

ABERDEEN CITY COUNCIL

| | |
|---------------|---|
| COMMITTEE | COUNCIL |
| DATE | 23 August 2017 |
| REPORT TITLE | GOVERNANCE REVIEW - UPDATE ON APPOINTMENTS TO OUTSIDE BODIES POLICY |
| REPORT NUMBER | CG/17/083 |
| LEAD OFFICER | FRASER BELL |
| REPORT AUTHOR | ALAN THOMSON |

1. PURPOSE OF REPORT:-

The report seeks to update Elected Members on items that were raised after the Council meeting on 21st June 2017 in relation to the provision of indemnity by Council for Elected Members on Outside Bodies, a review of the Outside Bodies that do not have insurance in place, and the Outside Bodies that had failed to respond to the original requests for information.

2. RECOMMENDATION(S)

The Council is recommended to:-

- (a) Approve the draft Policy on the Appointment of Elected Members to Outside Bodies as set out at Appendix 1 to the report;
- (b) Proceed with the appointments of Elected Members to the Outside Bodies as shaded in green in Appendix 2 to the report;
- (c) Proceed with the appointments of Elected Members to the Outside Bodies shaded in orange in Appendix 2 to the report;
- (d) Appoint Elected Members to the Outside Bodies shaded in green in Appendix 3 to the report; and
- (e) Agree to make no appointment to the Outside Bodies shaded in red and blue in Appendix 3 to the report and note that these Outside Bodies will be removed from the Outside Bodies Register until they have provided information required as per the Policy on the Appointment of Elected Members to Outside Bodies

3. BACKGROUND/MAIN ISSUES

3.1 Insurance Update

3.1.1 At the meeting of Council on 21st June 2017, a report on the Policy on Appointment of Elected Members to Outside Bodies was presented to the Council and the Council resolved as follows:

(a) *Defer approving the draft policy on the appointment of Elected Members to Outside Bodies as set out at Appendix 1 to the report in order for the Head of Legal and Democratic to bring back a report to the next Council meeting on the feasibility and costs of the Council indemnifying Councillors on all outside bodies within Appendix 3 as well as undertake an assessment of those outside bodies identified in the report where no insurance cover is currently provided by the Council to ensure Councillors are fully aware of the risk associated with joining an outside body.*

3.1.2 Elected Members only become personally liable if they are involved in decision making for certain types of Outside Body in circumstances as set out below. There is a distinction between corporate bodies and non-corporate bodies.

3.1.3 A corporate body, such as a company, has its own legal personality¹ and is responsible for its own governance arrangements, finances and contractual obligations. The body itself will incur direct liability for its actions or inactions. Individual members who are acting within any mandate given to them by that body will usually be protected by limited liability if it becomes insolvent.

3.1.4 Directors of companies, however, can be personally liable for:

- wrongful trading (trading when the company has no reasonable prospect of avoiding insolvent liquidation);
- fraudulent trading (carrying on the business of a company with the intent to defraud creditors or potential creditors); or
- where the company breaches other legislation in relation to health and safety, trading standards and the environment.

3.1.5 A non-corporate body, such as a charitable trust, has no separate legal personality and is in effect a collection of individuals who will usually be acting together under a formal structure such as a constitution, rules or terms of reference that have been agreed between the members. It should be noted that charities can also be run as incorporated companies (usually a company limited by guarantee).

3.1.6 Trustees (including Charity Trustees) can be personally liable for:

- breach of trust
 - ultra vires (acting outwith powers); or

¹ Legal Personality: Independent existence under the law, especially in the context of a company being separate and distinct from its owners. One of the main advantages of the company structure is the limitation of liability that the separate legal personality gives to the members.

- intra vires (within powers but done so negligently),
- breach of fiduciary duty (failing to act in interests of beneficiaries and acting in own interests).

3.1.7 It should also be noted that Trustees and Directors are only personally liable for the decisions they are involved in.

3.1.8 Insurance may be required to assist with the cost of defending a challenge against such a decision or defending other kinds of claim (e.g. claims for damages for personal injury). Due to the types of organisation and the types of decisions that Elected Members are expected to make, the risk and likelihood of such claims against Elected Members is deemed to be very low, but insurance is a recommended mitigation.

3.1.9 Many of the Outside Bodies in Appendix 2 only require Elected Members to act as observers or advisors. As the Elected Members will not be making any decisions and are representing the Council, they would be covered by the Council's insurance. Elected Members acting as observers in Outside Bodies must ensure that they do not get involved in the decision making process and inadvertently assume decision making responsibilities, as the Council's insurance policy will not cover any claims against the Elected Member in respect of their assuming such responsibilities.

3.1.10 A number of the Outside Bodies are Statutory Partnerships or Boards, and although there is no confirmation of insurance, they are deemed to be very low risk. The Council is obliged to appoint to these types of Outside Bodies and consequently the recommendation is for appointment in these instances.

3.1.11 An assessment was carried out on the Outside Bodies shaded orange on Appendix 2, which are mostly trusts, to assess potential risk. As long as trustees make fair and reasonable decisions, risk is deemed to be very low and likelihood of claims is deemed to be low as the trusts shaded orange on Appendix 2 give grants to other charities, or purchase pieces of art. Recommendations for appointment are therefore made based on risk being deemed to be low.

3.1.12 Some Outside Bodies (detailed in Appendix 2) were able to provide assurance that they have appropriate insurance arrangements in place.

3.2 Option 1 – Can the Council indemnify Elected Members on Outside Bodies?

3.2.1 Insurance Services were consulted for advice on the feasibility and cost of the Council indemnifying Councillors on all Outside Bodies. Insurance Services have confirmed, after consulting with the Council's insurance provider, that it is not possible for the Council's insurance policy to be extended to provide an indemnity for Elected Members on Outside Bodies.

3.2.2 The first reason for this is that insurance can only be provided when the Council has an "insurable interest". Insurance can only be provided to cover activities that Elected Members are carrying out in the interests of the Council and associated with its day to day business. As Elected Members are to act

solely in the interests of the Outside Body to which they are appointed, this cannot be said to be in the interests of the Council.

3.2.3 Secondly, there is English case law² that confirms that Local Authorities cannot provide insurance or indemnity to Elected Members or Officers in respect of their acting in the interests of an Outside Body.

3.2.4 Therefore, this option cannot be considered further.

3.3 Option 2 – Can the Council reimburse Outside Bodies for insurance costs?

3.3.1 The Council already provides funds for many of the Outside Bodies, so it may be possible to stipulate that part of the grant must be used to obtain appropriate insurance for Elected Members. This would have to be written into the funding agreements with the Outside Body.

3.3.2 If extended to the small handful of Outside Bodies that do not already have insurance arrangements, the Council would inevitably receive requests for additional support from Outside Bodies that already have insurance arrangements in place. Therefore, although the cost of providing this insurance is estimated to be relatively inexpensive, it could end up costing the Council much more than anticipated and could have long term funding implications.

3.3.3 The Council would also need to consider the fairness of providing additional resources to pay for something that the Outside Bodies should already have in place.

3.3.4 This option, although possible, is not recommended due to the administrative burden and unknown cost implications.

3.4 Option 3 – Council require that Outside Bodies provide Insurance

3.4.1 Option 3 is that the Council only appoint to Outside Bodies if they can provide reasonable assurance that they do already have insurance in place, or are willing to obtain insurance prior to appointments commencing or shortly thereafter.

3.4.2 Officers have reviewed Outside Bodies that do not appear to hold insurance and the recommendations to appoint were made on the basis that these organisations appeared, on the face of it, to be relatively low risk in terms of a potential personal liability of Elected Members. The decision whether or not to accept an appointment is up to the Elected Member and they can attend a meeting of the Outside Body to ascertain whether they are comfortable accepting the appointment.

3.4.3 Option 3 is recommended to the Council as the most preferable option for the following reasons:

² *Burgoine and Others v. London Borough of Waltham Forest*
347

- Fair – Outside Bodies treated equally
- Safest
- Cost effective
- Only small number of trusts affected

3.4.4 Option 3 is also consistent with the principles of the proposed Policy on the Appointment of Elected Members to Outside Bodies. As such, the proposed Policy has not been amended and it is recommended that Council approve the Policy as set out in Appendix 1.

3.4.5 Therefore, it is recommended to that Council appoint to the Outside Bodies shaded green in Appendix 2. It is recommended that for the Outside Bodies shaded orange on the same appendix, which appear not to have insurance, the Council is recommended to appoint as well, but that it will be up to the individual Elected Members is they wish to accept the appointment. If an Elected Member is uncomfortable with an appointment, then the Outside Body can be approached to ascertain whether they would be willing to provide insurance prior to appointment commencing or soon after the appointment commences.

3.5 Review of Outside Bodies on Appendix 4 of June report

3.5.1 The Council also made the following resolution on the 21st June 2017:

(b) Instruct the Head of Legal and Democratic Services to provide a report to the next Council meeting providing full responses received from each of the outside bodies listed in Appendix 4 to allow members the opportunity to determine membership or otherwise.

3.5.2 In the report presented to Council on 21st June, a number of Outside Bodies have already confirmed that they do not require Elected Members, or the Outside Body no longer exists or meets. These Outside Bodies have been removed from the Register and have not been included in the current report as no longer being relevant.

3.5.3 A number of Outside Bodies had not responded to the request for information, and these Outside Bodies have been contacted further to provide the required information. An update of the responses from these Outside Bodies is contained in Appendix 3, and Council is recommended to appoint to or remove Outside Bodies as detailed in that Appendix 3.

3.5.4 It should be noted that where an Outside Body has been removed from the Register by reason of non-response, it will be put before Members for reconsideration, should such body get in contact in the future and complete the questionnaire as required by the Policy on Appointment of Elected Members to Outside Bodies.

4. FINANCIAL IMPLICATIONS

- 4.1 There are no direct financial implications arising from the recommendations of this report.
- 4.2 The Council has a duty to secure best value, under section 1 of the Local Government in Scotland Act 2003. As demands on the Council and Elected Members increase, it is essential that the Council keep all of its activities under review to ensure that it is securing best value for the residents of Aberdeen.
- 4.3 Each individual charitable trust has statutory financial reporting obligations and Aberdeen City Council is responsible for the administration of some of these charitable trusts. In some cases, the cost of administering these trusts is greater than their annual income. The project ongoing to rationalise trusts seeks to minimise administration costs and ensure trust money available for trust purposes is maximised.

5. LEGAL IMPLICATIONS

- 5.1 Approval of the recommendations in the report is not considered to pose any significant legal risk to the Council and will ensure that the Council meets its statutory obligations. Depending on the constitution of the body, the appointment of a member to an Outside Body may be a statutory duty or a requirement of a trust deed. If the Council failed to appoint to these types of bodies, it could face enforcement action. However, it is more likely that an agreement could be obtained with remaining trustees to amend the trust deed and allow Elected Members to resign from trustee duties. The process may involve appointing Elected Members to the trust to allow them to participate in the discussions with the other trustees to amend the trust deed or wind up the trust.

6. MANAGEMENT OF RISK

- 6.1 The purpose of the policy and the review is to ensure resources are allocated appropriately and risks to Elected Members are mitigated, through implementation of a number of safeguards for Elected Members around liability and insurance.
- 6.2 In recommending appointments or nominations of Elected Members to Outside Bodies, the Council needs to ensure:
 - roles and responsibilities are understood;
 - conflicting interests are effectively managed;
 - risks are appropriately assessed and managed; and
 - Elected Members' time is being effectively used.
- 6.3 The policy has been developed in light of the CIPFA Principles of Good Governance, in particular the following:
 - Behaving with Integrity;

- Ensuring Openness and Stakeholder engagement;
- Defining outcomes;
- Determining the interventions necessary;
- Developing the entity's capacity; and
- Managing risks and performance.

7. IMPACT SECTION

7.1 Once decisions have been made as to appointments or nominations to the bodies mentioned within the report, the relevant organisations will be contacted as to the representatives nominated or appointed.

7.2 Economy

7.2.1 There will be no direct impact on the economy arising from the recommendations.

7.3 People

7.3.1 The report may be of interest to the public as it concerns membership of various public-facing bodies.

7.3.2 An Equality and Human Rights Impact Assessment is not required as the proposal does not disproportionately impact on persons with protected characteristics compared to persons without such characteristics.

7.4 Place

7.4 There will be no direct impact on the environment or the community arising from these recommendations. Many of the Outside Bodies do benefit the local environment, the local and wider community and make Aberdeen a better place to live and work.

7.5 Technology

7.5.1 There will be no impact on technology arising from the recommendations.

8. BACKGROUND PAPERS

8.1 Delivering Good Governance in Local Government: Framework (2016 Edition)
<http://www.cipfa.org/policy-and-guidance/publications/d/delivering-good-governance-in-local-government-framework-2016-edition>

8.2 Report to Council on 21st June 2017, *Appointments to Outside bodies, Amendments to Committee places and Council diary*, Item 9.4:
<http://councilcommittees/documents/g4325/Public%20reports%20pack%2021-st-Jun-2017%2010.30%20Council.pdf?T=10>

9. APPENDICES

Appendix 1 – Policy on Appointment of Elected Members to Outside Bodies

Appendix 2 – Update on Outside Bodies Insurance provisions

Appendix 3 – Update on recommendations for appointment or removal from Register.

10. REPORT AUTHOR DETAILS

Alan Thomson
Solicitor
Alathomson@aberdeencity.gov.uk
01224 523249

HEAD OF SERVICE DETAILS

Fraser Bell
Head of Legal and Democratic Services
Frbell@aberdeencity.gov.uk
01224 522084