

CODE OF CONDUCT FOR BIRCHWOOD HIGHLAND DIRECTORS

PURPOSE

The purpose of this code of conduct is to provide Directors with clear guidelines as to their standard of behaviour, responsibilities, and best practice in fulfilling their obligations to Birchwood Highland.

This document should be read in conjunction with the Director's job description and the conflicts of interest policy, prior to completing Birchwood Highland's register of interests. For further information on the legal responsibilities of a Director, please refer to the attached sheets, which outlines the role and responsibilities of company Directors in line with legal principles.

GENERAL

- Directors should familiarise themselves with the 'Nolan Principles', and act in accordance with them.
- Directors must have a good understanding of and be sympathetic with the aims and objects of Birchwood Highland and act in accordance with the governing document, its Memorandums and Articles, at all times.
- Directors must act and make decisions in the best interests of Birchwood Highland's present and future service users.
- Where professional assistance is required for the Directors to be able to make the most appropriate decision affecting Birchwood Highland, that assistance should be sought and considered carefully.
- Directors must not receive any financial or non-financial benefit that is not explicitly authorised by the governing document. Directors should not exert any influence to garner any preferential treatment for themselves or their family (refer to Birchwood Highland's conflict of interest policy).
- Directors are jointly and severally liable for their decisions, therefore decisions should be taken together and communicated to staff, stakeholders and funders in a unified manner.
- Directors are accountable to stakeholders for their actions, and as such decision-making and governance issues should be as transparent as possible, except for when confidentiality is required.
- Directors should be prepared to spend an appropriate amount of time reading papers and preparing for board

meetings. A minimum attendance of 75% meetings is required of Directors to ensure that best practice in governance is reached and maintained.

- Directors may be involved in high-level disciplinary processes with staff, and would need to bring an objective, professional and informed view on action to be taken based on the individual case and circumstances.
- Should a Director feel that they require further guidance or training in their role, they have a duty to inform the secretary to the board and actively develop aspects for new training on an individual or group basis.
- Any information of a confidential nature must remain so outside the confines of the Board of Directors meeting.

February 2006

BIRCHWOOD HIGHLAND ROLE AND RESPONSIBILITIES OF COMPANY DIRECTORS: LEGAL PRINCIPLES

ROLE

- The role of the board of directors is to set overall strategy; and to exercise overall supervision and control in relation to the company's activities.

SCOPE OF AUTHORITY

- Subject to the particular matters which require, in terms of company law, to be the subject of members' resolutions, the board can exercise all powers of the company.
- Where the board cause the company to act outwith the terms of the objects clause they could be personally liable for any losses thereby incurred by the company. If the directors are proposing to move into a new area of activity, therefore, the terms of the objects clause should be carefully considered – and (if applicable) guidance should be sought on whether the proposed new activity will be considered as falling within the charitable field.
- An individual director who acts on behalf of the company should ensure that he/she acts only within the scope of the authority delegated to him/her by the board; again, if he/she oversteps that authority, he/she might be personally liable to the company.

PROPER SKILL AND CARE

- In terms of the legal principles, a director is under a duty to apply to the best of his/her ability the skills and experience which he/she possesses in performing his/her duties as a director (the “wrongful trading” provisions do, however, apply an objective standard – see separate sheet on that topic). There is a general principle that a director should take the same care in relation to the company’s affairs as a reasonably diligent person would take in relation to his/her own affairs (note: that threshold will be increased as from April 2006 in relation to directors of companies with charitable status).
- The duty of care is of particular relevance in relation to the directors’ role in relation to monitoring the activities of the company, and especially the company’s financial position. So far as financial monitoring is concerned, each director should satisfy himself/herself that (a) the individuals responsible for bookkeeping and preparing financial reports are competent and reliable, (b) the accounting systems are adequate, (c) financial information, in a form which would readily disclose financial difficulties, is presented to the board on a frequent basis and (d) he/she personally understands the financial information which is presented to the board.
- The practicalities of a typical voluntary sector company are such that a high level of delegation by the board is inevitable, but the responsibility for overall supervision and policymaking remains with the board.
- Relationship between the board and outside advisers: in certain circumstances it would be irresponsible (and a breach of directors’ duties) for the board to proceed without first obtaining outside professional advice but it is important that the board should not follow outside advice blindly; the responsibility for making the decision rests with the board.

COLLECTIVE RESPONSIBILITY

- The principle is that decisions at board meetings are taken by majority vote – and directors, whether present at the meeting or otherwise, are bound by such decisions. If an individual director disagrees with a decision, he/she is entitled to ask that his/her dissent is recorded in the minutes; if the decision was taken at a board meeting which he/she did not attend, he/she should raise the matter at the

next board meeting or (if there is an element of urgency) request that the secretary convene a special meeting of the board. In circumstances of that kind, it would also be open to the director concerned to circulate his/her views in writing among the other directors.

DUTY TO ACT IN GOOD FAITH

- The board has a legal duty to exercise the powers of the company in a way which the board considers will best further the interests of the company (note: this duty, in relation to directors of a charitable company, will be altered with effect from April 2006).
- A director who has a personal interest in a proposed contract is under a duty to disclose this, and will (normally) be barred, in terms of the articles, from voting on the relevant resolution (note: the new charities legislation will impose detailed requirements in relation to contracts of this nature).
- A director appointed to the board on the basis of nomination by some outside body ought, in terms of legal principles, to take decisions at board meetings on the basis of what he/she considers will best further the interests of the company, even if a particular decision is in conflict with the policy of the outside body which nominated him/her.

CONFIDENTIALITY/OPENNESS

- As a general principle, a director should not disclose information which would damage the company's interests, but – particularly in the case of a company whose board has a strong representative element – a balance has to be struck between the benefits of keeping information confidential and the benefits of two-way feedback as between the board and members of the company.

STATUTORY OFFENCES AND OTHER LEGISLATION

- The Companies Act 1985 (as amended) imposes detailed requirements in relation to the keeping of statutory books, maintaining proper accounting records and filing annual accounts, the annual return and various other statutory forms with Companies House; although in practice the responsibility for keeping statutory books and filing returns is normally assigned by the board to the company secretary

in relation to the various fines prescribed by the Companies Acts for failing to comply with these requirements.

- Various other items of legislation (e.g. in relation to health and safety) could potentially involve directors being liable to criminal penalties.

LIABILITY TO THIRD PARTIES FOR NEGLIGENCE AND DEFAMATION

- While the primary target in the context of a claim by a third party against the organisation on the grounds of negligence will be the company as a corporate body, there remains the possibility that a claim could lie against the directors, if it could be demonstrated that they had a duty to third parties to ensure that the appropriate systems to reduce the risk of injury etc. were in place and/or were being properly implemented.
- Similarly, a director could be personally liable where defamatory material was issued by the company, if he/she had been personally involved in issuing it.

WRONGFUL TRADING PROVISIONS

- The “bottom line” in relation to these provisions is that a director would have to pay out of his/her own personal funds and assets towards a company’s debts if it has gone into liquidation; fortunately, there are a number of hurdles which have to be gone over before the court could order this to be done. The following circumstances would have had to apply:-
 - at some point before liquidation commenced, the director knew – or ought to have concluded – that there was no reasonable prospect that the company would avoid going into insolvent liquidation.
 - as from the point when the director knew or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation, he/she failed to take all necessary steps to minimise further loss to creditors.

(Further guidance on wrongful trading is available from the separate sheet on this topic).

COMPANY DIRECTOR DISQUALIFICATION ORDERS

A disqualification order can be made:-

- where a person has been convicted of an offence in relation to the promotion, formation or management of a company;
- where he/she has been persistently in default in relation to filing returns or accounts with Companies House;
- where he/she has been guilty of fraudulent trading or breach of duty;
- where (in the context of a company which has become insolvent or a special investigation) his/her conduct as a director makes him/her unfit to be concerned in the management of a company;
- where he/she has been ordered to make a contribution to a company's assets under the wrongful trading provisions.

DIRECTORS AND OFFICERS' LIABILITY INSURANCE

While directors and officers' liability insurance should provide an element of protection for directors, it is important to be aware that the detailed terms of the policy are such that the insurance does not provide blanket cover; the protection in relation to liability under the wrongful trading provisions, for example, is weakened by the need to renew the insurance on an annual basis, coupled with the requirement to disclose any circumstance (e.g. financial difficulties) which could be relevant to the insurance company in continuing the cover.

NOTE: The material in this paper is provided for the purposes of general guidance only. It does not represent an authoritative statement of the law, and specific legal advice should be sought if there is any doubt as to the impact of the legal principles or legislation in any given case.

BIRCHWOOD HIGHLAND ROLE AND RESPONSIBILITIES OF COMPANY DIRECTORS

Additional Legal Duties Arising Under New Charities Legislation

BACKGROUND

The Charities and Trustee Investment (Scotland) Act 2005 will impose new duties on directors of companies which have charitable status; these provisions are expected to come into effect in April 2006.

A director of a company with charitable status falls within the category of a 'charity trustee' for the purposes of new legislation.

DUTIES OF CHARITY TRUSTEES

Charity trustees must act in the interests of the charity; and must in particular:

- seek in good faith to ensure that the charity exercises its functions in a manner which is consistent with its purposes;
- act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person;
- in circumstances where a conflict of interest may arise, put the interests of the charity first (or, where some other duty prevents that, disclose the conflict and take no part in the deliberations/decision).
- In addition, the charity trustees must ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of the Act.
- Breach of trustees' duties specified above is to be treated as misconduct in the administration of the charity.

CONTRACTS BETWEEN A CHARITABLE COMPANY AND A DIRECTOR (OR A PARTY CONNECTED WITH A DIRECTOR)

The Act provides that where a charity trustee provides services to a charity or might benefit from any remuneration paid to a connected party for such services, then (unless otherwise provided in memo and articles in force prior to the Act):

- the maximum amount of the remuneration must be specified in a written agreement and must be reasonable;
- the charity trustees must be satisfied that it would be in the interests of the charity to enter into the arrangement (taking account of that maximum amount);
- less than half of the charity trustees must be receiving remuneration or benefit from remuneration;
- the remuneration must not be expressly prohibited by the constitution.
- Remuneration contrary to the above will be recoverable.

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BIRCHWOOD HIGHLAND
WRONGFUL TRADING PROVISIONS
(Insolvency Act 1986 s.214)

PRACTICAL IMPLICATIONS – RESPONSIBILITIES OF DIRECTORS

MONITOR the financial position of the company

- are the accounting systems adequate?
- are the people who prepare the financial reports competent and reliable?
- is financial information which goes to the board presented in a way which would show up financial difficulties?
- do you, as a director, understand the financial information?

If the company may be in financial difficulties, ESTABLISH what the prospects are for pulling through

- are there any positive factors coming up in the near future which may improve the company's financial position?
- how certain are they to arise?
- is it clear that the effect of those factors (include only those which are reasonably certain) will be that the company will avoid going under?
- if appropriate, commission a full report on the company's financial position and prospects, with full projections.
- ensure as far as possible that there is written evidence of commitments by banks, funding bodies etc, where the board is relying on these as the basis of the "reasonable prospect" that the company will pull through.
- ensure that the discussion of the board on whether or not there is a reasonable prospect of pulling through are carefully minuted.

If there is no reasonable prospect of the company pulling through, TAKE IMMEDIATE STEPS;

- the directors' duty is to take all necessary steps to minimise further loss to creditors; normally this will involve immediately terminating the company's activities – but the board should take immediate advice from an insolvency practitioner in relation to the particular circumstances of their company.