

TURCAN CONNELL

GUIDE TO THE CHARITIES AND TRUSTEE
INVESTMENT (SCOTLAND) ACT 2005

5TH EDITION

CHARITIES AND TRUSTEE INVESTMENT

The Charities and Trustee Investment (Scotland) Act 2005 ('the 2005 Act') as amended by the Public Services Reform (Scotland) Act 2010 is the principal Act of the Scottish Parliament governing the regulation of charities in Scotland. This guide to the Act summarises the main provisions of the legislation.

The Act established a new regulatory system for Scottish charities, brought the definition of "charitable purposes" up-to-date, introduced a public benefit test, and made a number of other far-reaching changes in the law of charities in Scotland. This guide is based on the legislation in force as of September 2015.

OFFICE OF THE SCOTTISH CHARITY REGULATOR

The 2005 Act established the new Regulator for the Scottish charity sector. The Office of the Scottish Charity Regulator (OSCR) is a body corporate, answerable to the Scottish Ministers to whom it reports on an annual basis. The members of the Regulator are appointed by the Scottish Ministers from people with knowledge and skills relevant to OSCR's functions.

The general functions of OSCR are:

- to determine whether bodies are charities
- to keep and maintain the public register of charities
- to encourage, facilitate and monitor compliance with the 2005 Act

- to identify and investigate apparent misconduct in the administration of charities
- to take remedial or protective action where misconduct is discovered
- to provide information or advice to the Scottish Ministers.

In carrying out its duties, OSCR must encourage equal opportunities and have regard to the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed.

THE SCOTTISH CHARITY REGISTER

It is essential for bodies to be entered onto the Scottish Charity Register in order to be recognised as charities in Scotland. OSCR is responsible for keeping the Register and maintains a separate entry on the Register for each charity. Each charity's entry contains the charity's name, its principal office (or the name and address of one of the charity trustees), the purposes of the charity and whether or not any directions or notices have been given by OSCR in relation to the charity. The Register

also provides a note of income and expenditure levels in previous years and indicates where charities may be in default of reporting obligations to OSCR.

Foreign charities which are active in Scotland may also have to register with OSCR. Registration is required for charities which are established under the law of another country but which are managed or controlled wholly or mainly within Scotland, occupy land or premises in Scotland or carry out activities in an office, shop or similar premises in Scotland. For example, an English charity regulated by the English & Welsh Charity Commission but occupying premises in Scotland will be obliged also to register with OSCR. In order to be registered, foreign charities may have to amend their purposes in order to meet the Scottish definition of charity (see pages 3-4 under 'THE CHARITY TEST').

From time to time, OSCR must review each entry in the Register and must amend inaccuracies and notify the charity of any amendments it makes.



APPLICATIONS

Applications for entry on the Scottish Charity Register must be made to OSCR and must set out a number of statutory items of information as well as any other information which OSCR may require or request. A standard application form has been devised by OSCR to assist proposed charities in providing sufficient relevant information for these purposes. A charity will only be entered on the Register if the applicant charity meets the charity test.

Charities which existed in Scotland prior to the 2005 Act were “grandfathered” onto the Scottish Charity Register without having to apply to OSCR. Those charities remain subject to review and monitoring by OSCR in the same way as all newer charities.

THE CHARITY TEST

To meet the charity test, a body must have purposes which consist of one or more of the charitable purposes

defined in the 2005 Act. In addition, the body must provide public benefit in Scotland or elsewhere.

The charitable purposes are 16 in number and expand greatly on the four heads of charitable purpose which existed prior to the 2005 Act. The 16 charitable purposes are as follows:

- the prevention or relief of poverty
- the advancement of education
- the advancement of religion
- the advancement of health
- the saving of lives
- the advancement of citizenship or community development
- the advancement of the arts, heritage, culture or science
- the advancement of public participation in sport
- the provision of recreational facilities, or the organisation of recreational activities, with the object of improving the conditions of life for the persons

for whom the facilities or activities are primarily intended

- the advancement of human rights, conflict resolution or reconciliation
- the promotion of religious or racial harmony
- the promotion of equality and diversity
- the advancement of environmental protection or improvement
- the relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage
- the advancement of animal welfare
- any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.

It is important to note that the Scottish charitable purposes listed above do not exactly match the English heads of charitable purpose, which are used for the purposes of charity tax relief in the UK. In order to secure UK tax reliefs available to charities, Scottish charities must ensure that their objectives meet both the Scottish and English definitions of charitable purpose. Varying tax tests may result from the devolution of some taxes under the Scotland Act 2012 and subsequent legislation.

Even if a body's purposes consist of only one or more of the defined charitable purposes and the body provides public benefit in Scotland or elsewhere, the body will not meet



the charity test unless it can also satisfy a further threefold test:

- The constitution of the body must not permit distribution of its property for any non-charitable purposes
- The body must not have in its constitution provisions which permit direction or control of its activities by the Scottish Ministers or by a Minister of the Crown
- The body must not be a political party or have as one of its purposes the advancement of a political party.

The Scottish Parliament has partly disapplied these additional requirements in the special cases of the national collections institutions and some further and higher education bodies.

PUBLIC BENEFIT

Public benefit is not to be presumed in any of the defined charitable purposes and it must be demonstrated in each and every case that a body provides or intends to provide public benefit. In doing so, regard must be had as to how any:

- benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public),

and

- disbenefit incurred or likely to be incurred by the public in consequence of the body exercising its functions,

compared with

- the benefit gained or likely to be gained by the public in that consequence.

In addition, where a benefit is or is likely to be provided to a section of the public only, regard must be had to whether any condition on obtaining that benefit is unduly restrictive. Any condition on obtaining a benefit includes any charge or fee payable to obtain the benefit.

THE SCOTTISH CHARITY REGISTER

Following experience gained under a phased rolling review of a limited number of charities, OSCR published guidance on meeting the charity test, demonstrating public benefit and protecting charitable status. That guidance is a useful starting point for any charity exploring whether it

meets the public benefit test under the 2005 Act. OSCR updated this guidance in August 2015.

An ongoing process of monitoring charities' compliance with the public benefit test continues. OSCR expects to test public benefit in individual cases by seeking a detailed business plan or other statement of proposed activities from applicant charities or from a close reading of trustee reports in existing charities' annual reports and accounts.

CHARITY NAMES

OSCR may refuse to enter an applicant on the Scottish Charity Register if the body has an objectionable name. A name may be objectionable for a number of reasons:

- It may be the same as, or too like, the name of a pre-existing charity
- It may be likely to mislead the public as to the true nature of the purposes of the body or of its activities
- It may be likely to give the impression that the body is somehow connected to central or local government when it is not so connected
- It may be offensive.

The consent of OSCR is required for a change in the name of any charity and 42 days' notice must be given to OSCR of any proposal to change a charity's name. OSCR may request a charity to review its name, and where there are two charities with names which are too alike, OSCR must direct either one or both of the charities to change its name.

Failure to comply with such a direction will result in removal from the Register by OSCR.

REFERENCES TO CHARITABLE STATUS

Bodies which are entered on the Scottish Charity Register may refer to themselves as one of the following:

- Charity
- Charitable body
- Registered charity
- Charity registered in Scotland

There are additional variations for bodies which are entered on the Register and which are also managed or controlled wholly or mainly in or from Scotland.

Any body that does not appear on the Register may still refer to itself as a charity (making clear that it is a foreign charity) if it is established under the law of another country where it is entitled to refer to itself as a charity. In order to do so, the foreign charity must not be managed or controlled wholly or mainly within Scotland and it must not occupy any land or premises in Scotland or carry out activities in an office, shop or similar premises in Scotland.

Regulations on references to charitable status apply to all charities entered on the Register. The regulations require charities to disclose in all official documents (including headed notepaper, contracts, leases and publications) their full legal name, any other name by which they are known, the fact that they are a charity and their Scottish Charity Number. The regulations also

extend to emails and the home page of charities' websites. Cheques are specifically excluded from the regulations, but company law requires charitable companies to disclose that they are a charity on cheques, regardless of the charity law position.

CHANGES

A number of changes that a charity may wish to make to its administration or affairs can only be put in place with the prior consent of OSCR. Those changes are:

- the amendment of a charity's constitution in so far as it relates to the purposes of the charity
- the amalgamation of the charity with another body
- the winding up or dissolution of a charity
- applying to the Court in relation to any of these changes.

A charity must give OSCR 42 days' notice of any proposed change for which consent is required and, in the case of an amendment to a charity's constitution in so far as it relates to its purposes, the charity must not proceed unless and until OSCR has given its consent.

OSCR is also entitled to receive notice of a number of other changes after they have been put in place, including changes in the principal office of the charity, a change in any details set out in the charity's entry in the Register or the appointment of a receiver. However, those changes do not require OSCR's prior consent.

Some changes may involve an extensive reworking of a charity's

constitution or of the conditions attaching to restricted funds held by a charity. If there are no powers available to the charity to make those changes by itself, it may be possible to make those changes under a reorganisation scheme.

REMOVAL FROM REGISTER

A charity may apply for removal from the Scottish Charity Register. Within 28 days of receipt of an application for removal, OSCR must remove the charity from the Register and give the charity notice of the date on which it is removed.

Despite removal from the Register, any body removed continues to be placed under duties in relation to the application of its property and income in accordance with its existing purposes. This is to ensure that funds which previously belonged to a charity continue to be applied only for charitable purposes, even if the charity is no longer in existence.

Once the necessary regulations come into force, OSCR may apply to the Court of Session for the approval of a scheme for the transfer of property or income from a body removed from the Register to a specified charity, and the Court may approve any such scheme where it is satisfied that the scheme is necessary or desirable for the purpose of protecting the property or income to which the scheme relates, or where the relevant charitable purposes would be better achieved by transferring the property and income to a charity. These requirements do not, however, relate to universities or to other charities specifically exempted by the Scottish Ministers.

CO-OPERATION AND INFORMATION

OSCR is under a statutory duty to co-operate with other regulators. This is to ensure that, where possible, the burden of dual or multiple regulation is minimised. To this end, OSCR has entered into Memoranda of Understanding with a number of other regulatory bodies including HM Revenue & Customs and the English & Welsh Charity Commission amongst others.



PUBLIC ACCESS TO THE REGISTER

OSCR must make the Scottish Charity Register available for public inspection. OSCR's website contains the Register and it is also available for public inspection at OSCR's office in Dundee. Information may be requested in braille, large print or other medium. OSCR may charge a fee, limited to the cost of supply, for providing information at somewhere other than its principal office.

POWER TO OBTAIN DOCUMENTS AND INFORMATION

OSCR can issue a notice to a charity requesting documents or information needed for the Register. A charity can refuse to provide information if it could do so on the grounds of confidentiality in the Court of Session.

ENTITLEMENT TO BE GIVEN INFORMATION BY CHARITIES

A charity must provide to anyone who makes a reasonable request a copy of its constitution or latest statement of accounts in whatever reasonable format is requested. A fee can be charged for complying with such a request, but it must not be greater than the cost of supplying the document or a maximum fee which might be set by the Scottish Ministers.



The Scottish Ministers may make an order that exempts charities from this duty if appropriate.

SHARING INFORMATION

OSCR may disclose information to other public bodies or office holders and they in turn can disclose information to OSCR, provided it is for purposes connected with their respective functions. In some instances this exchange can be subject to secrecy obligations. The secrecy obligation is removed for exchanges between charity trustees, whistleblowing auditors/examiners and financial institutions holding monies for apparently dormant charitable bodies.

It is a criminal offence, with a penalty set at level 5 (currently £5,000) or imprisonment of up to six months on summary conviction, to provide false or misleading information to OSCR or to knowingly alter, conceal or destroy information deliberately.

SUPERVISION OF CHARITIES - INQUIRIES

OSCR can make inquiries, either of its own accord or if somebody asks them to do so, about charities, bodies controlled by charities and those who hold themselves out as a charity, as well as persons who act on behalf of such entities. During the inquiry period OSCR can direct any body subject to an inquiry not to undertake

activities for a period of not more than six months. Such a direction can be revoked at any time or varied, but it cannot be extended.

Failure to comply with such a direction, without reasonable excuse, is a criminal offence. The level of fine is level 4 (currently £2,500), or imprisonment not exceeding three months, or both. OSCR can require, by notice, any affected person to provide it with documents necessary for the inquiry, unless the charity (or appropriate individual or body) could refuse on the grounds of confidentiality in the Court of Session.



OSCR can send a notice requiring a person to produce documents, information or explanation for the purposes of the inquiry.

That person has a minimum of 14 days to produce the requested information. Failure to comply with such a notice, without reasonable excuse, is a criminal offence. The level of fine is set at level 4.

Any information or explanation under this procedure cannot be disclosed except for the purposes of the inquiry. Reasonable expenses can be paid to the person providing the information.

REMOVAL FROM THE CHARITY REGISTER

After an inquiry, if OSCR believes a charity no longer meets the charity test, it must:

- direct the charity to take, within a specified period, such steps as OSCR considers necessary for the purposes of meeting the charity test (including a reorganisation scheme),
or
- remove the charity from the Register.

MISCONDUCT/NEED TO PROTECT ASSETS

Following inquiries, if it appears:

- there has been misconduct (including mismanagement) in the charity's administration, or
- it is necessary to act to protect a charity's property or to ensure it is used for charitable purposes.

then OSCR may:

- suspend any person involved in the management or control of the charity if they are privy to or have contributed to or facilitated or are responsible for the misconduct. Being unable or unfit to perform the functions can also lead to suspension
- restrict transactions or payments so they may only be made with OSCR's consent
- direct a financial institution, or person holding charity property, not to part with it without OSCR's consent.



If OSCR is satisfied a person has been claiming to act for or represent a charity it may:

- direct the person or body to stop representing itself as a charity or as acting on behalf of a charity
- direct them to pay to the charity any assets collected (less any sums due to the offending person)
- direct any financial institution to pay money collected for the charity or not to part with it without OSCR's consent
- direct that any transaction or payment is subject to OSCR's prior consent.

The maximum period for which OSCR can make directions, as detailed, is six months and OSCR may amend or revoke any direction

which it makes. It is a criminal offence to fail to comply with a direction. The maximum penalty on summary conviction is level 5 (currently £5,000), or up to six months imprisonment, or both.

The power to suspend a person does not apply if OSCR considers the person has acted honestly and reasonably and ought fairly to be excused.

Suspension cannot last for more than six months, and it can be lifted or varied. Any other direction issued by OSCR may be varied, revoked or reviewed by OSCR after it has been issued. A copy of any notice of suspension or a direction to stop persons or bodies holding themselves out as a charity must be given to the person or body in question.

OSCR must prepare a report of the subject matter of an inquiry if, as a result, it:

- gives a direction or removes a charity from the Register
- suspends a person
- makes an order to safeguard/deal with a charity's assets.

The reports must be sent to the person affected and published in such manner as OSCR thinks fit.

OSCR cannot identify the name of any person except those in respect of whom the inquiry is made and it cannot publish any particulars that can identify any such person, unless naming is required to avoid impairing the effectiveness of the report.

POWERS OF THE COURT OF SESSION

The Court of Session has a number of powers which it can exercise on the application of OSCR where the Court is satisfied that there has been misconduct in the administration of a charity or of a body controlled by a charity, or where it is necessary or desirable for the Court to act in order to protect the property of a charity or to secure its proper application.

The powers available to the Court of Session are:

- power to interdict a charity from such action as the Court thinks fit or from representing itself as a charity
- to appoint a Judicial Factor to manage the charity's affairs
- to appoint a trustee or to suspend or remove any person concerned in the management or control of the charity
- to order any relevant financial institution not to part with property which the institution holds on behalf of the charity without the Court's consent
- to make an order restricting transactions which charities may enter into
- to make an order declaring that a person has been removed from being concerned in the management or control of a charity
- to grant certain other orders and interdicts provided for in the 2005 Act.

The Court of Session retains its powers in relation to transfer schemes and in particular the Court



has power to approve schemes which have been prepared by OSCR for the transfer of assets

from: a charity,
a body controlled by a charity,
a body which is not a charity but which has represented itself as a charity,
to: any recognised charity which appears on the Scottish Charity Register.

The Court may approve such schemes where it is satisfied that there has been misconduct in the administration of the charity or where it is necessary

or desirable to act in order to protect the property of the charity or to secure its proper application, or where the purposes of the charity would be better achieved by transferring its assets to another charity. The Court of Session may also prevent financial institutions or other persons in Scotland parting with moveable property held on behalf of English and Welsh charities, where the Charity Commissioners for England and Wales have informed OSCR that such property is being held in Scotland. The regulations containing the power to approve transfer schemes are not yet in force.

REORGANISATIONS

OSCR has power under the Act to approve reorganisation schemes proposed by charities. A reorganisation may relate to an entire charity or to a restricted fund held by a charity. Any reorganisation scheme is subject to one of the reorganisation conditions being satisfied in relation to the charity or the restricted fund.

The reorganisation conditions are:

- that some or all of the purposes of the charity or of the restricted fund:
 - i. have been fulfilled
 - ii. have been adequately provided for by other means
 - iii. can no longer be given effect
 - iv. have ceased to be charitable purposes, or
 - v. have ceased in any other way to provide a suitable and effective method of using its property
- that the purposes of the charity or restricted fund provide a use for only part of the property concerned
- that (in relation to entire charities only) a provision within the constitution of the charity can no longer be given effect or is otherwise no longer desirable.

To meet with OSCR's approval, OSCR must consider that the proposed reorganisation scheme will enable the application of the charity's resources to better effect for charitable purposes, consistently with the spirit of its constitution, and having regard to changes in social and economic conditions since the charity was constituted. Alternatively, OSCR may consider that the proposed reorganisation scheme will enable the charity to be administered more effectively.

In the case of restricted funds, OSCR must also be satisfied that the wishes of the donor cannot be ascertained. Charities must give notice of any reorganisation scheme which is planned and, depending on the size of the charity, that may include advertisement in local or national press or may be limited to advertisement on OSCR's website. In the case of very small restricted funds (gross annual income of under £1,000) which own no land or buildings and no private company shares, it is possible to dispense entirely with advertisement and the reorganisation may be dealt with by OSCR as an internal procedure.

Reorganisation schemes can also be used by charities to insert desirable administrative powers which are otherwise not available under the charity's constitution, provided that the insertion of any such powers would not permit the charity to act in a way which is inconsistent with the spirit of its existing constitution.

OSCR may, of its own accord or on the application of a charity, apply to the Court of Session for approval of a reorganisation scheme. The charity trustees may enter appearance as a party in any proceedings before the Court of Session on such an application and OSCR must give 28 days notice to the charity of its intention to apply to the Court of Session in this way.

The power of the Court of Session to approve cy-près schemes in relation to charities is not affected by the Act and the Privy Council's powers in relation to charities constituted by Royal Charter or Royal Warrant are left intact.

ACCOUNTS

All Scottish charities must keep proper books of account and prepare an annual statement of account and report on their activities. These must be filed with OSCR and be audited or independently examined. Accounting records must be retained for at least six years.

The Charity Accounts (Scotland) Regulations 2006, as amended, set out OSCR's format and scrutiny requirements in relation to compliant accounts. At the time of this Guide going to press, the regulations provide that charities with a gross income of £250,000 or more should produce fully accrued accounts. For charities with a gross income of less than £250,000, simplified accounts which would consist of a receipts and payments account, statement of balances, notes and an annual report are required.

The regulations also provide that the threshold for audit is a gross income of £500,000 or gross assets of over £3.26 million, unless an audit is required by the charity's constitution. Otherwise, a more informal independent examination is required. Where a charity is not obliged by the regulations to have a full audit but does produce fully accrued accounts, the independent examination must be carried out by a member of a listed professional body. Receipts and payments accounts need only be independently examined by an appropriate person, that is to say a person whom the trustees



reasonably believe has the skills and practical experience to carry out a competent examination.

Under the regulations the period for submitting the annual report and accounts to OSCR is nine months after the end of the charity's financial year. The regulations also apply the principles and methodology of the Charities Statement of Recommended Practice (SORP)

which contains detailed requirements for the trustees' report, amongst other technical accounting conventions.

When a charity fails to prepare accounts, or provide copies if requested by a member of the public, OSCR may apply to the court for an order to prevent the charity, and any person engaged in its management or control, from carrying out further



specified activities until the failure has been rectified.

OSCR may appoint a qualified person to prepare accounts if accounts are not filed timeously (that is, in the manner prescribed by the regulations). The costs of this exercise will be passed to those managing or controlling the charity.

Failure to comply with a request by a person appointed to produce accounts by OSCR for information or access to books and records, is a criminal offence. If there is no reasonable excuse, a fine not exceeding level 3 (currently £1,000) can be levied.

DUTY TO WHISTLEBLOW

The 2005 Act introduced a duty for auditors and independent examiners to report immediately to OSCR anything which they consider would lead OSCR to take regulatory action. This duty extends to reporting accountants of corporate charities. There is a non-mandatory opportunity for those persons to report anything which they feel may become a regulatory issue. These duties are not annulled if the relevant person stops acting in an accounting capacity. Any secrecy obligations are lifted by the 2005 Act to enable such reporting to take place.

The duty to report concerns covers not only the charity but also 'connected' bodies, for example a trading arm of a charity.

DORMANT ACCOUNTS

OSCR is able in terms of the 2005 Act to redistribute money held in charity bank accounts which have not been used for several years. Any such sums must be applied for similar charitable purposes, or to a charity nominated by OSCR if the original purposes cannot be ascertained. The timetable for bringing these powers into force is yet to be determined by the Scottish Government.

SCOTTISH CHARITABLE INCORPORATED ORGANISATIONS

The 2005 Act provides for charities to be constituted as a new type of body corporate known as a Scottish Charitable Incorporated Organisation (SCIO).

SCIOs may only exist for charitable purposes and have a constitution, a principal office and a body of members as well as charity trustees. The great benefits of SCIO status are legal personality, limited liability for the members of the SCIO, and simpler regulation. Unlike charitable companies limited by guarantee, SCIOs are only subject to regulation by OSCR – there is no need to register with Companies House. This avoids event driven notifications which charitable companies are subject to and which some smaller charities in particular can find onerous.

The 2005 Act makes general provisions in relation to the constitution and powers of SCIOs and their names and status. More detailed regulations set out in greater detail the critical matters which must be covered in a SCIO's constitution for it to be registered by OSCR. The key features which must be covered in a SCIO's constitution are:

- eligibility for membership and the method for becoming a member
- the appointment of three or more charity trustees, and any eligibility conditions for serving as a charity trustee
- any restrictions on powers
- the SCIO's organisational structure
- procedural rules for convening meetings
- provisions for maintaining minutes of meetings
- provisions for the quorum at meetings
- voting rights of members and of charity trustees
- how resolutions are to be passed
- processes for withdrawal and removal of members and charity trustees
- any provisions relating to remuneration of charity trustees
- procedures for dealing with conflicts of interest and
- purposes for which any excess funds on a winding up are to be used.

Powers of conversion, amalgamation and transfer are also available in the 2005 Act, making it possible for existing charities, including charitable companies, to convert to a SCIO, and for SCIOs to merge to form a larger charity.

Detailed provisions in relation to the conversion and amalgamation, winding up, insolvency and dissolution of SCIOs are also in force. In the case of insolvent winding up of a SCIO, a formal sequestration process is required which involves both OSCR and the Accountant in Bankruptcy. The sequestration process is only available to SCIOs with debts which exceed £1,500. In the event that a SCIO has debts below that level, attempts will need to be made to resolve indebtedness with creditors in a more informal manner.



OSCR POWERS AND DECISIONS – APPOINTMENT OF CHARITY TRUSTEES

The Public Services Reform (Scotland) Act 2010 gave power to OSCR to appoint charity trustees in certain circumstances. The powers may be used by OSCR where there are no longer sufficient charity trustees of a charity to form a quorum and no mechanism available for the appointment of additional charity trustees. The power may be invoked by an application to OSCR made by a majority of the charity trustees then in office or, where there are only two charity trustees, by either of them.

OSCR's power is to appoint one or more acting charity trustees in order to create a board of trustees of sufficient size to carry out formal appointments of 'full' members of the board of charity trustees. Any acting charity trustee appointed by OSCR holds office for up to 12 months, with the possibility of an extension of a further three months. An acting charity trustee appointed by OSCR may become a 'full' charity trustee.

DESIGNATED RELIGIOUS CHARITIES

A short chapter in the 2005 Act gives OSCR power to designate a charity as a designated religious charity. This applies where the charity has as its principal purpose the advancement of religion and where its principal activity is the regular holding of public worship. A designated religious charity must have been established in Scotland for at least 10 years and have an adult membership resident in Scotland of at least 3,000 persons.

There must be a degree of internal organisation such that one or more authorities in Scotland exercise supervisory and disciplinary functions in relation to the component elements of the charity, including requirements as to the keeping of accounting records and the audit of accounts (for example, individual congregations may form component elements of a particular denomination, in which case the whole denomination may be recognised as a designated religious charity).

The 2005 Act makes provision for the amalgamation of designated religious charities and for the withdrawal of the designation.

Designated religious charities are excluded from some provisions of the 2005 Act including powers in relation to disqualification of charity trustees. This is on the basis that charity trustees of designated religious charities have or may have been appointed on the basis of a spiritual office governed by canon law or by equivalent rules (for example, the elders who comprise the kirk session of a Church of Scotland parish are not subject to disqualification by OSCR).

A small number of designated religious charities already exist in Scotland including, for example, the Church of Scotland and the Scottish dioceses of the Roman Catholic Church. The Free Church of Scotland and the United Free Church of Scotland are also included.

DECISIONS: NOTICES, REVIEWS AND APPEALS

The 2005 Act sets out a process which enables most of OSCR's decisions to be challenged. The process is intended to be simple and more cheaply accessible to charities than a formal court process. Any decisions taken by OSCR must be notified to the individual or charity concerned. In most instances, notices of decisions must set out the decision, the reasons for it and advice about when and how to seek a review. If requested, OSCR must carry out an internal review of any decision in line with its published procedures on the conduct of reviews. OSCR's decisions do not take effect until the review period has expired.

The 2005 Act also creates the Scottish Charity Appeals Panel, whose principal purpose is to review OSCR's decisions following an internal review in the event of a further appeal. The Panel may either confirm OSCR's action, ask it to review it, quash it or direct it to make another decision. The Panel cannot award expenses to any party. Panel decisions can, ultimately, be appealed to the Court of Session who may either confirm any decision appealed to it or quash it and direct OSCR to take another course of action.

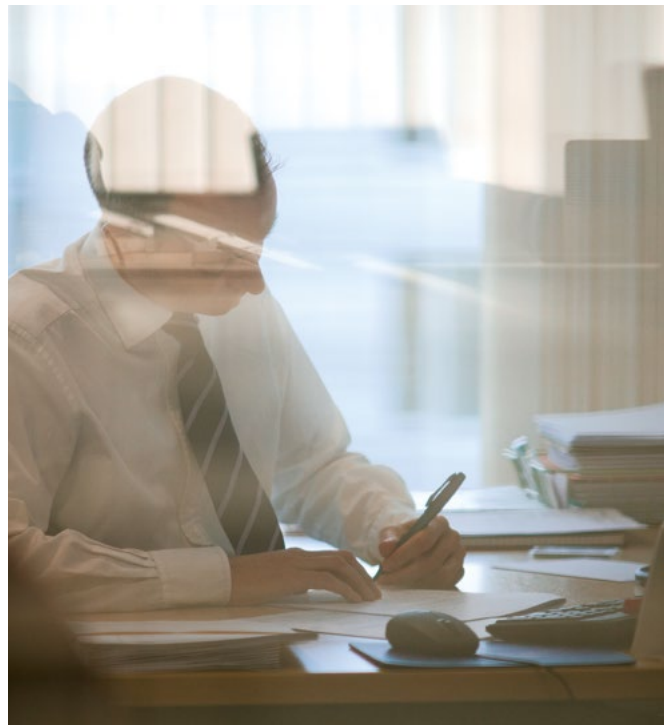
The Scottish Government has announced that it intends to review the role of the Scottish Charity Appeals Panel. In light of experience, the Panel has been called on in a very small number of appeals over the course of its existence. A likely option will be to merge the Panel into the existing Scottish tribunal system.

At the time of publication of this guide, however, a final decision on the future of the Panel is awaited.

FUNDRAISING FOR BENEVOLENT BODIES – CONTROL OF FUNDRAISING

The 2005 Act seeks to regulate, in a basic way, fundraising not just for charities on the Scottish Register, but all bodies established for benevolent and philanthropic purposes (e.g. bodies with charitable purposes, but which do not provide a sufficient level of public benefit and so are not on the Register).

Benevolent bodies are given greater control over those who fundraise on their behalf. Thus, professional fundraisers and commercial entities (fundraisers) involved in promoting contributions to a benevolent body must have an agreement with the benevolent organisation before fundraising. Regulations passed by the Scottish Parliament set out what is to go into such an agreement. Benevolent bodies (and OSCR on behalf of charities) can seek an interdict preventing fundraising if it has been carried out without an agreement or with an agreement which is not in the prescribed format.





An interdict can also be obtained if it is believed that a fundraiser is not fit and proper to fundraise or if a benevolent body does not want to be associated with a particular venture or if there is doubt as to the methods used by a fundraiser. If there is a breach then a fundraiser may not be entitled to expenses unless properly provided for in the agreement. Moreover the agreement can only be enforced in a Court.

The regulations include provisions such that the remuneration which will be paid to a fundraiser must be stated. They also cover the form of agreement which must be put in place when securing donations (for example, by credit or debit card payment) and the circumstances in which donations can be refunded.

The Institute of Fundraising performs a valuable role in the self-regulation of benevolent fundraising and has a UK-wide remit. While its role is not statutory, it is becoming widely recognised as the regulatory body in fundraising matters. In the event that self-regulation of the fundraising sector fails for any reason, the Scottish Government reserves the right to make more detailed regulations to govern matters more closely.

REGULATION OF COLLECTIONS

Organisers of public benevolent collections must apply to the relevant local authority to collect. Organisers are exempt if they are a designated national collector, if the collection is in a public meeting, takes place on the organiser's own land or is by way of an unattended box in a public place. An organiser of a collection held

without appropriate consent is guilty of an offence subject to a fine not exceeding level 3 (£1,000).

Local authorities have to make appropriate enquiries before giving permission (or not). Permission can be withdrawn even if already granted. There are provisions for appealing against local authority decisions and OSCR is also given powers to protect funds raised if there is a concern about their application.

Scottish Ministers may produce regulations for the house-to-house collection of goods from the public for charitable purposes. If taken up, it is likely that local authorities will perform the relevant licensing function. At the present time, there are no such regulations in force.

DUTIES OF CHARITY TRUSTEES

The 2005 Act sets out fundamental duties which apply to charity trustees who are defined as “the persons having the general control and management of the administration of a charity.” This includes trustees of charitable trusts, directors of charitable companies, the charity trustees of SCIOs and those in charge of charities which are unincorporated organisations. The 2005 Act duties and liabilities are in addition to any other legal duties which are imposed on charity trustees: for example, the common law also applies duties to trustees, and the Companies Act set out additional powers for directors of charitable companies.

The 2005 Act requires charity trustees to act in the interests of the charity, and this includes seeking to ensure that the charity acts consistently with its charitable purposes. The 2005 Act also contains a statutory duty of care for charity trustees, which is to act with the care and diligence that it is reasonable to expect of a person managing the affairs of another person.

If there is a potential conflict of interest between the charity and any person who appoints the charity trustee, the trustee must put the interests of the charity first unless prevented from doing so by some other duty, in which case the trustee must disclose his conflict of interest and take no part in the discussions and decisions.

Charity trustees must also ensure that the charity complies generally with the 2005 Act. Any breach of these duties is treated as misconduct in the administration of the charity, which entitles OSCR to invoke its powers set out earlier in this guide.

Where there has been a breach of these duties, the charity trustees must take whatever steps are reasonably practicable to correct it and to ensure that it is not repeated; and to remove any trustee who has been in serious or persistent breach of these duties. In some circumstances, persistent breach can lead to disqualification as a charity trustee and can also lead to criminal prosecution.

REMUNERATION

The Act permits charity trustees to be remunerated for services provided to the charity in certain circumstances. In order for remuneration to be permitted, the maximum amount of remuneration must be set out in a written agreement between the charity and the service provider and it must be reasonable in the circumstances. Any remuneration agreement must be in the best interests of the charity. Fewer than half of the charity trustees at any one time can be remunerated and there are provisions for connected parties to be taken into account when considering who is or is not being remunerated by the charity.

In terms of the Public Services Reform (Scotland) Act 2010, the purchase of trustee indemnity insurance to protect all of the charity trustees, paid for from charity funds, is specifically permitted and therefore does not fall foul of the remuneration rules.



TRUSTEE INVESTMENT

The 2005 Act makes provision for the investment powers of trustees of trusts, which includes trustees of charitable trusts. In the absence of investment powers in a trust deed, or where trust investment powers are limited, the 2005 Act provides a wide statutory power of investment.

If charity trustees are relying on the 2005 Act powers of investment, they must have regard to the suitability of the proposed investment and to the need for diversification. The charity trustees must also obtain and consider proper advice when exercising the statutory power of

investment and when reviewing the trust investments, unless they reasonably conclude in all the circumstances that it is unnecessary or inappropriate to take advice.

The 2005 Act permits trustees of charitable trusts to hold property through nominees when exercising their statutory investment powers, subject to certain conditions which include ensuring that the nominee has the requisite skills, knowledge and expertise to act as a nominee and that the trustees retain the power to give directions to the nominee or to revoke the appointment. The 2005 Act also provides that trustees are deemed to have the power to permit

management of their investments on a wholly discretionary basis.

There is a separate Turcan Connell Guide to the Duties of Trustees, which reviews the subjects of trustee duties, remuneration and trustee investment in greater depth.

TURCAN CONNELL

EDINBURGH:
Princes Exchange,
1 Earl Grey Street,
Edinburgh EH3 9EE
0131 228 8111

GLASGOW:
180 St Vincent Street
Glasgow
G2 5SG
0141 441 2111

LONDON:
12 Stanhope Gate,
London
W1K 1AW
020 7491 8811

If you'd like to get in touch, give us a call or email us at enquiries@turcanconnell.com

To find out more, visit us online at turcanconnell.com

Or keep up with our latest news on Twitter @tc_charities