

Trustees' Duties and Responsibilities

The Charities and Trustee Investment (Scotland) Act 2005 proposes a Scottish statutory definition for the first time. The definition is to be found in s.106 of the Act.

So, what is a Charity Trustee?

"The persons having the general control and management of the administration of a charity"

This means that the term "Charity Trustee becomes uniform throughout Scotland, Wales and England.

s.66 of the new Act stipulates new duties for charity trustees. These new duties are equally applicable to directors of charitable companies. In all cases, the duties are imposed **in addition to** the existing duties which are imposed by the law.

Existing Duties

The existing duties of "charity trustees" depend upon the legal form which the charity takes. The common law regards unincorporated associations as quasi-trusts, ("resembling something in some ways, but not exactly the same") and accordingly, the common law duties of trustees apply also to those who run such charities. Their identity will depend on the wording of the charity's constitution, but they are likely to be either the office bearers, or the management committee, or both.

The existing common law duty of care in relation to the trustees of a charitable trust and the trustees of an unincorporated association is to bring to the trust management "the same care and diligence which a man of ordinary prudence may be expected to use in his own concerns." **A trustee holds the position of utmost trust.** He must discharge his duties with honesty and integrity. The trustee of an unincorporated trust has complete exposure to personal liabilities.

The duties of the directors of a charitable company are a mix of statutory duties, arising from the Companies Act 1985 and common law duties. A director is an "officer" of a company in terms of s.744 of the Companies Act 1985 and so has the statutory duties of such an "officer". The principal common law duty of a director is to act at all times in what

the director honestly believes to be the company's best interests. The board of a company has collective responsibility for the management of the company and sets the company's policies. It has control over the charity's financial affairs and responsibility for the pursuit of the charitable objects within the terms of the constitution. The position of a director of a charitable company is also, to some extent, a position of trust although the extent to which such duties apply to charities under Scots law has never been clarified. It is however clear that the principal duty of the director of the charitable company is to act at all times in what the director believes to be the company's best interests.

For the first time, s.66 of the 2005 Act sets out the general duties of all "charity trustees", whether they are in law trustees or directors of in general control and management of some other legal form.

s.66 (1) of the 2005 Act requires that a charity trustee must:

- Act in the interests of the charity and, in particular
- Seek in good faith, to ensure that the charity acts in a manner which is consistent with its purposes and
- Act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person.
- In circumstances capable of giving rise to a conflict of interest between the charity and any person responsible for the appointment of the charity trustee:
 - put the interests of the charity before those of the other person; or
 - where any other duty prevents the charity trustee from doing so, disclose the conflicting interest to the charity and refrain from participating in any deliberation or decision of the other charity trustees with respect to the matter in question.

The first three general duties are certainly based upon existing law but there are a number of significant differences. The first of them is based upon a company director's duty to act in what he honestly believes to be the company's best interest. But s.66(1) requires that a charity trustee **must** act in the interests of the company. An honest belief that you are do acting is, it seems, no longer sufficient. It requires continuous assessment of the manner in which the charity trustees in fact run the charity.

The second duty is a reasonable re-statement of the existing law. The third duty is based upon the existing duties of trustees. The current standard is based upon the care and diligence that a man of ordinary prudence would bring to his own concerns. The new standard is based upon the care and diligence that it is reasonable to expect of a person who is managing the affairs of another. It would therefore appear that this is a more onerous test than that applied to trustees under the present law. It must be borne in mind that these duties are stated to be in addition to the existing duties of trustees and directors (s.66(3)).

Section 66(2) imposes a further general duty upon charity trustees. This provides that the charity trustees of a charity must ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of this Act. There are several points to note about the wording of s.66(2).

Firstly, the requirement upon trustees is that they "must ensure" that the charity complies. That seems to mean that it is not good enough that the trustees have their best or that they have instructed someone to carry out the task but that they have failed to do so. This is potentially a heavy burden for what is, after all, an unpaid and voluntary position.

Section 66(2) is also very wide. It covers "any direction, requirement, notice or duty" imposed by the Act. It seems therefore that the high standard of care is one which is applicable to all of the new requirements placed upon charities in terms of this Bill. There are a substantial number of these.

Section 66(4) provides that any breach of the duties under s.66(1) and (2) is to be treated as misconduct in the administration of the charity. This would allow OSCR to take regulatory action in the event that the charity trustees fail to achieve the high standards set out above. This provision does not make any distinction between the trustees who have simply got into a muddle and those who are engaged in a "fiddle". Of course, OSCR may be expected to use discretion in distinguishing between those charities which require assistance and those where regulatory action is required, and there are now a number of limitations on the use of OSCR's powers. This does make for a slightly more reassuring climate than that created by the original Bill which provided that in certain circumstances a breach of duty under s.66(2) may be a

criminal offence punishable by a fine and that conviction of such an offence would disqualify such a person from being a charity trustee.

Section 66(5) now requires "all charity trustees" to take such steps as are reasonably practicable for the purposes of ensuring,

- that any breach of duty under s.66(1) or (2) is corrected by the trustee concerned and not repeated and
- that any trustee who has been in serious or persistent breach of either or both of those duties is removed as a trustee

To contravene the fourth requirement would almost certainly constitute misconduct or mismanagement under the present law, but one can readily envisage evidential difficulties in proving this. This duty is in certain respects a reformulation of the "independence" test which was originally one of the requirements of the charity test. This always was more suitable and effective as a trustees' duty, because the requirement for independence of action cannot be ascertained by a snapshot taken at any given moment.

Disqualification from being a charity trustee

The provisions relating to disqualification as a charity trustee can be found in s.69 which sets out the categories of persons who are disqualified from serving as a charity trustee. These are:

- anyone convicted of an offence involving dishonesty or an offence under the Act, which conviction is not spent by virtue of the Rehabilitation of Offenders Act 1974;
- An undischarged bankrupt;
- Anyone removed from serving as a charity trustee or from being in management or control of a charity under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990; by the Charity Commission for England and Wales; or by the English Courts; or
- Disqualification from serving as a company director.

This broadly follows the previous law (s.8 of the 1990 Act). There are however some additions to the list of persons disqualified.

Anyone convicted of an offence under the Charities and Trustee Investment (Scotland) Act 2005 would be immediately disqualified. In addition, any person disqualified by the Charity Commission for England

and Wales or by the English courts is now added to the list of disqualified persons.

Section 69(4) allows OSCR to waive the disqualification of a person, thus allowing them to serve as a charity trustee, unless to do so would prejudice company legislation.

Section 70(2) provides that any acts done as a charity trustee by a person disqualified from being a charity trustee are not invalid by reason only of the disqualification, thus clarifying what was a grey area.

Charities Trustees' Remuneration

Sections 67 and 68 of the Act address the circumstances in which trustees may be remunerated. Section 67 now provides that a charity trustee may not be paid for any services provided to the charity unless this is permitted by:

- Any authorising provision of the charity's constitution which was in force on 15th November 2004; or
- By any order of the Court of Session; or
- By any enactment; or
- By s.67(2) and (3) of the 2005 Act.

The conditions listed in s.67(3) are that the maximum amount of the remuneration is set out in a written agreement, is reasonable in all the circumstances and that the charity trustees are satisfied that it is in the interests of the charity. In addition, less than half of the total number of charity trustees of the charity must be paid in this way, and finally, the constitution of the charity must not contain an express prohibition upon a trustee being remunerated for such services.

Section 67(2) makes it clear that these conditions apply where a charity trustee provides "services" (defined as including goods supplied in connection with services) or where the trustees might benefit from any remuneration for the provision of such services by a person with whom the trustee is connected.

Section 68 contains definitions of what constitutes a "benefit" and "remuneration" and also "services". There is also a definition of who would be considered to be connected with the trustees. Such a person is defined as "connected" to a charity trustee if they are married to them

or living as if married, or are a close family relative (ie a child, parent, grandchild, brother or sister of them or their spouse). An institution or body corporate is considered to be "connected" with a charity trustee if it is controlled by him or a "connected" relative, or if the charity trustee has a substantial interest in it.

The effect of this provision is far reaching. The first thing to notice is the backdating of s.67(5)(e). A provision of the charity's constitution authorising such payments can only have effect (assuming that it is not inserted by an enactment or a decree of the Court of Session) if it was in force before 15 November 2004. One result of this is that it creates problems for any new charity established after 16 November 2004. Any provision allowing payment of charity trustees which does not comply with s.67 became unlawful on the date the 2005 Act came into effect.

Section 67(7) provides that were a charity trustee or other service provider is remunerated in contravention of s.67, the charity may recover the amount of that remuneration. This sub-section of the Act also provides that proceedings for recovery **must** be taken if OSCR so directs. Such a payment would also constitute misconduct in terms of s.66(4).