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## 1. Introduction

The enormous contribution of charities to Scottish society is well recognised.

Charities are independent organisations which enjoy continued financial and in-kind support from the public. There is a clear public interest in their work and assets. Regulation is therefore important, not only to protect charitable assets but also to encourage continued public confidence and support.

The Charities and Trustee Investment (Scotland) Act 2005 (“the Act”) is the first comprehensive piece of legislation dedicated to the governance of charities in Scotland. Prior to this, the regulatory regime was limited and fragmented, with Her Majesty’s Revenue and Customs (HMRC) responsible for granting charitable status and Scottish Ministers, through the Scottish Charities Office, responsible for the investigation of apparent misconduct and any required remedy.

## 2. The Office of the Scottish Charity Regulator

The regulation of charities in Scotland is now the task of the Office of the Scottish Charity Regulator (OSCR). The Act gives OSCR a number of key functions in relation to charities:

- To determine whether organisations are charities;
- To keep a public register of charities;
- To encourage, facilitate and monitor compliance by charities with the provisions of the Act;
- To identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action; and
- To give information or advice, or to make proposals, to Scottish Ministers on matters relating to OSCR’s functions.<sup>1</sup>

In carrying out these functions, OSCR is required to have regard to the principles of good regulatory practice and to be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed.<sup>2</sup>

Although OSCR is the charity regulator, there are other regulatory bodies which may also regulate the activities of charities. Depending on how a charity is set up and what it does, these may include Communities Scotland, Companies House, HMRC, the Financial Services Authority and, in some cases, the Charity Commission for England and Wales.

OSCR is aware of the difficulties that could arise from multiple regulatory requirements and has established working relationships with other regulators such as Communities Scotland, to minimise the potential burden on charities.

<sup>1</sup> Section 1(5) of the Act

<sup>2</sup> Section 1(9) of the Act

More information on how OSCR works with other regulators can be found on OSCR’s website, [www.oscr.org.uk](http://www.oscr.org.uk)

## 3. Charity Status and the Scottish Charity Register

There is a new legal definition of ‘charity’ in Scotland. To be a charity in Scotland a body must be on the Scottish Charity Register.<sup>3</sup> Carrying out benevolent work or having charitable purposes does not in itself make a body a charity.

Being a charity may entitle the body to certain financial benefits, such as rates relief or Gift Aid, and equally importantly it will allow the charity to benefit from the considerable public goodwill towards charities.

Entry on the Scottish Charity Register does not in itself ensure that a body will get relief from UK taxes or receive Gift Aid. A charity on the Register will have to contact HMRC and ask for tax relief on the basis of being charitable for UK tax purposes.

Bodies registered or recognised as charities in foreign jurisdictions will also have to register with OSCR if they have a substantial presence in Scotland or wish to represent themselves as being charities in Scotland.<sup>4</sup>

Before a body can be entered onto the Register, and so be a charity in Scotland, it will have to satisfy the charity test. This requires the organisation to have exclusively charitable purposes<sup>5</sup> **and** to provide (or intend to provide) public benefit.<sup>6</sup> There are 15 charitable purposes listed in the Act, and the Act also sets out how OSCR should decide whether or not a body provides public benefit. For more information on the charity test see *OSCR Guidance 1: Meeting the Charity Test*. This is available on OSCR’s web site, [www.oscr.org.uk](http://www.oscr.org.uk) or can be requested as a hard copy by calling 01382 220 446.

OSCR may also, when requested, designate some charities which have the advancement of religion as their principal purpose as designated religious charities. Designated religious charities are exempt from certain regulatory requirements.<sup>7</sup>

If a charity were ever to be removed from the Register, whether at its own request or by OSCR (because it no longer met the charity test), then any assets it still held at the time of removal would be locked into the charitable purposes for which they were intended and OSCR would continue to exercise regulatory powers in relation to those assets.<sup>8</sup>

<sup>3</sup> Section 13 of the Act

<sup>4</sup> Section 14 of the Act

<sup>5</sup> Sections 7(2) to (4) of the Act

<sup>6</sup> Section 8 of the Act

<sup>7</sup> Chapter 8 of the Act

<sup>8</sup> Section 19 of the Act

OSCR makes the Register available on its website, [www.oscr.org.uk](http://www.oscr.org.uk), but it is also available for public inspection at OSCR's principal office during office hours.

#### 4. Information to the Public

The public's primary source of information about charities is likely to be the Scottish Charity Register.

The Act sets out that each Register entry must include the name of the charity, its principal office or contact address, the purposes of the charity, whether or not it is a designated religious charity, and whether or not it is a designated national collector. Its entry will also include reference to any notices or directions OSCR has issued to the charity.<sup>9</sup>

OSCR gathers and updates the information on the Register by asking all charities on the Register to complete an Annual Return. The Annual Return also allows OSCR to gather information on how charities in Scotland carry out their activities, as well as their beneficiaries, and their income. This information is also published on the Register.

The public can obtain a copy of the charity's latest statement of account or constitution directly from the charity, and the charity must provide this if the request is reasonable. The charity may charge for the provision of such information. The fee must not exceed the cost of supplying the information.<sup>10</sup>

Separate Regulations will set out what items of a charity's documentation must refer to the fact that the body is a charity, and include its charity number. Information will be available on OSCR's website as soon as Parliament has approved the Regulations.

#### 5. Accounts and Annual/Monitoring Return

Every charity on the Register must keep proper accounting records and prepare an annual statement of accounts including a report on its activities.

After having these independently audited or examined, it must send a copy of the statement of account to OSCR.<sup>11</sup> For charities with a gross income greater than £25,000 a Monitoring Return will need to be completed as part of this process.

For accounting periods commencing prior to 1st April 2006, charities should comply with the Charities Accounts (Scotland) Regulations 1992.

<sup>9</sup> Section 3(3) of the Act

<sup>10</sup> Section 23 of the Act

<sup>11</sup> Section 44 of the Act

The details of the accounting requirements relating to accounting periods commencing on or after 1st April 2006 are set out in the Charities Accounts (Scotland) Regulations 2006. These set out different requirements for different classes of charity.

Broadly speaking, charities with a gross income of over £500,000 or gross assets of more than £2.8 million will be required to prepare fully accrued SORP<sup>12</sup> compliant accounts and have their accounts audited.

Those with an income between £100,000 and £500,000 will have to prepare fully accrued SORP compliant accounts but instead of an audit will only require independent examination by a qualified examiner.

Those charities with an income below £100,000 will only need to prepare receipts and payment accounts which will require independent examination.

Charitable companies will comply with Companies Acts thresholds for external scrutiny, and those with gross income under £90,000 will require independent examination under the regulations.

The Act provides a new duty for those carrying out an examination or audit of a charity's statement of account to report immediately any matter that may have material significance to OSCR's work.<sup>13</sup>

Interim Guidance on accounting requirements is available on OSCR's web site, [www.oscr.org.uk](http://www.oscr.org.uk). OSCR is developing more detailed guidance for publication later in 2006.

#### 6. Consents and Notifications

Charities are obliged to seek OSCR's consent before undertaking a number of actions.

Where a charity proposes to:

- change its name;
- amend its constitution in such a way as to affect its purposes;
- amalgamate with another body;
- dissolve or wind up; or
- apply to the court in relation to any of the above;

then it must obtain OSCR's prior consent.<sup>14</sup> This allows OSCR to ensure that the body's charitable status will not be affected and that its charitable assets are not threatened. Once

<sup>12</sup> Statement Of Recommended Practice

<sup>13</sup> Section 46 of the Act

<sup>14</sup> Section 16 of the Act

OSCR has consented, the charity may make the change but it will be obliged to notify OSCR once it has actually done so.

In addition a charity must notify OSCR once certain other changes have taken place. This includes notifying OSCR of changes to any of the details set out in its entry on the Register and any change to its constitution<sup>15</sup> (other than a change in relation to its purposes).

For more information on when and how to seek OSCR's consent, and when to notify OSCR of changes, see *OSCR Guidance 2: Consents and Notifications*. This is available on OSCR's website, or can be requested as a hard copy by calling 01382 220446.

## 7. Reorganisations

If a charity's constitution does not allow it to vary its constitution, transfer its property or amalgamate with another charity, OSCR cannot consent to the action under section 16 of the Act, as set out above.

However, once sections 39 to 42 of the Act have commenced, charities which meet the reorganisation conditions<sup>16</sup> will be able to make changes, despite their constitutions not permitting them to do so. To do this a charity will be required either to seek OSCR's approval for a reorganisation scheme or to ask OSCR to apply to the Court of Session on its behalf. OSCR will also be able to make such applications to the Court of Session of its own accord. The Regulations commencing Sections 39 to 42 are not expected before Autumn 2006.

## 8. OSCR Powers of Supervision and Intervention

The Act gives OSCR supervisory powers over charities in Scotland.

These include the power to make inquiries either generally or for specific purposes<sup>17</sup>. Anyone refusing to provide information necessary for the inquiry, which OSCR requires by notice, shall be guilty of an offence.<sup>18</sup>

Following such inquiry, where OSCR believes there to have been misconduct in the administration of a charity, or that it is necessary to protect the assets of the charity, OSCR may take a number of actions including:

- the suspension of persons in the management or control of the charity;
- the issuing of directions restricting the representations it may make; or

<sup>15</sup> Section 17 of the Act

<sup>16</sup> Section 42(2) of the Act

<sup>17</sup> Section 28 of the Act

<sup>18</sup> Section 28(6) of the Act

- limiting the transactions it may enter into; and
- directing others holding property for the charity not to part with such property without OSCR's consent.<sup>19</sup>

Where it appears to OSCR as a result of its inquiries<sup>20</sup> that a charity no longer meets the charity test then OSCR must either direct the charity to take such steps that would allow it to meet the charity test or remove the charity from the Register.<sup>21</sup>

OSCR is also able to take action against bodies representing themselves as charities even though they are not on the Register.<sup>22</sup>

After taking such action OSCR is obliged to publish a report on the subject matter of its inquiries.<sup>23</sup>

The effect of OSCR's powers of suspension and direction is limited to six months. It may therefore be necessary for OSCR to ask the Court of Session to exercise the wide powers, both temporary and permanent, that it has under the Act.

The powers of the Court of Session include:

- interdict;
- the appointment of a judicial factor;
- the appointment of a trustee (if the charity is a trust); and
- the permanent suspension or removal of a person in management or control of a charity.

The court also has the power to approve a scheme presented to it by OSCR for the transfer of any assets of the charity or body representing itself as a charity, to a charity specified by OSCR.<sup>24</sup>

In any action brought by OSCR, the court may award expenses against a charity trustee or any number of charity trustees and ensure that such expenses are paid personally and not from the charity's funds.<sup>25</sup>

The Lord Advocate also has a function where criminal activity is involved.

<sup>19</sup> Section 31 of the Act

<sup>20</sup> under section 28 of the Act

<sup>21</sup> under section 30 of the Act

<sup>22</sup> Section 31(2) of the Act

<sup>23</sup> Section 33 of the Act

<sup>24</sup> Section 34 of the Act

<sup>25</sup> Section 37 of the Act

## 9. Charity Trustees - Duties and Disqualifications

Charity trustees are those persons having the general control and management of the administration of the charity.<sup>26</sup>

Depending on the individual charity and its legal form, the charity trustees may be called Board members, company directors, management committee members, trustees or whatever is relevant to the charity. The terminology used by the charity does not matter – for the purposes of the legislation, all charities have people who are the charity trustees.

Charity trustees must act in the interests of the charity. They must seek, in good faith, to ensure that the charity operates in a manner that is consistent with its purposes. They also have to ensure that the charity complies with directions, requirements, notices or duties imposed on it by virtue of the Act.<sup>27</sup>

Remuneration of charity trustees is permitted only in the limited circumstances set out in the Act.<sup>28</sup>

It is an offence for anyone to be a charity trustee if they:<sup>29</sup>

- have been convicted of an offence involving dishonesty or an offence under the Act (unless this is spent by virtue of the Rehabilitation of Offenders Act 1974);
- are an undischarged bankrupt;
- have been removed under the provisions of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 from being concerned in the management or control of a charity;
- have been barred from the office of charity trustee by the Charity Commissioners for England and Wales or the High Court of Justice on the grounds of misconduct in the administration of a charity;
- are subject to a disqualification order or disqualification undertaking under the Company Directors Disqualification Act 1986.

OSCR may, on application of the disqualified person, grant a waiver of disqualification to be a charity trustee, but such waivers will only be granted in exceptional circumstances.<sup>30</sup>

We are developing guidance for trustees, to be published later in 2006.

<sup>26</sup> Section 106 of the Act

<sup>27</sup> Section 66 of the Act

<sup>28</sup> Section 67 and 68 of the Act

<sup>29</sup> Section 69 of the Act

<sup>30</sup> Section 69(5) of the Act

## 10. Reviews and Appeals

The Act specifies the process for appealing against certain OSCR decisions, and OSCR publishes the relevant procedures on its website.

The charity, or persons which are the subject of a decision by OSCR under any one of the specified sections of the Act, may request a review of that decision.<sup>31</sup>

A charity or person seeking a review must request this within 21 days of the decision having been notified to them. If they are unhappy with the outcome of the review they may then appeal to the Scottish Charity Appeal Panel (SCAP). SCAP may confirm the decision, quash it or remit it back to OSCR for reconsideration.<sup>32</sup> Any decision by SCAP may in turn be appealed to the Court of Session.<sup>33</sup>

## 11. Fundraising and Public Benevolent Collections

One of the main points of contact between the wider public and charities is in the area of fundraising.

It is therefore important to charities that this contact is well managed. The Act makes provision to allow charities, and other benevolent bodies, to have greater control of those who fundraise for them.

The Act regulates fundraising not just for bodies on the Scottish Charity Register, but for all benevolent bodies and charitable, benevolent and philanthropic purposes. Benevolent bodies are defined as any bodies established for charitable, benevolent or philanthropic purposes, whether they are actually charities or not.<sup>34</sup>

The Act gives benevolent bodies greater control over those fundraising on their behalf and requires professional fundraisers and commercial participators to have an agreement with a benevolent body before fundraising on their behalf.

Benevolent bodies (and OSCR on behalf of charities) have the right to seek an interdict preventing a professional fundraiser or commercial participator fundraising on the body's behalf, if they are doing so without an agreement or outwith an agreement in the prescribed format.<sup>35</sup>

<sup>31</sup> Section 71, 72 and 74 of the Act

<sup>32</sup> Section 76 of the Act

<sup>33</sup> Section 78 of the Act

<sup>34</sup> Section 79(1) of the Act

<sup>35</sup> Section 81 of the Act

Scottish Ministers have agreed to allow the sector time to develop a scheme of self regulation, but have powers under the Act to further regulate benevolent fundraising if required.

The regulation of public benevolent collections - that is, collections in public places – is on the whole the responsibility of local authorities. The provisions in the Act setting out a local authority led system for licensing will largely be the same as those in the Civic Government (Scotland) Act 1982.

These provisions are not in force yet, but when commenced the main changes will include the extension of licensing to also cover the collection of promises of money (for example direct debits). There will also be a role for OSCR in designating certain charities, who meet the criteria which OSCR will publish, as designated national collectors.

Designated national collectors will not have to seek the consent of the relevant local authorities but will have to notify them of their intention to collect. A local authority will be able to prohibit the collection if it is likely to cause undue public inconvenience.<sup>35</sup>

OSCR will also have the power to protect funds raised in a public charitable collection<sup>36</sup> and local authorities will have to consider guidance issued by OSCR in relation to public benevolent collections.<sup>37</sup>

## 12. Contact Information

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Dundee  
DD1 4NY  
Telephone No: 01382 220446  
Facsimile No: 01382 220314  
Email: [info@oscr.org.uk](mailto:info@oscr.org.uk)  
[www.oscr.org.uk](http://www.oscr.org.uk)

This information is intended for general guidance only.  
Those requiring legal advice should consult a solicitor.

<sup>35</sup> Section 87 of the Act

<sup>36</sup> Section 89 of the Act

<sup>37</sup> Section 92 of the Act

