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# ADVICE FOR COUNCILLORS ON ARM'S LENGTH EXTERNAL ORGANISATIONS

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## 1. Introduction

- 1.1 This Advice Note, issued by the Standards Commission for Scotland (Standards Commission), aims to provide councillors with an overview of matters they should consider when they are involved with or have been invited to participate in arm's length external organisations (ALEOs).
- 1.2 The advice provided focuses on councillor responsibilities under the ethical standards framework and seeks to assist councillors in recognising and dealing with potential conflicts of interest to minimise risks to governance and accountability arrangements.
- 1.3 Councillors have a personal responsibility to observe the rules in the Councillors' Code of Conduct. This advice is intended to assist them in interpreting the provisions in the Code of Conduct in order to do so. This Advice Note should, therefore, be read in conjunction with the Code of Conduct.

## 2. Background

- 2.1 The Standards Commission's functions are provided for by the Ethical Standards in Public Life etc. (Scotland ) Act 2000 (the 2000 Act) as amended by the Scottish Parliamentary Commissions and Commissioners etc. Act 2010. The 2000 Act created an ethical standards framework whereby councillors and members of devolved public bodies are required to comply with Codes of Conduct, approved by Scottish Ministers, together with Guidance issued by the Standards Commission.
- 2.2 The role of the Standards Commission is to:
- Encourage high ethical standards in public life; including the promotion and enforcement of the Codes of Conduct and to issue guidance to councils and devolved public bodies.
  - Adjudicate on alleged breaches of the Codes of Conduct, and where a breach is found, to apply a sanction.
- 2.3 While there is no legal definition of an ALEO, it is any body which is formally separate from a council but is subject to its control and influence. ALEOs are bodies through which Councils

seek to carry out some of their functions, other than on a straightforward contractual basis. They are often used by councils as an efficient and cost effective way of delivering public services including services relating to leisure, arts, culture, employment, economic development and urban regeneration, waste management, property development and social care. ALEOs usually take the form of companies or trusts and some can register as charities (provided they have a wholly charitable purpose) or as limited liability partnerships.

- 2.4 While governance for ALEOs can be complex, it also needs to be strong and effective and should be managed through the Council's ALEO governance and scrutiny framework. Representation on ALEOs by councillors can help ensure they are being properly run and that all funds are being used appropriately and in accord with best value principles. Councillors can also inform the ALEO about the council's policies and priorities. However, councillors sitting on ALEOs have legal obligations and responsibilities to those ALEOs as well as to the Council. When members of an ALEO Board, councillors have a duty to act in the best interests of that organisation and not the body which appointed them. There is, therefore, the potential for conflicts of interest and risks to arise.
- 2.5 The Accounts Commission's 'How Councils Work' Report on ALEOs and the Auditor General for Scotland's Report 'The role of boards' both advise that board members should be aware of the skills and abilities required of any board position, and assure themselves that they can meet that requirement. You should, therefore, ensure that you have the skills and abilities to meet the requirements of a member of an ALEO before accepting any nomination or appointment to an ALEO. You may wish to refer to the Scottish Government's 'On Board - A guide for Board Members of Public Bodies in Scotland (April 2015)', which outlines some helpful principles for roles on boards and the types of skills required.
- 2.6 The Scottish Parliament's Local Government and Regeneration Committee published a report in March 2016 on an inquiry they had undertaken into ALEO's. The Committee recommended that councillors who are nominated or appointed as board members of ALEOs that are delivering public services should be provided with mandatory training on declarations of interests, conflicts of interests and risk awareness. This Advice Note is intended as an additional resource available to support the training provided to councillors by their council.

### **3. Understanding the Council's Role and Responsibilities**

- 3.1 The Following the Public Pound (FPP) Code published jointly by the Accounts Commission and COSLA, places a statutory obligation on councils to comply with it, regardless of how they deliver services. The FPP Code sets out the principles of best practice when councils establish significant funding relationships with companies, trusts and other bodies other than on a straightforward contractual basis. This includes when councils are entering into or implementing any arrangement or agreement with a body corporate.
- 3.2 You should be aware that one of the principles and specific requirements of the Code is that councils must ensure that councillors and officers are properly advised of their responsibilities to the council and to the ALEO, including in respect of making declarations of interest.
- 3.3 In addition, the Accounts Commission's 2011 Report 'How Councils work series: ALEOs: are you getting it right' provides a range of practical advice for councils and councillors to ensure that they fulfil their responsibilities. Specifically, the report advises that in order to fulfil their FPP responsibilities, councils should provide members (and officers) with ongoing advice and training. You may wish to ensure that you have read, and are familiar, with this advice and that you seek and attend such training.

## 4. Understanding Your Role & Responsibilities

- 4.1 It is important for councils to ensure governance and accountability in respect of both finance and performance. If you are nominated, appointed or otherwise agree to sit on an ALEO, you will need to be aware of your obligations to the ALEO and reconcile these with your obligations to the Council.
- 4.2 You should seek an induction on being an ALEO member to assist you in understanding the roles and responsibilities you are to undertake. You should consider providing feedback on any training or induction you receive to help ensure it remains effective and relevant.
- 4.3 The Councillors' Code of Conduct makes it clear that you still need to observe the rules in the Code even while carrying out your duties as a member of an ALEO. You will also be bound by the rules of conduct for the ALEO and are also responsible to the ALEO and to act in its best interests. This obligation is outlined in Paragraph 3.19 of the Code, which states:

You may be appointed or nominated by the Council as a member of another body or organisation. If so, you will be bound by the rules of conduct of these organisations and your responsibility for any actions taken by you as a member of such an organisation will be to the organisation in question. You must also continue to observe the rules of this Code in carrying out the duties of that body.

In most cases your duty under the Code to act in the public interest will align with your duty to act in the best interests of the ALEO. Where there is a conflict, however, you must follow the rules that govern such conflicts.

- 4.4 You should make sure you are clear about the status of your appointment. For example, is it intended that you are to be an observer only or are you on the Board in a decision-making capacity. If you become a director of an ALEO that is a company, you will assume personal responsibilities under the Companies Act. If you become a trustee of an ALEO that is a charity you will have duties under the Charities and Trustee Investment (Scotland) Act 2005, as outlined in the Office of the Scottish Charity Regulator's Guidance, which can be found at [www.oscr.org.uk/charities/guidance/guidance-and-good-practice-for-charity-trustees](http://www.oscr.org.uk/charities/guidance/guidance-and-good-practice-for-charity-trustees).
- 4.5 In order to be able to understand the differing roles and responsibilities you should ensure, before you accept an appointment or nomination to a partner organisation, that you are clear as to the status of that organisation. You may wish to consider:
- Do both the Council and organisation consider the organisation to be an ALEO?
  - If it is an ALEO, how is it constituted? Is it
    - a Trust?
    - Limited Liability Company or Limited Liability Partnership?
  - Is the ALEO a registered charity?
  - Does the ALEO have decision-making powers or is it simply an advisory body?
  - Has the ALEO been established wholly or mainly to provide services to the Council?
- 4.6 You should check whether the ALEO has a contractual arrangement with the council for the supply of goods and services and ensure that you understand the basis and content of such contracts and the implications for any failure to fulfil them.
- 4.7 You should ensure that you are fully aware of the ALEO's purpose and structure and why it was established. You should also ensure you understand the functions it performs and the activities it undertakes.

- 4.8 It is also important to have knowledge of the funding arrangements for the ALEO including the level of funding provided by the council, the body’s solvency and whether the council is a guarantor. You should be satisfied you are aware of the ALEOs financial monitoring and reporting arrangements.
- 4.9 The table below summarises the information you should consider before accepting an appointment or nomination to sit on an ALEO.

Your responsibilities as a Board member of an ALEO
Any Code of Conduct for the ALEO
The legal status of the ALEO
The purpose and function of the ALEO and the activities it undertakes
The ALEOs funding arrangements
Whether the ALEO has a contractual relationship with the Council
Has the ALEO been established either wholly or mainly to provide services to the Council
The status of your appointment to the ALEO
If a specific exclusion does not apply, whether the appointment would mean you would have to frequently declare interests at meetings of a particular committee
Will or has the Council approved the appointment

## 5. Risks to Governance and Accountability

- 5.1 ALEOs can play a significant role in a council’s service delivery and the council is often a major if not the sole source of funding for an ALEO. Therefore strong governance and, in particular, regular and proportionate monitoring, is essential. This is to ensure effective service delivery and to mitigate against any risks, which includes minimising potential conflicts of interest. Councils, when determining governance arrangements at the outset, should ensure they are considering both the advantages and risks of having its representatives on boards, and considering arrangements for funding and scrutiny that, for example, minimise potential conflicts. Both the FPP Code and the Accounts Commission’s ‘How Councils Work’ Report on ALEOs emphasise the need for councils to carefully consider representation, including ensuring the right mix of skills and experience required to govern the organisation, and to ensure that councillors and officers are advised of their responsibilities.
- 5.2 Governance in itself can pose a risk if a councillor has a role on both an ALEO Board and also on the council committee that governs or scrutinises it. Such a councillor would have an inherent conflict between the interest in how the ALEO is governed and the interest in holding it to account and potentially taking decisions over funding. As such, councils should not entirely rely on those who sit on ALEO boards to scrutinise and monitor them.
- 5.3 It is important, therefore, that you are aware of and understand the scrutiny, reporting and monitoring arrangements the council has in place.

## 6. Registration of Interests

- 6.1 It is your personal responsibility to ensure your **register of interests** is accurate and up to date. You must ensure any changes are made within one month of your circumstances changing (see the Ethical Standards in Public Life etc. (Scotland) Act 2000 (Register of Interests) Regulations 2003 (S.S.I. 2003/135).

- 6.2 In terms of your membership of an ALEO you should, in particular, consider whether you need to register an interest under Categories 1 (Remuneration), 3 (Contracts) and 8 (Non-Financial Interests).
- 6.3 **Category 1:** If your position on the ALEO had been remunerated, you would have been required to register it as such under Paragraph 4.4 of the Code. However, the Local Governance (Scotland) Act 2004 (Remuneration) Amendments 2011, which came into effect on 1 July 2011, prohibit a local authority from allowing a body controlled by it to make any payments to councillors by way of remuneration other than the reimbursement of authorised and receipted expenses.

If you are a director, Paragraph 4.11 of the Code obliges you to provide the registered name of the undertaking in which the directorship is held and detail the nature of the business.

If your position on the ALEO is remunerated and the ALEO is also a charity, then the provisions of Section 67 of the Charities and Trustee Investment (Scotland) Act 2005 should also be considered.

- 6.4 **Category 3:** If you are a partner or a director of a firm or undertaking, including being a director of an ALEO, which has a contract with the Council of which you are a member to provide goods and services, you are required to register a description of the contract, including its duration.
- 6.5 **Category 8:** You must register and describe any relevant interest, which includes membership or holding office, in public bodies, companies and voluntary organisations. Paragraph 4.23 of the Code states that non-financial interests in this context are:

Those which members of the public might reasonably think could influence your actions, speeches or votes in the Council which could include appointments to Committees or memberships of other organisations.

- 6.6 You must, therefore, register any appointment to an ALEO (including where you have been nominated or appointed by the Council) under either category 1 (if your position is remunerated) or category 8 (where the position is not remunerated). You cannot remedy a failure to register a financial or non-financial interest by declaring it.
- 6.7 If you are unclear about how much information to include in your register of Interests, you should refer to the Code and /or seek advice from the Monitoring Officer.
- 6.8 You should bear in mind that what you are required to register in the ALEO's Register of Interests, if one exists, and what you are required to declare may be different. You should seek advice if you are unclear on what is required.

## 7. Identifying Potential Conflicts of Interest and Making Declarations of Interest

The table below summaries the main points you should consider when identifying conflicts of interest and determining whether to declare an interest.

It is your responsibility to identify conflicts of interest.
You should remember the possibility that you may have a personal conflict of interest.
Most, but not all, ALEOs will be covered by the specific exclusion in Paragraph 5.18 of the Councillors' Code of Conduct.
The specific exclusion at Paragraph 5.18 of the Councillors' Code of Conduct has been included so that ALEOs can function with councillors as members. It recognises that it is not

practical for councillors to always remove themselves from council discussions relating the ALEO.
You need to declare your interest in the ALEO at any meeting where matters relating to, or concerning, the ALEO are being discussed. However, the specific exclusion at Paragraph 5.18 means you can take part in the consideration and discussions as well as vote on the matter provided it is not of a quasi-judicial or regulatory nature.
You must declare any financial and non-financial interests even if the specific exclusion applies unless the interest could not reasonably be taken to fall within the objective test. However, if the specific exclusion applies you do not need to withdraw and you can take part in the discussion / decision.

- 7.1 You should ensure that you can identify potential conflicts of interest. These will include not just the potential for competing interests between the ALEO, the Council and also any other organisation you are part of but also any personal interests you may have. **Paragraph 3.20** makes it clear that it is your responsibility to identify conflicts of interest and it is for you to seek advice on your responsibilities to both the council and ALEO. While paragraph 3.20 specifically mentions companies, the principles apply equally to other forms of body; for example charitable trusts. Paragraph 3.20 states:

If you become a director of a company as a nominee of the Council you will assume personal responsibilities under the Companies Acts. It is possible that a conflict of interest may arise for you between the company and the Council. In such cases it is your responsibility to take advice on your responsibilities to the Council and to the company. This will include questions of declarations of interest.

- 7.2 You should be aware that even if the ALEO does not have an interest in a matter being discussed, you may have a personal interest.

If you sit on an ALEO you will also have a duty to comply with that ALEO's Code of Conduct and its conflict of interest policy and to comply with the requirements of the ALEOs Register of Interests. Where the ALEO is a charity, you must comply with the duties of a Trustee as outlined in the Charities and Trustee Investment (Scotland) Act 2005.

### ***Exclusions and Dispensations***

- 7.3 Paragraph 5.18 of the Councillors' Code of Conduct sets out a specific exclusion from the general rule about declaration of interests, and the consequences of doing so, for councillors who are appointed to:

- (d) a body -
- i. established wholly or mainly for the purpose of providing services to the councillor's local authority; and
  - ii. which has entered into a contractual arrangement with that local authority for the supply of goods and/or services to that local authority.

- 7.4 The specific exclusion exists:

So as to enable the councillor to take part in the consideration and discussion of, and to vote upon, any matter relating to the body in question the councillor is required to declare his or her interest at all meetings where matters relating to the body in question are to be discussed.

- 7.5 However, the Code makes it clear that

This is always provided the exclusion does not apply in respect of any matter of a quasi-judicial or regulatory nature where the body in question is applying to the local authority for a licence, a consent or an approval, is making an objection or representation or has a material interest concerning such a licence, consent or approval or is the subject of a statutory order of a regulatory nature, made, or proposed to be made, by the local authority.

- 7.6 Even though the structure and functions of ALEO's will vary, most will be covered by the specific exclusion in Paragraph 5.18 of the Councillors' Code of Conduct. Some will not, however, as they do not, or no longer, have a contractual relationship with the Council. You need to be aware of whether a specific exclusion applies or not. If you are in any doubt about whether the ALEO you are on is covered, you should seek advice from the Council's Monitoring Officer.
- 7.7 The specific exclusion at Paragraph 5.18 has been included so that ALEOs can function with councillors as members. It also recognises that it is not practical for a councillor to always remove themselves from council discussions relating to the ALEO. However, the specific exclusion cannot entirely remove the risk of conflicts of interest arising. Therefore, you should still be vigilant about identifying potential conflicts of interest, including personal interests.
- 7.8 You still need to declare your interest in the ALEO at any meeting where matters relating to, or concerning, the ALEO are being discussed. However, you can take part in the consideration and discussions as well as vote on the matter provided it **is not of a quasi-judicial or regulatory nature**.
- 7.9 You must declare any financial interest even if a specific exclusion applies unless it is so remote or insignificant that it could not reasonably be taken to fall within the objective test at paragraph 5.3 of the Code. However, if the specific exclusion applies you do not need to withdraw and you can take part in the discussion / decision.

The objective test:

Whether a member of the public, with knowledge of the relevant facts, would reasonably regard an interest as so significant that it is likely to prejudice your discussion or decision-making in your role as a councillor.

- 7.10 You must declare any non-financial interest if it has been registered, even if a specific exclusion applies. However, you do not need to withdraw from the room and you can take part in the discussion / decision.
- 7.11 If you have an interest (either financial or non-financial) in an ALEO and the matter before the Council is of a quasi-judicial or regulatory nature where the ALEO:
- Is applying for a licence, consent or approval; or
  - Is making an objection or representation; or
  - Has a material interest in a licence, consent or approval; or
  - Is the subject of a statutory order of a regulatory nature which is made or proposed by the Council

Then you have to make a declaration and withdraw from the room. You cannot take part in the discussion / decision.

- 7.12 You should not rely on, or expect, officers to remind you to make declarations even if they are aware of your membership of an ALEO. It is solely your own personal responsibility to make declarations of interest as required. If you are in any doubt, you should ask for help (see paragraph 5.2 of the Code).

- 7.13 You should consider whether agendas for meetings raise any issue of declaration of interest and, if so, you should make your declaration of interest as soon as practicable at a meeting where that interest arises. If you do identify the need for a declaration of interest only when a particular matter is being discussed you must declare the interest as soon as you realise it is necessary (see paragraph 5.13 of the Code).
- 7.14 You should begin your statement with the words “I declare an interest” and identify the item or items of business to which it relates. You do not need to give a detailed description of the interest but your statement must contain sufficient information to enable those present to understand the nature of your interest (see paragraph 5.14 of the Code).
- 7.15 If accepting an appointment on an ALEO would mean you would have to declare interests frequently at meetings of a particular committee or in respect of any role which you are undertaking as a councillor, you should carefully consider whether it is appropriate to accept the appointment.
- 7.16 Similarly, if any Council appointment or nomination to an ALEO would give rise to reasonable concern that your existing personal involvements or affiliations would be so significant that they were likely to prejudice your discussion or decision-making in your role as a councillor, you should not accept the appointment or nomination (see paragraph 5.15 of the Code). You should always bear in mind the objective test.
- 7.17 The table below summarises the questions you should consider when identifying potential conflicts of interest and making declarations of interest.

What are the potential conflicts between the specific ALEO I am appointed to and the Council?
Am I clear about my responsibilities to both the ALEO and the Council?
Do I have any personal interests in the matters being discussed?
Is the matter being discussed at council quasi-judicial or regulatory in nature?
Does the matter being discussed relate to funding for the ALEO?
Have I registered my interests as required by the Code?
Have I checked the meeting agenda to determine whether I will need to make any declarations of interest?
Am I regularly making declarations of conflicts of interest?
Does the specific exclusion apply?

## 8. Confidentiality

- 8.1 You may have access to information that should not be disclosed to both the Council and ALEO. As such, you should be aware of the following confidentiality requirements outlined in paragraphs 3.16 and 3.17 of the Code, which are as follows:

3.16 Council proceedings and printed material are generally open to the public. This should be the basis on which you normally work, but there may be times when you will be required to treat discussions, documents or other information relating to the Council in a confidential manner, in which case you must observe such requirements for confidentiality.

3.17 You will often receive information of a private nature which is not yet public or which perhaps would not be intended to be public. There are provisions in legislation on the categories of confidential and exempt information and you must always respect and comply with the requirement to keep such information private. Legislation gives you certain rights to obtain information not otherwise available to the public and you are entitled to exercise these rights where the information is necessary to carry out Council duties. Such information is,



however, for your individual use as a councillor and must not be disclosed or in any way used for personal or party political advantage or in such a way as to discredit the Council. This will also apply in instances where you hold the personal view that such information should be publicly available.

- 8.2 This means that if you were provided with confidential information, such as information disclosed in a closed or private section of a council meeting or legal advice obtained by the Council (either from officers or external legal advisers), you should not disclose or release it to the ALEO or to any other outside body or individual even if it concerns the ALEO. If such a case were to arise, you should raise the matter with the Council's Monitoring Officer.
- 8.3 If you are in any doubt about whether information is confidential, you should seek advice from the Monitoring Officer.
- 8.4 If, in terms of the Companies Acts, you are a company director, you should ensure you are aware of your responsibilities to the public body and your personal responsibilities under the legislation. Section 175 of the Companies Act 2006 states that a director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company and, in particular, the exploitation of any property, information or opportunity. In addition to this, a non-contractual duty of confidentiality may be imposed by common law whenever a director receives information he knows or ought to know is to be regarded as confidential. A director's duty of confidentiality can be expressed in a contract of employment or implied by law.

## 9. Training and Assistance

- 9.1 You should obtain training on your role from the Council and/or the ALEO when appointed to an ALEO and should also attend any ongoing or refresher training in respect of your role as a councillor. Where the ALEO is a charity, specific training should be provided on the specific roles and duties of charity trustees.
- 9.2 If you have any concerns about how an appointment to an ALEO will impact on your role as a councillor or require advice on interpreting the provisions in the Code of Conduct, you should seek assistance from the Council's Monitoring Officer. You can also refer to the Standards Commission's Guidance on the Councillors' Code of Conduct, which can be found on our website at [www.standardscommissionscotland.org.uk/guidance/guidance-notes](http://www.standardscommissionscotland.org.uk/guidance/guidance-notes) or contact the Standards Commission using the contact details outlined below.

Standards Commission for Scotland  
Room T2.21, Scottish Parliament  
Edinburgh, EH99 1SP  
Tel: 0131 348 6666  
Email: [enquiries@standardscommission.org.uk](mailto:enquiries@standardscommission.org.uk).

## 10. Sources of Information

10.1 Further sources of information you may find to be of assistance are listed in the table below.

Publication	Issued By	Date
<a href="#">Guidance and Good Practice for Charity Trustees</a>	Office of the Scottish Charity Regulator	2016
<a href="#">On Board – A Guide for Board Members of Public Bodies in Scotland</a>	Scottish Government	2015
Reports to the Accounts Commission: ALEOs Following the Public Pound	Audit Scotland	2015 2015
<a href="#">How Councils work series: ALEOs: are you getting it right</a>	Accounts Commission	2011
<a href="#">Office of the Scottish Charity Regulator: Who's in charge guidance?</a>	OSCR	2011
<a href="#">How Councils Work Series: Roles and working relationships</a>	Accounts Commission	2010
<a href="#">Scottish Local Authorities Remuneration Committee – Salary and Allowances paid to Councillors - Review 2010</a>	SLARC	2010
<a href="#">The Role of Boards</a>	Auditor General for Scotland	2010
<a href="#">Registration of Interests Amendment Regulations 2010</a>	Scottish Statutory Instrument	2010 No 392
<a href="#">Registration of Interests Regulations 2003</a>	Scottish Statutory Instrument	2003 No 135
<a href="#">Following the Public Pound 2004 (See Appendix 1 for 1996 Code)</a>	Accounts Commission	1996

Data control and version information				
Date	Action by	Version Updated	Current version	Brief Description
28/09/2016	LJ	N/A	V1 09/2016	Implementation of Policy
02/11/16	LJ	V1	V2 11/2016	Section 7 Table –final row removed - funding and declaration of interest action
23/10/2018	JS	V2	V3 10/2018	Updating references to paragraphs in the Code to reflect changes to numbering of paragraphs in the Code when it was re-issued in July 2018.

