice-Chair will take the casting vote.

**3. Procedures**

- 3.1 Except as provided herein, Council Procedure Rules (as applicable to all Committees) shall apply in all other respects to the conduct of the Committee.
- 3.2 Meetings of the Committee shall be held in public, subject to the provisions for considering exempt items in accordance with sections 100A-D of the Local Government Act 1972 (as amended).

**4. Meetings**

- 4.1 The Audit Committee will meet at least four times a year.
- 4.2 Meetings will generally take place in the spring, summer, autumn, and winter. The Chair of the Committee may convene additional meetings as necessary.
- 4.3 The Chief Executive may ask the Committee to convene further meetings to discuss particular issues on which the Committee's advice is sought.

## 5. Reporting

- 5.1. The Audit Committee will formally report back in writing to the full Council at least annually.

## 6. Responsibilities

- 6.1. The Audit Committee will advise the Executive on:
- the strategic processes for risk, control and governance and the Statement on Internal Control;
  - the accounting policies and the annual accounts of the organisation, including the process for review of the accounts prior to submission for audit, levels of error identified, and management's letter of representation to the external auditors;
  - the planned activity and results of both internal and external audit;
  - the adequacy of management responses to issues identified by audit activity, including the external auditor's annual letter
  - the Chief Internal Auditor's annual assurance report and the annual report of the External Auditors.
  - assurances relating to the corporate governance requirements for the organisation;
  - (where appropriate) proposals for tendering for either Internal or External Audit services or for purchase of non-audit services from contractors who provide audit services.
- 6.2. The Committee's responsibilities in relation to the annual accounts will include:
- to approve the Council's Statement of Accounts, in accordance with the deadlines set out in the Accounts and Audit Regulations **2003 2015**;
  - acting as the Approval of Accounts Committee;
  - to consider any report as necessary from the External Auditor under **Statement of Auditing Standard 610 ISA (UK) 200 (Revised June 2016)**;
  - to re-approve the Council's Statement of Accounts following any amendments arising from the external audit, in accordance with the deadlines set out in the Accounts and Audit Regulations **2003 2015**.
- 6.3. The Committee's responsibilities in relation to risk management will encompass the oversight of all risk analysis and risk assessment, risk response, and risk monitoring. This includes:
- the establishment of risk management across the organisation, including partnerships;
  - awareness of the Council's risk appetite and tolerance;
  - reviewing the risk portfolio (including IT risks);
  - being appraised of the most significant risks;
  - determining whether management's response to risk and changes in risk are appropriate.
- 6.5. The Council has nominated the Committee to be responsible for the effective scrutiny of the Treasury Management Strategy and policies.

6.6. The Council has nominated the Committee to be responsible for the effective scrutiny of anti-fraud arrangements and activities.

# Updated Guidance on Council Owned Companies

This appendix details the proposed amendments to 'Guidance for Councillors and Officers Involved in Outside Organisations' (Part 5 of the Constitution – Codes and Protocols).

*NOTE: The detailed guidance on 'Companies, unincorporated Associations and Charities' (previously paragraphs 2.6 to 6) has been moved into the newly created Appendix 3. Additions are highlighted in yellow.*

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## Guidance for Councillors and Officers Involved in Outside Organisations

### 1. INTRODUCTION

- 1.1 Councillors are often appointed or nominated by the authority to represent it on the management committees of outside bodies, or will be involved in such bodies in their own personal capacity either as ordinary members or as members of the management committee board of trustees, executive committee etc.
- 1.2 The authority generally encourages Councillors and officers to be active citizens and to participate in the wider community in this manner. Not only does it enable the authority to participate in partner organisations, but it also means that Councillors and officers bring back to the authority additional knowledge and experience which are of value to the authority. However, if Councillors or officers are to take on such additional roles, it is important that they appreciate the responsibilities which they are taking on, understand how these responsibilities interact with their existing responsibilities to the authority, and recognise and deal with any conflicts of interest which may arise.

If you are appointed or nominated by the Council it is vital that you read this guide and bear it in mind when carrying out your duties.

### General Responsibilities and Liabilities of Members of Managing Bodies

- 1.3 Any member of a managing body has a responsibility to take the task seriously, attend meetings and carry out work for the organisation. Some organisations have rules about attendance (e.g. missing a number of consecutive meetings may lead to loss of the place on the committee). In view of the very considerable demands on Councillors' time and energy, it is prudent to check what is expected before accepting a place and to be clear what commitment can be made right from the start so that the organisation does not have unrealistic expectations.
- 1.4 In participating in outside bodies, Councillors and officers act both as individuals and, in some instances, as representatives of the authority. This

entails:

(a) **Positively**

- acting according to the rules, constitution and framework set by the outside body;
- making independent and personal judgments in line with the duty of care to the outside body;
- possibly reporting back to the authority, where they have been appointed by the authority;
- behaving ethically and following as far as applicable the authority's local Code of Conduct for Members or the National Code of Conduct for Officers;
- taking an active and informed role in the management of the outside body's affairs.

(b) **Negatively**

- Unless appointed specifically to represent the authority, it does not entail following instructions from the authority;
- It does not entail following instructions from a political party to which the Councillor may owe their political loyalty;
- It does not entail avoiding taking part in the outside body's discussions and decisions;
- It does not entail looking at things simply from the Council's perspective;
- It does not entail being there in name only and merely turning up to meetings.

1.5 The role of Councillors or officers on outside bodies may give rise to occasional conflicts of interest. If any matter relating to the outside body comes up in the course of the Councillor's work as a Councillor, or in the officer's work for the authority, it is likely that the Councillor or officer will have a significant interest which they will have to disclose. Where the conflict is such that it might be considered likely to affect the way that the Councillor would vote or act as a Councillor, they may have not only to disclose the outside interest but to take no part in the consideration of the matter.

1.6 In a very few and extreme cases, if there is a major dispute between the Council and the outside body, the Councillor or officer could be placed in an untenable situation. It is possible that the Councillor or officer may find they are unable adequately to carry out their responsibilities properly, both as a Councillor or officer and as a member or director of the outside body. But such circumstances would be rare and should not deter Councillors or officers generally from being prepared to participate in the management and running of outside organisations.

1.7 Because there is always a potential for conflict between the interests of the



authority and the outside body, Councillors and officers who are thinking of taking on such an outside interest should consider how that interest will affect their ability to continue to act as a Councillor or as an officer. Councillors and officers are asked to read the guide and if there are issues arising from their particular situation at any time, to contact the Monitoring Officer for advice.

- 1.8 This advice is for Councillors and officers who represent the Council on organisations outside the Council, for example as a company director, the trustee of a charity or a member on a management committee. It sets out some of the most important responsibilities. It is not meant to be a comprehensive guide. If Councillors or officers have specific queries, the Monitoring Officer would be happy to advise you.

## **2. GENERAL ADVICE**

- 2.1 Local authorities are often asked to nominate Councillors and officers to take part in outside bodies. The range of such external activities is very wide.
- 2.2 If you are asked to allow the authority to put your name forward, you should ask the authority for a clear statement of what will be expected of you. Any organisation which asks the authority for such a nomination should be able to provide this information. If it is unable to provide such information, you should ask whether you want to be a member of such an organisation.
- 2.3 You will probably be agreeing to be a member of that outside body because it is active in an area which is of particular interest to you. But you should be aware that the rules on such outside interests may limit your ability to continue to take an active part in this topic within the authority. You may have to disclose membership of the outside body in your dealings with the authority. Where any conflict of interest arises between the outside body and the authority, it is likely that you will have to withdraw from any consideration by the authority of any matter affecting the outside body, unless the outside body is another public authority, or you are appointed strictly as the representative of the authority. This aspect is dealt with in more detail below.
- 2.4 As a member of an outside body, you will be expected to participate fully in that organisation. If your other commitments mean that you will regularly have to miss meetings of the organisation, or that you have to withdraw from meetings because of conflicts of interest, you will be doing that organisation no favours, and this may reflect badly on the authority which put your name forward. If you neglect your responsibilities to that outside body it is even possible that you will incur a personal liability. Therefore do not allow your name to be put forward unless you are satisfied that you can participate fully in that organisation.
- 2.5 In almost all circumstances you will owe a duty to act in the best interests of that body. You will have to exercise your own best judgement and you cannot just take instructions from the authority. It is permissible to take account of the authority's wishes, but in any conflict, you must act in the best interests of the outside body. The Council recognises this in appointing or nominating you.
- 2.6 Your responsibilities as a member of an outside body depend on the legal

form of that body. The principal forms are statutory corporations, Companies, unincorporated Associations and Charities. It is vital that you understand the nature of the body, your duties to it and potential liabilities, further guidance is found in Appendix 3 – Responsibilities and Liabilities of Companies and Charities.

### **3. REQUIREMENTS OF THE MEMBERS' CODE OF CONDUCT**

3.1. Under the provisions of the [Localism Act 2011](#), the Council has adopted a Members' Code of Conduct. Each member of the authority, elected or co-opted, is required to sign an undertaking to observe the provisions of the Members' Code of Conduct.

#### **3.2. The requirements of the Members' Code of Conduct can be summarised as:**

- a. a requirement to comply with the "Nolan" principles of standards in public life;
- b. a requirement to notify the authority's Monitoring Officer of any disclosable pecuniary interests which information will then be included in a public register of interests;
- c. a requirement that a Member may not participate in a meeting or vote or remain in the room during discussion when they have a disclosable pecuniary interest in a matter being considered.
- d. a requirement that a Member disclose significant interests (which may include membership of outside bodies) when present at a meeting and, if the interest may give rise to a perception of a conflict of interests in a matter under discussion, to consider whether to withdraw from the meeting.

#### **General Rules of Conduct**

3.3 The Council's Members' Code of Conduct sets out some general rules of conduct which must be observed by Members. The most important rules, in the context of outside interests are as follows:

- "Not allowing other pressures, including the financial interests of myself or others connected to me, to deter me from pursuing constituents' casework, the interests of the London Borough of Hammersmith and Fulham area or the good governance of the authority in a proper manner.
- Exercising independent judgement and not compromising my position by placing myself under obligations to outside individuals or organisations who might seek to influence the way I perform my duties as a member/co-opted member of this authority.
- Contributing to making this authority's decision-making processes as open and transparent as possible to enable residents to understand the reasoning behind those decisions and to be informed when holding me and other members to account, but restricting access to information when the wider public interest or the law requires it.

- Behaving in accordance with all our legal obligations, alongside any requirements contained within this authority's policies, protocols and procedures, including on the use of the Authority's resources."

#### **4. REGISTRATION AND DISCLOSURE OF OUTSIDE INTERESTS FOR OFFICERS**

##### **Declaration of Interests**

- 4.1 Section 117(1) of the Local Government Act 1972 requires that, if it comes to the knowledge of any officer of a local authority, that the authority has entered or proposes to enter into any contract in which they have a pecuniary interest, whether or not they would actually be a party to the contract, they must give notice in writing to the authority. There is a difficulty with this provision as the definition of a pecuniary interest has now been repealed, but it must be taken as any circumstance in which they or a member of their immediate family stand to gain or lose financially as a result of the contract.

##### **Registration of Interests**

- 4.2 Most local authorities require officers to declare any interests which they have, both upon appointment and as those interests change, and enter those declarations in a register which is not available to the public but is accessible by other officers who have a "need to know".

#### **5. GIFTS AND HOSPITALITY**

- 5.1 Members and officers must never accept any gift or consideration as an inducement for doing or forbearing to do anything in their roles as members or officers of the authority. Indeed, where officers accept any such gift or consideration from anyone who has or is seeking a contract with the authority, the gift or consideration is deemed to have been accepted corruptly unless the officer can prove to the contrary. It is therefore very important to be completely open about any significant gift or hospitality, to avoid the suspicion of misconduct.
- 5.2 Members are required by the Council's Members' Code of Conduct to notify the Monitoring Officer of receipt of any gift or hospitality with a value of more than £50, whatever the motivation for such a gift.
- 5.3 A particular issue arises for officers seconded to work on behalf of outside bodies, as Section 117(2) of the Local Government Act 1972 provides that an officer shall not, under colour of his office or employment, accept any fee or reward whatsoever other than their proper remuneration. It is therefore essential that, where an officer is to be seconded and might be in receipt of any remuneration, bonus or allowances from the authority to which they are to be seconded, that the seconding authority agree that their proper remuneration shall henceforth include any remuneration, bonus or allowances paid to the officer by the body to which they are seconded.

## **Guidance for Councillors and Officers Involved in Outside Organisations – Appendix 3 – Responsibilities and Liabilities of Companies and Charities**

Your responsibilities as a member of an outside body depend on the legal form of that body. The principal forms are:

### **(a) Statutory corporations**

These are bodies which are set up under by statute. There is a wide range of such statutory corporations, including school governing bodies, universities, combined Police and Fire Authorities, and many "quangos". The members of the statutory corporation, such as the governors of a school, and how they are appointed is set out in the statute, as are the powers of the statutory corporation. That statute will also set out the responsibilities and liabilities of members of the corporation.

### **(b) Companies**

Companies are separate legal entities which are set up by their members, who may be either shareholders or guarantors. In a company limited by shares, each member's personal liability is limited to the face value of their shares. In a company limited by guarantee, their personal liability is limited to the value of their guarantee, which may be as little as £1. The structure of the company, and its powers, in terms of the activities which it may undertake and its powers to buy and sell land, employ staff or enter contracts are defined in its Memorandum and Articles. Directors of companies can incur personal liability, particularly if the company becomes insolvent. Industrial and Provident Societies (IPSs), are similar to companies, but the member's liability is limited to their annual subscription to the association. This legal structure is popular for housing associations.

### **(c) Unincorporated Associations**

Unincorporated associations are more or less informal organisations, in which the members regulate their relationship by a contract, such as a membership agreement or the rules of the club or association. Because the association has no legal existence separate from its members, there can be no limited liability. Each member incurs full personal liability for their own actions, and relies on the membership contract to be able to recover their costs from the other members.

### **(d) Charities**

Some companies and unincorporated associations are also charities. To be a charity, the body or organisation must satisfy the Charity Commissioners that it is directed to charitable objectives. As a charity, it gains relief from corporation tax, VAT and business rates, but is subject to stricter regulation by the Charity Commissioners, to ensure

that it is properly managed and that it is spending its money properly on the charitable objects.

It is vital that you understand the nature of the body, your duties to it and potential liabilities.

### 3 COMPANIES

3.1 Governance arrangements over companies should be regularly reviewed to ensure they remain appropriate for the size and activities of the companies and the strategic rationale surrounding the creation and function of companies with an appropriate business case.

3.2 On incorporation a company becomes 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.

3.3 When entering into complex or large company arrangements, focus on accessing the right financial and legal advice. This should include advice on Companies Act, tax, and group accounting requirements. This advice should be from a suitably qualified party with no interest in or relationship with the deal and include a suitably comprehensive appraisal of all risk factors.

3.4 Companies limited by shares are those which have a share capital (e.g. 1000 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, although there may be restrictions requiring the shares to be offered to existing shareholders. 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, or the amount of their guarantee. This can be as little as £1.

3.5 Companies limited by guarantee are those where there is no shareholding. Instead each Member agrees that in the event of the company being wound up they will agree to pay a certain amount. This may also be as little as £1.

3.6 There should be explicit shareholder (sometimes called 'Members' Agreements) when setting up a Joint Venture with another party. The Council will have to appoint a nominated shareholder representative with authority to take decisions as shareholder (albeit as directed by the Council). Where these are already in place, consider whether they continue to reflect current circumstances.

3.7 Where a company is a trust, it is not permitted to distribute any profit to its shareholders, but must ensure that any such profit is ploughed back into the business. Trust companies are normally limited by guarantee, and this form of company is the most usual form in the public and voluntary sector, particularly where charitable status is sought.

3.8 The management of a company is generally the responsibility of a board of directors, elected by the members of the company. The powers of the

directors are usually set out in the company's Articles of Association (the rules each company has to govern its internal management). Sometimes even though the company has been incorporated the directors may be referred to as members of the committee of management, governors or even trustees. However this does not change their status as directors. Conversely, sometimes officials are called directors but they are not members of the board. Again their status will not be affected. Directors are those who are appointed by the company to act in the capacity.

**3.9** Internal and external directors for LBHF companies must attend training to understand commercial awareness, roles and responsibilities and update this regularly. Directors should be able to interrogate management accounts and the assumptions upon which the cashflow and any profit is founded and also scrutinise and hold a company to account.

#### **4 Directors' Duties**

A director is an agent of the company. Their prime duties are as follows:

- (1) A fiduciary duty to the company (not to individual shareholders) to act honestly and in good faith and in the best interests of the company as a whole. Directors are therefore in the position of "quasi trustees" who must take proper care of the assets of the company. The fiduciary duty of the director towards the company is very similar to the fiduciary duty of Councillors to the Council Tax payers of the London Borough of Hammersmith and Fulham.
- (2) A general duty of care and skill to the company. So long as the company remains solvent, a director requires no greater skill than might reasonably be expected of someone of that individual's particular knowledge and experience. A director is not deemed to be an expert, but is expected to use due diligence and to obtain expert advice if necessary. However if the company becomes insolvent, the Court may expect that the director brings an appropriate level of skill, competence and experience to the job.
- (3) Consider whether the focus of reporting on the work and activities of companies is appropriate and realistic for example, is there an appropriate separation of the strategic oversight from operational service delivery reporting?
- (4) Like a Councillor in respect of Council decisions, the director is under a duty to exercise independent judgement, though it is permissible for them to take account of the interests of a third party which they represent. 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 the authority's instructions. To do so would be a breach of duty.
- (5) Conflicts of Interest. There may be actual or potential conflicts between the interests of the company and those of the authority. The Councillor or Officer owes an independent duty to the company in their capacity as director and, where there is a conflict, they have to act in the interests of

the company first. The Councillor or officer cannot waive their statutory responsibilities as a director.

- (6) Directors are not allowed to make a private profit from their position. They must therefore disclose any interests they or their family may have in relation to the company's contracts. Whether they are then allowed to vote will depend on the Articles of Association. Equally, officers are not allowed under cover of their office to take any more than their proper remuneration. They must obtain the consent of their employing authority if they are to receive any remuneration from a company to which they have been appointed by their employing authority.
- (7) Directors must ensure compliance with the Companies Acts in relation to the keeping of accounts, and that the relevant returns are made to the Registrar of Companies. Directors of charities have similar responsibilities to ensure compliance with charities law. Failure to do so may incur fines and persistent default can lead to disqualification as a director.

#### 4.1 Directors' Liabilities

- (1) The company's identity must clearly be shown on its stationery. The company number, place of registration, registered office address and if any of the directors' names are shown then they must all appear. Non-compliance is an offence and the directors and company officers can be fined.
- (2) A company can only act within the scope set out in its Memorandum of Association (the document which sets out the objects of the company). A director who knowingly causes the company to act beyond the activities set out in the Memorandum can be liable personally. In very limited circumstances it is possible for the actions of the directors to be ratified by the members of the company after the event.
- (3) A director may also be liable for breach of trust, if they misapply the money or property of the company. Directors may also be liable if they fail to take action to prevent the breach of a co-director of which they are aware.
- (4) In the event of failure to act in accordance with the best interests of the company, or if a director uses their powers improperly or makes personal profit from their position as director, then the director may be personally liable for loss to the company and may be required to give the company the personal profit made.
- (5) If the level of skill and care shown by a director falls below that which could be reasonably expected and the company suffers loss, the director will be liable for the loss incurred. However if it believes the director acted honestly and reasonably, a Court may excuse the director liability.
- (6) If a company continues to trade despite the fact that the directors know or ought to know that there is no reasonable prospect of the company

meeting its liabilities, this is "wrongful trading". Where a director participates in wrongful trading, a Court may require that director to meet any creditor's additional losses resulting from the failure of the company to cease trading as soon as it knew that it could not remain solvent. No such order will be made if the Court is satisfied that the director took all reasonable steps to minimise the loss to the creditors. If a director has concerns about the company's financial position they could be well advised to inform the other directors and seek advice from the company auditors.

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

#### 4.2 Indemnities

- (1) Councillors who are directors cannot be indemnified by the company 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, default etc. Directors would be well advised to ensure that such a policy of insurance is maintained at all times.

### 5 Local Authorities (Companies) Order 1995

- (1) This Order, made under the Secretary of State's powers contained in [Part Five of the Local Government and Housing Act 1989](#), sets out



rules concerning local authorities' involvement in "regulated companies" which are subject to extensive controls, and their involvement in other companies where a number of rules apply.

- (2) "Regulated companies" are so defined if they are controlled or influenced by the local authority. "Influenced companies", under the effective control of the local authority, will be subject to the capital finance regime and special property controls. In broad terms, the test as to whether companies are local authority influenced is whether the local authority has the right to or in fact does exercise a dominant influence over the company in question.
- (3) The original concept of controlled influenced and minority interests in companies were introduced by the 1989 Act. "Influenced" means at least 20% local authority interest plus a business relationship with the company accounting for over 50% of the company's turnover and/or the company was located on local authority land leased or sold for less than best consideration. "Controlled" means over 50% local authority interests, and "minority" less than 20% interest. The concept in the 1989 Act stands, but the Order introduces the term "regulated".
- (4) A local authority influenced or controlled company must state this on all business documents.
- (5) Councillors or officers who are directors of outside companies to which they have been nominated by the Council are under the following obligations:-
  - (a) (Councillors only) that the remuneration they receive from the company should not exceed that received from a local authority and should be declared.
  - (b) to give information to Councillors about their activities required by the local authority (save for confidential information) and
  - (c) to cease to be a director immediately upon disqualification of being a Councillor or termination of their employment by the Council.

You will be notified by officers if you are appointed to a regulated local authority company.

## **MANAGEMENT COMMITTEES**

### **5.1 Unincorporated Associations**

Groups which are not charitable trusts or companies are "unincorporated associations" and have no separate legal 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. An unincorporated organisation may be charitable and may register as a charity.

5.2 Property will have to be held by individuals as the association has no legal existence of its own.

### 5.3 **Duties**

Broadly, management committee members must act within the constitution, and must take reasonable care in exercising their powers.

### 5.4 **Liabilities**

- (1) Generally, the management committee members are liable for the acts of the organisation, but are entitled to an indemnity from the funds of the organisation if they have acted properly. If there are not enough funds, the committee members are personally liable for the shortfall.
- (2) If one person is appointed by the constitution to act as the agent of the organisation for certain purposes, then that person acts as the agent for all the members, who have joint liability for the agent's actions.
- (3) Members of the committee of management will have personal liability if they act outside the authority given to them or if they do not comply with statute e.g. the payment of employees' tax etc.

### 5.5 **Indemnities**

Members will be entitled to an indemnity 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.

## 4. **CHARITIES**

4.1 To be a charity an organisation must operate for a charitable purpose. There are four such charitable purposes:

- the relief of poverty and human suffering
- the advancement of education
- the advancement of religion
- another purpose for the benefit of the community.

It must operate for the public benefit and have exclusively charitable purposes. An organisation which operates for political purposes will not qualify for charitable status.

4.2 To register as a charity the organisation must submit its completed constitution (usually Certificate of Incorporation and the Memorandum and Articles of Association of a company limited by guarantee) to the Charity Commissioners for approval. If they are satisfied that the organisation is charitable it will be registered as such.

4.3 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 even though they are not strictly trustees. Trustees of a charity retain personal liability, and can only delegate to the extent that the constitution authorises them so to do.

#### 4.4 Trustees' Duties

- (1) Trustees must take care to act in accordance with the constitution and to protect the charity's assets. They are also responsible for compliance with the Charities Acts, and should note the particular requirements of the Acts in respect of land transactions.
- (2) Trustees must not make a private profit from their position. They cannot receive remuneration without the sanction of the Charity Commission. They must also 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.
- (3) 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.
- (4) If charitable income exceeds £10,000, the letters, adverts, cheques etc must bear a statement that the organisation is a registered charity.
- (5) Trustees are under a duty to ensure compliance with all relevant legislation (e.g. in relation to tax and land matters).

#### 4.5 Trustees' Personal Liability

- (1) Generally a trustee incurs personal liability if they:
  - acts outside the scope of the trust deed
  - falls below the required standard of care
  - acts otherwise than in the best interests of the charity, in a way which causes loss to the charity fund
  - makes a personal profit from the trust assets

In such circumstances the trustee will incur personal liability for losses incurred.

- (2) If in doubt, always consult the Charity Commissioners. A trustee who does so can avoid personal liability for breach of trust if they act in accordance with the advice given.
- (3) Trustees of a trust can be liable personally to third parties unless the trust is also a company, and therefore has a separate legal identity from the trustees. The constitution will normally provide for trustees to be given an indemnity from the trust assets, provided they act properly

in incurring the liability. Trustees remain personally liable for their own acts and defaults once they have retired. If they have entered into any ongoing contracts on behalf of the trust they should seek an indemnity from their successors. 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, but will be personally liable if they commit a breach of trust (see (1) above).

- (4) Trustees may be liable to fines if they do not comply with the duty make returns etc.

#### 4.6 **Indemnities**

An indemnity can be given from the trust fund provided the trustees have acted properly and within their 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 first, unless the trust deed allows it.