



The Royal Scottish Country Dance Society

Duties of Charity Trustees

Introduction

This briefing provides some information about the regulation of charities in Scotland and the duties and liabilities of charity trustees.

Charity trustees are people who are responsible for the management of charities whether they are directors of charitable companies, trustees of charitable trusts, council members, management committee members or office-bearers of unincorporated associations. As such, they are subject to a range of legal duties.

Regulation of Charities in Scotland

The Office of the Scottish Charity Regulator (OSCR) is responsible for the regulation of charities in Scotland. OSCR's functions are to determine whether bodies are charities, keep a public register of charities, monitor compliance with the Charities and Trustee Investment (Scotland) Act 2005, identify and investigate misconduct in the administration of charities and to advise the Scottish Ministers on matters relating to OSCR's functions.

The Charities and Trustee Investment (Scotland) Act 2005

The Charities and Trustee Investment (Scotland) Act 2005 ("2005 Act") came into force in April 2006 and is the principal legislation governing charities in Scotland. The Act established OSCR and the Scottish Charity Register, introduced a new charity test, deals with reorganisation of charities, sets out new responsibilities for charity trustees, controls fundraising and extends the investment power of trustees.

The Companies Act 2006

The Companies Act 2006 ("2006 Act") governs charitable companies in Scotland including their constitution, governance and administration, and the responsibilities of directors. Charitable companies are limited by guarantee, rather than by shares, and despite being constituted as a company, they operate on a not-for-profit basis.

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In charitable companies, the trustees are “directors” for the purposes of company law and are subject to duties as directors under the 2006 Act in addition to their duties as charity trustees under the 2005 Act. In practice, these duties are largely similar.

Charity Trustees

The 2005 Act defines “charity trustees” as the persons having the general control and management of the administration of a charity. This definition is sufficiently wide so as to include “shadow trustees” such as senior employees, parent company trustees and trustees’ relatives who in fact exercise the control and management of a particular charity.

General Duties

- *Duty of Care*

In carrying out all aspects of their role, charity trustees are under a duty of care to act in accordance with certain standards. In terms of the 2005 Act trustees must act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person.

- *Duty to carry out the terms of the charity*

Under the 2005 Act charity trustees must seek, in good faith, to ensure that their charity acts in a manner which is consistent with its purposes. They must be familiar with and understand the charity’s constitution and must adhere to it in administering the charity. In particular, they must be familiar with their organisation’s charitable purposes and ensure that the charity does not operate out with the boundaries of these.

- *Duty to keep accounts*

Charity trustees have a duty to ensure that the charity keeps proper accounting records. Charitable trusts are subject to specific accounting requirements. Corporate charities are required to prepare accounts in accordance with the Companies Acts. All types of charity are also bound to follow, to a greater or lesser extent, the Charities Statement of Recommended Practice 2005 (and relevant updates) when preparing their accounts.

- *Duty to devote time to the charity’s affairs*

Charity trustees should meet together as often as is necessary for the proper administration of the charity. Charity trustees should attend meetings where possible and read the papers issued for the meeting. Those charity trustees who do not attend meetings may not be well-informed of the charity’s affairs and may be unable to make a meaningful contribution.

- *Conflict of interest*

Charity trustees must put the interests of the charity first. If they are prevented from doing so, as a result of any conflict of interest, they must disclose this conflict and take no further part in any deliberation or decision of the other charity trustees on the matter in question. Where there is a potential conflict between the interests of a charity and the body which appoints a charity trustee, the charity trustee must put the interests of the charity first.

Duties of Charity Trustees

- *Duty to take advice*

Charity trustees must take proper professional advice when appropriate.

- *Duty to observe the general law*

Charity trustees are subject to the general law, and depending on the activities in which they are involved, they may be subject to employment law, health and safety legislation, the law of delict, criminal law, human rights legislation, data protection and so on.

Statutory Duties

Under the 2005 Act, charity trustees must ensure that their charity complies with any direction, requirement, notice or duty imposed on it by virtue of the 2005 Act and any other legislation.

Charity trustees have a collective responsibility to ensure that breaches of statutory duties under the 2005 Act are corrected and not repeated and that any trustee in serious or persistent breach is removed.

Breaches of Duty

Any breach of the duties set out in the 2005 Act by charity trustees is treated as misconduct in the administration of a charity and OSCR may invoke its powers under the Act. These include power to suspend the trustees, to direct the charity to cease representing itself as a charity and other related powers. OSCR is obliged to act proportionately. It is unlikely to suspend a charity trustee under these powers if it considers the trustee has acted honestly and reasonably in relation to the misconduct and, in fairness, ought to be excused.

Payment

The 2005 Act allows certain payments for services (including services provided in the capacity of a charity trustee or under a contract of employment) given to a charity by a trustee or someone connected to a trustee.

As a preliminary issue, the charity's constitution must not contain a prohibition on trustees receiving payment (other than in respect of pocket expenses).

Remuneration (which includes any benefit in kind) for particular services can be given provided the conditions specified in the section 67 of the 2005 Act are met. These conditions are:

- The trustees must satisfy themselves that the arrangements are in the charity's interest before they enter into an agreement.
- There is a written agreement.
- The maximum amount of possible remuneration is set out in that agreement and is reasonable in the circumstances.
- Fewer than half of the trustees at any time are subject to such arrangements with the charity.

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- The charity's constitution does not contain any provision which expressly prohibits such remuneration being paid.

If a charity trustee, or person connected to a charity trustee, is remunerated in contravention of these rules, the charity may recover the amount of the remuneration, and proceedings for its recovery must be taken if OSCR so directs.

For the avoidance of doubt, the purchase, by a charity, of indemnity insurance for its trustees will not fall foul of the section 67 conditions in relation to remuneration.

Connected Persons

Persons "connected" with charity trustees are also subject to the conditions specified in the Act regarding remuneration. These include a spouse, civil partner, children, parents and other close relatives.

Any institution which is controlled by a charity trustee or a relative is regarded as a "connected person"; as is a company in which a charity trustee or relative has a "substantial interest". Substantial interest is defined as an interest in shares comprising more than one fifth of the share capital or an ability to nominate more than a fifth of the voting power at any general meeting of the company.

Where a charity trustee or relative is a partner in a professional firm which operates as a Scottish partnership, there will be a connected person relationship.

Trustee Indemnity Insurance

The Public Services Reform (Scotland) Act 2010 has clarified that it is permissible for charities to purchase trustee indemnity insurance for their trustees.

Disqualification from being a Charity Trustee

The 2005 Act sets out in detail the persons that are disqualified from being charity trustees. This includes persons convicted of offences involving dishonesty, undischarged bankrupts and disqualified directors. It is prudent for charities to ask potential charity trustees to give written confirmation that they are not a person disqualified from being a charity trustee.

A person who acts as a charity trustee while disqualified is guilty of an offence and liable on conviction to a fine or up to two years' imprisonment.

Administration and Good Practice

OSCR has produced a great deal of helpful guidance for charity trustees in relation to proper administration of their charities. This can be accessed via their website. OSCR recommends that charity trustees implement certain measures to ensure that their charity is compliant with legislative requirements and meets the standards expected by OSCR.

Charity trustees are not obliged to implement such measures, but may find the following suggestions helpful to ensure proper and effective administration of their charities:

- Maintain a register of current trustees and a list of where they work and any other charities they are involved with.
- Implement a Code of Conduct for trustees.
- Set out a policy which prescribes what will happen if a trustee does something wrong.
- Keep accurate records regarding any trustee who received remuneration.

Duties of Charity Trustees

- Keep minutes of all trustee meetings and record any decisions taken.
- Keep abreast of relevant changes in the law.
- Regularly review the charity's constitution, policies and decisions for potential improvement.
- Comply with OSCR's requirements to file an annual return and copy of the charity's accounts each year.
- Keep proper records of accounts – accounts should be kept on file for at least 6 years. Charities must also provide a copy of their accounts and constitution to anyone requesting to see them.
- Comply with requirements in relation to publicising information – a charity's name, charitable status, charity number and registered address must appear on all stationery, invoices, emails and on the charity's website. Charitable companies will also be required to publicise company information.

Responsibilities of Charity Trustees

Charity trustees have overall responsibility for the effectiveness and proper management of their charity and need to pay close attention to the charity's administration, policies, finances and financial well-being. Whilst the responsibilities and duties of charity trustees may appear daunting they need not be. By acting in good faith, honestly and in the best interests of the charity, the legal duties of charity trustees should be met and individual charity trustees can usefully contribute to the future of their charity.

Lindsays is a leading legal adviser to the charity sector. For further information on any of the issues referred to or for specific legal advice please contact:

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