

Meeting of the Board of Governors

4.00 pm on Thursday, 12 March 2020
in 1B27 Technopark, SE1 6LN

Supplement

<i>Item</i>	<i>Pages</i>	<i>Presenter</i>
DMU changes	139 - 162	JS
<ul style="list-style-type: none">• New Speak Up policy• Application of policies to governors• LSBU email addresses• Directors' liability guidance		

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	CONFIDENTIAL
Paper title:	Supplement: Updates following DMU issues
Board/Committee:	Board of Governors
Date of meeting:	12 March 2020
Author(s):	Michael Broadway, Deputy University Secretary
Sponsor(s):	James Stevenson, Group Secretary
Purpose:	For Information
Recommendation:	The Committee is requested to note the updates.

Executive summary

This supplement pack includes the following documents, provided for information following issues at DMU in 2019:

1. Action plan and best practice grid
2. New speak up policy
3. Application of policies to governors
4. LSBU email addresses
5. Directors' liability guidance

1. Action plan and best practice grid

Following an Office for Students investigation into DMU in 2019, a set of recommendations has been published. The Governance Team is reviewing LSBU's compliance with these recommendations and a full report will be brought to the May 2020 Board meeting. The majority of actions prescribed for DMU are already carried out by LSBU or are in progress.

Items 2-4 below specifically address parts of the guidance.

2. Speak up policy

The speak up policy has been significantly revised and updated to be more user-friendly and clearer on:

- What is and what is not covered by the policy;

- What complainants can expect of us, during and following investigations;
- What we expect of them during investigations; and
- Any review requested following the initial investigation.

It also includes procedures for speaking up against governors, including the Chair (which was one of the issues at DMU).

3. Application of policies to governors

One of the issues raised at DMU was that it was unclear whether university policies applied specifically to governors.

At LSBU, the governor appointment letter sets the expectation that governors follow the travel and expenses policy, and the LSBU values.

Following review of other LSBU policies, the governance team recommends that the following policies also apply to governors:

- Speak up policy (which has been updated to reflect this)
- Anti-fraud policy
- Anti-bribery policy
- Gifts and Hospitality policy

These policies will be reviewed and a further briefing will be brought to the May 2020 Board meeting.

4. LSBU email addresses

Governors will be given the opportunity to use an LSBU email address for university business. A separate note will be sent to governors with details.

5. Directors' liability guidance

For governor's information, LSBU's external lawyers, VWV, have prepared an advice note on personal liability of governors. This advice note will form part of the new governor induction pack.

The advice note covers:

- circumstances in which personal liability may arise;
- approaches to minimise the risk of personal liability; and
- protections against personal liability.

The summary of the advice is that, "the risks of incurring personal liability are low, particularly if the directors:

- 5.2.1 fully understand their duties and responsibilities under company law (and charity law in the case of LSBU, SBC and SBA) and the duties and responsibilities owed to the companies' regulators;
- 5.2.2 adopt proper decision-making processes (for example, in line with the Charity Commission's guidance);
- 5.2.3 appropriately delegate their powers to an individual or committee, including by putting in place clear terms of reference setting out the scope of the delegation and limits on authority”.

The Governance team is happy to answer any questions governors may have on the advice.

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LSBU Group Speak up policy

1. Introduction from senior leadership

The LSBU Group¹ is committed to conducting its business on a daily basis with fairness, integrity and respect for the law and our values of Excellence, Professionalism, Integrity, Inclusivity and Creativity. In spite of this commitment, you may one day observe conduct that seems to violate the law, our Values and/or our policies. If you observe or suspect such misconduct, you are encouraged to Speak Up. By doing so, you give LSBU the opportunity to deal with the issue. Remaining silent about possible misconduct may worsen a situation and decrease trust.

The LSBU Group truly values the help of employees or students who identify and Speak Up about potential concerns that need to be addressed. Speaking Up is encouraged and employees and students who Speak Up are protected. You will not suffer for raising concerns in good faith about suspected misconduct, and we do not tolerate any form of retaliation against you for Speaking Up. After all, Speaking Up is essential for us to sustain our reputation, success and ability to operate – both now and in the future.

What is the purpose of this Speak Up Policy?

The purpose of this policy is to explain how you can raise concerns about suspected misconduct in confidence and without fear of retaliation. It also describes what you can expect from LSBU if you Speak Up.

Who can speak up?

This Speak Up policy is available to everyone working for or studying with the LSBU Group (or parents of younger learners). It is also open to any party with whom the LSBU Group has or has had some type of business relationship (such as business partners, suppliers and agents) who wish to raise a concern about possible misconduct within the LSBU Group.

¹ The LSBU Group consists of London South Bank University, South Bank Academies, South Bank Colleges, South Bank University Enterprises Ltd and SW4 Catering Ltd

2. Scope of the speak up policy

What concerns are covered by this Speak Up policy?

This Speak Up policy can be used to raise concerns about suspected misconduct by any employees or governors or directors within the LSBU Group, that is: any violation of the law, our Values and/or our policies. Employees are expected to report any fraud or suspicion of fraud in good faith as explained in the Anti-Fraud Policy.

Examples of concerns that can be raised using this Speak Up policy are:

- financial malpractice, impropriety or fraud
- breaches of financial controls, false accounting/reporting, financial and other reporting irregularities
- academic malpractice
- failure to comply with LSBU's legal or regulatory obligations – for example about the health and safety of students, employees or the public, anti-discrimination legislation, trading standards or environmental protection laws
- unethical business conduct, where colleagues receive or solicit anything of value from a third party or promise, offer or give anything of value to influence the decision of a third party in procurement or contract execution for LSBU
- any other criminal activity, such as assault
- bullying, harassment, discrimination or victimisation of others
- colleagues who are involved in the taking, buying, selling of drugs or other forms of substance abuse
- behaviour which might damage LSBU's reputation
- serious breach of LSBU's Values
- actions intended to hide any of the above

Please note that this policy does not apply to the following, which are dealt with under separate procedures:

- any grievances you may have in relation to your terms of employment;
- matters which should be raised under grievance, complaint or disciplinary procedures, or to reopen matters which have already been considered under them;
- challenges of financial or business decisions of the LSBU Group;
- settling personal disputes; or

- making accusations which you know are false. Doing so may lead to disciplinary measures.

3. Safeguarding your position: confidentiality and non-retaliation

3.1 *Protection*

Speaking Up is encouraged and this speak up policy is designed to offer protection to those identified in paragraph 2 who disclose such concerns, provided that the disclosure is made:

- (i) in good faith, and
- (ii) in the reasonable belief of the individual making the disclosure that it tends to show misconduct.

Please feel confident that you will not suffer for raising concerns in good faith about suspected misconduct. If you make an allegation in good faith, but it is not confirmed by subsequent investigation, no action will be taken against you. Any form of threat or retaliation will not be tolerated. Retaliation is treated as a disciplinary matter.

LSBU takes the welfare of its staff seriously and is committed to supporting staff who Speak Up. We provide a confidential and free of charge Employee Assistance Programme (EAP) to support you with a wide range of advice ranging from emotional support to work and personal life issues.

3.2 *Confidentiality*

Your identity when making the allegation will be kept confidential only to those dealing with the issues raised, so long as this does not hinder or frustrate any investigation or the LSBU Group's ability to meet its legal obligations. However, the investigation process may reveal the source of the information and the individual making the disclosure may be requested to provide a statement as part of the evidence required.

3.3 *Anonymous Allegations*

You are encouraged to put your name to any disclosures you make. Concerns expressed anonymously carry less weight, but may be considered at the LSBU Group's discretion. Factors to be taken into account in exercising this discretion include:

- the seriousness of the issues raised;
- the credibility of the concern;
- any supporting evidence received; and
- the likelihood of confirming the allegation from alternative credible sources.

4. Procedures for speaking up

Our Speak Up policy allows you to raise concerns about suspected misconduct through a variety of channels. Please feel free to raise questions and concerns through any of the following Speak Up channels:

Step 1

- *Staff*

As a general guideline, the first person to approach when raising a concern is your line manager. You may also choose to discuss your concern with an HR business partner.

- *Students*

Students are encouraged to raise any concerns about misconduct (as set out in section [2]) with their course director. If you feel this is inappropriate or you are dissatisfied with the outcome you may raise your concern through the independent reporting line (see below).

If you are a student on placement and your concerns relate to the organisation in which you are placed you should, in the first instance, follow the speak up policy of that organisation. For student nurses and midwives your attention is drawn to the Nursing and Midwifery Council's guidance: *Raising concerns: Guidance for nurses, midwives and nursing associates*. Further information is available on the NMC's website:

<http://www.nmc-uk.org/Nurses-and-midwives/Raising-and-escalating-concerns/>

For complaints, please follow the Student Complaints Procedure.

Step 2

- *Independent reporting line*

Where you suspect misconduct and genuinely believe that the matter cannot be dealt with through the available channels set out above, you can use the external Speak Up reporting line (<http://www.safecall.co.uk/report>). This gives you the opportunity to raise concerns confidentially. The Speak Up reporting line is run by Safecall, an independent third party, and is available 24/7, 365 days a year. There are three ways to submit a report through the Speak Up reporting line by:

- phoning (free of charge): 0800 915 1571
- emailing: lsbu@safecall.co.uk
- completing a web form available at www.safecall.co.uk/report

After you complete your report (online or by phone), you will receive a unique username and password. You can use this username to log in to check progress on your report. You can check whether the person dealing with your report has feedback for you or further questions. If you want, you can provide additional information. Your username is particularly important if you choose to remain anonymous, as we can only contact you through the website in that case. All reports received via the Speak Up Service are forwarded to LSBU for further handling.

What kind of information do you need to provide?

When you file a report please provide as much detailed information as you have to enable us to assess and investigate your concern, such as:

- the background, history and reason for the concern;
- names, dates, places and other relevant information;
- any documents that may support your report.

A report can only be followed up if it contains sufficient information and there is a reasonable possibility of obtaining further information.

What should you do if you do not have all the facts?

We encourage you to Speak Up as soon as possible, ideally before situations get out of hand or damage is done. It is always better to report early than to wait for all the facts. If you know about or suspect misconduct, Speak Up with the facts you have. We do not expect you to have all the answers. Let us look into the matter to determine if there is a reason for concern.

Never investigate the matter yourself and do not seek evidence to build a strong case. We guarantee that no disciplinary measures or other steps will be taken against you if your genuine concern later turns out to be mistaken.

What about 'external whistleblowing'?

We strongly encourage you to raise concerns internally through one of the available channels. By Speaking Up internally, you give us the chance to look into the matter and take action if needed. In this way we can truly improve the LSBU Group together.

5. Follow up – what happens after you Speak Up?

What can you expect if you Speak Up?

LSBU takes every report of possible misconduct seriously. If you submit a report, you will receive a confirmation of receipt within 5 to 7 working days, with an estimate of how long it will take to handle and assess your concern. Your report will undergo an initial review, and if necessary, it will be appropriately investigated.

You will be informed of the overall findings, i.e. whether or not LSBU has established that misconduct has taken place. Please note that we will not be able to give you full details of the outcome of a case (or related actions taken) for reasons of confidentiality, privacy and the legal rights of all concerned.

If your concern is well-founded (i.e. misconduct has indeed taken place), appropriate measures will be taken where necessary and in accordance with the law and our Disciplinary Policy.

Who will act on your concerns and how?

All concerns that are received are logged into a case management system. Members of the Group Executive or, if appropriate, the Chair of the relevant Group Audit Committee will consider the information made available and should determine next steps following a two-phased approach:

1. Initial review and inquiries – The purpose is to assess the concern and decide if, on the face of it, it requires further review and investigation (and, if so, by whom and in which form). You may be approached for additional information.

2. Further review and investigation - If the report requires further review and investigation, a Case Manager will be assigned. The investigation itself will focus on an objective, factual analysis of the case. If needed, outside experts (e.g. lawyers or accountants) will be engaged to assist in the investigation. They will work under strict confidentiality.

The review and investigation will be conducted in an independent, fair and unbiased manner with respect to all parties involved and in accordance with relevant laws and principles (including natural justice). Investigations will be overseen by individuals more senior than the individual against whom the complaint is made. For members of the Group Executive this means members of the LSBU Board; for members of the LSBU Board this means the Chair of the LSBU Board and for the Chair of the LSBU Board this means, the [senior independent governor].

Details of the case, your identity and the identity of anyone else mentioned in the report, are kept confidential throughout and after the investigation, and are only shared on a need-to-know basis.

If the matter would be more appropriately considered under another LSBU process, such as grievance or disciplinary you will be advised of this.

What is expected of you in connection with investigations?

If you become involved in an investigation, you need to co-operate and answer all questions completely and honestly. Lying to the people performing the investigation as well as delaying, interfering with or refusing to cooperate with an investigation may lead to disciplinary measures. All parties involved, including the accused, are entitled to confidentiality in order to avoid unnecessary damage to their reputation. Therefore, if you participate in or learn about an investigation, you must keep the matter confidential.

What to do if you have a concern about the follow-up on a report?

If you believe that your concern or a concern raised against you has not been handled appropriately or that an investigation has not been performed correctly, please write to the Chair of the relevant Board, c/o the Group Secretary at 103 Borough Road, SE1 0AA, marking the envelope "*Personal and Confidential: please forward*".

In your correspondence please state the grounds for dissatisfaction which may cover the following and, where relevant, provide supporting evidence:

- There is evidence of procedural irregularity, or
- There is evidence of prejudice or bias, and/or
- There is further evidence that was not available at the time the original disclosure was made.

5. Monitoring and Review

A brief anonymised report of all disclosures and any actions taken will be regularly reported to the Group Audit Committee.

The Group Secretary will report to the Group Audit Committee annually on the effectiveness of this policy and will ensure that periodic reviews are carried out.

Approved by the Group Audit & Risk Committee on [12 February 2020]

Advice in relation to personal liability

London South Bank University (and its subsidiaries)

Contents

1	Introduction	3
2	Circumstances in which personal liability may arise	4
3	Mitigation of risk of personal liability	6
4	Other protections against personal liability	8
5	Summary	10

1 Introduction

- 1.1 London South Bank University (**LSBU**) is a company limited by guarantee and exempt charity. LSBU has the following wholly-owned subsidiaries:
 - 1.1.1 South Bank Colleges (**SBC**), a company limited by guarantee and exempt charity; and
 - 1.1.2 South Bank University Enterprises Limited (**SBUEL**), a company limited by shares.
- 1.2 Officers of LSBU are also company law members of South Bank Academies (**SBA**), which in essence, gives LSBU control over SBA. SBA is established as a company limited by guarantee (and is an exempt charity).
- 1.3 References to the **Group** in this advice note are to LSBU, SBC, SBUEL and SBA together.
- 1.4 Like all companies, the companies in the Group have a two-tier governance structure. The first tier of governance comprises the company's members who have certain rights under company law, including to change the articles of association, remove directors and wind-up the company.
- 1.5 The second tier of governance comprises the directors who are responsible for the day to day management and administration of the company. As each of LSBU, SBC and SBA are also charities, the directors of these companies are also charity trustees for the purposes of charity law.
- 1.6 Due to each company's incorporated status, the members of each company benefit from limited liability. Generally, liabilities are incurred by the company and it can be sued or sue in its own name.
- 1.7 In the case of LSBU, SBC and SBA, the members' liability is limited to the amount of the guarantee confirmed in the articles of association. In terms of SBUEL, the liability of LSBU as sole shareholder is limited to the amount which remains unpaid on the shares it holds (if any). In general, the directors of each company in the Group will also benefit from their company's limited liability status.
- 1.8 There are, however, circumstances in which the directors of the Group companies could be exposed to incurring liabilities personally. It should be noted that whilst there are various circumstances in which personal liability may arise, in practice, where directors have acted in good faith, it is a relatively rare occurrence that a director would find themselves in a position of actually incurring personal liability.
- 1.9 We have been asked by LSBU to advise in relation to the personal liability of the directors of the Group companies. This advice note therefore covers:
 - 1.9.1 circumstances in which personal liability may arise;
 - 1.9.2 approaches to minimise the risk of personal liability; and
 - 1.9.3 protections against personal liability.
- 1.10 Although we have outlined below circumstances in which personal liability may arise, we have provided a high level overview only. If further advice is required in respect of specific liabilities, we would be happy to advise further.

2 **Circumstances in which personal liability may arise**

2.1 There are various circumstances in which personal liability may arise for company directors.

2.2 We have provided an outline below of some of the circumstances which may lead to personal liability for directors. This is not an exhaustive list¹, but identifies the more common areas where we consider personal liability may arise in the context of the Group and the operations and activities of the Group companies.

2.3 **Breach of duty and breach of trust**

2.3.1 Directors owe various duties to their company under legislation and common law. For example, under the Companies Act 2006, there are seven general duties, including to act within the directors' powers, to exercise independent judgment and to exercise reasonable care, skill and diligence. It should be noted that the duty to act with reasonable care, skill and diligence is a subjective test and directors would be judged in accordance with their specific skills and expertise.

2.3.2 Where a director acts (or fails to act) in such a way as to breach a duty owed to his or her company, the director may be personally liable to compensate the company for any loss it suffers as a result. The company has the right to pursue a director who has breached a duty owed to the company.

2.3.3 The company also has the right under company law to ratify (i.e. forgive or condone) conduct of a director which amounts to a breach of duty or breach of trust.

2.3.4 For the directors of LSBU, SBC and SBA, who are also charity trustees under charity law, there is the possibility of incurring personal liability for acting outside of the objects or powers. Where a director acts in breach of trust, he or she may be personally liable to compensate the charitable company for any loss suffered as a consequence. In such circumstances, the company itself, the Charity Commission or Attorney General (acting on behalf of the company) could bring a claim against the director.

2.3.5 The Office for Students (**OfS**) in relation to LSBU and SBC, and the Department for Education (**DfE**) in relation to SBA, as the principal regulators of these companies for the purposes of charity law regulation, would also be involved in any decision taken to bring a claim against a director for breach of trust.

2.4 **Liability to third parties**

2.4.1 Although the general position, as highlighted at paragraph 1.6 above, is that due to their limited liability status, the Group companies would incur liabilities to third parties (rather than the directors personally), there are circumstances in which directors may still be personally liable to third parties.

2.4.2 The most significant example is in respect of the offence of wrongful trading under insolvency legislation. Wrongful trading will arise where the company goes into insolvent liquidation and, before the start of the insolvency process, the directors

¹ We have not included liabilities arising in respect of, for example, individuals acting as company directors when they have been disqualified from holding office as a company director (under the Company Directors Disqualification Act 1986); making false statements as to the affairs of the company with the intent to deceive shareholders or creditors (under the Theft Act 1968); defrauding creditors (under the Fraud Act 2006); certain money laundering or terrorism offences committed by the company but with the consent, connivance or neglect of the director (under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017).

knew or ought reasonably to have known that there was no reasonable prospect that the company would avoid insolvent liquidation.

2.4.3 If a liquidator can show that this is the case and that the directors did not subsequently take all reasonable steps in the circumstances to minimise the potential loss to the company, the liquidator can apply to the court for an order that the directors contribute to the company's assets to make up any shortfall that has resulted. Directors may be personally liable for any losses arising since the point that the directors' failed to identify there was no reasonable prospect of the company avoiding insolvent liquidation and take steps to minimise the losses.

2.4.4 Another example is where a director enters into a contract without the appropriate authority to do so. The director may be personally liable for any loss arising as a result of that unauthorised act.

2.5 Breach of company law requirements

2.5.1 Directors are subject to various statutory requirements under company law, including a duty to:

- (a) keep proper books and records; and
- (b) make trading disclosures (for example, the requirement to display the company's registered name at business locations and to include certain particulars in business letters and on the company's website).

2.5.2 A failure to comply with such requirements constitutes a criminal offence and directors may be personally liable to pay a fine.

2.6 Personal liability arising under other legislation

2.6.1 Certain legislation can confer personal liability on directors, in addition to, or rather than, the company itself. Key examples which may be relevant in respect of the Group include under:

- (a) The Data Protection Act 2018 - a director may be personally liable when a company has committed an offence under the Data Protection Act 2018 with the directors' "consent, connivance or neglect". Such offences may include unlawfully obtaining, disclosing or procuring the disclosure of personal data without the data controller's consent; or altering, destroying or concealing information with the intention of prevention of disclosure to a data subject who has made a subject access request.
- (b) The Bribery Act 2010 - where a company is convicted of an offence of offering, or receiving a bribe, or bribing a foreign public official, its directors can also be held liable where it can be shown that they "consented" or "connived" in the act of bribery. These words are not defined in the legislation but the courts have considered a director to have consented where he or she is aware of what is happening and agrees to it. The courts have determined that a director has connived where he or she has not actively encouraged the offensive action but has allowed it to continue.
- (c) The Equality Act 2010 - directors can be personally liable for discrimination claims brought under the Equality Act 2010. For example, where directors

can be found to be "acting as agents" for their company, they can be personally liable for the discriminatory act together with the company itself.

- (d) Health and safety legislation - where a company has committed a health and safety offence with the consent or involvement of a director, or the offence has arisen as a result of the director's neglect (i.e. breach of duty of care), then the director may be liable to prosecution.
- (e) Environmental legislation - directors can be personally liable (as well as the company) of certain environmental offences (e.g. breaching permit conditions or unauthorised depositing of waste).
- (f) The Fraud Act 2006 - directors can incur personal liability under this Act where they are found to have committed the offence of fraud by abuse of a position in which they are expected to safeguard the financial interests of another person (including companies) and intend to profit from such abuse or cause loss to another.

2.6.2 Company directors are also potentially subject to the common law offence of manslaughter by gross negligence. This offence applies where (a) the director owed a duty of care to the deceased; (b) there has been a breach of duty of care; and (c) the breach was so grossly negligent that the director can be deemed to have had "such a disregard to life" for the deceased that the director's conduct should be seen as criminal and should be punished.

2.6.3 In respect of the offences listed above, directors may be liable to pay a fine or to imprisonment, or both. Where a director is convicted of an indictable offence they may also be disqualified from acting as a company director.

2.7 Defending legal proceedings

2.7.1 Directors may be exposed to personal liability in the defence of some legal proceedings brought against him or her. Please see sections 4.2 and 4.3 below for further details of where personal liability may arise.

2.8 Unauthorised benefits to charity trustees

2.8.1 As charities, LSBU, SBC and SBA can only provide benefits to their directors if they are authorised (a) under the articles of association; (b) by the law; or (c) by the Charity Commission (in the case of LSBU and SBC, consultation with the OfS would also be required, and in respect of SBA, consultation with the DfE).

2.8.2 If a director of LSBU, SBC or SBA receives an unauthorised benefit from their company, the director will be personally liable to put the company back in the position it would have been had the unauthorised benefit not been provided.

3 Mitigation of risk of personal liability

3.1 In general, the risk of personal liabilities can be mitigated to a large extent by the way in which directors conduct the day to day management and administration of their company. Although there are various circumstances in which company directors could incur personal liability, in reality, the risk of actually incurring such liabilities is low.

3.2 Governance generally

- 3.2.1 Following good practice principles in governance will support effective decision-making and help the directors to ensure compliance with the law and relevant regulations. Directors should be committed to good governance.
- 3.2.2 We have highlighted some of the key principles of good governance below which we consider to be most relevant to the mitigation of the risk of personal liability.

3.3 Understanding duties and responsibilities

- 3.3.1 Directors should be confident that they understand their duties and responsibilities as company directors under company law and, in the case of LSBU, SBC and SBA, their duties and responsibilities as charity trustees under charity law.
- 3.3.2 Also, directors should be confident that they understand the duties owed to their company's regulators i.e. in the case of LSBU and SBC, to the Registrar of Companies and the OfS; SBA, to the Registrar of Companies and the DfE; and SBUEL, to the Registrar of Companies. All of the above-mentioned regulators issue and maintain guidance which can be accessed online by the directors.
- 3.3.3 Having a thorough understanding of the relevant duties and responsibilities will give directors confidence that they are carrying out their role in a way which benefits the company and in a way which is compliant with key legal and regulatory requirements.

3.4 Decision-making

- 3.4.1 The directors are collectively responsible for making decisions about how their company should be run. Making decisions is one of the most important parts of the directors' role. All directors should be given the opportunity to participate.
- 3.4.2 Where directors have a full understanding of these duties and responsibilities, it will give them more confidence in their decision-making.
- 3.4.3 For LSBU, SBC and SBA, the Charity Commission has issued guidance to charity trustees: *It's your decision: charity trustees and decision making* (publication CC27), to assist charity trustees in their decision-making. Although LSBU, SBC and SBA are not directly regulated by the Charity Commission, their principal regulators are likely to adopt similar principles.
- 3.4.4 The Commission's guidance sets out the principles of trustee decision making. In summary, these are to:
 - (a) act within their powers;
 - (b) act in good faith and only in the interests of the charity;
 - (c) make sure they are fully informed;
 - (d) take professional advice (if considered it is required);
 - (e) take account of all relevant factors;
 - (f) ignore any irrelevant factors;
 - (g) manage conflicts of interest; and

- (h) make decisions that are within the range of decisions that a reasonable trustee body could make.

3.4.5 Although not directly relevant to SBUEL as a non-charitable company, the majority of these principles should also be adopted by its directors to ensure proper decision-making processes are adopted.

3.4.6 It will be important for all decisions taken by the directors to be properly recorded, particularly in respect of significant decisions. In the event that a decision of the directors is challenged in future, the directors can look to the minutes to provide an audit trail.

3.5 Delegation

3.5.1 Each of the companies in the Group has a power to delegate powers to individuals or committees. These powers are worded slightly differently for each company and therefore it will be important for the relevant directors to understand the nature and the extent of the power as it applies to their company.

3.5.2 The power to delegate is simply that; it is a delegation of powers and not responsibility for the exercise of the power. The directors will retain ultimate responsibility and accountability for all decisions that are made in respect of their company.

3.5.3 It is therefore important that where directors do delegate, clear and robust reporting procedures and lines of accountability are agreed to ensure that the directors retain the appropriate level of oversight and to ensure that the delegated authority is exercised properly.

3.5.4 Best practice is to ensure that clear terms of reference are agreed by the directors in respect of the delegation. Terms of reference could be contained within minutes or in a standalone document, but should at least include the scope of the delegation and the limits on the delegate's authority. Any delegation should be reviewed on a regular basis.

3.5.5 Generally, decisions likely to be regarded as high risk or those which are outside of the ordinary course in the context of a company's general business, should not be delegated.

4 Other protections against personal liability

4.1 As section 3 above explains, the directors can conduct the affairs of their company in such a way so as to minimise the risk of incurring personal liability. There are, however, some additional protections available, including under the general law, which may be available to directors to mitigate the risk of incurring personal liability.

4.2 Qualifying third party indemnities

4.2.1 Under the Companies Act 2006 (**2006 Act**), a company may provide an indemnity against liability incurred by a director to a person other than the company or an associated company (e.g. in this case, companies in the Group). This is known as a "qualifying third party indemnity" (**QTPI**).

4.2.2 A QTPI cannot provide an indemnity to a director in respect of:

- (a) fines imposed in criminal proceedings or a penalty payable to any regulatory authority; or
 - (b) defending any criminal proceedings in which a director is convicted, in defending civil proceedings brought by the company (or an associated company) in which judgment is given against a director, or in connection with certain specified applications for relief where the court refuses to grant relief.
- 4.2.3 There is no obligation for a company to indemnify its directors by exercising the power in the 2006 Act. However, matters which a company may wish to take into consideration in deciding whether or not to exercise this power include, for example, whether it should protect the director to the fullest extent permitted under the law or whether there should be a cap placed on the company's liability, and whether it would promote the success of the company.
- 4.2.4 The articles of association of each of SBC, SBA and SBUEL contain an express power for the company to indemnify the directors. These are all drafted differently, although the net effect is that each of SBC, SBA and SBUEL may indemnify their directors in accordance with the 2006 Act and subject to the terms of the indemnity insurance in place in respect of liability for negligence, default, breach of duty or breach of trust relating to the affairs of the company.

4.3 Insurance

- 4.3.1 Insurance for company directors is intended to protect directors from loss resulting from claims made against them in relation to the discharge of their duties. The 2006 Act provides companies with a power to buy insurance for its directors to cover liabilities arising as a result of negligence, default, breach of duty or breach of trust by a director in relation to the company.
- 4.3.2 Directors of companies in the Group benefit from insurance with Royal and Sun Alliance. We understand that the policy indemnifies directors against loss arising from claims for "wrongful acts".
- 4.3.3 Wrongful acts includes: any actual or alleged error, misstatement, misleading statement, act, omission, neglect, breach of duty, breach of trust, libel, slander, breach of contract, breach of warranty of authority and wrongful trading (see paragraph 2.4.2 above).
- 4.3.4 The cover offered by the policy is wide-ranging. However, no insurance policy can indemnify directors against:
 - (a) fines imposed in criminal proceedings or a penalty payable to any regulatory authority;
 - (b) liabilities arising out of criminal proceedings in which a director is convicted of any offence arising out of any fraud or dishonesty or wilful or reckless misconduct by the director; or
 - (c) liabilities incurred by a director that arise out of any conduct which the director knows (or must reasonably be assumed to have known) was not in the interests of the company or where the director did not care whether it was in the company's interests or not.

- 4.3.5 The net effect of this is that a company can only insure its directors against their own breaches of trust where such breaches are as a result of negligent acts or omissions that the director did not know about and could not reasonably be assumed to have known about (and would lead to a breach of trust).
- 4.3.6 We understand that specific major exclusions under the Group's policy include: breaches of obligations in relation to schemes to provide benefits to employees, fraudulent acts or wilful violation of the law, discrimination disputes with employees or claims for pollution or contamination.
- 4.3.7 The provision of indemnity insurance to the directors of LSBU, SBC and SBA is considered a trustee benefit. However, such benefit is authorised under the articles of association of each of these companies.

4.4 Relief granted by a court

- 4.4.1 The court has a general discretion to relieve a director from personal liability where it is considered that he or she has acted honestly and reasonably, notwithstanding the consequences of his or her breach. Where, on the other hand, the director has been involved in misconduct or mismanagement that was clearly intended or undertaken recklessly, the court is unlikely to relieve him or her from personal liability.
- 4.4.2 In requiring the relief of the court, a director must be able to demonstrate that he or she has acted honestly (this is a subjective test) and reasonably (this is an objective test). Therefore, the court will take into consideration any special skills or knowledge that the director has. If these two conditions are fulfilled, the court will then consider whether it would be fair to excuse the director from liability.
- 4.4.3 In respect of LSBU, SBC and SBA, the Charity Commission also has a discretion to relieve any trustee from personal liability under the Charities Act 2011 where the Commission considers the trustee acted honestly and reasonably and ought fairly to be excused. This power would be exercised in consultation with the relevant principal regulator (i.e. the OfS for LSBU and SBC, and the DfE for SBA).

5 Summary

- 5.1 The directors of the Group companies have various duties and responsibilities in ensuring the successful management and administration of their companies. Whilst the directors will, in most circumstances, be able to benefit from the Group companies' limited liability status, there are still occasions where the directors may be exposed to incurring personal liability both to their company and to third parties.
- 5.2 The risks of incurring personal liability are low, particularly if the directors:
 - 5.2.1 fully understand their duties and responsibilities under company law (and charity law in the case of LSBU, SBC and SBA) and the duties and responsibilities owed to the companies' regulators;
 - 5.2.2 adopt proper decision-making processes (for example, in line with the Charity Commission's guidance);
 - 5.2.3 appropriately delegate their powers to an individual or committee, including by putting in place clear terms of reference setting out the scope of the delegation and limits on authority.

- 5.3 Protection is also provided to directors under insurance arranged through LSBU for the Group, which covers a range of liabilities (although the exclusions should be noted). Additional protection from personal liability could also be provided by the company by way of an indemnity in accordance with the 2006 Act (and the company's articles of association).
- 5.4 Therefore, generally, provided the directors act in good faith and fully understand and effectively discharge their duties and responsibilities to their respective Group company, they are unlikely to incur personal liability whilst carrying out their role.

VWV LLP
25 July 2019

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