

Glasgow School of Art (the School)

Directors' Duties and Charity Trustees' Duties applicable to Governors

This note summarises the duties and responsibilities incumbent upon Governors of the School as directors and charity trustees.

The School is a company limited by guarantee, and is therefore subject to the Companies Act 2006 (the **Companies Act**), and company law generally. For company law purposes, the Governors are directors, and must comply with the duties incumbent on directors under the Companies Act. These are summarised in section 1 of the note.

The School is also a charity and is therefore subject to the Charities and Trustee Investment (Scotland) Act 2005 (the **Charities Act**), and the oversight of the Office of the Scottish Charity Regulator (**OSCR**). From a charity law perspective, the Governors (and potentially the most senior members of the School's executive) are charity trustees, and therefore have duties and responsibilities to act in the best interests of the School and to ensure that its assets are safeguarded and applied to pursue its charitable purposes. These are summarised in section 3 of the note.

Looking beyond the duties of directors and charity trustees, there are a number of other areas and pieces of legislation under which personal liability may arise for directors/ trustees. We have briefly commented on some of the most notable of these areas at section 2. However, this is not an exhaustive list, and represents a summary only.

In addition, directors and charity trustees must also comply with the powers and/or duties placed upon them in constitutional or governance documents, including the School's Order of Council, Articles of Association and the School's Standing Orders as well as any internal policies (HR, employee handbooks, health and safety procedures).

We have also included brief comments at section 4 on the Gender Representation on Public Boards (Scotland) Act 2018 for reference.

Section 1 – Directors' Duties

The duties of directors to the company they are appointed by are regulated primarily by the Companies Act. These general duties apply to all directors and those acting as directors, even if not formally appointed as such, or expressly identified by the company using the term "director". The Act makes no distinction between executive directors (i.e. directors employed full or part time in working in a management role within the company) and non-executive directors (i.e. a director who is not employed in a day-to-day role in the company).

Where more than one duty applies in any particular circumstances, the directors must comply with each applicable duty. For example, the duty to promote the success of the company will not authorise directors to breach their duty to act within their powers, even if they consider that action would be likely to promote the success of the company. The general duties also do not require or authorise a director to breach any other law.

Generally, if directors act within their powers, with such care as is reasonable to expect from them having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, then they will have discharged their duties to the company and cannot be held personally liable for loss or damage suffered by the company or third parties. However, there is the potential that personal liability may arise in the event that a director fails to properly discharge their duties.

Directors' Duties under the Companies Act 2006

The duties contained in the Act are owed by directors to the company itself rather than to any other director, shareholder or member of the company, or to any third party.

In the context of a charitable company limited by guarantee which does not have any shareholders, the duties are still owed to the company, but in exercising their duties the directors require to consider the company's provision of public benefit in pursuit of its charitable purposes rather than provision of a financial benefit to its shareholders/ members.

The Act imposes the following specific duties on directors:

1. To Act Within Powers

The directors of a company must:

- Act in accordance with the company's constitution (including, but not limited to its Articles of Association). In the School's case, this will include its Order of Council as the School's constitution is made up of both its Articles and the Order (which provides a statutory basis for the School).
- Only exercise powers for the purposes for which they are conferred.

Directors must ensure they are aware of and act consistently with their company's Articles. In addition to the Articles, directors must act in accordance with any decisions which are taken in accordance with the Articles, for example decisions or resolutions made at general meetings, or any agreements made which affect the company's constitution – this would, for example, include the School's Standing Orders and wider suite of governance documents.

A director's motivation for taking any decision or action is also relevant to this duty. An act which is within the scope of the Articles or the Act but which is done for an improper reason will breach the duty. The test to be applied is subjective and must examine the opinion and primary purpose in the mind of the director at the time at which the relevant decision was taken.

2. To Promote the Success of the Company

A director must act in the way they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members (i.e. its shareholders) as a whole.

In the context of a guarantee company which is a charity, as the School is, its objectives are to pursue its stated charitable purposes rather than to generate any financial benefit or profit for its members. In these circumstances, the obligation is to act in such a way as would be most likely to further those purposes. We have set out the School's charitable purposes at section 3 below.

In so doing, a director must have regard (among other matters) to:

- The likely consequences of any decision in the long term.
- The interests of the company's employees.
- The need to foster the company's business relationships with suppliers, customers and others.
- The impact of the company's operations on the community and the environment.
- The desirability of the company maintaining a reputation for high standards of business conduct.

- The need to act fairly as between the members of the company. This is not really an issue in the context of the School as a guarantee company and charity where the members have no ownership or economic interest in the company.

In establishing whether this duty has been satisfied, the initial consideration will be whether subjectively, based on the evidence of the directors' considerations, these factors have been taken into account and the decision is in the interests of the company. Where there is no evidence of the factors considered by the directors, the question becomes an objective test, namely whether an intelligent and honest person in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the decision in question was for the benefit of the company.

It should be noted that:

- The duty applies to all decisions made by a director, not only formal decisions made by the whole board.
- The above list of factors is not exhaustive; directors should have regard to any other matters which may be relevant to the duty to promote the success of the company in the circumstances. In the context of the School, this would include furtherance of the School's charitable purposes (see detailed comments on charity trustee duties at section 3 below), the School's obligations in terms of funding arrangements with the SFC, or the School's standing and reputation as an art school.
- In having regard to the listed factors, the duty to exercise reasonable care, skill and diligence will apply. In some cases, it may be necessary to seek expert advice.
- The duty is subject to any requirement to act in the interests of the creditors of the company in certain circumstances – i.e. when the company is at risk of insolvency. In these circumstances, the directors have a responsibility to take account of the interests of the company's creditors.
- Keeping appropriately detailed, accurate and consistent minutes recording the considerations and decisions of the directors is important to demonstrate the factors considered by directors in reaching any particular decision.

3. Exercise Independent Judgement

Directors must exercise their powers independently, without subordinating their decision-making to third parties or constraining their ability to exercise discretion. For example, a director could not agree with a third person (such as the organisation or constituency that appointed or nominated them to the role) to vote at board meetings in any particular way, even if voting that way would not otherwise have breached their duties to the company.

This duty will not prevent directors relying on advice, as long as the directors exercise their own judgement in deciding whether or not to follow the advice. Similarly, the duty does not prevent directors from delegating decisions in line with an agreed scheme of delegation and where it is appropriate to do so.

4. Exercise Reasonable Care, Skill and Diligence

A director must exercise the care, skill and diligence which would be exercised by a reasonable, diligent person with both:

- the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company (the objective test); and
- the general knowledge, skill and experience that the director actually has (subjective test).

As a minimum, a director must display the knowledge, skill and experience set out in the objective test, but where a director has specialist knowledge, the higher subjective standard must be met. This can be particularly relevant where a director holds financial or other relevant professional qualifications. Directors should also bear in mind their own particular role or any specific functions undertaken by them – for example, as chair of an audit committee or similar.

A director will also be required to exercise their duties diligently, keeping themselves informed about the company's affairs and join with their co-directors in supervising and directing the activities of the Company. This does not prevent a director from relying on the experience and expertise of colleagues or from delegating to senior management, provided that the director does not attempt to disclaim overall responsibility.

5. Avoid Conflicts of Interest

A director must not, without the company's consent, place themselves in a position where there is a conflict, or possible conflict, between the duties they owe the company and either their own personal interests or duties they owe to a third party.

Directors must avoid situations in which they have or can have a direct or indirect interest that conflicts with, or may conflict with, the company's interests. That applies, in particular, to the exploitation of property, information or opportunity, and whether or not the company could take advantage of the property, information or opportunity.

Whether or not this duty is breached is assessed objectively, and does not depend on whether the director is aware that what they are doing is a breach of their duty.

The duty to avoid conflicts of interest continues to apply after a director has ceased to hold office in relation to any opportunity or information which a director became aware of during their period of office as a director.

6. Not to Accept Benefits from Third Parties

Directors must not use their position for personal benefit. They must not accept any benefit (including, but not limited to, a bribe) from any third party which is conferred because of their holding office as a director, or in relation to doing or omitting to do anything as a director. This duty continues to apply after the individual ceases to be a director in relation to opportunities which arose before they ceased to be a director.

7. To Declare Interest in Proposed Transaction or Arrangement with the Company

Directors must declare to the other directors the nature and extent of any interest, direct or indirect, in any proposed transaction or arrangement with the company. The director need not be a party to the transaction for the duty to apply. An interest of another person connected with the director involved in contracting with the company may require the director to make a disclosure, if the other person's interest amounts to a direct or indirect interest on the part of the director. Directors should therefore be conscious of the interests of family members or other businesses with which they may be involved.

The declaration must be made before the company enters into the transaction or arrangement. The declaration may be made at a meeting of the directors, or by notice in writing. In the School's case, any relevant interests will be recorded in the School's register of interests, which will be consulted at each meeting of the Board of Governors.

Section 2 – Directors' Duties – other key areas

Other than the Companies Act, other significant pieces of legislation that can potentially result in personal liability for directors include:

- Duties under the Insolvency Act 1986 which arise when a company is in financial difficulty. For example, directors can become personally liable for their actions where a director continues to allow a company to trade when the director knew or ought to have known that there was no reasonable prospect of the company avoiding insolvent liquidation (known as "wrongful trading"), or if the director knowingly continues to carry on business with the intention of defrauding creditors in the knowledge that there was no reasonable prospect of the creditors being paid by the company. Action can be taken in certain circumstances by a liquidator or administrator of the company following formal insolvency proceedings, or by the Insolvency Service and prosecuting authorities in certain circumstances (e.g. fraud).
- The Health and Safety at Work etc. Act 1974 and associated regulations. This Act and the regulations made under it (of which there are a vast number, relating to a range of different industries, hazards or circumstances) sets out the basic health and safety duties of a company, its directors and employees. The particular obligations and duties which apply will depend on the circumstances. However, directors can be held criminally liable where the company is found guilty of a health and safety offence, and it can be demonstrated that the offence was committed with the consent or connivance of a director, or the offence is attributable to neglect on the part of a director.
- Directors can similarly be held personally responsible for certain offences under a variety of different pieces of environmental legislation if it can be shown that the director contributed to a breach through consent, connivance or neglect.
- Under the Company Directors Disqualification Act 1986, individuals may be barred from acting as directors of limited companies where they have been found to have been involved in circumstances involving fraudulent or dishonest business activity. To act as a company director whilst disqualified is a criminal offence.

The Equality Act 2010 and equality duties

Governors should also be aware of legal requirements applying to the School arising in relation to equality and non-discrimination – and specifically under the Equality Act 2010 (the **2010 Act**).

One of the key purposes of the 2010 Act is to ensure that organisations do not treat any person unfairly on the basis of a protected characteristic. The protected characteristics recognised under the 2010 Act are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race (including nationality and ethnicity); religion or belief; sex; and sexual orientation.

Governors should be aware of the protected characteristics and, as a matter of good practice, be confident that any decision taken is in line with the School's equality policy, and reflects the School's obligation to ensure equal and fair treatment, consistent with the 2010 Act.

The 2010 Act also provides for the "Public Sector Equality Duty", which requires the School (and decisions taken by Governors) to have due regard to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the 2010 Act; and
- advance equality of opportunity and foster good relations between individuals who share a relevant protected characteristic and individuals who do not share it.

In addition, under the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 as amended, the School has a duty to:

- report progress on mainstreaming the equality duty;
- publish equality outcomes and report on the progress;
- assess and review policies and practices;
- gather and use employee information, including the composition of the School's employees and the recruitment, development and retention of employees;
- publish gender pay gap information;
- publish statements on equal pay etc.; and
- consider award criteria and conditions in relation to public procurement.

Section 3 – Charity Trustees' Duties

In addition to Governors' duties as directors, the Charities Act imposes certain duties on charity trustees. These apply to Governors, on the basis that the Charities Act defines charity trustees as the group of individuals with general control and management of the administration of a charity, however they are identified. These duties are also potentially capable of applying to the most senior members of the School's executive management team, based on the broad definition of "charity trustee" adopted in the Charities Act and their level of influence and control over the day-to-day running of the School.

As charity trustees, the Governors have collective responsibility for the actions and operation of the School as a charity. Collective responsibility means that the Board of Governors as a whole are together responsible and accountable for any decision taken by the Board, irrespective of whether any individual Governor agrees with or votes in favour of that decision. This accountability cannot be delegated or passed on to any other party. There is a positive obligation under the Charities Act on all trustees to take all steps reasonably necessary to correct any breach of duty identified. As such, the conduct of one trustee is also the concern of the others.

Failure by charity trustees to comply with their duties under the Charities Act can constitute misconduct in the running of the charity, the consequences of which and potential for personal liability to arise we have commented on further below.

The Charities Act divides trustees' duties into two categories: general duties, set out in section 66 of the Charities Act; and specific duties which are spread through the Charities Act and accompanying legislation.

General duties: Section 66 of the Charities Act

The general duties applicable to all charity trustees are to act in the interests of the Charity and in particular:

- Ensure the charity operates consistently with its purposes
- Act with care and diligence
- Manage conflicts of interest
- Ensure the charity complies with the requirements of the Charities Act and any other specific applicable duty or requirement

The key, overarching obligation on trustees is to act in the interests of the charity. The three particular strands of that duty which follow each focus on a specific aspect of that overall responsibility.

Guidance published by OSCR makes clear that the obligation to act in the interests of the charity must include reference to or consideration of the charity's beneficiaries – highlighting that a charity does not exist in a bubble or purely to serve its own interest. All charities must provide public benefit, either to individuals, their wider community, or both (as in the School's circumstances).

Looking at each of the strands of the general duty:

Ensure the charity operates consistently with its purposes

Trustees must seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes. All charities benefit from the advantages of charitable status on the condition that they pursue identified purposes which are recognised as charitable under the Charities Act. As such, trustees are expected to ensure that the charity pursues those stated aims.

From a practical point of view, it is important that trustees are familiar with their charity's purposes, and that they effectively test every decision they make against those purposes. If a decision or action is not aligned with, or cannot be reconciled with or considered to further or promote those purposes in some way, the decision may be beyond the powers of the charity, as the trustees' powers can only be exercised to further the charity's purposes.

Provided that trustees act with honesty, reasonableness and purity of motive in the decisions they take and their actions on behalf of their charity, the good faith requirement will be satisfied.

For reference, the School's charitable purposes are *"To advance, for the public benefit, the education of the public in the sphere of art including, without prejudice to the foregoing generality, art, fine art, design, and architecture."*

Act with care and diligence

The duty to act with care and diligence is a fiduciary duty, which means trustees are expected to act with the level of care and diligence expected of someone managing the affairs of another person.

The aim of this duty is to ensure that the charity's assets are safeguarded to make sure they can be applied to the charity's purposes. Although careful stewardship of finances is perhaps the most obvious practical application of the duty applies, trustees should also be aware of the importance of other resources and less tangible assets, including reputation, as critical assets.

Unlike the corresponding directors' duty, trustees are not subject to a higher, subjective standard depending upon a trustee's own particular skills or expertise.

Having in place documented, robust and effective governance arrangements and risk management processes is likely to be a key way in which charity trustees can engrain good practice and demonstrate that this duty has been discharged.

It is important that charity trustees are able to commit time, consideration and energy to their role by attending meetings and actively participating in the running of the charity, irrespective of the fact they are not actively engaged in working in or on behalf of their charity on a day to day basis,

Manage conflicts of interest

In circumstances giving rise to the possibility of a conflict of interest between the charity and any other party, each charity trustee:

- must put the interests of the charity before those of the other party; or
- where any other duty or interest prevents them from doing so, they must disclose the conflicting duty or interest to their fellow Charity Trustees and refrain from participating in any discussions or decisions with regard to the matter in question.

A conflict of interest occurs when a charity trustee is unable to act impartially and properly discharge their duty to act in the best interests of the charity because either: they owe a duty to the body that appointed them, or that appointing body's interest conflicts in some way with the interests of the charity (an appointment conflict); or, the trustee has a personal or business interest in relation to a matter involving the charity (a personal conflict).

In relation to appointment conflicts, there can be a misconception where a trustee is appointed or nominated to their role by a third party organisation or a particular nominating group (for example, Trade Union appointees, or staff-elected Governors) that the trustee has a representative role or is on the board to reflect the interests of their nominating/ appointing party or constituency. However, this is not the case. All trustees have a duty to act exclusively and at all times in the best interests of the charity of which they are trustee, and if they cannot do so, to exclude themselves from any situation where a conflict of interest could arise.

The existence of a conflict (or potential conflict) does not mean that any impropriety has occurred – it is acknowledged that conflicts can and do arise. Trustees' duty is to ensure that they are properly identified and managed.

External perception is an important factor in managing conflicts. From a third party's point of view, it should be clear that any decision by trustees has been taken because that is the best thing for the charity rather than for any other reason. This is not about whether the decision was in the best interests of the charity, but what the motivation appears to be for taking it.

Specific Duties under the Charities Act

The Charities Act contains a number of specific obligations which all charities must comply with, and for which ultimate responsibility rests with the charity trustees.

In broad terms, these include:

- Ensuring the charity's registered details with OSCR are kept up to date.
- Obtaining OSCR consent to certain changes (name, amendment to objects/ purposes, merger, change of legal form).
- Maintenance of accounting records in line with the Charities Accounts (Scotland) Regulations 2006 (which set out detailed accounting and reporting requirements and principles), auditing of accounts and submission to OSCR.
- Filing of annual return, accounts, trustees' report and audit report to OSCR each year.
- Provision of information to the public upon request – including a list of trustees and a copy of the charity's constitution.

Consequences of failure to comply with charity trustees' duties

Breach of duty as a charity trustee can constitute misconduct in the administration of the charity. OSCR have broad powers of enquiry to investigate any aspect of the running of a charity, both general and specific, and either of OSCR's own volition or in response to issues reported to them. Following an investigation, OSCR have a wide-ranging power to direct a charity to do/ not do something for a period

6 months. These powers have been expanded recently to include powers to appoint interim trustees and to conduct enquiries into former charities and charity trustees.

OSCR also have the power to suspend any person involved in the management or control of a charity where that person appears to have been responsible for or privy to misconduct, has contributed to or facilitated misconduct, or where the person appears unable or unfit to perform their functions in relation to the charity. By application to court, OSCR may also direct the removal of a trustee.

There is scope for personal liability to arise for charity trustees in limited circumstances. If trustees act beyond their powers – for example, if a power is exercised otherwise than in pursuit of charitable purposes – there remains the possibility of trustees being held personally liable. However, this will generally only occur in instances of fraud, recklessness, or gross negligence on the part of trustees. Where trustees have acted honestly and reasonably, they will not be exposed to personal liability for actions undertaken by their charity.

The Charities Act also makes provision for a number of criminal offences which may be committed by a charity trustee, including providing false or misleading information to OSCR, failing to provide information on request by OSCR, breaching a suspension as a trustee, and failure to comply with a direction of OSCR following an enquiry.

Section 4 – Gender Representation on Public Boards (Scotland) Act 2018

The Gender Representation on Public Boards (Scotland) Act 2018 (the **2018 Act**) aims to address the underrepresentation of women on boards of Scottish public bodies and authorities. For the purposes of the 2018 Act, the School is classed as a public body.

In summary, the 2018 Act set a "gender representation objective" (which was to be achieved by 31 December 2022) for public bodies that 50% of the board's non-executive members are women, and it requires those with appointment rights to boards and public bodies themselves to take certain steps towards achieving the objective. In the School's case, the Board of Governors has responsibility for the appointment of board members, other than those Governors appointed by election or nomination.

Appointments

The 2018 Act provides that in circumstances where there are two or more equally qualified candidates, at least one of whom is a woman, then the 2018 Act requires the appointing person to give preference to a woman if doing so will result in the board achieving (or making progress towards achieving) the gender representation objective.

This requirement is subject to an overriding requirement that appointments must be made on merit and the "best qualified" candidate should always be appointed. In making any appointment however, the appointing person must consider whether two or more candidates are equally qualified, and in these circumstances, the requirement to give preference to a female candidate where this would contribute to meeting the gender representation objective will apply.

There is also an exception which allows, where there are 2 equally qualified candidates one of whom is a woman, the appointing person to appoint an equally qualified candidate who is not a woman where this can be justified on the basis of a "characteristic or situation" particular to that candidate. There is no definition of "characteristic or situation", but guidance suggests that a "characteristic" includes a protected characteristic within the meaning of the Equality Act 2010, including age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. A characteristic or situation particular to a candidate may be another protected characteristic or a factor such as socio-economic background, caring responsibilities or employment sector. This will be for the appointing person to determine based on the individual candidate, the board's skills and diversity requirements, which will have been established at the outset of the appointment round.

Encouraging women to apply

The 2018 Act requires public bodies to take such steps as they consider appropriate to encourage women to apply to become non-executive members, but does not prescribe those steps. This is because the relevant appointing person is deemed to be best placed to determine the appropriate steps to take in any given appointment round. Any steps taken must be lawful under the Equality Act (i.e. not otherwise discriminatory on the grounds of any protected characteristic).

Guidance on the 2018 Act gives some examples of other steps including positive action measures, such as:

- Providing training or coaching to women candidates prior to interview.
- Providing networking opportunities for women candidates and existing women board members.
- Offering opportunities to women candidates to shadow existing board members or observe board proceedings.

Reporting

Regulations published following the 2018 Act set out the reporting requirements against the gender representation objective, and require the School to publish a report at intervals of not more than 2 years beginning with the date on which it last published a report. The regulations require the report to be accessible to the public and require the appointed persons to submit a copy of the report to the Scottish Ministers within 7 days of publication.

The report must contain the following:

- a statement of whether at the date of publication the gender representation objective has been achieved;
- a statement confirming the number of vacancies for non-executive members which arose during the period covered by the report;
- a statement confirming for each vacancy referred to in the point above how many recruitment competitions were held with a view to fill the vacancy and, for each competition;
 - the number of applications received and, where applications were received, the percentage which were from women;
 - confirmation of whether an appointment was made and, where an appointment was made, whether a woman was appointed; and
 - details of any steps taken to encourage applications from women to become non-executive members of the public board.

Maintaining the gender representation objective

Given that membership of boards will fluctuate over time and appointments to the board must be made on merit, the gender representation objective, even if previously achieved, may subsequently lapse. It is important therefore, that the gender composition of the board is monitored on an ongoing basis to ensure compliance with the regulations.