

The Charities and Trustee Investment (Scotland) Act 2005

An Overview

Background

The process of reforming Scottish Charity Law began in the year 2000 when the Scottish Charity Law Review Commission was set up (the McFadden Commission). The McFadden Commission issued its formal report in 2001 and eventually a draft Bill was issued for public consultation in 2004.

Subsequently, a full parliamentary Bill was introduced, the Charities and Trustees Investment (Scotland) Bill. It was introduced to the Scottish Parliament in November 2004 and was then subjected to scrutiny by the Communities Committee of the Parliament. This Committee then issued its report and the Scottish Parliament then gave its detailed consideration to the Bill.

The new resulting Act received Royal Assent on 14th July 2005.

The new Act requires a set of regulations to be developed to supplement it, including regulations on:

- Accounting and reporting
- References to charitable status in documents
- Regulation of relationships between charities and professional fundraisers or commercial participators
- Rules regarding the Scottish Charity Appeals Panel.
- Provisions for charity reorganisations and transfer of assets schemes.
- Regulation of public benevolent collections.

Projected Timetables for Implementation

The main provisions of the new Act were implemented on 24th April 2006 which, activated OSCR's (Office of Scottish Charity Regulator's) full powers, the Scottish Charity Register and the new registration requirements. Other provisions are expected to be introduced as follows:

- Accounting and Reporting requirements - April 2006
- Regulation of relationships with professional fundraisers and commercial participators - July 2006

- Provisions for the Scottish Charitable Incorporated Organisations - 2007
- Regulation of public benevolent collections - 2007

This timetable however, could be subject to change.

The "Charity Test"

One of the most important areas of the Act is the new statutory definition of what is charitable activity in Scotland. This is described in the Act and the "charity test".

Every charity will have to demonstrate that it provides public benefit **and** has one (or more) of the listed charitable purposes (See Appendix 1). No **non-charitable** purposes are permissible.

Public Benefit

The Act states that no particular purpose is to be presumed to be for the public benefit. Therefore, whatever charitable purpose is set out in a charity's constitution, that charity must prove it delivers public benefit when it is first registered as a charity in Scotland. Thereafter, it must continue to deliver charitable public benefit and be able to demonstrate how it does so.

The "public benefit" can be provided in Scotland or elsewhere. Benefit can be to public as a whole or to part of it. However, there must not be undue restriction on access to benefit by the imposition of any conditions, including charges or fees which restrict access too much.

In assessing whether any body provides public benefit, the Act requires the following to be considered:

- Benefit which will or is likely to be gained by persons not simply as members of the public (ie any potential private benefit); and
- Any "disbenefit" incurred or likely to be incurred by the public

The Office of Scottish Charity Regulators (OSCR) have now published "Initial Guidance on Meeting the Charity Test", this is available to download from their website at www.oscr.org.uk

Charity Names

Charity names are subject to a range of new restrictions and requirements under the Act. In addition, names remain subject to present legal restrictions, such as company law restrictions on the use of certain words in the names of companies. In these notes we deal first with the new rules and then add some comments about other legal issues regarding charity names.

Objectionable Names

The new restrictions on names centre on the concept of "objectionable" names. The Act defines objectionable names as:

- A name the same as another charity
- A name "too like" the name of another charity
- A name likely to mislead the public
- A name likely to suggest, incorrectly, connection to government (The Scottish Administration or Her Majesty's Government) or to a local authority or some other person
- An offensive name

Misleading names are those which are most likely to mislead in relation to the true nature or purposes of the body **or** mislead in relation to the organisation's activities in pursuit of its purposes. For these rules, the purposes of a charity are the purposes recorded in the Scottish Charity Register held by OSCR.

OSCR's powers in relation to objectionable names

OSCR has been given the following powers in relation to objectionable names:

- It will be obliged to direct a charity to change an objectionable name
- It will be empowered to review a charity's name if another charity claims the name is too like its name. If OSCR agrees that is so, OSCR will then be obliged to direct one **or both** of the charities to change its/their names.

Where a direction to change is given, OSCR's consent to the new name will be required before the change is made. OSCR can only refuse permission if the new name is "objectionable".

If a charity is directed to change its name and does not do so, OSCR must remove that charity from the Scottish Charity Register.

Changes of name

A charity will have to obtain OSCR's advance consent to any proposed change of name. This applied to all charities, regardless of their particular legal form.

Notice of the proposed change specifying the intended new name, must be given to OSCR not less than 42 days before the date on which the change is to be made. If OSCR approved the change the charity can proceed. If OSCR **does not** respond within 28 days of the date on which its consent was sought, its consent is deemed to have been given, so the charity can proceed. Consent can only be refused if the name is objectionable.

Company law restrictions on names

Current company law rules on company names remain in force and are relevant to trading subsidiaries owned by charities and to charitable companies. So, there are still restrictions on the use of offensive words in company names, a requirement to have permissions from official bodies for use of certain words in company names and a requirement to justify use of specified "sensitive" words in company names (justified to the satisfaction of Companies House).

Other issues concerning names

Charities and their trading subsidiaries also have to be aware of other legal issues regarding names. These include:

- Trademarks law - a name may be protected by a trademark and trademark rights might be infringed by use of a particular name. A charity may need to undertake trademark searches before using a proposed name. Equally, a charity should consider protecting its own name and logo by registering one or more trademarks when it can do so.
- The Business Names Act 1985 imposes rules on organisations which use a business or "trading" name, that is a name other than its true legal name. Those rules cover, for example, a charity's trading subsidiary which uses a trading name or a charitable company which does so. Where the rules apply, certain specified information must

be shown on the company's stationery and certain specified statements must be made in a notice displayed at all premises where there is public access.

- Domain names and the legal rules regarding domain name registrations, infringement of legal rights (ie intellectual property rights) in domain names and the relevant dispute resolution procedures may be relevant to a charity or its trading subsidiary.
- The common law rules on "passing off" may be of relevance. These
- allow legal action to be brought in the courts where one entity claims that another is infringing its common law rights by passing itself off as the entity. This is a complex area of the law; specialist legal advice should therefore be taken on it whenever appropriate.

DECLARATION AND DESCRIPTIONS OF CHARITY STATUS

General

How charities may **describe** themselves will be regulated. First, any charity on the Scottish Charity Register (including English charities required to register in Scotland) can describe itself by any of these terms:

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

Scottish charities - specific rules

However, only charities on the register which are also established under the law of Scotland **or** are managed or controlled wholly or mainly in or from Scotland can describe themselves as a:

- Scottish charity; or
- Registered Scottish charity

Regulations

The Act enables regulations to be made which will require charities on the Scottish Charity Register to *declare* their charity status and give other specified information on particular documents.

The regulations are expected to deal with not only traditional stationery, such as letterheads, invoices and receipts but also other documents which

encourage donations of funds or gifts or goods or services to the charity. They are also likely to be widely drawn so that more modern "documents" will be subject to them, for example e-mail and websites.

CHARITY CONSTITUTIONS

General

Most of the legal rules regarding charity constitutions flow from existing legislation. For instance the Companies Act 1985 (as amended) governs the form and content of a company's memorandum and articles and will continue to be relevant to trading subsidiaries and to charitable companies.

The Act is relevant to charity constitutions in two respects, first because it requires OSCR's consent to alterations to charity constitutions. Secondly, it regulates the new legal corporate form for Scottish charities - the Scottish Charitable Incorporated Organisation (SCIO). It therefore imposes requirements for the constitution of a SCIO.

Changes to charity constitutions

OSCR's consent will be required for any amendment of a charity's constitution which alters the charity's purposes.

The charity must notify OSCR at least 42 days before the proposed date for making the alteration and it **cannot** proceed with the change unless and until OSCR gives its consent. Other constitutional changes, eg to the articles of association of a charitable company, will not require consent.

There is a separate rule that **all** constitutional changes must be notified to OSCR (Whether or not they need OSCR's advance consent). So changes will need to be filed with OSCR on each occasion.

Existing legal procedures for altering constitutions and existing filing requirements will, of course remain (eg Companies Act procedures and requirements for charitable companies).

REORGANISATION OF CHARITIES

General

There is a new regime designed to facilitate reorganisations of charities. Where certain "reorganisation conditions" are satisfied an approved reorganisation scheme can be made and approved by OSCR or by the

Court of Session. There are three circumstances in which this may occur, first the charity itself can propose a reorganisation scheme and seek OSCR's approval for that scheme. Secondly, OSCR can apply to the Court of Session for approval of a scheme which it is proposing. Thirdly, the charity's trustees may approach OSCR with a proposed scheme and ask OSCR to seek the Court of Session's approval of that scheme.

Where OSCR proposes a re-organisation scheme it must notify the charity of its proposals at least 28 days before applying to the Court of Session. The charity's trustees can opt to become party to the application.

Reorganisation conditions

At least one of the reorganisation conditions must be met. These conditions are:

1. That some or all of the charity's purposes have been fulfilled as far as possible or are adequately provided for by other means.
2. That some or all of the charity's purposes can no longer be given effect (whether or not in accordance with the directions or spirit of its constitution).
3. That some or all of the charity's purposes have ceased to be charitable purposes.
4. That some or all of the charity's purposes have ceased in any other way to provide a suitable and effective method of using its property, having regard to the spirit of its constitution.
5. That the charity's purposes provide a use for only part of its property.
6. That a provision of its constitution (other than its purposes) can no longer be given effect to or is otherwise no longer desirable.

Applications on grounds 1-5 need to show that the scheme the charity proposes will enable the charity's resources to be applied for better effect for charitable purposes consistent with the spirit of its constitution, having regard to changes in social and economic conditions since it was constituted.

Applications on ground 6 must show that the proposed scheme would enable the charity to be administered more effectively.

Reorganisation scheme

A reorganisation scheme can:

- Vary the charity's constitution, including varying its purposes;
- Transfer any of the charity's property to another charity (after liabilities have been satisfied); or
- Amalgamate the charity with another charity.

Restrictions

Note that these reorganisation provisions do **not** apply to charities constituted under a Royal charter or warrant or under statutory provisions (ie Acts of Parliament). Nor do they apply to charitable property held on trust by local authorities under the Local Government etc (Scotland) Act 1994. However, there are exceptions which allow application of the rules to endowment where the governing body is a charity and the reorganisation of endowments rules in the Education (Scotland) Act 1980 apply to it.

Appendix One

What are the Charitable Purposes?

The first part of the charity test says that a charity must have one or more charitable purposes. Section 7(2) of the Act sets out the new charitable purposes which s.7(3) gives a more detailed explanation of what is meant by particular charitable purposes. Reading s.7(2) and s.7(3) together, the following are the charitable purposes in terms of the Scottish charity test:

a. The prevention or relief of poverty

Poverty will be interpreted broadly and a person does not have to be destitute to be considered poor. The prevention of poverty includes preventing those who are poor from becoming poorer as well as preventing those who are at risk of being poor from becoming poorer.

b. The advancement of education

This will cover both formal education, such as schools and universities, and less formal education which may take place in the community. It covers education, training and research and broader education in the development of individual capabilities, skills and understanding.

c. The advancement of religion

Religion encompasses faith and worship of one or many gods. See also (p) below.

d. The advancement of health (including the prevention of relief or sickness, disease or human suffering)

OSCR will consider health in the context of this purpose to encompass both physical and mental health. The advancement of health can be pursued by conventional methods as well as complementary.

e. The saving of lives

This includes a range of activity directed towards saving people whose lives are in danger and protecting life.

f. The advancement of citizenship or community development (including rural or urban regeneration and the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities)

This covers a very wide range of purposes, and is focussed more on the community rather than the individual.

g. The advancement of the arts, heritage, culture or science

This covers art at a national or professional level as well as at a local or amateur level, the provision of arts facilities and encouraging high standards in the arts. Heritage can be seen as part of a country's local or national history and traditions. Advancing heritage includes the preservation of historic land and buildings. The advancement of science includes scientific research and charities connected with learned societies and institutions.

h. The advancement of public participation in sport (and "sport" means sport which involves physical skill and exertion)

The Act specifies that sport, in the context of this purpose, must involve physical skill and exertion. This reflects the fact that the advancement of public participation in sport is included as a charitable purpose mainly because of the health benefits that it can provide. This may restrict the types of sport that can be considered for this charitable purpose.

The provision of facilities and activities related to many sports (whether or not involving physical skill and exertion) may also be considered to be charitable under other purposes such as (f) or (i)

i. 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, and only in relation to recreational facilities or activities which are

- (i) primarily intended for persons who have need of them by reason of their age, ill health, disability, financial hardship or other disadvantage, or**
- (ii) available to members of the public at large or to male or female members of the public at large.**

This purpose ensures continuity with the Recreational Charities Act 1958 which states that the provision of recreational facilities in the interest of social welfare is charitable and so ensures that purposes that were regarded (by HM Revenue and Customs) as charitable under the 1958 Act will continue to be charitable.

However, charities (and applicants for entry on the Register) that have such charitable purposes must, as part of the charity test, provide public benefit, in the same way that any other charities (or applicants) must.

j. The advancement of human rights, conflict resolution or reconciliation

This covers relieving the victims of human rights abuse, raising awareness of human rights, and securing the enforcement of human rights law. It covers the resolution of international conflicts and relieving the suffering, poverty and distress arising through conflict at a national or international scale by identifying the causes of the conflict and seeking to resolve such a conflict. It includes the promotion of restorative justice and mediation or reconciliation between persons, organisations, authorities or groups.

k. The promotion of religious or racial harmony

This covers purposes which actively aim to promote harmony and the lessening of conflict between people from different races, religions or belief systems.

l. The promotion of equality and diversity

This covers the elimination of discrimination and promotion of diversity in society.

m. The advancement of environmental protection or improvement

The advancement of environmental protection or improvement includes preservation and conservation of the natural environment and the promotion of sustainable development. It includes the conservation of a particular animal, bird, or wildlife in general; a specific plant species or habitat or area of land or water, including areas of natural beauty and scientific interest.

n. The relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage (including relief given by the provision of accommodation or care)

This purpose will be relevant to organisations concerned with the care or upbringing of children or young people (for example children's homes) or organisations concerned with the relief of effects of old age or disability (for example by providing specialist advice or equipment, drop-in centres). It will also be relevant to housing associations and Registered Social Landlords.

o. The advancement of animal welfare

The advancement of animal welfare includes any purpose directed towards the prevention or suppression of cruelty to animals or the prevention or relief of suffering by animals.

p. Any other purpose that may reasonably be regarded as analogous to any of the preceding purposes (and the advancement of any philosophical belief (whether or not involving belief in a god) is analogous to the purpose set out in (c) above).

This purpose provides the necessary flexibility to allow charitable purposes to evolve as society changes. However, because it requires analogy with the purposes listed, parameters have been set around how and to what extent new purposes can evolve, which should give certainty and stability to charities, applicants and the public.