

Diocese of Glasgow and Galloway

OSCR and the Vestry

Charity Law and the Management of a Charge

v2

1. Introduction

Recognition as a charity has beneficial consequences because of the tax benefits which go with that status. Thus a charity may claim exemption from income tax on its income provided it is used for charitable purposes, and may also obtain tax relief on donations under the Gift Aid Scheme. In addition, most types of investment income are free of tax, bank or building society interest can be paid gross, there is tax relief on rental income from land/property held for charitable purposes and charities are exempt from Capital Gains Tax provided the proceeds are put to a charitable purpose. There may be other tax benefits in addition to those I have just mentioned, for example, certain VAT reliefs and exemptions may also be available.

Charitable status also has other consequences in that it requires us to be much more focussed and professional about what we do in the management of our charges than we have in the past. This is not to imply that we have been lax or casual in discharging our responsibilities previously, just that the world has moved on and there are now specific statutory requirements with which we must comply if we are to have the benefits of this new status. In addition, we now have to report to a supervising third party in the form of the Office of the Scottish Charities Regulator (OSCR) which has the right to challenge us and hold us to account and so our management procedures ought to be geared up to meet that need.

Prior to 1st April 2006, Her Majesty's Revenue & Customs (HMRC) maintained the register of charities. After the coming into force of the Trustee and Charities Investment (Scotland) Act 2005 (the 2005 Act), OSCR took over the role of supervising the Scottish Charities Register which was populated with all the charities on the HMRC charities list as at 31st March, prior to going live the following day, 1st April, 2006.

Broadly speaking, the functions of OSCR are as follows :-

- (a) to keep a public register of Scottish charities to be known as the "Scottish Charities Register";
- (b) to determine if bodies are charities ;
- (c) to encourage, facilitate and monitor etc., compliance by charities with the 2005 Act ;

- (d) to identify and investigate apparent misconduct in the administration of charities & take remedial or protective action as appropriate;
- (e) give information / advice / proposals etc., to Scottish Ministers on matters relating to OSCR;
- (f) As soon as practicable after the end of the financial year, OSCR must prepare and publish a general report on its functioning in the year just gone which report must be copied to the Scottish Ministers, and also laid before the Scottish Parliament.

It may be helpful to bear in mind some defined terms:-

- (a) Trust any trust constituted by any deed or other writing or by Act of Parliament or by resolution of any corporation or ecclesiastical body;
- (b) Charity Trustees the persons having the general control and management of the administration of a charity;
- (c) Charity a body entered in the Register;

2. Church Governance

The Vestry is the governing body of the charge to which it relates. In terms of Canon 60, the Vestry is to assist the Rector in the spiritual welfare of the congregation and the mission of the whole Church. Unless the Constitution of the charge says otherwise, it is up to the Vestry to look after the property and fabric of the charge as well as the finances and any acquisitions, gifts, and legacies.

Detailed procedures for the operation of the Vestry, the membership thereof and the duties incumbent upon the Vestry, in addition to those specified in Canon 60, will be set out in the Constitution of each charge. Each charge will be, in itself, a registered charity, as will each Diocese. This apparent autonomy does not mean that the charge is in any sense independent of the Diocese. Of the various “lines of responsibility” emanating from the charge/vestry, the principal line is that which connects the charge to the Bishop, and so to the Diocese. In addition, the vestry will be directly liable to HMRC for all tax matters, and to OSCR for all matters relating to compliance with charity law.

As an aside, it is probably the case that many charges within the Diocese are still operating under their own unique constitutive documents. Whilst there may be a certain historic attractiveness to this, especially if they reach back into the early days of the church in question, it is unlikely that they will deal properly with the contemporary needs of a church. Proper management of the charge is the responsibility of the Vestry & as that must include making sure that governance documents are fit for purpose, it is suggested that vestries might care to consider reviewing their constitution and perhaps updating to the model constitution approved by General Synod (Revised 2008), a copy of which can be seen on the

provincial website (www.scotland.anglican.org) under ORGANISATION - GUIDANCE and RESOURCES for VESTRIES.

So, when the Vestry is operating in the management of a charge, as an elected church body, as a charity, or as a trust, it has three basic governing documents, namely : the Code of Canons of the Scottish Episcopal Church; the Constitution of the Charge; and the Trustee and Charities Investment (Scotland) Act 2005, mediated through OSCR .

As a trustee, you have personal liability on a joint and several basis along with your fellow trustees for whatever happens in the name of the trust. This means that you cannot “hide behind” the trust and say that you have no liability. In addition, if someone has a claim against the trust, they can either sue the trustees collectively for the full amount or raise an action against just one individual trustee who would then be obliged to seek relief from his/her fellow trustees.

3. Qualification and Disqualification

Members of the Vestry are, of course, elected from the congregation at the AGM and hold office in accordance with the provisions laid down in the constitution and in addition include *ex officio* members such as the Rector, the Lay Rep and so on.

Candidates for election should be made aware before agreeing that their names may be put forward that if they are elected and accept a place on the Vestry, they will thereby become Charity Trustees. This is important because the 2005 Act (Section 69) provides that certain persons are disqualified from being charity trustees, namely those who :

- (a) have been convicted of an offence involving dishonesty, or of an offence under the 2005 Act, unless the conviction is spent under the Rehabilitation of Offenders Act 1974;
- (b) are undischarged bankrupts;
- (c) have been removed from the management or control of any body by the Court of Session on application by OSCR where it relates to misconduct in the administration of a charity etc..
- (d) have been removed from office by the Charity Commissioners for England and Wales on much the same grounds as those mentioned relative to the Court of Session;
- (e) are disqualified from acting as a company director under the Company Directors Disqualification Act 1986 or the Northern Ireland equivalent.

It is open to OSCR, on application by the party concerned, to waive the disqualification.

So, whilst you don't want to discourage potential members of the Vestry / Charity Trustees, you don't want them to be embarrassed either so it is important that they

know the implications of election beforehand and have a chance to decline discretely, if appropriate.

In addition, the Finance Act 2010 introduced a new definition of a charity for tax purposes in that it now requires that a “management condition” be satisfied. That means that any person involved in the management of a charity (known as a “manager” must be a “fit and proper person”. HMRC assumes that every person appointed is indeed a fit and proper person but they suggest that, whilst there is no statutory requirement for it, the charity ask each manager/vestry member/trustee to sign a Model Declaration for Fit and Proper Persons (a style is provided on the HMRC website ---a style is also provided on the SEC website) in terms of which the signatory confirms, essentially, that the disqualification points which I’ve already mentioned do not apply to him/her. The advantage of this procedure is that it informs the vestry member of the potential for disqualification and in addition, it gives the Vestry /charity the comfort of knowing, when everyone has signed up, that in so far as HMRC is concerned, it does meet their charity test. (see www.hmrc.gov.uk/charities/guidance-notes/chapter2/fp-persons-test.htm). From a governance point of view, it also means that the Vestry has a written record of the Declaration from all members.

4. General Duties of Charity Trustees / Vestry Members

So, you’re not disqualified and you have been duly elected to the Vestry and have thereby become a charity trustee and as such are involved in the control and management of the charity.

The following are some of the particular duties to be observed by trustees along with what OSCR considers to be best practice:

(a) **Act in the Interests of the Charity**

You must avoid a conflict of interest between your own personal interests and those of the charity. If a conflict arises, the interest of the charity must always come first. If there is a conflict of interest or if there is a possibility of one arising, you must declare it to your fellow trustees. All trustees, individually and collectively, must act in the interests of the charity and so if it becomes apparent that a fellow trustee is in breach of this requirement, the 2005 Act makes it clear that it is the responsibility of the remaining Trustees to ensure that any improper conduct relative to the conflict of interest rule is corrected and not repeated. If as trustee persists in the breach of the rule, it is the duty of the remaining trustees to remove the offender from their position as a trustee. The constitution should have powers to allow for this.

Examples of Good Practice:

- Declare any conflict of interest, actual or potential, and do not take part in any discussion/decision making.
- Maybe keep an up to date register of each trustee's interests although arguably not necessary in this setting.
- Have a code of conduct for managing conflict of interest situations.
- Review the constitution to ensure that there is a power to remove any trustee who is in serious / persistent breach of the 2005 Act.

(b) **In good faith, ensure that the charity acts in a manner consistent with its purposes;**

Essentially this means you should act in accordance with the terms of your constitution as it will set out the aims of the charity, how it is to be run and so on. In particular, ensure that all activities and all uses to which the charity's property is put fall within the objects/aims/purposes set out in the constitution.

Examples of Good Practice:

- all trustees to have a copy of the constitution & be familiar with it;
- all new trustees to be given an induction pack, to include the constitution and an up to date note of the current activities of the charity;
- trustees should refer to the charity's purposes when making any strategic plans;

(c) **Act with Care and Diligence;**

The standard of care is the standard that would be required of someone having the management of the affairs of another person, eg, someone having a Power of Attorney. Broadly this might be said to mean that the trustees must ensure that the charity is run properly & lawfully, that it is solvent; that you take care of the assets of the charity, that you ensure that the Vestry / Management Board is fit for purpose & that everyone is working together; that you apply a duty of care to paid staff and volunteers; that you exercise reasonable business sense in concluding contracts on behalf of the charity, as well as funding agreements with local or central government and grant providers. This means taking a cool view on whether or not all the costs of a particular project have been covered before going ahead & what the consequences of going ahead might be if they are not. In that context, the obtaining of professional advice from solicitors, accountants, architects would be reasonable and maybe, even desirable.

This heading would also cover the protection of any charity assets, including intellectual property rights in a name or a logo.

Examples of Good Practice:

- Agree & review charity policies/strategy regularly;
- Agree budgets & monitor financial performance;
- Have a framework for support/management of paid staff/volunteers;
- Keep up to date with relevant law, eg employment law;
- Agree expectations of trustee attendance at meetings;
- Annual review of performance of the charity;
- Provide charity trustees induction pack, as mentioned above & include any specific responsibilities & the remit of any sub committees;
- Implement any training required;
- Have a dispute procedure for internal disagreements among trustees/ staff;
- Take professional advice when necessary;

(d) **Comply with the terms of the 2005 Act and other legislation;**

You must comply with the provisions of the 2005 Act and any other relevant legislation such as health & safety; data protection; employment law and so on. Specifically, trustees must ensure that the charity complies with any requirements imposed on it under the Act, failure to do so being technically a breach of charity trustee duty and therefore, misconduct. Part of OSCR's remit is to encourage & facilitate compliance & to advise if things are getting wobbly, so one should hope for a reasonably light touch from them.

(e) **Internal Supervision**

The charity trustees are individually and collectively responsible for the activities of the charity and so whilst they are expected to act together in the interests of the charity, they each individually have a duty of care for the charity. If anyone fails in their duty, the others must remedy the failure & ensure it doesn't happen again. In the case of persistent misconduct, they must ensure that the offending trustee is removed from his /her appointment as a charity trustee.

Examples of Good Practice

- Have misconduct procedures available for use just in case of misconduct by a trustee;
- Check the constitution to make sure that you have the power to remove a charity trustee if there is a serious / persistent breach of the 2005 Act;
- Agree what is expected of trustees as far as attendance at meetings is concerned and what is to be done if that does not happen;

5. Specific Duties of Vestry Members/Charity Trustees

(a) The Register

The 2005 Act requires OSCR to maintain a Register of Scottish Charities and to that end, each charity must advise OSCR of the following:-

- (i) the name of the charity;
- (ii) the principal office address of the charity or the name and address of one of the charity trustees;
- (iii) the charity's purposes, a copy of the constitution, a copy of the most recent statement of accounts (if any); and
- (iv) such other information as may be required (eg is it a designated religious charity, or a national collector)

(b) Reporting to OSCR & changes to the structure of the charity

At the heart of OSCR's duty is the obligation to maintain an accurate Register as this is essential for public confidence in the understanding and transparency of the system.

(i) So when applying to register as a Scottish Charity, applicants must provide the above information (s.4) and thereafter, notify OSCR of any change in the initial information provided (s.17) so that the Register may be kept up to date.

(ii) Each charity will be issued with an *Annual Return* which must be completed and returned to OSCR along with a set of the annual accounts within 9 months of the charity's year end.

If the gross income of the charity exceeds £25,000, OSCR will provide a supplementary *Monitoring Return* which will require further information concerning the annual accounts, fundraising activities, any remuneration agreements with trustees, and dealings with connected trading companies. Also to be returned to OSCR within 9 months.

(iii) According to OSCR's guidance, a charity can only change its constitution if the operating constitution permits it, this follows from the general principle that a charity must conform to the terms of its own constitution.

OSCR's consent is required if a charity wants to change its name, amend its charitable purposes, amalgamate with another body, wind up/dissolve the charity, or to apply to the Court in relation to the last three items.

(c) Financial Records and Reporting

Charities are required to keep clear and accurate accounting records in enough detail to disclose :

- (i) money received and spent on a daily basis
- (ii) a record of the assets and liabilities of the charity
- (iii) the financial position of the charity at any time;

At the end of each financial year (FY), charities must :

- (iv) prepare a statement of account, including a report of activities, and which must be independently examined or audited;
- (v) after the independent examination / audit has been done, send a signed copy of the statement of account to OSCR at the same time as the Annual Return and, if appropriate, the Monitoring Return;

So far as OSCR is concerned, accounting records must be kept for at least six years from the end of the FY to which they refer.

The preparation and audit / independent examination of the annual statement of account must be carried out in accordance with the Charities Accounts (Scotland) Regulations 1992 No. 2165 and the Charities Accounts (Scotland) Regulations 2006 SSI No. 218 and guidance on both these Regulations may be found on the OSCR website (www.oscr.org.uk) .

Trustees should note that Section 46 of the 2005 Act imposes a duty on independent examiners / auditors of the statement of account to provide OSCR with a written report of any matter which they come across which could be of material significance to OSCR in the exercise of its functions. These things might include :

- (vi) dishonesty or misuse of funds
- (vii) serious breach of the legislation
- (viii) operating beyond the powers laid out in the constitution/governing document of the charity;

Charity accounts must be prepared either on a receipts and payments, or on an accruals basis, as determined by the gross income of the charity for the year in question. Provided always that if the constitution specifies a particular method, that is what you must do. See

www.oscr.org.uk/ScottishCharityAccounting.stm

(d) Fundraising

(i) The 2005 Act allows charities to use professional fundraisers / commercial organisations to raise funds on their behalf. In which case, the charity must have a formal agreement (S.81) with the fundraiser setting out the level of fees to be charged and also the expenses which will be paid for the work. In addition, the agreement must satisfy the requirements to be set out in the Fundraising Regulations.

If the project goes badly wrong, the charity may obtain an interdict banning the fundraiser from acting on their behalf and from using their name. Possible grounds are : objectionable fundraising methods; fundraiser not being a fit and proper person;

(ii) Public Benevolent Collections. This refers to the collection of money from the public. If your charity is going to do this, you need the consent of the local authority , unless, the collection is by a designated national collector; or it takes place at a public meeting; or on land occupied by the organiser; or the collection is by an unattended receptacle in a public place. Breach of these conditions is an offence.

(e) Providing Information to the Public

(i) The Charities References in Documents (Scotland) Regulations 2007 (SSI 2007 No. 203) provides that a Scottish Charity must state the following :

- (a) The registered number allocated by OSCR;
- (b) Its name as entered in the Scottish Charity Register;
- (c) Any other name by which it is commonly known;
- (d) Where the name in the Register does not include the word “charity” or “charitable” , that it is a charity by using one of the terms referred to Section 13 of the 2005 Act;

In business letters, emails, adverts, notices, bills, invoices & receipts, statements of account; educational documentation, contractual documentation, etc..

(ii) Certain information about a charity is available to the public on the Register itself. In addition, however, if requested a charity must provide a member of the public with a copy of the constitution / governing document , and / or the latest statement of account provided that in the circumstances the request is reasonable. The person making the request may also specify the format and again the charity should comply if the request is reasonable. A fee may be charged for providing the information provided that it is no more than the cost of providing the copies. For the present, OSCR does not intend to publish charity accounts online.

6. Remuneration of Charity Trustees

Charity trustees must always act in the interest of the charity and so any personal benefit granted to a trustee must be done with caution. The 2005 Act (Section 67) provides that a trustee must not be paid from charity assets unless certain conditions are met:

- (i) the maximum amount payable is set out in a written agreement;
- (ii) the maximum amount is reasonable in all the circumstances;
- (iii) it is in the interests of the charity that the services be provided by the trustee in question for that amount;
- (iv) only a minority of trustees will receive remuneration after the agreement is entered into;
- (v) such remuneration is not actually forbidden in the constitution / governing document of the charity;

In this context, remuneration is a payment or a benefit in kind paid from a charity to someone because he/she is : a charity trustee; or is under a contract of employment with the charity; or provides services to, or on behalf of, the charity. This rule also applies when the payment is made to someone who is a “connected person” in relation to a charity trustee and that list includes :

- (vi) immediate family and domestic partners;
- (vii) a company in which the trustee or persons connected with them have a substantial interest;
- (viii) a Scottish partnership in which the trustee or someone connected with the trustee has an interest;

Incidentally, whilst it is considered that the payment of stipend would fall under these provisions, where there is a provision in the charity’s constitution authorising such payment and that constitution was in force on 15th November 2004, these provisions do not apply.

The remuneration must be in the interests of the charity, and must also be reasonable, as must, say, the employment of a charity trustee to provide goods / services to or on behalf of the charity, in which case it must be reasonable in all the circumstances of the matter.

So for example, if a local solicitor is a trustee and the charity uses the Law Firm of which he is a partner to provide the charity with legal services of one sort or another, the above conditions would have to be met and in addition, the solicitor trustee would have to withdraw from decisions / deliberations concerning the appointment of his Firm. Clearly there is a strong potential for a conflict of interest situation to arise not only when the contract is made, but also as the business progresses and thought should also be given as to how that situation might be dealt with. It goes without saying that the charity should never award such a contract to one Firm

without obtaining comparative fee quotes from other Firms or advice from professional bodies.

Charities are now permitted to use charity funds to provide indemnity insurance for all their charity trustees. It is probably very unlikely that anyone will sue a charity for their losses but it is always possible and given the general liability of trustees (joint and several) for the actings of the trust of which they are trustees, such cover is a good idea. Not only that but it may be necessary to encourage people to put themselves forward as potential trustees given the onerous nature of the appointment. It may also be appropriate to take out insurance cover for legal fees and expenses if these are not included in the indemnity cover because it may be necessary to defend any court action for the indemnity insurance to be operative. Check with OSCR to see if legal expenses cover is a permissible payment from trust funds – it should be because it is on a similar footing to indemnity cover.

7. Investment Powers of Trustees

Generally the 2005 Act extends the investment powers of trustees so that broadly, they may now invest as if they were the beneficial owners of the trust assets but before doing so, they should take into account the following:

- (a) is diversification of the trust investments necessary?
- (b) is the proposed investment suitable for the trust?
- (c) Should advice be obtained before investments are made or current investments changed?
- (d) Make sure that any potential adviser is qualified to give the advice sought.

The 2005 act also provides that it is competent for the trustees to appoint nominees (investment managers) to manage the investment of their assets and to transfer to those nominees title to the assets for that purpose. It is also possible for the trustees simply to delegate to an agent their investment management function. The duty of care never flies away, however, and so the trustees must always ensure that the persons on whom they bestow such power are suited to the task, that any appointment is in writing and that at all times a reversionary power is in their hands. Check with OSCR / the statute for the details, if necessary. Remember that it is the duty of the trustees to continue to monitor such appointments and related investments as time goes by.

8. Breach of Duty

OSCR has a statutory duty to intervene if there is evidence of misconduct in the running of a charity, the nature and extent of that intervention being dependent on three circumstances. OSCR has very wide powers but they say

that they will be supportive and proportionate if trusts are having difficulties. Even so, they have to be fair, not only to the charity in question, but also to those other charities which are discharging their obligations in a serious and diligent manner.

Good practice is probably the best way to prevent misconduct or breach of duty , neither of which are likely if trustees :

- (a) understand their duties
- (b) put the interests of the charity first
- (c) act reasonably
- (d) operate within the charity's constitution
- (e) comply with the law & the regulators
- (f) get advice when it is needed
- (g) make sure that the charity has enough money to meet its contractual liabilities;

If in any uncertainty, seek advice, and don't be slow to ask OSCR or others who are qualified to advise.

That concludes this note. This training note has been prepared and is provided only as guidance for those who are present and potentially future members of the Vestry of various charges within the United Diocese of Glasgow and Galloway, part of the Scottish Episcopal Church, but its terms are not warranted and it is not advice and is not to be relied upon as the basis for any action and anyone purporting to do so, does so at their own risk.

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