

# **Roles and Responsibilities of Academy Governors**



ALLEN & OVERY

**SGOSS**  
Governors for Schools

brownejacobson  
education advisors

# Contents

<b>4</b>	<b>Executive Summary</b>
<b>6</b>	<b>Introduction</b>
<b>8</b>	<b>Academy Governance</b>
<b>9</b>	<b>Members</b>
<b>10</b>	<b>Governors</b>
<b>24</b>	<b>Practical Measures     for Academy Governors</b>
<b>28</b>	<b>Multi Academy Trusts (MATs)</b>
<b>32</b>	<b>Appendix</b>

# Executive Summary

Academy trusts have different governance arrangements to maintained schools and their governors have a wider range of duties than governors of maintained schools. These changes in responsibilities can be unsettling to governors looking to go through the conversion process and can deter prospective governors. However, the governance arrangements, once understood, should pose no problems and many of the new legal duties should be familiar, especially given that governors of maintained schools are already under a general duty to act in good faith and in the best interest of the school.

Academy trusts have an additional layer of governance compared to maintained schools, known as the members. In reality the members will be responsible only for fundamental decisions such as changing the constitution of the academy trust and it is the governing body which remains the body responsible for making strategic decisions about the day to day running of the academy.

As an academy is also a charitable company limited by guarantee, the governors have duties as directors under company law and trustees under charity law. These duties are similar to those they have as governors of the school. These duties are summarised on the next page.

## Responsibilities as charitable trustee

- Duty of Compliance;
- Duty of Prudence; and
- Duty of Care.

## Responsibility as directors

- Duty to act within powers;
- Duty to promote success of the company;
- Duty to exercise independent judgement;
- Duty to exercise reasonable care, skill and diligence;
- Duty to avoid conflicts of interest;
- Duty not to accept benefits from third parties; and
- Duty to declare an interest in a proposed transaction or arrangement.

It is also important to consider that the board of directors of a Multi-Academy Trust (“MAT”) must still comply with duties under both charity and company law, despite the fact they are likely to delegate the day to day running of the schools to the local governing body of each academy. Mechanisms should be put in place to ensure that delegated duties are properly discharged.

For reference, full details of the relevant legislation that applies to Academy governors is set out in the Appendix.

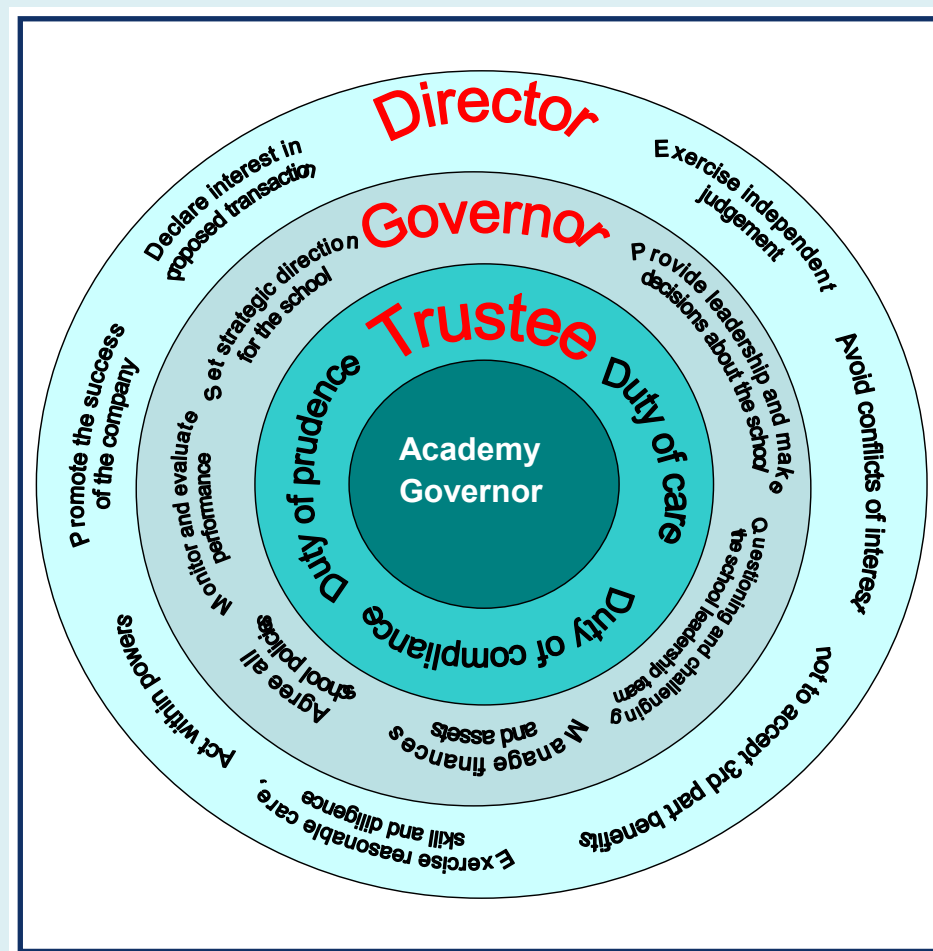
# Introduction

A key part of the academy programme is increased autonomy and independence for schools. With this independence comes greater responsibility, the extent of which will depend on the status of the predecessor school. For example, a community school that converts to academy status will become the employing body of staff and the admissions authority for the first time. There are also new obligations which governors will need to understand in order to ensure that the academy trust meets those obligations. For example, there are responsibilities under the funding agreement (entered into with the Secretary of State) and community schools will have new obligations under their 125 year lease (entered into with the local authority).

In this briefing we will:

- look at the governance structure of academies – there is an additional layer of governance compared to maintained schools which will be new for many governors;
- consider what the duties and responsibilities of academy governors are; and
- explore ways in which these duties can best be met together with protection from potential liability in your new role.

## Overview of all duties of an academy trustee/governor/director



# Academy Governance

Unlike in maintained schools where there is one tier of governance (the governing body), as an academy there is an additional tier of governance in the form of Members, a necessary part of the structure of an Academy Trust.



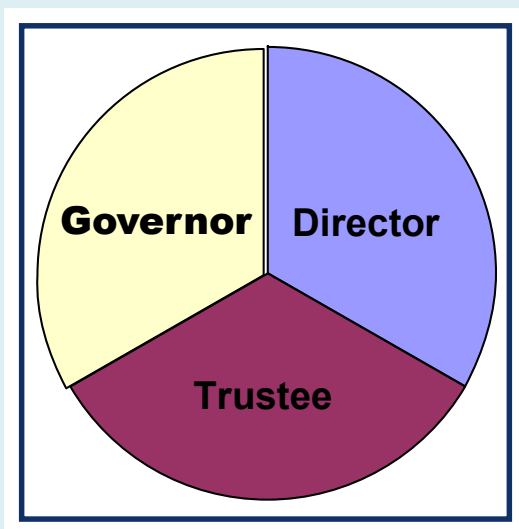
## Members

Academy trusts do not have shareholders; they have members. The role and rights of members is analogous to that of shareholders. Members of an academy trust do not have rights of ownership in the company like shareholders because the profits of the company cannot be distributed to them. However, the members can control changes in the constitution (subject to DfE approval) and other fundamental decisions relating to the academy trust. Members also have the right to remove a governor by ordinary resolution (a vote passed by a simple majority of members).

Generally, the members of a company limited by guarantee have few obligations other than their obligations towards the company and the other members, as set out in the constitution and other constitutional documents. This reflects the fact that it is the directors of a company that are responsible for its operation.

The role of member is likely to therefore be a largely “hands-off role”. Perhaps the distinction between a member and governor is best illustrated by an example; whilst the annual audited accounts will be presented to the members it is the governing body and the chair of governors who approve, sign them and send them to Companies House.

## Governors



As a governor of an academy trust you are a school governor, a company director and a charity trustee. These are not different positions but rather reflect the origin of your legal duties.

Experience tells us it is important to decide what you want to call yourselves and stick with it to avoid confusion. Our suggestion for single academies would be to use the phrases 'governors' and 'members' and avoid using the terms 'trustee' or 'director'. This is because some academies have got the position confused and call their members "trustees", where in fact it is the governing body that is the board of trustees.

## New Duties

Governors will be familiar with their duties as a governor of a school (although it is important to understand the legal framework in which academies operate). However, many governors will be less familiar with their duties as company directors and charity trustees and therefore this note concentrates on these two areas of responsibility.

As an academy governor you will continue to act as the critical friend of the headteacher and senior leadership team, and provide support and challenge.

The key responsibilities of the governing body include:

- ensuring the quality of educational provision;
- challenging and monitoring the performance of the academy;
- ensuring good financial health and probity;
- supporting the SLT in management of staff.

In fulfilling these responsibilities an effective governing body will:

- help the school to set high standards by planning for the school's future and setting targets for school improvement;

- keep the pressure up on school improvement;
- be a critical friend to the school, offering support and advice;
- help the school respond to the needs of parents and the community;
- make the school accountable to the public for what it does;
- work with the school on planning, developing policies and keeping these under review;
- exercise its responsibilities and powers in partnership with the headteacher and staff; and
- not intervene in the day-to-day management of the school unless there are weaknesses in the school, when it then has a duty to take action.

## Duties as a charity trustee

Academy governors are also charity trustees. It is therefore important that you understand your duties as a charity trustee.

There are three core duties that charity trustees must comply with. These are the duty of compliance, the duty of prudence, and the duty of care.

## Duty of compliance

Charity trustees must always ensure that the charity is using its resources for its charitable purposes. The charitable purpose of your academy trust is set out in your objects clause in your articles of association. The primary object will be to advance education for the public benefit. You may also have a secondary object of providing a community benefit through recreation and leisure time activities.

Before making any decision, governors should ask the question: “does this directly further the academy trust’s objects?”. Most times the answer to this will be obvious but it is a good idea for governors to get into the habit of asking this question because, as school activities diversify, it could become trickier to answer. If you get into the habit of asking this question you will then hopefully spot when you are considering carrying out an activity that is not in line with your charitable object.

The duty of compliance is a very wide duty. For example, you will need to ensure that you follow all relevant laws, act in accordance with your written constitution and comply with all regulatory requirements, such as Companies House rules and filing the school’s accounts.

Some examples of events where you need to tell Companies House about changes are alterations to the Articles of Association, change of residential address of governors and change of registered office.

## Duty of prudence

The duty of prudence is largely about fiscal responsibility, ensuring that the charity's assets are protected and used for the benefit of its charitable beneficiaries.

Trustees must ensure the academy trust remains solvent and keeps up-to-date with its financial records. Trustees must ensure that the academy trust's assets are used to meet its charitable objects - for example, it would not be appropriate for an academy to let profit-making organisations use its premises for profit-making activities free of charge. This example includes any trading subsidiary of the academy.

It is also important to avoid carrying out activities which might put the reputation or assets of the academy at risk.

A common misconception can be that as a charity you must ensure you build reserves. Yes, you can have reserves to cover unexpected events but these should not be so large that your current charitable beneficiaries suffer as a consequence.

Finally, if you are intending to invest or borrow money you need to ensure you comply with the terms of your articles and funding agreement, take special care and seek professional advice.

## Duty of care

You must use reasonable care and skill in your work as a governor, using your personal skills and experience as needed to ensure that the academy trust is well-run and efficient.

This duty also means that you should consider if it is appropriate to get external advice. This is a matter for governors to decide but you should certainly consider getting external advice where there is a material risk to the academy trust or if there is a question of governors potentially breaching their duties. If you get external professional advice then you are expected to follow it. If you do not, you should have a good reason for not doing so.

If you would like more details on the role of a charity trustee please read CC3 *'The Essential Trustee: What you need to know'* which can be found on the Charity Commission's website and is a useful source of information.



## Duties as a company director

In this section we summarise the statutory code of directors introduced by the Companies Act 2006.

The statutory code applies to every company director and therefore applies to academy governors. However, please be aware that there are additional duties that directors must comply with which are not set out in the code. Examples of these include the duty of confidentiality and undivided loyalty. There are also duties imposed by Acts of Parliament such as the Health and Safety at Work Act and the Insolvency Act.

In this briefing we will concentrate on the statutory code of directors duties. You will see that many of the company law duties overlap with the core charitable duties. The phrases in italics are the guidance issued by the government at the time setting out their plain English statement on the intended meaning of each duty.

### Duty to act within powers

*- Obey the company's constitution and decisions taken under it.*

Governors must act within their powers. This means that governors need to become familiar with the provisions in their Articles of Association.

Whilst this might seem obvious at the point of conversion, you need to ensure copies are given to each new governor. If you have a governance question then your first port of call should be the Articles. For example, how to deal with conflicts of interest.

Acting within your powers also means that you should only act within the scope of that delegated authority where such authority is given to you. For this reason it is very important that the governing body are very clear when giving delegated authority. This is for the benefit of both the governing body but also the person to whom responsibility is delegated.

### Duty to promote the success of the company

*- Act in the company's best interests, taking everything you think relevant into account.*

Governors must act in a way that promotes the success of the academy having regard to all relevant factors. This duty replaced the obligation "to act in the best interests of the company", which you may have heard of.

What does success mean? In our view, success for the academy trust is the attainment of its charitable objects.

Whilst the Act sets out six factors, this is not an exhaustive list and you must take into account all relevant factors. If the factors conflict then governors should choose the factor that they believe, in good faith, will promote the overall success of the academy.

The non-exhaustive list of factors is:

- 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; and
- the need to act fairly between members of the company.

There are likely to be other factors you consider before making decisions that will affect the success of the academy trust, such as having an in-year surplus, pupil outcomes and pupil welfare.

It is a mark of good governance to consider these factors before making crucial decisions that will affect the future of the academy trust and ensure these considerations are reflected in governing body minutes.

On a practical note you may want to consider how you can ensure that the Senior Leadership Team (SLT) are aware of this duty so that when they are preparing reports they highlight and address relevant factors.

## **Duty to exercise independent judgement**

*- Remember you remain responsible for the work you give to others.*

When performing your role you must act in person and use your own independent judgement. This means that although you can rely on expert advice and delegate matters to committees, you should still sense-check any advice or committee recommendation. Collectively, the governors are ultimately responsible in law.

Another aspect of this duty is to understand that governors elected or nominated by a particular body are not representatives of that body. Whilst they can inform the governing body of the views of their organisation or the body that elected them they have to make decisions on their own.

Each governor must exercise their own independent judgement always acting to promote the success of the academy trust, regardless of how they were appointed. Whilst this is a straightforward concept in practice it can sometimes be challenging.

## Duty to exercise reasonable care, skill and diligence

*- Be diligent, careful and well informed about the company's affairs. If you have any special skills or experience, use them.*

This is similar to the duty of care under charity law. Again it is a two stage standard with a universal minimum standard which is raised if you have particular skills or experience.

You must exercise:

- the same general knowledge, skill and experience as would be reasonably expected from a “reasonably diligent person” carrying out the functions carried out by the governor; and
- the same general knowledge, skill and experience that the governor has.

## Duty to avoid conflicts of interest

*- Avoid situations where your interests conflict with those of the company. When in doubt disclose potential conflicts quickly.*

You are under a duty to ensure that you avoid potential conflicts of interest. Decisions should be taken in the public interest and not for financial material benefits, decisions should be based on merits and reasons should be given for decisions reached.

You should not put yourself in positions that could influence the performance of your role as a governor. You should submit yourself to scrutiny and declare any private interests relating to public duties and take steps to reduce the conflict. It is a good idea to ensure you have a governors' code of conduct that sets out these principles for governors to follow.

If you have other outside interests you should also remember that whilst it may be clear to you in what capacity you are acting, it may not be so clear to others around the GB board table.

From a practical perspective it is important to keep the register of interests up-to-date.

The procedure you should follow if you believe there may be a conflict of interest is to check your articles and your code of conduct. The articles give examples of conflict and sets out what you should do. If you are in doubt, declare it and leave the meeting.

If you do not declare an interest, you could be challenged by an interested party. Possible consequences may be that the contract is rescinded or made void and if the governor made a personal profit they can be required pay it back.

It can also lead to criminal liability as well as implications for the governing body as a whole. There may be questions about how open and transparent their decisions are and an erosion of trust can damage the reputation of the academy and lead to loss of confidence.

### **Duty not to accept benefits from third parties**

*- Be honest and remember that the company's property belongs to it and not to you or its members.*

You must not accept benefits given from third parties because of your position if those benefits are reasonably regarded as being likely to give rise to a conflict.

This mirrors the common law rule that you must not make a secret profit. The benefit does not have to be financial - it could be an appointment, interest or position. You must ensure that you have policies in place so that everyone is clear on what they can and cannot accept. Such a policy does not need to be long but it should be clear with a central register where you record all offers of hospitality. This is particularly important following the introduction of the Bribery Act.

### **Duty to declare interest in proposed transaction or arrangement**

You should declare any interest in a proposed transaction or arrangement before the transaction is entered into by the governing body. Be aware of indirect interests as well. For example if a governor's spouse is entering into a transaction it is good practice for the board to take the decision without the governor being present.

## Practical measures for academy governors

In the final section of this briefing we explain the protection governors have and practical ways governors can take relatively simple steps to help them meet their duties.

### Protection

The Articles of Association state that the academy trust will indemnify a governor against any claim brought against them in their capacity as a director in certain conditions as set out in the Articles. This should be backed by directors' and officers indemnity insurance.

In addition, courts can give relief if a director has breached their duties but acted honestly and ought fairly to be excused.

Whilst it would be extremely rare for a governor of a not for profit company to be personally liable it is important that all governors are offered appropriate support and training.

## Practical measures

The following practical measures can also be taken by governors (in conjunction with their clerk) to ensure they are in compliance with their duties:

- regularly attending and preparing for meetings (e.g. read the agenda and papers in advance and seek briefing where necessary);
- contributing to and raising concerns at meetings;
- ensuring that the GB regularly monitors and reviews its compliance with and performance of its policies;
- ensuring that the academy trust has proper procedures for reporting on activities performance and the academy trust's financial information to governors at each meeting (for example, receiving regular management accounts);
- encouraging the governing body to seek and act upon legal, financial and other professional advice whenever necessary;
- checking minutes to ensure they accurately reflect any concerns raised at meetings;
- clarify the insurance arrangements in place for governors;

## Practical measures (cont.)

- reading and being familiar with the Memorandum and Articles of Association of the academy trust and be aware of its powers, duties and objectives;
- reading and being familiar with the governors Code of Conduct and any standing orders of the academy;
- seeking advice from the appropriate members of the leadership team in the event of any doubts or concerns about the running of the academy trust;
- being extremely scrupulous in the attention they give to the academy trust's present and future liquidity, and in ensuring that their concerns and actions are minuted;
- ensuring that your interests are registered with the academy trust; and
- taking an interest in the appointment of the management of the academy trust to ensure that suitably qualified and experienced managers are in place.

# Multi Academy Trusts (MATs)

**A** MAT is one legal entity which is set up to run a number of schools. The MAT will have a board of directors which commonly comprises of representatives from each of the member academies. In a MAT, the board of directors has the same governor/trustee/company director duties as a governing body of a single academy trust. Hence, the board of directors will deal with the strategic running of the MAT and will delegate the operational day-to-day running of the member schools to each academy's Local Governing Body (LGB), which will usually be set up for each school. The level of delegation to LGBs can be varied to suit specific circumstances. For example, if a school is not performing well, the directors may reduce the level of delegation to the relevant LGB until the school improves. An alternative approach would be for the directors to appoint new persons to the relevant LGB to strengthen it and impact on performance.

## Duty of the board of directors

The board of directors of the MAT must take into account their duties outlined in the pages above when making strategic decisions. They must also ensure that they act in line with their duties when delegating authority to a LGB, and ensure that the individuals or entity discharging these duties are doing so correctly.

Each LGB should be required to report to the directors about how its duties are being discharged.

## Duties of the LGB

Most of the LGB will not be directors or trustees of the MAT and will mainly be representatives from the school. They will however have duties delegated to them by the board of directors and it will be the responsibility of the board of directors to ensure that they are exercising these functions in line with the relevant duties. The LGB will still have responsibilities as school governors.

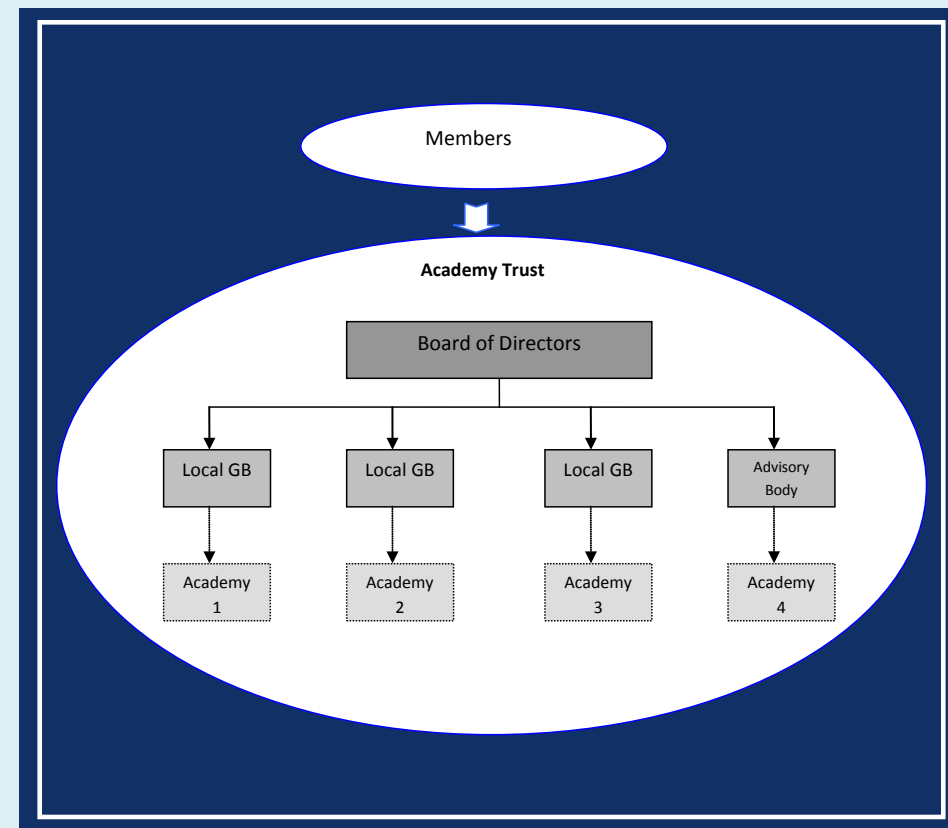
## Conflicts

The board of directors must consider the potential for conflicts between their duty to the MAT as a whole and duty to individual schools. There is potential for a conflict between a person's duty as a governor (to their respective school) and their duty as a director (to the MAT) e.g. where a MAT provides services to the member school. A director must ensure he considers and promotes the needs of each individual school for the benefit of the MAT, and not simply focus on achieving the best outcome for their own school.

## The Board

The specific governance arrangements are usually tailored to your circumstances. Commonly, the chair of each LGB and possibly each head teacher will be directors of the MAT, although this approach may be rationalised once a MAT reaches a certain overall size. The board of directors of the MAT must also have at least two parent directors (voted from among the parent governors on the LGBs), but there is no requirement to have staff representation on the board. In the case of sponsored MATs, the sponsor would normally appoint the majority of members of the board of directors.

It is up to the directors to decide on the constitution and membership of each LGB, but it is usual to have parent, staff and community representation. If a sponsor is involved, it may want to have the right to appoint the majority of the governors. Alternatively, and particularly if the academy is in special measures, the MAT may not wish to delegate any powers and will instead set up an advisory body for an academy with no delegated powers. Please note that the ability to give more power or remove power is not static and the level of delegation can be reviewed to meet changing circumstances (for instance, if a school moves out of special measures, the directors may consider delegating more powers to the school's LGB).





# Appendix

## Excerpts from Relevant Legislation and Regulations

The following are the key statutory provisions that set out the various duties of school governors. A set of these provisions is available on request.

### Duties as a director

- Companies Act 2006 ss170-177  
(Sets out the duties which apply to a director of a company)
- Companies Act 2006 ss178- 181  
(Sets out supplementary provisions and the consequences for breach of the directors duties)
- Insolvency Act 1986 ss213 and 214  
(Fraudulent Trading and Wrongful Trading by an officer of a company)

### Duties as a trustee

- These arise primarily as a matter of common law, rather than statute.

### Duties as a Governor

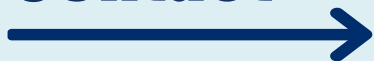
- Education Act 2002, Sections 19, 21, 23, 29, 30, 32, 33, 35 and 78–80, and Schedules 1 and 3
- Education Act 1996, sections 2, 4, 5, 496 and 497  
(Applies to governors of maintained schools)
- Equality Act 2010, Part 6 chapter 1 sets out the particular application of the act to Schools, and Parts 1 and 2 set out the protected characteristics and prohibited behaviours. (Governors have a duty to ensure they comply with a range of duties set out in this Act)
- Education (School Government) (Terms of Reference) (England) Regulations 2000, regulations 4, 6 and 7.

- School Governance (Procedures) (England) Regulations 2003, parts 3 and 4. (Sets out roles and responsibilities of governors and head teacher and procedures governing bodies are required to follow)
- School Standards and Framework Act 1998: Section 48 (as amended by the Education Act 2002)
- The Education and Inspections Act 2006, in particular Section 67 and Part 4

## Other relevant legislation

- Charities Act 2006
- Charities Act 2011  
(Sets out administrative duties that apply to Charity trustees e.g. duties in connection with registering with the charity commission)
- Company Directors Disqualification Act 1986 (Act governing the circumstances in which a director is disqualified for breach of duty)
- The School Governance (Constitution) (England) Regulations 2007: SI 2007/957
- The School Staffing (England) Regulations 2003: SI 2003/1963 (as amended by SI 2003/2725 and SI 2006/3197)
- Trustee Act 2000 (There are some duties for trustees set out in this act but this act does not apply to incorporated charities and so would not strictly apply to academy trusts)

# Contact



**E : [info@sgoss.org.uk](mailto:info@sgoss.org.uk)**

**T : 020 7354 9805**

**F : 020 7288 9549**

**[www.sgoss.org.uk](http://www.sgoss.org.uk)**

** [www.twitter.com/SchoolGovNet](https://www.twitter.com/SchoolGovNet)**

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**Produced by SGOSS, Browne Jacobson and Allen and Overy**

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