

Charity Briefings

Duties of Charity Trustees

The Charities and Trustee Investment Scotland Act 2005 has been passed by the Scottish Parliament and it comes into force on 24th April.

This represents the most significant shake-up of the regulation of charities for many years and for the first time there will be a Scottish equivalent to the Charity Commissioners for England and Wales taking over responsibility for the regulation of charities in Scotland.

Charity Trustees will now be far more accountable for their actions and failure to comply with the terms of the Act could result in the person concerned being suspended from acting as a charity trustee (31(4)) and ultimately in a fine of up to £5,000 or imprisonment for up to 6 months. (32(5))

Who are the Charity Trustees?

The 2005 Act states that Charity Trustees mean the persons having general control and management of the administration of a charity (106). This definition brings Scotland into line with England and Wales.

Exactly who is in general control and management of a particular charity will depend upon its constitution and it is important to identify exactly who the Charity Trustees of a particular charity are. Frequent charities may be run by small committees but if the constitution states that a particular group are responsible for its management and control and they are the Charity Trustees and they will be responsible for ensuring compliance with the Act.

Trustees must act in the interests of the charity (66(1))

This is based on the law that a company Director's duty is to act in what he honestly believes to be the company's best interests. However it is significant that the Act requires that a charity Trustees must act in the interests of the charity.

Charity Trustees must seek in good faith to ensure that the charity acts in a manner which is consistent with its purposes. (66(1)(a))

It is important to note that the charity's purposes must consist only of one or more of the charitable purposes laid out in the Act (7(1)(a)) and the charity must provide public benefit in Scotland or elsewhere (7(1)(b)).

For further guidance on this see our Charity briefing on Meeting the Charity Test

Act with the care and diligence that is reasonable to expect of a person who is managing the affairs of another person. (66(1)(b))

This is based upon the existing duties of Trustees although again there is a subtle difference between the current law for Trustees and the new law under terms of the Act. Currently the 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.

In circumstances capable of giving rise to a conflict of interest between the charity and the person responsible for the appointment of the charity Trustees the Charity Trustee must put the interests of the charity before those of any other person.

The law in relation to conflicts of interest is now very clearly stated and where there is a conflict of interest between the charity and any person responsible for the appointment of the Charity Trustee (for example an ex-officio Charity Trustee). That Trustee must put the interests of the charity first. If there is some other duty which prevents the Charity Trustee for doing so he must disclose the conflicting interest of the charity and refrain from participating in any deliberation or decision of the other Charity Trustees with respect to the matter in question.

A Charity Trustees must ensure that the charity complies with any direction requirement notice or duty imposed on it by virtue of the act. (66(2))

Simply doing your best or instructing someone else to carry out the task and rely on them to do it is not good enough.

Further, all Charity Trustees must take steps to ensure that any breach of a duty of a Trustee is corrected by the Trustee concerned and not repeated and that any Trustee who has been in serious or persistent breach is removed as a Trustee.

Failure to meet these standards will be treated as misconduct in the administration of a charity allowing OSCR to take regulatory action against the charity. OSCR are entitled to distinguish between persons who had acted honestly and reasonably in relation to the misconduct from those who had acted dishonestly and an honest mistake may now not result in suspension from acting as a Charity Trustee.

The Act introduces a number of changes which charities may wish to make which require the consent of OSCR before these can be made.

The main changes include change of name, amending the charity institution in so far as it relates to the charity purposes; amalgamating with another body; winding itself up or dissolving itself or applying to the Court in relation to any of the foregoing actions. 42 days notice must be given to OSCR.

For further guidance on this see our Charity briefing on Consents and Notifications

Charity Trustees must also ensure that the charity keeps proper accounting records and prepares for each financial year of the charity a statement of account including a report of its activities for the financial year. A copy of the statement of account must be sent to OSCR.

If a charity fails to account OSCR can appoint a suitably qualified person to prepare the account and the Charity Trustees will be personally liable both for the costs incurred by OSCR in relation to the appointment and also the expenses of the appointed person.

For further information on accounting regulations from OSCR please follow:-

<http://oscr2005phase2.cctechnology.com/Draft/Transitionalaccounting.stm>

Conclusion

The aim of this document is to give an outline of the new duties of Charity Trustees in terms of the Charities & Trustees Investment Scotland Act 2005. This Act also makes a number of other changes to the way that Trustees should operate and the intention of this document is only to give a flavour of the new regime. OSCR also produce an excellent guidance for Charity Trustees which can be found at

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<http://oscr2005phase2.cctechnology.com/Draft/Guidance.stm> For further information and advice please contact Tom Murray, Gillespie Macandrew LLP, 5 Atholl Crescent, Edinburgh, EH3 8EJ, telephone: 0131 225 1677, fax 0131 225 4519, email: thomas.murray@gillespiemacandrew.co.uk.