

Charity Law: the FAQs

Throughout the summer, CVS Fife ran a series of awareness-raising sessions for charity trustees across Fife aimed at familiarising the charitable sector with the requirements of the new Charities and Trustee Investment (Scotland) Act 2005. At the end of each session, delegates were invited to pose specific questions relating to the Act and how it might affect their own organisation to Caron Hughes, CVS Fife's Governance & Compliance Adviser.

The questions raised at all the sessions have been pulled together into a 'Frequently Asked Questions' document which has been verified and enhanced by the Compliance Team at the Office of the Scottish Charity Regulator (OSCR). This document covers issues such as OSCR's function and remit, changes to accounting and reporting regulations and the role of the charity trustee, topics which will be of relevance and interest to charities across Fife.

Charity Law – Frequently Asked Questions

Q1. How can I contact OSCR (Office of the Scottish Charity Regulator)?

- A. By phone: 01382 220 446 (8.30am-4pm, Mon-Fri)
By email: info@oscr.org.uk (www.oscr.org.uk)
By post: Office of the Scottish Charity Register (OSCR)
2nd Floor
Quadrant House
9 Riverside Drive
Dundee
DD1 4NY

Q2. Are there relationships between OSCR and any other statutory bodies? E.g. Care Commission

- A. OSCR is the independent registrar and regulator for 21,500 Scottish Charities. It is a non Ministerial Department and forms part of the Scottish Administration.

OSCR has however developed a Joint Positioning Statement with HM Revenue and Customs and Memoranda of Understanding with Communities Scotland, the Financial Services Authority and the Charity Commission for England and Wales. They are currently developing further Memoranda of Understanding with the Care Commission, the Crown Office and Procurator Fiscal Service, Fundraising Standards Board, HM Revenue and Customs and the Scottish Funding Council.

For further details on these arrangements, all of the above mentioned documents can be found on OSCR's website within the publication section and within the guidance section.

Q3. Do OSCR charge if an organisation asks them for advice/documents/guidance?

- A. OSCR has a comprehensive range of guidance and support available on their website. They will also accept telephone or email (info@oscr.org.uk) enquiries regarding the new legislation or the registration process for charitable status. There is also a "Frequently Asked Questions" section on their website. For specific support and advice on how to implement new systems and procedures to ensure compliance with the new legislation or, for a charity law "health check" of your organisation, please contact Caron Hughes or Laura Allan at CVS Fife on 01592 414588 or caron.hughes@cvsfife.org or laura.allan@cvsfife.org

Q4. How does OSCR relate to the Charity Commission in England & Wales?

- A. There are many charities which are registered with the Charity Commission in England and Wales but, because they have activities in

Scotland, may also have obligations under the new Scottish legislation and therefore will have to register with OSCR. In order to set out the operational arrangements for cross border charities, a Memorandum of Understanding (MOU) has been developed with the Charity Commission and this was signed on 20th May 2006. OSCR and the Charity Commission already have a good working relationship but this MOU will set the scene for further joint working in the future.

Q5. Is a charity permitted to earn money through trading under the new legislation?

A. The Charities and Trustee Investment (Scotland) Act 2005 does not affect the situation as regards charitable subsidiaries or trading, except that OSCR has certain powers to look into the business of charity subsidiaries in order that it may regulate charities properly.

Q6. What percentage of the charity's activities should be classed as a charitable activity? How does a trading arm relate to this?

A. 100% of a charity's activity should fall under one or more of the 15 charitable purposes (Heads of Charity) outlined in the legislation. If any of the charity's current activity is not deemed charitable under the new regulations then that organisation cannot be deemed to be charitable, and therefore will not be listed on the Scottish Charity Register.

The Charities and Trustee Investment (Scotland) Act 2005 does not affect the situation as regards charitable subsidiaries or trading, A "charity subsidiary" is a body which is owned by an organisation which itself is a recognised charity. The subsidiary is a legal entity distinct from the charitable organisation and may, or may not, be a recognised charity itself.

Charities may consider establishing a subsidiary organisation for a number of reasons; the most common is in order to carry out trading activities. Other uses for a subsidiary company may be to limit liability on a planned risk, such as taking a lease on property. Additionally, if the organisation wishes to carry out an activity which in itself does not fit with the charitable purposes, it can set up a subsidiary to deal with this issue.

It may be advisable to set up a subsidiary for trading purposes as trading through the main charitable body runs the risk that, at best, the profits made will be taxable, and at worst, the organisation may lose its charitable status. Using a subsidiary company to carry on all the trading activities is one way to remove these risks from the charitable body itself. The subsidiary carries on the trading activity and either covenants or donates all of its taxed profits to the main charity which can then recover the tax already paid.

Q7. Are there any new regulations relating to fundraising?

A. Yes. Section 81 of the Act requires professional fundraisers (or commercial participants in a fundraising scheme) to have and to abide

by a formal agreement between them and the benevolent body, and requires professional fundraisers (or commercial participants in a fundraising scheme) to provide statements of information to donors detailing their remuneration arrangements. The agreement will have to comply with regulations that have yet to be published.

Section 82 of the Act allows benevolent organisations, under certain circumstances, to obtain an interdict banning fundraising on their behalf. The regulations pertaining to this section will control the collection of money from the public, and those carrying out such collections. Section 82 of the Act is not yet in force and fundraising regulations have yet to be published.

Some aspects of fundraising will be self-regulated through the new Fundraising Standards Board (FSB) to be launched this summer. The FSB will be UK wide, providing a means for benevolent bodies (including charities) to join. By joining, they are signing up to working to a set of standards and also a Donor's Charter

Q8. If an organisation chooses to become a SCIO (Scottish Charitable Incorporated Organisation), does it cease to be a company limited by guarantee?

A. Yes. A SCIO is a new legal form designed specifically for charities to enable them to become a corporate body, without having to become a company or industrial and provident society. Registration for this new legal entity, however, will not be available until summer 2007.

Q9. Is it necessary for an organisation performing trading activities to become a SCIO?

A. No.

Q10. Will OSCR write to us for information or should we contact them first?

A. At the moment, OSCR's advice is to refrain from sending them information until it is requested. OSCR will send out the 2006 Annual Return Form for completion two months after your charity's Accounting Period End Date. In some instances, charities will not receive an Annual Return Form until early 2007. The Annual Return should not be sent back to OSCR until the charity's accounts are ready (i.e. they have been subject to external scrutiny and approved by the charity trustees). The Accounts and Annual Return should be submitted to OSCR together.

Q11. The new regulations give Scottish charities the option of using one of six different descriptions. Does each description have a different meaning?

A. No; these descriptions are a summary of those currently being used by the charitable sector in Scotland. Charities should pick one of these names and use it consistently to describe themselves. However, we are expecting regulations to proscribe how charities refer to themselves

on documents and publicity material etc. Once these regulations are published, there is likely to be a short delay to them being enacted to allow charities to use up stocks of stationary.

Q12. Is it okay for a charity to provide a benefit to members only and not to the general public?

A. Yes, however, the benefit to the members must not be unduly restrictive and the criteria for membership must be clear and concise.

Q13. Are the new requirements available in checklist form for organisations?

A. No, however, CVS Fife intends to offer a service to voluntary organisations along the lines of a 'health check' to assess how well they are currently complying with the new legislation. Contact us for more details. Tel: 01592 414588 or contact caron.hughes@cvsfife.org or laura.allan@cvsfife.org

Q14. What is the difference between being a committee member and a trustee?

A. Under the new legislation, charity trustees are defined as "the persons having the general control and management of the administration of a charity" (this is now a consistent term across Scotland, England and Wales). Therefore, if you are an unincorporated charity, your committee members are your charity's trustees and similarly if you are a charitable company, the directors are your charity's trustees.

Q15. Can we still give a token payment to the individual who independently examines our accounts?

A. Yes, this is still possible. However, any financial arrangements should be recorded formally and agreement by the charity trustees should be minuted. The charity trustees should satisfy themselves that the remuneration is reasonable in the circumstances.

Q16. Has OSCR devised a pro-forma for the Trustee Declaration?

A. Yes, there is a form which has to be completed as part of the application to become a charity. The same format can be applied to existing trustees.

Q17. Is it worth purchasing a private insurance policy as a charity trustee?

A. Charity trustees are free to take out their own indemnity insurance if they desire or reimburse the charity for their share of the cost of trustee indemnity insurance. However, this should not be seen as a safeguard. Charity trustees should still act in the best interests of the organisation and handle its affairs as prudently as they would their own.

NB. OSCR are currently awaiting a response from Scottish ministers regarding whether indemnity insurance will be classed as remuneration under the new legislation. Therefore, it is possible that in the future a

charity may be permitted to take out indemnity insurance on behalf of its trustees.

Q18. How long can a retired charity trustee be retrospectively held to account if something goes wrong within the organisation?

A. If an investigation into a charity's affairs highlights any wrong-doing and this can be attributed to one or more charity trustees, these individuals can still be held liable for their actions for an indefinite period of time following their retirement from the organisation.

Q19. Can an employee become a trustee?

A. Yes, however as they will be receiving remuneration from the charity, the provisions in the Act regarding remuneration of charity trustees apply. Remuneration of charity trustees is allowed in the following circumstances only:

- if a charity's constitution contains a specific authorising provision in force on 15 November 2004 authorising the payment of remuneration to a service provider who is either a charity trustee, or a person connected to a charity trustee. If the constitution is silent, or has only a general empowerment provision, it is not the specific authorising provision required.
- if there is either an order made by the Court of Session or any enactment by Parliament specifying that the remuneration can be paid.
- if the two conditions above do not apply then the following conditions have to be met before a charity trustee can receive remuneration from a charity's assets:
 - The charity trustees should be satisfied it is in the interests of the charity for the charity trustee to provide a service to the charity for a particular amount.
 - The amount is reasonable.
 - There is a written agreement between the charity trustee and the charity that sets out the maximum amount of the payment.
 - The majority of charity trustees remain unpaid at all times.
 - The constitution does not expressly forbid remuneration of charity trustees.

Q20. Will these new rules and regulations deter people from joining a board?

A. The new legislation is certainly more thorough than that which existed previously and this may in turn lead to a heavier workload for charity trustees. Some people may be put off by the rigorous regulation, however, there is also an opportunity for the sector to attract people from other areas of society onto their board of trustees as many people may see the regulatory framework as professionalising the charitable

sector and offering them a greater safeguard than was possible under the old regime.

Q21. Following the new legislation regarding vulnerable adults, will all trustees be expected to undergo Disclosure checks?

A. There is a general duty on charity trustees to ensure the charity complies with all relevant legislation. Charity trustees will have to establish for themselves, in their particular circumstances, whether or not the vulnerable adults legislation will require them to undergo a disclosure check.

Q22. What guidance is there for practising charity trustees?

A. OSCR has published "Guidance for Charity Trustees - Acting with Care and Diligence". A copy has been sent to every active charity in Scotland. Further copies can be obtained from the OSCR website or from your local CVS

Q23. Where can we get support to advertise for charity trustees?

A. CVS Fife can provide this service if it is required. Contact us for further details on 01592 414588 or contact caron.hughes@cvsfife.org or laura.allan@cvsfife.org.

Q24. Does the treasurer have to be a charity trustee?

A. The Act defines a charity trustee as a person who is involved in the "general control and management of the administration of a charity." It is likely that a treasurer would be covered by this definition.

Q25. What are the regulations regarding honorariums?

A. Under the new legislation, a trustee cannot receive payment from the charity for acting as a trustee or under a contract of employment, unless:

- there is any provision for this within the charity's constitution which was in force on 15 November 2004.

OR

- there is either an order made by the Court of Session or any enactment by parliament specifying that the remuneration can be paid.

OR

- the following conditions are met:
 - the charity trustees are satisfied it is in the interests of the charity for the charity trustee to provide a service to the charity for a particular amount.
 - the amount is reasonable.
 - there is a written agreement between the charity trustee and the charity that sets out the maximum amount of the payment.
 - the majority of charity trustees remain unpaid at all times.

- the constitution does not expressly forbid remuneration of charity trustees.

Q26. Will there be a standard format for accounting records?

Accounting records and the annual accounts prepared by charities are governed by the Act and the 1992 and 2006 Charities Accounts Regulations.

Section 44 of the Act requires charities to keep “proper accounting records”. Section 4 of the Regulations specifies that the accounting records must be sufficiently detailed so that they are able to show and explain the transactions of the charity. In particular they must be able to:

- show, day by day, the money received and spent by the charity.
- record the assets and liabilities of the charity.
- disclose the financial position of the charity at any time.
- produce a statement of account in line with the Regulations.

Accounting records must be kept for **at least 6 years** from the end of the financial year to which they relate.

The new regulatory regime covers the following points:

- Annual accounts that have been subject to external scrutiny by an Independent Examiner or Auditor have to be prepared by all charities.
- Annual accounts have to be prepared in accordance with the relevant Charities Accounts Regulations.
- A copy of the annual accounts has to be submitted to OSCR along with Annual Return, and Monitoring Return (if income is £25,000 or more).
- Accounts prepared on an accruals basis must comply with the Charities Statement of Recommended Practice (SORP) 2005. Registered Social Landlords and Further or Higher Education Institutions are exempt from the Charity SORP but must produce accounts that comply with their own industry SORPs.
- Annual accounts must include a trustee annual report, the content of which complies with the Regulations

Further information is available from Caron Hughes, Governance & Compliance Officer or from Sandra Rimmer, Finance Assistant at CVS Fife on 01592 414588 or at caron.hughes@cvsfife.org and sandra.rimmer@cvsfife.org.

Q27. If a charity ceases to operate and its offices are closed, where should accounting records be held for the 6 year minimum period? Whose responsibility are these records?

A. It is the duty of the charity trustees to ensure that accounting records are stored safely for the 6 year minimum period in such a way that they are protected from potential damage by fire or flood. The charity trustees should decide collectively where the documents will be stored and OSCR should be advised of their location and a trustee appointed as a contact for any future enquiries.

Q28. What's the difference between *receipts and payments* accounts and *accrued* accounts?

A. Receipts and payments accounts show only the money actually received or spent in the period, with no timing adjustments. If there are any capital receipts and payments, they are considered as income in the period in which they occur. For example, if a charity pays its rent in advance on the last day of its accounting year, the receipts and payments system would show the payment as a cost of the year in which it was paid, despite the fact that the period covered by the payment is the next year.

In full accrual accounts:

- Income is recognised in the accounts when it is earned or when it is due rather than when it is actually received.
- Expenditure is recognised when it is incurred, not when it is paid. This introduces the concept of debtors and creditors into the accounts.
- Income matches expenditure as far as their relationship can be established. Both should be included in the Statement of Financial Activity (SOFA) for the period to which they relate.

For instance, if a charity pays its rent in advance on the last day of its accounting year, under full accruals accounting this would be adjusted by carrying forward the payment in the balance sheet as a prepayment, rather than charging it as a cost for the previous year.

Under accruals accounting it is recognised that fixed assets (computer equipment for example) will normally last for more than one year. Therefore to write them off in the year of purchase is not matching income and costs, because future periods will benefit from their use. The purchased fixed assets will therefore be included in the balance sheet and be written off or depreciated over their useful life. So the SOFA produced on an accruals basis will include a charge for depreciation, which will not appear on a receipts and payments account.

(www.voluntarymatters1and2.org provides useful information on preparing accounts).

Q29. Where can I obtain a copy of the Charity SORP 2005 (Statement of Recommended Practice)?

A. This can be found on the Charity Commission's website at www.charity-commission.gov.uk.

Q30. What happens if a charity receives assets?

A. It has to account for those assets as appropriate for the type of asset (restricted, unrestricted or endowment) and the type of accounts being prepared (receipts & payments or accrued).

Q31. Can you expand on rules regarding transfer of assets?

A. When a charity winds up, the assets should be disposed of as specified by the constitution or governing document.

Q32. What are the time limits for submission of accounts?

A. For accounts which start on or after 1 April 2006, signed accounts should be submitted to OSCR with the Annual Return within 9 months of the organisation's financial year end. Charities with accounting periods starting before this date will have 10 months in which to submit their accounts. Please note the charitable companies must also file their accounts with Companies House within ten months of the financial year end.

Q33. What is the accounting reference date?

A. The accounting reference date is the date to which accounts will be drawn up each year i.e. the company's financial year end.

Q34. Will financial limits relate to company as a whole or to each separate unit of that organisation? E.g. Oxfam – each separate shop.

A. The thresholds in the accounting Regulations apply to each separate entity. However, charities with subsidiaries that have a combined income of £500,000 or more after consolidated adjustments will also have to produce consolidated accounts using the 2005 Charity SORP

Q35. Is there a template for a set of accounts for a small charity?

A. OSCR will be producing a template for receipts and payments accounts in the spring of 2007.

Further support and advice is available from CVS Fife, please contact Sandra Rimmer, Finance Assistant on 01592 414588 or at sandra.rimmer@cvsfife.org.

Q36. If an organisation has a clause in its constitution regarding remuneration prior to 15 Nov 2004, can this be included in any updated versions of constitution?

A. Yes, unless the charity is adopting a new constitution, for example when an unincorporated association incorporates. As the new constitution did not exist before 15 November 2004, it cannot have such a clause in force before that date.

Q37. If an organisation's income increases substantially in one year because of a particular project, making it eligible for more in-depth monitoring, will it be kept in this bracket permanently or can it move down the scale as its income decreases again?

A. The scale to which organisations are monitored is assessed on a yearly basis, meaning that this will change with income. All charities must complete an annual return but if an organisation has an income of over £25,000 per annum, a monitoring return must also be completed.

Q38. Is there a template for the annual report?

A. There is no template as such for the report. However, if a charity is required to produce receipts and payments accounts, the Charities Accounts (Scotland) Regulations 2006 specifies the content for the report. Likewise, for a charity preparing accrued accounts, the Statement of Recommended Practice 2005 (SORP) outlines the basic requirements for the report. OSCR will soon be producing detailed guidance which will include example accounts and trustee annual reports.

Q39. Is it compulsory to include home addresses of our trustees in the report?

A. No; only trustees' names need to be included.

Q40. What does OSCR mean by 'risks' to the organisation?

A. Risks to an organisation can be varied and are likely to be specific to each individual's circumstances. Some examples of risk areas might include the organisation's IT system – what would happen if this system failed? Are services dependent upon it or would it be costly to repair? It is good practice to have a risk management policy in place which identifies these potential risks and outlines measures to be taken to minimise the chance of them occurring.

Q41. Could a chairperson's report be submitted instead of the mandatory annual report?

A. No, but a report from the chairperson can be incorporated into the Trustees Annual Report.

Q42. Is there any leeway if organisations don't prepare an annual report and adhere to deadlines?

A. No, however, OSCR has stated that for the first year or so of operation it will be accommodating with organisations as they get to grips with the new legislation.

Q43. Can evaluation forms be used within the annual report?

A. The minimum requirements regarding the content of the annual report produced as part of the accounts are contained within the Charities Accounts (Scotland) Regulations 2006 and SORP. However, organisations are free to include any additional information they feel is required to give the reader an enhanced understanding of their operation.

Q44. Is the annual return for OSCR in addition to the Companies House annual return form?

A. Charitable companies will need to submit annual returns to both OSCR and Companies House, however, OSCR advise that the requirements of each agency should be taken into account and *one* annual report be drawn up which satisfies both sets of criteria.

Q45. Who compiles the Trustee Annual Report?

A. Annual reports have traditionally been delegated to a member of staff to complete before being 'rubber-stamped' by the Board. OSCR are now urging trustees to take responsibility for drawing up the report themselves as it is their duty to ensure it complies with the applicable requirements. The annual report submitted as part of the accounts must be signed by a charity trustee on behalf of all the charity trustees and be dated at the meeting at which it was approved by the charity trustees.

Q46. Are annual reports which have previously been submitted to OSCR available to view as examples?

A. No, not at this time. However, the accounts guidance that OSCR will produce at the end of the year will have example receipts and payments accounts including a trustee annual report.

Q47. Will there be feedback on the annual report?

A. Yes, OSCR will contact organisations if more information is required in the report, or if they require clarification of any information in the report.

Q48. My organisation registered with OSCR last year but nothing has come back.

A. The annual return will be sent out to charities two months after their financial year end.

Q49. Who performs the rolling review?

A. This is a statutory function of OSCR.

Q50. Do the annual accounts need to contain the annual report?

A. The annual accounts produced by a charity must include a trustees' annual report, the content of which is laid down in the Charities Accounts (Scotland) Regulations 2006 and the SORP depending on what type of accounts the charity prepares. It is an integral part of the annual accounts. A charity's financial statements alone do not provide all the information a reader would need to gain a full picture of the charity. The financial statements cannot easily explain:

- what the charity has done; its outputs.
- what the charity has achieved; its outcomes.
- what difference the charity has made; its impact.

The financial statements alone also do not provide information on the structure, governance or management arrangements of a charity.

The Trustees' Annual Report provides the opportunity to explain the areas not covered in the financial statements and is a crucial component of the charity's accounts. The Annual Report will enable a reader to understand how the numerical information presented in the financial statements relates to the organisational structure and activities of the charity.

There has been a requirement to produce an annual report of a charity's structure and activities as part of the accounts since the 1992 Charities Accounts Regulations. However, because there was little active overview of charities and the accounts they produced, this was often an area where charities provided little or no information as part of the accounts. This has now changed; the Office of the Scottish Charity Regulator will require accounts annually from charities that comply with the relevant Charities Accounts Regulations. These accounts must include an annual report from the charity trustees.

Q51. When a church is joining or closing parishes, will this come under the re-organisation rule?

A. The provisions regarding "re-organisation" of charities apply to charities that want to make changes to their constitution but do not have the powers in their constitution to carry out the changes. The amalgamation or closing of parishes that are charities has to proceed as specified in their constitution and as required by charity law.

Q52. If an organisation wants to become a Company Limited by Guarantee, is permission required from OSCR to do this?

A. Yes, OSCR have also created a "fast track" process to consider such applications, provided that the purposes of the new incorporated charity remain the same as those of the unincorporated charity it succeeds and there are no other issues prohibiting or complicating the incorporation process. Further information on this process is available on OSCR's website at www.oscr.org.uk.

Q53. If an organisation is not registered as a charity but wants to review its constitution, is OSCR's permission required?

A. No, OSCR regulates charities listed on the Scottish Charity Register only.

Q54. Are declarations and descriptions of charity status the same thing?

A. Yes.