



# BIGGART BAILLIE

## S O L I C I T O R S

### **CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) ACT**

**(Royal Assent granted 14 July 2005)**

The measure is divided into four parts.

**Part 1** deals with charities and contains 10 chapters dealing with OSCR, the Scottish Charity Register, Cooperation and Information from OSCR and Charities, Supervision of Charities, the reorganisation of Charities (previously a separated part of the Consultation Draft), Charity Accounts, Scottish Charitable Incorporated Organisations, Religious Charities, Charity Trustees and Reviews of and Appeals against OSCR's decisions and those of the Scottish Charities Appeals Panel.

**Part 2** deals with fundraising for benevolent bodies.

**Part 3** deals with the Investment Powers of Trustees and

**Part 4** "General and Supplementary" deals with offences by Corporations and ancillary provisions.

There are **four schedules**, as undernoted

1. OSCR
2. Scottish Charity Appeals Panel
3. Powers of Trustees: Consequential amendments
4. Minor and consequential amendments and repeals, divided into two parts as follows:-
  - Part 1 - Acts
  - Part 2 - Subordinate legislation

**PART 1 - CHARITIES****CHAPTER 1 - OSCR**

- Section 1** establishes the Office of the Scottish Charity Regulator (OSCR) with the function of
- (a) determining whether bodies are charities,
  - (b) keeping a public register,
  - (c) overseeing compliance by charities,
  - (d) dealing with misconduct, and
  - (e) advising Scottish Ministers on matter relating to OSCR's functions.

In terms of Sub-section (6) "**OSCR may do anything** (whether in Scotland or elsewhere) which is calculated to facilitate, or is conducive or incidental to, the performance of its functions" although Sub-section (7) provides that it has not to do anything in contravention of anything expressly forbidden. In terms of Sub-Section (8) it is to encourage "equal opportunities".

Schedule 1 makes further provision about OSCR.

In terms of **Schedule 1** (introduced by Section 1) OSCR is to consist of at least four members **appointed by the Scottish Ministers** and must not include any MSPs, MPs, MEPs, Officeholders in the Scottish Administration, and such other persons as the Scottish Ministers may prescribe. The Scottish Ministers are to appoint a Chairman and Deputy Chairman, while OSCR must appoint a Chief Executive and such other employees as it considers appropriate.

- Section 2** OSCR is to publish an **Annual Report** and it is for OSCR to determine the form and content of this report.

## CHAPTER 2 – SCOTTISH CHARITY REGISTER

### Section 3 Scottish Charity Register

The register must contain the **name** of each charity, its principal office or the name and address of one of its “charity trustees” (the person having general control and management of the administration of the charity) the **purposes** of the charity, and certain other information including whether it is a designated national collector or religious charity. The other information also includes whether or not OSCR has made **any “directions” or “notices”** to the charity. OSCR must **review** each entry from time to time and if it is satisfied that any notice or direction has been complied with, remove the same. Directions and notices affect a number of activities, such as change of name and suspension of charity trustees. The Scottish Ministers may make regulations to add to the mandatory information to be held on the register under S.3(3)(f) and OSCR may also decide to include other information as it sees fit. If a charity feels that information jeopardises its personnel or premises, OSCR must exclude it if satisfied that such jeopardy is likely.

**Section 4** Applications for registration must include body’s name, principal office (which failing the address of a “charity trustee”), a copy of its constitution, purposes and (if any) accounts, and other information requested by OSCR or the Scottish Ministers.

**Section 5** OSCR may register applicants only if they meet the “charity test”. IT MUST NOT DO SO if the applicant has an objectionable name or fails to comply with regulations made by the Scottish Ministers, but it must not otherwise refuse an application which it considers to have met the charity test.

**Section 6** The **Scottish Ministers** may make regulations in connection with applying for and determining applications for entry in the Register (including applications for the creation of SCIO’s - see section 54).

**Section 7** deals with the **charity test** which has two prongs:-

- (a) Meeting one or more of the “**Charitable Purposes**” and
- (b) Providing **public benefit** in Scotland OR ELSEWHERE.

The charitable purposes in Scotland are as listed below:-

#### Scotland

- (a) Relief or prevention of **poverty**
- (b) The advancement of **education**
- (c) The advancement of **religion**
- (d) The advancement of **health**
- (e) The **saving of lives**
- (f) The advancement of **citizenship or community development**
- (g) The advancement of the **arts, heritage, culture or science**
- (h) The advancement of **public participation in sport**
- (i) The provision of **recreational facilities** or the organisation of recreational activities
- (j) The advancement of **human rights**, conflict resolution or reconciliation
- (k) The promotion of **religion or racial harmony**
- (l) The promotion of **equality and diversity**
- (m) The advancement of **environmental** protection or improvement
- (n) The relief of those in need by reason of **age, ill-health, disability, financial hardship** or other disadvantage
- (o) The advancement of **animal welfare**
- (p) **Any other purpose** that may be reasonably regarded as analogous to any of the preceding purposes. [This is a change from “any other purpose intended to provide community benefit”]

In terms of Sub-section 4 a body will fail the test if (a) its property can be used for non-charitable purposes, (b) its constitution expressly allows the Scottish Ministers or a Minister of the Crown to control its affairs, or (c) it is to advance, or itself is, a political party. Nevertheless, the Scottish Ministers may by order disapply (a) and (b) in relation to any body or type of body.

**Section 8** Provides criteria for establishing whether a body provides a Public Benefit. These include the extent to which a benefit is gained by members or other persons (other than as members of the public) and the disbenefit incurred or likely to be incurred by the public. The second criterion covers how widely available and unrestrictive a body’s functions may be.

**Section 9** OSCR is obliged to **issue guidance** as to how it determines whether a body meets the charity test. In terms of Section 7 (4) it will not meet the test if funds can be used for non-charitable purposes or to advance a political party. Political parties are not charities.

**Section 10** Names are “**objectionable**” if they are too similar, or are likely to mislead or imply connection with the government, or are “offensive”.

**Section 11** **Name changes require 42 days’ notice** to OSCR, but consent “is to be taken” as having been given, unless OSCR objects within 28 days. OSCR can only object if the name is “objectionable”.

**Section 12** **OSCR can require** a name change where names are too similar and can remove from register any charity which fails to comply with a direction under this section.

**Section 13** **deals with badging**

**A body entered** in the Register may call itself a “Charity”, a “Charitable Body”, a “Registered Charity”, or a “**Charity registered in Scotland**”. If a body is established under **Scots Law** OR is managed or controlled mainly from Scotland it may also be a “Scottish Charity” or a “**Registered Scottish Charity**”. If a body refers to itself in any of these ways it is to be treated as representing itself as registered.

**Section 14** If a body is established under another legal system whereby it is entitled to refer to itself as a charity and is managed mainly from outside Scotland, it will not be treated under S.13 as representing itself if it refers to this and

- (i) does not occupy land or premises in Scotland or
- (ii) carry out activities in any shop, office or similar premises there

**Section 15** By Regulation, the Scottish Ministers can require registered bodies to state that they are a charity and can determine what documents require this type of labelling.

### **CHANGES to registered bodies**

**Section 16** **OSCR’s consent** is needed for

- (a) amendments to its **purposes**,
- (b) **amalgamations**,
- (c) **winding up** and
- (d) **applying to the court** for any of these. The charity must notify OSCR **42 days** prior to the date upon which any action in (a) - (d) is to be taken. The charity cannot amend its **purposes**

“unless and until OSCR has given its **consent**” but in any **other case** unless OSCR directs otherwise within **28 days**, consent will be taken to have been given.

**Directions** only last for 6 months. In this connection, OSCR has either to (a) give its consent, whether or not subject to conditions or (b) refuse its consent.

**Section 17** A charity must give **notice** of

- (a) change in **address** of office or charity trustee specified in the register,
- (b) changes in other details in the **register**,
- (c) **constitutional** changes,
- (d) any **action taken where consent is needed** under Section 16(2)(b) to (d),
- (e) an order for **administration or winding up** made by the court,
- (f) the appointment of a **receiver**.

(This does not apply with regard to any action which requires OSCR’s prior consent as in Section 16 (5) to a reference under Section 16 (2) (a) amendments to the Constitution or purposes.)

### **REMOVAL FROM REGISTER**

**Section 18** If a Charity applies for removal from the register OSCR must do this within 28 days.

**Section 19** **Despite removal**, a body which has been registered continues to need to **apply** its **property and income for the charitable purposes** which were entered on the register immediately before its removal. To that extent the body will remain subject to supervision by OSCR and the Court of Session. Under Sub-section (4) where a body is to be **wound up** or dissolved **OSCR may direct the funds** to be transferred to a charity

- (a) with closely similar purposes AND
- (b) which is prepared to accept the property.

**Section 20** Enjoins cooperation between OSCR and “other relevant regulators” (i.e. those with similar functions) in the UK or elsewhere.

**Section 21** Deals with public access to the Register including OSCR’s ability to charge fees

**CHAPTER 3 - INFORMATION ABOUT CHARITIES ETC**

- Section 22** OSCR has **power to obtain documents and information** in relation to the Charity's entry in the register. A **notice** requiring these must specify the type of documentation and information which is needed and specify a date for compliance **at least 14 days** hence. If information which confidentiality would preclude the charity from disclosing before the Court of Session need not be disclosed.
- Section 23** **Constitution and Accounts must be given to those who seek them.** The Scottish Ministers may by order exempt charities from this. Charges must not exceed the costs of making the information available but the Scottish Ministers may by order set a maximum.
- Section 24** **OSCR can share information** with any public body or office holder (including any officeholder in the Scottish Administration, the Scottish Parliamentary Corporate Body, any local authority, any constable and any other Scottish public authority) subject to any obligations as to secrecy or other restrictions in relation to the disclosure of information.
- Section 25** Allows the Scottish Ministers to permit OSCR to provide information to any public body or officeholder, designated by them or they may designate any Scottish Public Authority to allow it to disclose information as to OSCR without any obligation as to secrecy or other restriction on disclosure of information. It allows Scottish Ministers to remove restriction on charity trustees, independent examiners or auditors of a charity's accounts that stops them disclosing information to OSCR.
- Section 26** **Makes it an offence to provide false or misleading information.** On a summary conviction the penalty is a fine up to level 5 on the standard scale and/or imprisonment up to six months.

## CHAPTER 4 - SUPERVISION OF CHARITIES ETC

**Section 28** Confers important powers of **enquiry and regulation**. Under it, OSCR may **direct the cessation** of activities for up to six months. **Failure** to comply is an **offence**.

**Section 29** Confers **powers** to obtain documents and **information by notice**, which must specify the **type** involved and the **date** by which the information must be produced as well as **stating that failure to comply is an offence** bringing with it on summary conviction a fine up to level 4 and/or imprisonment for up to 3 months.

**Section 30** Where **OSCR** is satisfied as a result of enquiries under Section 28 that a charity no longer meets the charity test it must

- (a) direct it to **take steps** to do so,
- (b) apply to the court for **re-organisation**, or
- (c) **remove** the charity.

If a charity **fails to comply with a direction** to meet the charity test it **must be removed** by OSCR, which has a duty to notify (with reasons) within seven days of the removal.

**Section 31** Confers important **powers under notices or directions** as follows:-

### MISCONDUCT

Where there has been **misconduct or OSCR has had to act to** protect charitable property OSCR has power under Sub-section (4):-

By **notice to suspend any charity trustee, agent or employee**

- (a) **responsible for or privy to** the misconduct,
- (b) **contributing to or facilitated** it, OR be unable or unfit,

Under Sub-sections (2), and (5) **OSCR may direct**

- (a) a body representing itself as a charity,
  - (b) a person representing the body as a charity,
  - (c) a charity representing itself as being established under Scots law, and
  - (d) a person representing the charity as being established under Scots law
- not** to do so if it is not.

Similarly under Sub-section (6) OSCR may issue a direction regarding transactions and under Sub-section (7) direct that holders of property may not part with it.

### NOTICES AND DIRECTIONS

Under **Section 32, notices and directions under Section 31**, while they may be varied, **last for only six months** from the initial time of issuance. However, a person who refuses or **fails** without

reasonable excuse to comply with a direction under Section 27 commits an **offence** liable on summary conviction to a fine up to level 5 and/or imprisonment for up to six months.

**Section 33** OSCR must prepare a **Report** if as a result of a Section 28 enquiry it

- (a) gives a **direction** or **removes** a charity under Section 30,
- (b) **suspends** a person under Section 31, (basically misconduct and/or misrepresentation)
- (c) gives a direction under Section 31 (ie, basically misconduct and/or misrepresentation that a body is a charity) . It **may** do so in other cases. In terms of Sub-section 3, **only the person enquired about can be identified unless OSCR determines** that it is necessary to do so. Copies of the Reports must be sent **to the enquirees**.

### **COURT OF SESSION - MISCONDUCT ETC**

Under **Section 34**, the **Court of Session**, where it is **satisfied by OSCR** that there has been

- (a) **misconduct** in administration or
- (b) **that it is desirable** in order to secure proper application of a charity's property, **may under Sub-section (5)**
  - (a) **interdict action**
  - (b) interdict from **representing** itself as a charity or such other action as the court thinks fit,
  - (c) appoint a **judicial factor**,
  - (d) appoint a **trustee** if the charity is a trust,
  - (e) **suspend or remove** any person in management or control,
  - (f) order the body not to part with **property**.

Under **Sub-section (2)** if the court is satisfied by OSCR that a body has been **misrepresenting** itself as a charity, the court may under Sub-section 5 exercise the powers (b) to (f) referred to above and **also** (g) **restrict** the **transactions** and (h) **interdict from representing** the body as a charity. Where a charity has been misrepresenting itself as being established under the law of Scotland, the court may also interdict from such misrepresentation.

### **ASSETS TRANSFER BY COURT OF SESSION**

Under **Section 35**, **OSCR can ask the Court of Session** in accordance with **regulations** made by the Scottish Ministers to **transfer assets** of charities, of bodies controlled by charities or of bodies wrongly representing themselves as charities, but the **court must be satisfied** that there has been misconduct, that it is necessary or desirable, and, in the case of an actual charity, that the purposes can be better achieved by being transferred to another charity.

### **ENGLISH CHARITIES**

**Section 36** If the Charity Commissioners advise OSCR that moveable property is held in Scotland for an English Charity where there has been misconduct OSCR may ask the Court of Session to ordain

the holder not to part with it, and may ask the Court to order it to be transferred for similar purposes.

**Section 37** Allows expenses for actions under SS34 to 36 to be awarded against charity trustees rather than charities.

**Section 38** Provides that the Scottish Ministers will exercise OSCR's functions under SS28 to 35 with regard to bodies which are or are controlled by "registered social landlords" under the Housing (Scotland) Act 2001 and OSCR can delegate its authority in other cases, but any delegate must report to OSCR

## CHAPTER 5 - REORGANISATION OF CHARITIES

- Section 39** Applications by charities to reorganise
- By Sub-section (1)** OSCR is given power to approve schemes
- (a) where any of the “reorganisation conditions” (see S42(2)) are satisfied, (basically that purposes are (i) fulfilled, (ii) can no longer be given effect to, (iii) have ceased to be charitable, and (iv) ceased in any case to be suitable and effective, or
- (b) the purposes affect only part of the body’s property,
- and
- the scheme will make more effective use thereof,
- or
- (c) that a provision can no longer be given effect to or is no longer desirable.
- By Sub-section (2)** the Scottish Ministers may make Regulations about such applications, including rules on the form and manner of applications, timescale, and publicity.
- Section 40** Applications by OSCR where similar conditions apply as in S39, OSCR (on its own volition or on the application of a charity’s trustees) may on 28 days’ notice apply for a charity to be reorganised.
- Section 41** Charities may apply for reorganisation despite any constitutional provisions to the contrary.
- Section 42** Deals with “interpretation of Chapter 5” through a number of **definitions**:-
- (2) **“Reorganisation conditions”**:-
- (a) Some or all of the purposes are
- (i) **fulfilled**
- (ii) can **no** longer be given **effect** to
- (iii) have **ceased** to be charitable, or
- (iv) in any case ceased to be suitable and effective
- (b) The purposes affect only part of the body’s property.
- (c) That a constitutional provision (other than a purpose) is no longer effective or desirable.
- (3) **“Reorganisation Scheme”** may affect
- (a) **constitution,**
- (b) **property**
- (c) **amalgamation**
- (4) The **Court of Session’s** power to approve cyprès schemes is saved.
- (5) It is said that SS 39 & 40 do not apply to charities constituted by Royal Charter or warrant or any enactment (such as Act of Parliament)

But by Sub-section (6) they do apply to endowments if their governing bodies are charities referring to the Education (Scotland) Act 1980.

**Section 43** Endowments - provides that the re-organisation provisions will also cover educational and non-educational endowments that are also Charities. This is rather than under regime laid out in Part VI of the Education (Scotland) Act 1980. The provision under S 104 of that act shall apply.

## CHAPTER 6 - CHARITY ACCOUNTS

Under **Section 44** a charity must keep proper **accounting records** including a Statement of Account and Report which is independently **examined or audited**, after which a **copy** of the Statement of Account must go **to OSCR**.

Records must be **preserved for six years**.

Under Sub-section (4) the Scottish Ministers may make **regulations** regarding

- (a) the meaning of “**financial year**”,
- (b) **information** to be provided,
- (c) manner of **presentation**,
- (d) keeping and preservation of **records**,
- (e) accounting **methods and principles**,
- (f) **time limits** for submission,
- (g) examination or **audit**,
- (h) **other matters** the ministers may think necessary or expedient.

Under Sub-section (5) different regulations may be made for **different types** of charity and some may be **exempted**.

**Section 45** Enables **OSCR**, where a charity has failed to provide a Statement of Account, to **nominate an “appointed person”** to prepare such a statement after notifying the charity.

In terms of Sub-section (3) an appointed person can

- (a) on reasonable notice **enter premises** at all reasonable times,
- (b) have **access to all documentation** appearing to relate to finance,
- (c) **require assistance** from any charity trustee or agent or employee,

Under Sub-section (4) the **charity trustees** of the body concerned are **personally liable** jointly and severally for the expenses of the appointed person in the performance of his functions.

Sub-section (5) deals with the appointed person’s duties to send Reports to OSCR and Charity Trustees.

In terms of

Sub-section (6) **failure to comply** with an appointed person’s requirements is an **offence** liable on summary conviction to a fine not exceeding level 3.

**Section 46** Outlines the circumstances under which auditors and independent examiners must report matters to OSCR. These include having reasonable cause to believe that any matter may be material to OSCR’s exercise of its functions under:

SS28 (inquiries)

30 (continuing to meet the charity test)

31 (OSCR’s powers in cases where misconduct has been found following inquiries)

These must be immediately reported to OSCR.

## **DORMANT FUNDS**

**Section 47** Enables **OSCR** to transfer funds in **dormant accounts** to such charity as **OSCR** considers appropriate.

**Section 48** Enables the **Scottish Ministers to make regulations** regarding

(a) the procedure to be followed,

(b) **expenses OSCR** can claim. It also **defines dormancy** as being no transactions within 5 years.

**CHAPTER 7**

Provides for the creation of SCOTTISH CHARITABLE INCORPORATED ORGANISATIONS.

Under **Section 49** an SCIO must have a **constitution**, a principal **office in Scotland**, and two or more **members**.

**Section 50** provides for “the appointment of three or more persons (“**Charity Trustees**”) who are charged with the general control of the SCIO’s administration and about any conditions of eligibility for becoming a charity trustee” or member.

The constitution must **also provide for such other matters** as may be specified in **regulations** made by the Scottish Ministers.

In terms of Sub-section (5), subject to anything in its constitution, a SCIO has power to do anything incidental or conducive to “its purposes”, and of (6) its charity trustees for management purposes may exercise all of its powers.

**Section 51** imports from S66 the provisions that SCIO trustees must act in good faith, and that a breach of duty is an offence carrying a fine up to level 3.

**Section 52** deals with documentary **identification** of bodies as SCIOs.

**Section 53** makes it an **offence** for a charity trustee or other person on behalf of an SCIO **to issue documentation which does not comply** with Section 52, under power of interdict in the Court of Session - but OSCR cannot apply for this unless there has previously been a failure to comply with the direction to cease.

**Section 54** contains the procedure needed to apply for registration as an SCIO. These are similar to provisions laid down in Section 4, with specific requirements relating to a SCIO.

**Section 55** provides that entry to the register as a SCIO has the effect of a body becoming a body corporate as described in the application. If a SCIO ceases to be SCIO it ceases to be a charity.

**Section 56** allows for the conversion to SCIO by a charity that is a company or an industrial and provident society. These organisations cannot transfer if they hold any share capital that is not fully paid up or if they have only a single member. Copies of both the resolution of the body to be converted to a SCIO and adopting the proposed constitution of the SCIO must accompany the application.

**Sections 57-58** When an application for a body’s conversion to SCIO is granted by OSCR, the body must be entered on the Register, also a copy of the body’s resolution to convert must be sent along with

a copy of the entry in the Charity Register to the registrar of the original body (Companies House or FSA).

**Sections 59-60** allow for the amalgamation of a number of SCIOs through application to OSCR. A two thirds majority of those voting at a general meeting or a unanimous vote is required to pass a resolution to amalgamate. If the amalgamation is granted by OSCR it must replace the original bodies' enlines and all the property, rights and liabilities of all the old SCIOS belonging to the new SCIO with an entry registering the new SCIO.

**Section 61** deals with the transfer of undertakings.

**Section 62** Provides that a third party dealing with a SCIO in good faith and for value is entitled to assume that the SCIO's constitution provides it under sufficient legal powers to enable it to act in the way it is proposing or attempting to act. SCIOs and their trustees must ensure that they have relevant powers.

It is intended that those dealing, in good faith, with SCIOs and their trustees will be afforded a level of protection similar to that provided when dealing with registered companies.

**Section 63** allows for a SCIO to amend its constitution by at least a two thirds majority.

**Section 64** allows Scottish Ministers to make regulations that relate to SCIOs and their application process, their administration, amalgamations, transfers, winding up, insolvency or dissolution of SCIOs and other matters regarding this chapter "as they see fit".

## CHAPTER 8 - RELIGIOUS CHARITIES

- Section 65** allows OSCR to designate as a religious charity those bodies which appear to have
- (a) Advancement of religion as the principal purpose.
  - (b) the regular holding of public worship as its principal activity.
  - (c) been established in Scotland for at least 10 years.
  - (d) a membership of at least 3,000 over the age of 16.
  - (e) an internal organisation with supervisory and disciplinary functions over all its component parts and have a regime for keeping accounting records which OSCR considers correspond to those for other charities.

Designated religious charities do not need to seek OSCR's consent for certain of the changes to its constitution set out in Section 16, OSCR may not direct the Charity or the trustees to stop undertaking activities (under Section 28(3)) and it cannot suspend its charity trustees (under Section 31(4)) following its inquiries. Under Section 34(5) the Court of Session cannot appoint a judicial factor, appoint a trustee, nor suspend a charity trustee or manager of the religious charity. Section 69 does not apply to these designated religious charities.

Section 64(5) allows OSCR to withdraw the designated status from any of these religious charities if it considers that it no longer satisfies the qualifying criteria, or after investigating OSCR considers that it is no longer appropriate for it to hold the designated status.

## CHAPTER 9 - CHARITY TRUSTEES

**Section 66** sets out the general duties of Charity Trustees as follows:-

- (1) to act in the Charity's interests
  - (a) in **good faith**, consistent with its purposes
  - (b) with the **care and diligence** reasonably expected of someone managing **another's affairs**.
  - (c) must disclose conflicts of interest, put the charity first, and not participate in deliberation or decision-taking by the other Trustees.
- (2) to ensure **compliance** with any direction, requirement, notice or duty imposed by the Act.
- (3) all **without prejudice to** other such duties.
- (4) any failure under Sub-sections (1) and (2) to act in the Charity's interests in good faith with due diligence and in compliance counting as **misconduct**, and
- (5) take such steps as are reasonably practicable to ensure that any breach of a duty under (1) or (2) above is corrected by the Trustee concerned and is not repeated and, where there has been persistent breach, to remove the Trustee.

**Section 67** Charity trustees may only receive **remuneration** where the maximum amount is **reasonable** and subject to **written agreement**, and prior to the agreement the charity trustees were satisfied that this would be in the charity's interests.

Less than half the total trustees must be entitled to remuneration unless there are three or fewer trustees.

Existing arrangements under existing constitutions, Court of Session orders, or enactments, are saved.

Remuneration paid in contravention hereof may be **recovered** and OSCR can direct a charity to do so.

**Section 68** provides definitions for terms referred to in Section 67. "**Connected persons**" includes spouses (or similar), bodies on which the remunerated charity trustee has a "substantial interest", and a Scottish partnership of which he is a member.

### CAUSES OF DISQUALIFICATION

**Section 69** provides for **disqualification** from being a charity trustee of anyone

- ❖ convicted of an offence involving **dishonesty**,
- ❖ **an offence under the Act**, or
- ❖ who has been a **bankrupt** or
- ❖ **removed from being concerned** in the management or control of any body.

- ❖ Causes for disqualification include being **removed by the Charity Commissioners** or the High Court in England on the grounds of any mismanagement to which the person was privy or to which his conduct contributed or facilitated.
- ❖ So too is **disqualification as a company director**.

However, the Rehabilitation of Offenders Act 1974 applies and **OSCR may waive the disqualification** generally or in relation to a particular charity or type of charity.

**Section 70** provides that a charity trustee **acting while disqualified is an offence** liable on summary conviction up to the statutory maximum and/or six months' imprisonment, and on indictment to a fine and/or imprisonment up to two years.

## CHAPTER 10 - DECISIONS: NOTICES, REVIEWS AND APPEALS

**Section 71** applies to any decision by OSCR (or by a person to whom OSCR's functions are delegated by virtue of Section 38) to:-

- (a) refuse an application for entry in the Register, including entry as SCIO under Section 55, 58 or 60, (creation and amalgamation).
- (b) refuse to disapply Section 3(3)(b) in relation to a charity (address etc not shown on Register)
- (c) give a direction under Section 11(3) (change of name)
- (d) give a direction under Section 12(2) or (3) (names too similar)
- (e) refuse to give a direction under Section 12(2) (names too similar)
- (f) refuse to consent to a charity taking any action set out in Section 16(2) (amending, amalgamating etc)
- (g) give a direction under Section 28(3) (cease activities)
- (h) make a requirement under Section 29(1) (for information etc)
- (i) remove a charity from the Register under Section 30(1) or (3) (no longer meets test or refuses to do so)
- (j) suspend a person under Section 31(4) (privy to misconduct)
- (k) give a direction under Section 31(5) or (8) (representation as charity)
- (l) give a direction under Section 31(6), (7) or (9) (restriction of activities to retain funds)
- (m) refuse an application made for purposes of Section 39(1) (re-organisations)
- (n) give a direction under Section 53(2) (representation as if an SCIO)
- (o) give a direction under Section 67(7) (recovery of remuneration)
- (p) refuse to grant a waiver under Section 69(4) (disqualification)
- (q) refuse to designate a charity as a designated religious charity or designated national collector, or
- (r) withdraw the designation of a charity as a designated religious charity or designated national collector.

**Section 72** sets out the persons that must be informed about different decisions made by OSCR and its delegates and provides that notices of decisions must set out the decision, the reasons and advice about seeking a review, typically, the person in respect of whom the decisions were made, or a charity which had requested a review, eg, regarding a name change.

**Section 73 -** provides that **decisions under**

- S71**
- (d) (give a Direction under S12 ss(2) or (3) regarding name change)
  - (i) (remove a Charity under S(30)(1) (no longer meeting the charity test) or S30(3) failing to comply with a direction to meet the test))
  - (o) (give a direction about recovering remuneration from a charity trustee under S67(7)), or

- (r) (withdraw recognition as a religious charity or a national collector)

**are of no effect**

**unless** the **notice** required by S72 is given

**and**

- (a) the review **period expires** with no review request being made **or**
- (b) Where OSCR confirms the decision,
  - (i) the S76 appeal **period expires** without appeal
  - (ii) such an appeal is **abandoned or determined**

**In addition**, a decision under S71(h) (to make a **requirement** under S29(1) **to produce information** to OSCR requires S72 notice and is of no effect unless and until (a) the period for review expires without a review request or (b) where such a request is made, OSCR confirms or varies the decision.

## **REVIEWS**

**Section 74** - provides that **OSCR has 21 days** of a review request **to do so** and give notice to the requester. This must give reasons.

Under Sub-section (4) **OSCR must publish any further procedures** in accordance with which reviews are to be conducted

## **SCOTTISH CHARITY APPEALS PANEL**

**Section 75** - provides for a Scottish Charity Appeals Panel to be constituted by the Scottish Ministers.

**Schedule 2** directs the Scottish Ministers to constitute a panel of members serving up to five years. At least one of those must for the previous five years have been an admitted solicitor or an advocate. However, MSPs and officeholders are disqualified as are such other persons as the Scottish Ministers may prescribe by order. Each panel is to consist of three persons at least one of whom must be a solicitor as above or an advocate.

The Scottish Ministers may make rules providing for the detailed administration of the panel and the time within which a decision of the panel may be appealed to the Court of Session.

**Section 76** **deals with appeals from OSCR** to the Panel. The references need to be followed through a number of Sections with regard to particular items of appeal. Appeals must be **made within**

**28 days.** Decisions under S71 (g) (a direction under S28(3) not to undertake certain activities) or S71(h) (a notice under S29(1) to provide OSCR with **information**) **cannot be appealed** to the Panel. The Panel may **confirm, quash** or **remit decisions back** to OSCR and by Schedule 4 it is added to the bodies under the jurisdiction of the Scottish Committee of the Council on Tribunals.

**Section 77** provides that for **matters referred back to OSCR** by the Scottish Charity Appeals Panel it must complete its consideration within **14 days** and within that period confirm, vary, reverse or revoke the decision and provide reasons.

**Section 78** provides for **appeals** from the decision of the panel to the **Court of Session**.

## Part 2 - FUNDRAISING FOR BENEVOLENT BODIES

**Section 79** Defines these as being “for **charitable, benevolent or philanthropic** purposes”

It also defines as a “**commercial participator**” someone who is not connected with a benevolent body and in the course of business represents that “benevolent contributions” as defined are to be given to one or more benevolent bodies or applied for charitable benevolent or philanthropic purposes.

“**Professional Fundraisers**”, not connected with a benevolent body or company connected with it, are defined as **persons who for reward solicit** money or other property including “promises of money”.

Sub-section 3 **excludes** from the definition

- (a) a **benevolent** body or company connected thereto;
- (b) persons in the management or control or employed by the same;
- (c) someone who supports a benevolent body in the course of a **TV or Radio** programme;
- (d) a **commercial participator**;
- (e) a **person who receives no more than:**
  - (i) a **sum specified by regulations made by the Scottish Ministers under Section 83**
  - or**
  - (ii) **sum specified by way of remuneration;**

A **company is “connected”** if one or more charitable bodies exercise the whole voting power.

**Section 80** Representation and solicitation are widely drawn and where someone by agreement with a benevolent body is to receive funds, he or she will be regarded as soliciting.

A solicitation made by a third party at a professional fundraiser’s request during a radio or TV programme will be regarded as a solicitation made by the fundraiser.

### CONTROL OF FUNDRAISING

**Section 81** prohibits **professional fundraising or commercial participation** for a benevolent body except by agreement, which **must conform to** requirements prescribed by **regulations** to be made by the Scottish Ministers under Section 83.

The Sheriff can grant an **interdict on** the application either of the body concerned or (in the case only of a charity) OSCR.

An agreement **not satisfying** the prescribed requirements **is not enforceable** except insofar as the Sheriff may provide by order.

The agreement must provide for any remuneration or expenses paid.

**Section 82** allows a benevolent body **on 28 days' notice** to the parties affected to seek an **interdict** from the Sheriff where, in terms of Sub-section (2)

- (a) the person uses fundraising **methods** to which the body objects;
- (b) is **not a fit and proper** person;
- (c) the body **does not wish to be associated** with the venture.

If the body seeks a further interdict within 12 months of the service of the first notice, it does not require to serve notice again.

**Section 83** enables the Scottish Ministers to make **regulations** about fund-raising which may include under Sub-section (2):-

- (a) sums paid as **remuneration** (Section 79(3)(e))
- (b) **form and consent of**
  - (i) **agreement** (under Section 81) and
  - (ii) **notices** (Section 82(3))
- (c) **information** to be provided about representations made
- (d) information and identification of fundraisers
- (e) refunds
- (f) availability of records
- (g) manner in which **funds are transmitted** to benevolent bodies
- (h) requiring benevolent fundraisers to **ensure**
  - (i) that their activities do not unreasonably intrude on **privacy**,
  - (ii) are **not unreasonably persistent** approaches,
  - (iii) do not unduly **pressure** people to donate,
  - (iv) do not include **false or misleading** representations concerning (in terms of Sub-section 3)
    - (a) the **extent or urgency** of need,
    - (b) **use** of funds and
    - (c) **activities, achievements, or finances**

**Sub-section (4)** goes on to provide that “money” includes “promises of money”.

**Sub-section (5)** provides that **failure** without reasonable excuse to comply with the regulations **is an offence** on summary conviction leading to a fine up to level 5.

**Sub-section (6)** defines “**benevolent fundraising**” and “**benevolent fundraisers**”, which later term includes the agents, employees and volunteers of benevolent bodies and companies connected with them.

### **PUBLIC BENEVOLENT COLLECTIONS**

**Section 84**, in connection with public benevolent collections, provides extra definitions for Sections 85 to 92.

**Sub-section (3)** defines “**public place**” as:-

- (a) any road within the meaning of the Roads (Scotland) Act 1984 and
- (b) any other place where the **public has access** as of right or express or implied permission and which, within a station, airport, shopping precinct, or other similar public building is without payment or by ticket or by virtue of special permission.

**Section 85** deals with the powers of **local authorities** in connection with public benevolent collections by designated national collectors and others.

**Designated national collectors** are not guilty of an offence by holding a collection without local authority consent but in terms of **Section 86** they are bound to **notify** the local authority between no earlier than 18 or later than 2 months prior to the proposed date and the local authority must respond within one month of receiving the notice. This is further treated under that section.

Similarly, **it is not an offence** to take up a collection in the course of a **public meeting**, or on land to which the public only have **access by permission**, or by means of an **unattended receptacle**.

**Otherwise**, in terms of Section 85(1), **it is an offence** to hold such a collection **without local authority consent** liable on summary conviction up to a level 3 fine.

**Section 86** provides that **local authority consent** for public benevolent collections **must be sought** no earlier than 18 months and no later than two months before the event, unless the organiser and the authority agree otherwise.

The local authority must **consult the Chief Constable** before dealing with the application and a local authority **must give notice of** its decision no later than 14 days before the proposed collection.

In terms of **Sub-section (5)** a local authority can impose conditions regarding:-

- (a) **date, time or frequency,**
- (b) **location,**
- (c) **conduct,**
- (d) **badges and certificates of authority,**
- (e) **form of collection boxes etc,**
- (f) **“any other matter** relating to the local circumstances”,

In terms of **Sub-section (6) grounds of refusal** include

- (a) time, date, frequency or area would cause undue **public inconvenience**,
- (b) that there is **another collection** (whether or not by a national collector) on the same day or the day preceding or succeeding,
- (c) that the local authority believe an **inadequate amount** to be collected,
- (d) that the organiser has been **convicted** of
  - (i) holding a collection **without necessary local authority** consent, **or a breach of the regulations** to be made by the Scottish Ministers, or
  - (ii) **any other offence** involving **dishonesty or** which would be **facilitated** by the consent being granted,

**Sub-section (7)** allows a local authority to **vary or withdraw** consent up to the day before the collection **if** they believe that a **ground of refusal** under **Sub-section (6)** may exist, and under **Sub-section (8)** also if they believe that a **condition** will be breached.

Under **Sub-section (9)** a local authority must serve a **notice** giving reasons and inform the organiser about appeals under Section 88 to the Sheriff.

Sub-section (10) allows the Scottish Ministers to disapply the duty to consult the Chief Constable by means of Regulations.

**Section 87** entitles OSCR, after consulting “associations representing local authorities” and such other persons as it sees fit including charities to specify **criteria for becoming and remaining a designated national collector**.

A **designated national collector must notify** the appropriate local authority **no later than 3 months or earlier than 18** months prior to holding a proposed public benevolent collection of the intention to do so.

The local authority may **prohibit** the collection due to expected undue public inconvenience “or for any other reason”, on giving **no less than 1 month’s notice** after the date of the national collector’s notification of intent.

**Reasons** must be given and information about the right to appeal under Section 88.

**Under Section 88 appeals** lie within 14 days to the Sheriff

(1) By the organiser of a public benevolent collection against a Section 86 decision regarding

- (a) Conditions,
  - (b) Refusal,
  - (c) Withdrawing or varying consent, but under Sub-section
- (2) Not against decision regarding the unsuitability of a date
- (3) By a designated national collector against a local authority decision to prohibit a collection. The appellant (local or national) must lodge the appeal within 14 days of receiving the notice under sections 86 or 87.

The Sheriff may quash the decision and remit it back for further consideration.

**Section 89** allows **OSCR to ask the Sheriff** to:-

- (a) any person holding the proceeds of a public benevolent collection **not to part** with them, and
- (b) **approve a scheme** prepared by OSCR (subject to the “modification” if necessary) transferring funds to a charity, where OSCR believes funds can for any reason be applied for the purposes for which they were collected.

**Section 90** enables the Scottish Ministers to make **regulations** regarding public benevolent collections including provisions regarding:-

- (a) accounts,
- (b) preventing public inconvenience,
- (c) specifying those provisions of which breach is an offence.

**Contravening** the regulations is **an offence** liable on summary conviction up to level 3.

**Section 91** enables the Scottish Ministers to make **regulations** about the collection from the public of **goods** for the benefit of benevolent bodies or for charitable, benevolent or philanthropic purposes

- (a) requiring the organiser to **notify** the local authority,
- (b) allowing or requiring the local authority, in such circumstances as may be specified in the regulations, to **prohibit** the collection,
- (c) about the dates, **times and places** at which, and the frequency of, such collections,
- (d) about keeping and publishing **reports**,
- (e) for preventing **public inconvenience**,
- (f) **specifying particular provisions** of the regulations breach of which is to be an **offence**.

**Breach** will render one liable on summary conviction to a **fine up to level 5**.

**Section 92** provides that local authorities must have regard to OSCR’s guidelines.

### PART 3 - INVESTMENT POWERS OF TRUSTEES

**Sections 93 to 95** provide an extension to the **investment powers of trustees** (of all trusts, whether charities or not).

**Section 93** amends the Trusts (Scotland) Act 1921 adding a provision (Section 93(2)) allowing a trustee to make any kind of investment of the trust estate (including investment in heritable property). The effect is that trustees will **generally** have the same powers of investment **as if they were the beneficial owners** of the trust estate.

These wider powers are subject to any restriction or exclusion imposed by other enactments and do not extend to certain categories of trustees (Sub-section (3) such as Pension or Unit Trust trustees). Sub-section (3) continues the policy of the Trustee Investments Act 1961 in relation to pre-existing trust deeds. No term in a private trust deed made before the passing of the 1961 Act was to restrict the investment powers granted to trustees by that Act as amended.

The new general power in Sub-section (2) is similarly not to be restricted. In relation to trust deeds made after the passing of the 1961 Act, where the investment powers contained in the 1961 Act are conferred the trustees are to have the new general powers. **Prohibitions** on trustees in existing post-1961 Act deeds or in future deeds from making certain investments **will continue to apply**. This is because Section 4(1) of the 1921 Act, in which the new general investment power is inserted, authorises only acts which are not at variance with the terms and purposes of the trust.

**Section 94** Adds a new Section 4A to the 1921 Act regarding Trustees' duties to consider the suitability of investments and the need for diversification, and obtain advice (unless they actively consider this to be unnecessary).

It also adds, by new Section 4B, an explicit power to appoint nominees, and goes on to make provisions about suitability and terms of employment.

Schedule 3 deals with the consequential amendments.

## PART 4

### GENERAL AND SUPPLEMENTARY

#### FINANCIAL ASSISTANCE FOR BENEVOLENT BODIES

**Section 96** confirms that every charity may participate in common investment schemes and common deposit schemes unless its constitution specifically excludes it.

**Section 97** allows the Scottish Ministers to fund any benevolent body (other than a local authority or other public body or office-holder) in connection with the costs of establishing, dissolving or winding up a benevolent body.

**Section 98** Rate relief for registered community amateur sports clubs.

**Section 99** deals with **transitional arrangements**

- (1) existing bodies recognised as charitable must be registered as such by OSCR (although this does not affect OSCR's powers to remove from the Register under section 30)
- (2) the Scottish Ministers may **by ORDER** make **further** transitional and savings **provisions**,
- (3) such order **may provide**
  - (a) that **despite non-registration**, a body may call itself a charity
  - (b) each registered body's requirements regarding **information** to be lodged with OSCR
  - (c) **disapply any provision of the Act** to any registered body by virtue of SS(1) for such period as may be specified.

**Section 100** deals with formalities regarding notices and applications.

**Section 101** provides that an individual who is a **director, manager or secretary** of a body corporate or a partner or purported partner in a partnership **or** appears to be in the **management or control** of an unincorporated association **is guilty of an offence** if that body, partnership or unincorporated association has committed an offence under the Act with the consent, connivance or neglect of that individual, and penalties imposed upon bodies corporate Scottish partnerships and unincorporated associations can be recovered by civil diligence in accordance with Section 221 of the Criminal Procedure (Scotland) Act 1995.

**Section 102** The Scottish Ministers may by **order** make **such incidental**, supplemental, consequential, transitional, transitory or saving provisions **as they consider necessary or expedient** for the purposes or in consequence of this Act.,

**Section 103** provides that orders, regulations and rules made by the Scottish Ministers may be made by statutory instrument subject to annulment by the Scottish Parliament and that **Regulations** under Section 19 regarding the protection of assets for charities removed from the register,

Section 64 (d) regarding Scottish Charitable Incorporated Charitable organisations, Section 83 regarding regulations about fundraising or Section 102 regarding modifying aspects of the “charity test” must instead be subject to positive resolution of the Parliaments.

**Section 104** refers to the “minor and consequential amendments and repeals” set out in Schedule 4.

**Section 105** defines what is meant when a charity is said to “control” another body.

**Section 106** dealing with general interpretation defines a new term of art in Scots law, “**charity trustees**”, as being (a) for corporate bodies other than SCIOs (i) their directors, or \*ii) where managed by their members, those members of management committee or group, (b) for trusts, the Trustees, (c) for unincorporated associations, those in accordance with whose directions the managers are accustomed to act, and (c) for SCIOs, those charged with general control in terms of S50(2)(b). It also defines “**misconduct**” to include “mismanagement”.

**Section 107** *inter alia* provides for the measure to be brought into force by Scottish Ministerial Order on an appointed day.

## **GOVERNANCE AND INDEPENDENCE**

Under the existing law the duties of trustees, though nowhere codified, are clear, and can be summarised as follows:-

### **TRUSTEES' DUTIES**

#### **USE GOOD FAITH AND UPHOLD THE TRUST**

A Trustee's primary obligation is to carry out the Trust purposes in accordance with the Trust Deed or other foundation documentation.

The utmost good faith is required of anyone aspiring to be a Trustee. A high degree of probity, honesty, and integrity are required in undertaking to ensure the fulfilment of the Trust.

Once the purposes of a public Trust have been declared, the donor is not entitled to intervene or change them.

#### **JOINT RESPONSIBILITY**

Trusteeship imposes a duty on each Trustee to ensure that the actions of his fellows comply with the Trust Deed and with the law.

Even although day-to-day management may be, and sometimes practically must be, delegated, overall supervision lies with the Trustees as a whole. Trustees are not entitled through good nature or embarrassment or indolence or ignorance to allow co-Trustees free rein to do as they see fit.

Allowing a co-Trustee to commit a breach of trust, whether expressed or implied, will involve both Trustees in the consequences of breach of trust.

#### **CHARITY TRUSTEES AND QUASI TRUSTEES**

The responsibility for charities extends beyond those who are formally Trustees - by statute all who are "concerned in the management or control" of bodies recognised as charities in Scotland, whether Trustees or not, are bound to administer the charity honestly and ensure the sound management and proper application of its assets.

#### **OWN OPINIONS**

Trustees are entitled to have their own opinions but must distance themselves from these and not allow them to undermine the Trust. They cannot allow themselves to be influenced by matters extraneous to the terms and purposes of the Trust and must uphold Trust strategy.

#### **ADVICE**

It is the duty of Trustees to take advice but make their own decisions in the light of the advice

#### **AVOID CONFLICTS OF INTEREST**

Trustees must separate their own interests and personality from the interest and personality of the Trust.

If a Trustee finds he cannot do that, he should abstain from participating in relevant decisions and if it goes further than single issues should resign as a Trustee.

This duty to avoid conflicts has now become a matter of statute in terms of Section 66 of the Act, which makes it clear that, for charitable trustees at least, they must always put the charity first.

### STANDARD OF CARE

The general standard of management is the same standard of care that a prudent man of business would take in his own affairs. This involves having a reasoned and reasonable basis for decisions taken.

However, for charitable trustees, the test imposed by Section 66 is the care and diligence reasonably expected of someone managing another person's affairs.

### AVOID BREACH OF TRUST

Trustees must not allow a conflict of interest to develop between themselves and the Trust - to do so is a breach of trust and for charitable trustees it is a breach of the Act.

Breach of trust can involve dishonesty but can also consist in failure to observe the law or failure to seek proper advice.

It includes any form of bad management or neglect or any act that goes against the purposes of the Trust. Allowing a co-Trustee to commit a breach of trust is itself a breach of trust.

It is no defence that the other Trustees concurred nor that they acted in good faith.

Similarly, it is no defence that Trustees in breach have exercised the same prudence that they do in their own affairs; a Trustees' actions must be measured against the objective standards of prudence and ordinary diligence.

### LIABILITY FOR ACTIONS

The general rule is that Trustees incur personal liability on a joint and several basis. The liability of the Trust Estate is determined by the liability of the Trustees, not their ability to pay.

Trustees can take out their own insurance to cover liability for their actions but this can only be met from Trust funds where there is authority in a Deed of Trust or a scheme approved by the court. However, if insurance cover is justified by the nature of the Trustees' activities the expenditure on premiums may be justified.