



Guidance for Charity Trustees

'acting with care and diligence'

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Section 1 Introduction

1.1 The guidance

The Charities and Trustee Investment (Scotland) Act 2005 (referred to as “the Act”) establishes a new, comprehensive and coherent regulatory framework for charities in Scotland.

The Act establishes the Office of the Scottish Charity Regulator (known as “OSCR”) as the statutory regulator of the charity sector, with enhanced powers and responsibilities, including the responsibility for facilitating and encouraging compliance with the new legislation. This guidance is one in a series of publications which are intended to assist charity trustees and others to navigate their way through the principles and the specific requirements of the new legislation.

The focus in this guidance is on the duties and responsibilities of charity trustees in Scotland. It also offers examples of good practice in the governance of charities which should help charity trustees fulfil their duties and responsibilities.

1.2 Who is this guidance for?

This guidance is for trustees of all Scottish charities, i.e. organisations entered in the Scottish Charity Register maintained by OSCR.

Depending on the individual charity and its legal form, the charity trustees may be called board members, directors, management committee members, trustees or whatever is relevant to the charity. Whatever the terminology used by the charity, for the purposes of the legislation, the group of people who manage and control the charity are known as “charity trustees”. The term “charity trustee” will be used throughout this guidance.

The guidance is written principally with the charity trustees of small to medium-sized charities in mind (i.e. charities with an income below £500,000) because they make up the great majority of charities in Scotland.¹ However, the guidance should also prove useful to charity trustees of larger charities.

1.3 How to use the guidance

The key reason for providing this guidance is to assist charity trustees to understand what is expected of them, as individuals and collectively, under the Act. The guidance is intended to be used in a number of ways:

- as a document for a charity’s trustees to read, so as to ensure they know about their duties and understand their legal responsibilities. This would be especially important when an organisation applies to join the Scottish Charity Register
- as part of the information prepared for new or potential charity trustees, for example as part of an induction pack
- as the basis for handouts and other resource material for use in training courses on governance in charities

This guidance can both be used as a reference to help with particular questions and concerns, or it can be read all the way through.

¹ ‘Scottish Charities 2005’ OSCR 2006

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The guidance covers eight topics, presented in separate sections:

- who are charity trustees? This includes who may qualify and who are disqualified
- the general duties of charity trustees as required by the new charity legislation
- the specific duties of charity trustees as required by the new charity legislation
- charity trustee remuneration (i.e. payments or benefits in kind given to charity trustees other than for out-of-pocket expenses)
- the investment powers of trustees of trusts, including charitable trusts
- the consequences of misconduct or "breach of duty" or if the requirements of OSCR are persistently not met
- a checklist of duties and responsibilities linked to practical examples of good practice
- suggestions as to where to obtain more information and assistance

This guidance focuses on what charity trustees must do to comply with the law. However, at various points examples of good practice are highlighted to help charity trustees identify how they can fulfil their duties and responsibilities.

Section 2 The charity trustees

2.1 Who are charity trustees?

There are many different types of organisation which can be charitable, for example a company, a trust or a voluntary association. The people who make up the governing body which controls these organisations can be called by different names, e.g. directors, trustees, management committee members or even quite simply committee members.

Whatever their title, if their organisation is a charity and they have “general control and management” of it, no matter how they have been appointed or elected, these people are defined by the Act as being a “charity trustee”. Therefore the duties, responsibilities and liabilities of “charity trustees” within the meaning of the Act apply to them.

The rules relating to legal capacity or the authority to act on behalf of an organisation as a charity trustee are complicated. If a charity is proposing to appoint or elect a charity trustee under the age of 16, or about whom there is doubt regarding their capacity to act, the charity should seek legal advice on the particular circumstances. This area is governed by legislation other than the 2005 Act.

2.2 The “shadow trustee”

The Act states that charity trustees are the people who have “the general control and management” of a charity. However, there can be situations in which one or more people who are not formally appointed as charity trustees can exercise influence and even control over a charity. Such people may be considered as “shadow trustees”. An example might be where an elected member or employee of a local authority attends meetings of the charity trustees. In determining whether they may be a “shadow trustee”, charity trustees will need to consider the degree of participation and influence these people have at meetings. The Act makes the following two points clear:

- first, charity trustees may not, under any circumstances, give up their duties
- secondly, any person who, though not formally elected or appointed as a charity trustee, exercises some degree of control over a charity, may nevertheless be held legally liable as a charity trustee

2.3 Disqualification

The constitution or governing document of a charity should specify who is eligible to be elected or appointed to the governing body. However, under section 69 of the Act the following are disqualified from acting as charity trustees:

- someone with an unspent conviction for dishonesty or an offence under the Act
- an undischarged bankrupt
- someone who has been removed under either Scottish or English Law or the courts from being a charity trustee
- a person disqualified from being a company director

It is the responsibility of individual charity trustees to ensure they personally are not disqualified from being a charity trustee.

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It is also in the interests of the charity for the charity trustees collectively to ensure that no charity trustees are disqualified from being a charity trustee.

Anyone who acts as a charity trustee whilst disqualified is guilty of an offence punishable by a fine or imprisonment, or both. The disqualified person may apply to OSCR for a waiver to lift the disqualification generally, or in relation to a specific charity or type of charity. However, a waiver lifting a disqualification will not be given lightly by OSCR.

Examples of good practice

- Prospective charity trustees sign a form before their election or appointment to confirm they are not disqualified from acting as a charity trustee.
- Consider whether any other checks need to be carried out. This may be particularly relevant for charity trustees working with vulnerable beneficiaries where there are likely to be requirements under other legislation.

Section 3 What is expected of charity trustees – general duties

3.1 The duties of charity trustees

As noted above, charity trustees are defined as those responsible for “the general control and management of the administration of a charity” and they carry out these functions within the context of the charity’s legal framework.

This does not mean that charity trustees necessarily undertake day-to-day operations; some charities may have staff who do this. However, charity trustees, irrespective of the employment of staff, are and remain responsible for the governance and strategy of the charity.

It is the principal duty of charity trustees to maintain general overall control of the charity. They need to ensure that the charity is administered effectively, and is able to account for its activities and outcomes both to OSCR and to the public.

The Act defines:

- four general duties which are fundamental to charity trustees carrying out their role. These are described in more detail in sections 3.2 to 3.6 below
- a number of more specific duties with which charity trustees must comply. These are described in more detail in section 4

3.2 The general duties of charity trustees

Section 66 (see Annex 1) of the Act describes four general duties of charity trustees which are fundamental to their role as a charity trustee. Charity trustees are required to comply with these while carrying out their functions as a charity trustee.

A charity trustee must:

- act in the interests of the charity
- seek, in good faith, to ensure that the charity operates in a manner that is consistent with its objects or purposes
- act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person
- ensure that the charity complies with the provisions of this Act, and other relevant legislation

The rest of this section explains in more detail what are the implications of these principles for charity trustees, both as individuals and as a group.

3.3 Acting in the interests of the charity

Charity trustees are expected to put the interests of the charity before their own interests or those of any other person or organisation.

Three possible scenarios which may give rise to conflicts of interest are described here along with how they should be resolved. They should not be seen as the only areas where conflicts of interest can arise, but are provided as examples of the most common.

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First, individual charity trustees should avoid circumstances in which there is a conflict between their personal interests and those of the charity. Where there is such a conflict, they must put the charity's interests first. An example might be where the charity trustee has a connection with a company that may be awarded a contract by the charity. It would be good practice for the charity trustee to make the conflict of interest known to the other charity trustees, and not take part in any discussion or decision-making on this matter.

Secondly, where a charity trustee is faced with a conflict of interest between the interests of the charity and those of a person or organisation responsible for their appointment as a charity trustee, the interests of the charity must come first. The charity trustee must act in the interests of the charity to which they have been appointed, not in the interest of the person or organisation which appointed them, for example a local authority or another charity.

If in relation to a particular issue the conflict of interest is irreconcilable, then the charity trustee in question must make this known to the other charity trustees, and not take part in any discussion or decision-making on the issue. An example might be when a charity trustee has been appointed by an organisation which pays rent to the charity. It may be in the charity's best interest to raise the rent. However, the appointing organisation has an interest in the rent being set as low as possible.

Thirdly, there may be the possibility of a conflict of interest between the concerns of two different organisations to which a charity trustee is affiliated. The trustee should declare the conflict of interest to the other charity trustees, and refrain from participating in any discussion or decision-making process about the subject in question. An example might be where a charity trustee is a member of two different organisations which are applying to the same trust for a grant. The conflict of interest should be disclosed (while respecting the confidentiality of both organisations) and the charity trustee should not take part in any discussion or decision-making.

It is not only the responsibility of individual charity trustees to act only in the interests of the charity and avoid conflicts of interest, but also the duty of their fellow charity trustees to take reasonable steps to ensure that they do so.

Collectively the charity trustees must also take all reasonable steps to make sure that a trustee who has acted improperly in relation to a conflict of interest corrects the situation and does not repeat the offence. The Act makes clear that if a charity trustee is in serious or persistent breach of these requirements, then it is the responsibility of all the other charity trustees to initiate procedures for removing them from their position as trustee.

Examples of good practice

- Charity trustees declare any conflict of interest and do not take part in any discussion or decision on the matter
- Maintain an up-to-date register of each charity trustee's interests
- Agree a code of conduct for managing conflicts of interest
- Review the constitution to ensure the power to remove charity trustees who are in serious or persistent breach of the Act is available

3.4 Operating in a manner consistent with the charity's purposes

Charity trustees should carry out their duties in accordance with the specific terms of their charity's constitution or governing document. The constitution or governing document will set out the aims of the charity and the powers it has to act, and will include provisions for how the charity is to be run. Charity trustees must ensure that:

- all the activities of the charity fall within the objects, aims or purposes as stated in the constitution or governing document of the charity
- the charity adheres to the terms of its constitution or governing document
- the charity's assets are only used for the charitable purposes set out in the constitution or governing document

Examples of good practice

- All charity trustees have a copy of and are familiar with the charity's constitution or governing document
- An induction pack is given to all new charity trustees which includes the constitution or governing document, up-to-date information about the activities of the charity and any statement of the values of the charity
- Board and staff refer to the charity's purposes when developing and agreeing strategic plans

3.5 Acting with care and diligence

The Act makes clear that charity trustees must take such care of the charity's affairs as is reasonable to expect of someone who is managing the affairs of another person. This means that a charity trustee would be expected to take even more care than they would if acting on their own behalf.

Acting with care and diligence would mean that charity trustees:

- ensure the charity is run properly, responsibly and lawfully
- ensure the charity is solvent
- act as guardians of the charity's assets
- ensure the board is "fit for purpose" and the charity trustees are working together
- apply a duty of care to paid staff and volunteers

It is OSCR's view that acting with care and diligence would also mean that charity trustees must exercise reasonable business sense in concluding any contracts on behalf of the charity. These contracts would include funding agreements with central or local government as well as grant-providers. Taking a reasonable business approach would include having a considered view on whether the costs of a particular project are fully covered and what would be the possible consequences of going ahead if they are not. It would be reasonable for charity trustees to take appropriate professional advice, e.g. from solicitors or accountants.

Charity trustees should also be prepared to consider what action to take in order to protect the charity's assets. These assets would include, for example, the charity's name and any intellectual property such as a recognisable logo.

The Act does not impose a higher standard on “professionals” who are charity trustees, e.g. solicitors or accountants. These charity trustees are expected to demonstrate the same standard as it is reasonable to expect of other charity trustees. However, “professional” trustees may be covered by other legislation which may impose a higher standard, for example, on the professional directors of charitable companies.

Examples of good practice

- Agree and regularly review the strategy and policies of the charity
- Agree financial delegation, agree budgets, and monitor financial performance
- Agree framework for support and management of paid staff and volunteers
- Ensure procedures are in place to keep up-to-date with legal responsibilities, e.g. employment legislation
- Agree expectations of charity trustee attendance at meetings and what to do if these are not met
- Annually review the progress and effectiveness of the charity and agree priorities for improving performance
- Issue charity trustees' induction pack identifying role, responsibilities and liabilities, and the remit of any sub-committees
- Agree and implement programme for charity trustee training, board building and renewal
- Agree and apply process for managing serious differences between charity trustees, and between charity trustees and staff
- Take professional legal or financial advice if required

3.6 Compliance with the Act and other legislation

Charity trustees must ensure that the charity complies with the provisions of the Act and with the requirements imposed by other relevant legislation or regulators, for example:

- health and safety law and regulations
- company law in the case of charitable companies
- data protection law
- employment law if employing staff

The Act specifically requires charity trustees to make certain that the charity complies with any direction, requirement, notice or duty imposed on it by the Act. Not to do so (for example by not sending in annual accounts or OSCR's Annual Return) is technically a breach of charity trustee duty. See section 4 for more information on the specific duties under the Act.

OSCR will encourage and facilitate compliance by issuing general guidance (such as this guidance), by consulting widely on proposals for change and by offering advice where it detects errors and failures. It will generally use its powers of intervention only where this is a reasonable response to instances of breach and misconduct. For further information see section 7.

3.7 Collective or corporate responsibility

Charity trustees as a body are collectively or corporately responsible for all the activities of the charity. This means that all charity trustees are equally accountable for their organisation. They have a collective general duty of care for the charity, and they must all observe the requirements of the Act. Charity trustees are expected to act together as a board or committee to realise the values and purposes of the charity and to comply with legislative and regulatory requirements.

Generally, charity trustees cannot delegate their responsibilities to others, although they can delegate some of their functions. So, for instance, sub-committees, operational volunteers or paid staff may well perform tasks and activities associated with these responsibilities. However, ultimate accountability remains with the charity trustees. For example, OSCR requires that a charity trustee must sign the Annual Return - not a member of staff. It is also the charity trustees who are responsible for approving the accounts.

If a charity trustee fails in his or her duty, it is the obligation of the other charity trustees to take reasonable steps to ensure that the misconduct is rectified and not repeated. They also need to ensure that anyone guilty of serious or persistent misconduct or breaches of their duties no longer remains a charity trustee.

Examples of good practice

- Charity trustee misconduct procedures formulated and applied
- Review constitution or governing document to ensure the power to remove charity trustees is available where there is serious or persistent breach of the Act
- Agree expectations of charity trustee attendance at meetings and what to do if these are not met

Section 4 What is expected of charity trustees – specific duties

In addition to the general duties of charity trustees outlined in section 3, the Act also puts additional specific duties on charities which charity trustees must ensure are met. These additional duties relate to the following:

- charity details on the Scottish Charity Register
- reporting to OSCR
- financial record keeping and reporting
- fundraising
- providing information to the public

4.1 Charity details on the Scottish Charity Register

The Act requires OSCR to maintain a Register of Scottish Charities. The Register must contain:

- the name of the charity
- the principal office or the name and address of one of the charity trustees (unless OSCR is satisfied it is necessary to protect an individual or the charity's premises)
- the charity's purposes
- certain other information (including whether it is a designated religious charity or national collector)

The Register will be available for public inspection at realistic times at OSCR's principal office. OSCR will also use its website to make the Register widely and freely available. OSCR may also provide information from the Register in Braille, large print, or other mediums as requested. OSCR may charge a fee for this service which will not exceed the cost of supply.

4.2 Reporting to OSCR

The Act requires charities on the Register to supply certain information to OSCR. Compliance with this requirement is a statutory duty, and it is central to the new regulatory regime. An accurate Register is the key to transparency, and underpins public understanding and confidence in Scottish charities.

Basic information

When applying to register as a Scottish Charity, applicants must supply basic information for the Register. As individuals, charity trustees must sign a declaration that they understand their duties. Thereafter, charity trustees are responsible for ensuring that the details on the Register remain accurate and charities must notify OSCR of any change to the information set out in the Charity's entry in the Register.

Annual and Monitoring Returns

Every year, charities will be issued with an *Annual Return*, which will already have in it the Register entry information. In addition, charities with a gross income of £25,000 or above will receive a supplementary *Monitoring Return*. This will seek additional information for example about their:

- annual accounts
- fundraising activities

- remuneration agreements with trustees
- dealings with connected trading companies

Every charity must file the signed Annual Return, supplementary Monitoring Return (if appropriate) and annual accounts with OSCR within 9 months of the charity's financial year end (10 months for accounting periods starting before 1 April 2006).

Changes to the structure or constitution of a charity

A charity can only make changes to its constitution or governing document if the constitution or governing document gives it the power to do so and, in making the changes, the terms of the constitution or governing document are followed. This flows from the general principle that charities have to follow the specific terms of their constitution.

In addition, some changes that a charity may wish to make to its constitution may only be made with the consent of OSCR. This is because these changes could affect a charity's status on the Register. The changes that require the consent of OSCR are:

- changing the name of the charity
- amending the charitable purposes of the charity
- amalgamation with another body
- winding up or dissolving the charity
- applying to the court in relation to amending its purpose, amalgamating or winding up

OSCR can withhold consent to a change of name only if the new name may raise objections (for example the new name is the same or similar to that of another charity).

If a charity wishes to amend its purposes, it must give OSCR 42 days' notice, and not carry out the change without OSCR's consent.

Other changes to the constitution, for example how board members are elected or appointed, do not require OSCR's prior consent. However, OSCR has to be notified of the changes within three months of them being made.

i Further information can be found in OSCR guidance – Consents and Notifications – available from the OSCR website: www.oscr.org.uk

What does OSCR expect to receive?

- ✓ Annual Return (all charities)
- ✓ Monitoring Return (charities whose income is £25,000 or above)
- ✓ Individual forms where a charity wishes to:
 - change its name
 - change its constitution
 - wind up or dissolve
 - amalgamate
 - make changes to the information on the Register

4.3 Financial records and reporting

Charities must keep accounting records of sufficient detail that are able to:

- show, day by day, the money received and spent by the charity
- record the assets and liabilities of the charity
- disclose the financial position of the charity at any time

At the end of each financial year charities must:

- prepare a statement of account, including a report of activities, which must be independently examined or audited
- after the independent examination or audit has been completed, send a signed copy of the statement of account to OSCR at the same time as the Annual Return and, if appropriate, the Monitoring Return

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

The preparation and audit or independent examination of the annual statement of account must be carried out in accordance with the relevant Charities Accounts (Scotland) Regulations and any additional legislative requirements for organisations formed under other statutes (e.g. charitable companies formed under company law). Guidance on the Charities Accounts (Scotland) Regulations 1992 and the Charities Accounts (Scotland) Regulations 2006 is available from the OSCR website.

Charity trustees should be aware that section 46 of the Act provides a new duty for those carrying out an independent examination or audit of a charity's statement of account to report in writing immediately to OSCR any matter that may have material significance to OSCR's work. Areas of particular interest to OSCR include:

- dishonesty or misuse of funds
- serious breach of a legislative requirement
- operating beyond powers contained in the constitution or governing document

What does OSCR expect to receive?

- ✓ Statement of account
- ✓ Annual Return
- ✓ Monitoring Return, if appropriate



For further information:

The Charities Accounts Regulations – Guidance available from OSCR website: www.oscr.org.uk

4.4 Fundraising

The Act provides charities, and therefore charity trustees, with greater control over those who fundraise for them. This part of the Act covers not just charities but all benevolent organisations (i.e. organisations with charitable or philanthropic purposes whether or not they are actually charities).

Sections 81 of the Act requires a formal agreement between the charity or other benevolent body and any professional fundraiser or commercial organisation that is involved in raising funds for them.

The agreement must state the level of remuneration and expenses to be paid to the fundraiser, and satisfy a number of requirements that will be set out in the forthcoming Fundraising Regulations. If these requirements are not met, the agreement is only enforceable against the charity or other benevolent body by an order of the sheriff.

Section 82 of the Act also allows the charity or other benevolent organisations, under certain circumstances, to obtain an interdict banning fundraising on their behalf. Examples where an organisation may take this action could include:

- if the organisation objects to the methods of fundraising
- if the person involved is not a fit and proper person to fundraise
- if the organisation does not want to be associated with the venture

The Act also allows Scottish Ministers to make Regulations controlling both the collection of money from the public and those carrying out such collections. At the time of publication the Regulations are still under consideration.

The Act also has provisions covering:

- public benevolent collections
- designated national collectors
- breach of regulations and agreements

These provisions are explained below. However, they have not yet come into force. Meanwhile the regulations governing public charitable collections are contained in section 119 of the Civic Government (Scotland) Act 1982, and the Public Charitable Collections (Scotland) Regulations 1984 and the Amendment Regulations 1988.

Public benevolent collections

A public benevolent collection is a collection from the public of money, or promises of money, for the benefit of organisations with charitable, benevolent or philanthropic purposes. Organisers of such collections are required to apply to the relevant local authority for permission to collect unless any of the following conditions apply;

- the collection is by a designated national collector (see below)
- the collection takes place at a public meeting
- the collection takes place on land occupied by the organiser
- the collection is by an unattended receptacle in a public place

Unauthorised collection under any other conditions is an offence.

Local authorities are required to make enquiries before they either give or refuse permission to collect. This requirement may be waived for certain types of applications. They are also able, under certain circumstances, to withdraw permission previously granted. Local authorities must have regard to the guidance issued by OSCR in exercising these functions. The organiser of a public benevolent collection may appeal to the sheriff against the decision of the local authority.

Designated National Collectors

OSCR may designate charities that meet certain criteria as *Designated National Collectors*. Before setting the criteria OSCR must consult representatives of local authorities, representatives of charities, and any other persons that it thinks fit.

Collections by Designated National Collectors must be notified to the appropriate local authority, which may prohibit the collection if it is considered likely to cause undue local inconvenience. A Designated National Collector may appeal to the sheriff against the decision of the local authority.

The Designated National Collector must also report annually to OSCR.

Breach of regulations and agreements

A person or organisation that contravenes any of the Regulations will be guilty of misconduct. They may also be guilty of a criminal offence and liable on conviction to a fine. It is unlawful for an organisation or promoter to fundraise if the Court has prohibited them from doing so, or if the charity or other benevolent body with which they had an agreement has withdrawn from that agreement.

Charity trustees have a duty to consider what action to take in the interests of the charity if they become aware of unauthorised fundraising carried out in their name or on their behalf.

Examples of good practice

- Adopt the codes of fundraising practice developed by the Institute of Fundraising
- Join the self regulation scheme developed by the Fundraising Standards Board

What does OSCR expect to receive?

- ✓ An annual report where a charity is a designated national collector



For further information:

OSCR website: www.oscr.org.uk

Institute of Fundraising

4.5 Providing information to the public

Charity details on stationery, etc.

The way in which charities refer to themselves, for example on their stationery, is important to members of the public understanding which organisations are legitimate charities.

Scottish Ministers will make Regulations directing charities on how they should refer to themselves in their main documents (and their literature, brochures, website, etc.) to show clearly that they are a charity and are registered. It is likely that the Regulations will cover documents such as cheques, credit cards, annual reports, headed notepaper, raffle tickets, and advertising material. OSCR may require examples of these documents from charities.

At the time of publication the Regulations regarding how charities should refer to themselves are still under consideration. However, once the Regulations come into force there is likely to be a short period to allow charities time to use up existing stationery and make any other changes required.

Public access to charity accounts and constitution or governing document

The Act allows for members of the public to have access to particular information about charities on the Register.

Charities must, if the request is reasonable, provide a copy of their constitution or governing document, or latest statement of account to anyone who asks for them. The person asking for these documents may also specify the format in which they are to be delivered, again provided that the request is reasonable.

The charity is able to charge a fee for making these documents available, as long as the fee does not exceed the cost of supplying the copies (or any fee Scottish Ministers may decide upon). The cost of supply does not include the cost of preparing accounts, as there is a statutory requirement for the charity to maintain records, prepare accounts and supply these to OSCR and the public. See 4.3 above.

For the present OSCR does not propose to publish charity accounts online, but may do so in the future.

What information should charities provide to the Public?

- ✓ Charity details specified on stationery, cheques, invoices, etc. (the relevant Regulations have yet to be confirmed)
- ✓ Charity details on the OSCR Register
- ✓ Copies of accounts and constitutions or governing documents on request

Section 5 Charity trustee remuneration

Because charity trustees must act in the interests of the charity, *any personal benefit to a charity trustee*, whether direct or indirect, has to be treated with some caution. Sections 67-68 of the Act deal with one particular aspect of this – the remuneration of charity trustees.

Section 67 specifies that a charity trustee **must not** be remunerated from charity assets **unless** certain conditions set out in the Act are met.

5.1 What is remuneration?

Remuneration in this context would include payment or benefit in kind:

- for being a charity trustee
- under a contract of employment
- for other services to or on behalf of the charity

This may include payment made either to a charity trustee personally or to a person with whom the charity trustee is connected. Section 68(2) defines the persons who are “connected” with the charity trustee. These include:

- immediate family and domestic partners
- a company in which the charity trustee or persons connected with them may have a substantial interest, or
- a Scottish partnership in which the charity trustee or a person with whom the trustee is connected is a partner

Out-of-pocket expenses paid to charity trustees, for instance travel expenses to attend meetings, would not be considered remuneration.

5.2 Conditions for remuneration

The specific conditions under the Act that would allow charity trustees to receive remuneration are:

- the maximum amount of the payment is set out in a written agreement
- the maximum amount is reasonable in the circumstances
- it is in the interests of the charity for the services to be provided by the charity trustee for that amount (this must be agreed before the agreement is entered into)
- after the agreement is entered into, only a minority of the charity trustees receive remuneration
- the charity’s constitution or governing document does not expressly rule it out

What is “reasonable remuneration” has to be considered with a view to all the circumstances, but there are often professional associations that will provide guidance for charity trustees. Consulting such an association would be one way in which the trustees could satisfy themselves that an amount of remuneration was reasonable. Another way would be to obtain at least two separate quotes for the service to be given by the charity trustee.

Charities that had trustees receiving remuneration when the Act came into force in April 2006 and are not exempt from the conditions regarding remuneration (see 5.3 below), must review these arrangements. They will have to consider if it is in the charity’s interest for them to receive that benefit and whether the amount is reasonable. A clear minute should be made of the decision reached.

If it is agreed that the payments are in the interests of the charity and the amount is reasonable then, as long as the majority of trustees remain unpaid, a written agreement will need to be drawn up setting out the maximum amount to be paid.

5.3 Exemptions from the conditions for remuneration

The Act states that the above conditions regarding charity trustee remuneration do not apply if:

- there is a specific provision in the constitution or governing document authorising remuneration to trustees that was in force on 15 November 2004 (the day the Charities and Trustee Investment (Scotland) Bill was introduced into the Scottish Parliament)
- there is legislation or an order is made by the Court of Session that allows charity trustees to receive remuneration

However, it must be remembered that charity trustees are still bound by their general duty to act in the interests of the charity. If the remuneration appears to be excessive, or the majority of the charity's trustees appear to benefit, there may be a breach of duty. This would constitute misconduct.

The date of 15 November 2004 is only relevant if the constitution or governing document specifically permits the payment of remuneration. If the constitution is silent, or only has a general empowerment provision, then the conditions set out in section 5.2 for the remuneration of charity trustees apply.

5.4 Examples of remuneration

The examples given below, of where charity trustees may or may not receive remuneration should not be seen as definitive. They are given for illustrative purposes only.

Where all the conditions for remuneration are fulfilled (see 5.2) or charities are exempt from these conditions (see 5.3) then some examples where charity trustees may receive remuneration are:

- when a local tradesman is a charity trustee and provides services to the charity
- when employees of the charity are members of a board either because of their position, e.g. chief executive, or because they are elected, e.g. as staff representative
- when a local solicitor or accountant is a charity trustee, and the solicitor's or accountant's firm provides services to the charity at an agreed price.

Some examples where charity trustees should not receive remuneration include:

- when all, or the majority of, the employees of the charity are closely related to the charity trustees (i.e. they are "connected persons" under section 68 (2))
- when a company or firm owned or controlled by a charity trustee or their relatives charges the charity excessive amounts for services

Examples of good practice

- Adopt a charity trustee remuneration policy and procedures which ensure any remuneration complies with the conditions set out in the Act
- Establish a register of trustees' interests
- Consult professional bodies before agreeing remuneration
- Obtain at least two separate quotes for services
- Clearly minute the decision that remuneration of a particular charity trustee is in the charity's interest

5.5 Trustee indemnity insurance

Some charities may wish to take out *trustee indemnity insurance*, which provides cover for legal expenses and awards made against individual trustees. It is not normally possible to insure against recklessness on the part of trustees, but up to now it has been possible to insure against technical misconduct.

However, trustee indemnity insurance falls within the definition of "remuneration" in section 68 of the Act because it provides a personal benefit to the charity trustees. It will therefore be subject to the same conditions and restrictions as any other type of remuneration. Because most policies benefit all charity trustees, trustee indemnity insurance will fall foul of the condition that only a minority of charity trustees can benefit from remuneration. Therefore, charity trustees will be in breach of the Act if they authorise trustee indemnity insurance covering all the charity trustees.

Operating under different legislation, the Charity Commission (which regulates charities in England and Wales) also considers trustee indemnity insurance to be a personal benefit to the charity trustees. However, unlike OSCR, the Charity Commission has the statutory power to consent to the taking out of trustee indemnity insurance.

OSCR has raised this with the Scottish Executive as an unexpected and unintended consequence of the legislation and at the time of writing this guidance the Scottish Executive is considering whether to introduce amending legislation to resolve this issue. For up-to-date details see the OSCR website.

Section 6 Investment powers of trustees

Powers of investment of trustees and associated duties

Sections 93 to 95 of the Act implement longstanding recommendations of the Scottish Law Commission and provide an extension to the investment powers of trustees of all trusts, whether they are charities or not. By virtue of this provision, trustees are entitled to make any kind of investment of the trust estate including a wider power to acquire stocks and shares. The effect is that trustees will generally have the same powers of investment as if they were the beneficial owners of the trust estate. Trustees also have the power to acquire heritable property (i.e. land or buildings) for any other reason.

All these wider powers introduced by the Act are subject to the same restrictions and exclusions as are imposed by previous Acts and do not extend to certain categories of trustees.

Furthermore, the Act stipulates a number of conditions and duties that must be followed by the trustees in the exercise of their extended powers of investment. These duties are that before making an investment trustees should:

- consider, as is appropriate for the trust, the need for diversification of the trust's investments. Diversification may not be appropriate in all circumstances
- consider the suitability to the trust of the proposed investments
- consider whether they need to obtain appropriate advice on the way in which their power to invest should be used, or whether their investments should be changed
- if they decide advice is required, obtain it from someone who they believe has the ability, practical experience and appropriate qualifications to provide proper advice

Power to appoint nominees and associated duties

Section 94 also provides for a new statutory default power to appoint nominees (e.g. an investment manager) for the purpose of investment. This meets modern day investment practice and will allow trustees to transfer title to property to nominees where a trust deed is silent. This provision also sets out key elements of the duty of care to which trustees must pay particular regard in exercising this power. These are, that the:

- appointment is appropriate to the trust and that the trustees believe the nominee has the skills, knowledge and expertise to act as a nominee
- power to appoint nominees is subject to any restriction or exclusion in the trust deed and any enactment
- appointment should be made in writing with the trustees determining the terms of the appointment and retaining the power to direct the nominee and revoke their appointment
- trustees may not, unless it is reasonably necessary,
 - o permit the nominee to appoint a substitute
 - o restrict the liability of the nominee, or substitute, to the trustees or any beneficiaries
 - o permit the nominee, or substitute, to act in circumstances giving rise to a conflict of interest
- trustees must keep the nomination under review and consider whether they need to exercise their powers to direct a nominee (or revoke their appointment). If it is appropriate they must actually exercise their powers

Guidance for Charity Trustees

'acting with care and diligence'

Power to delegate investment management functions

Section 94 also confirms the power of trustees to delegate investment and management of funds where a trust deed is silent. The Act indicates what will satisfy trustees' common law duty of care, namely, that trustees should:

- select agents with care
- determine the investment policy
- set guidelines
- communicate with and monitor agents

OSCR and trustee investments

There is no provision in the Act for OSCR to consent to particular investments or to an investment policy, and investments do not have to be reported to OSCR. However, the Accounting Regulations will require information to be provided in annual accounts.

***i** For further information on the scope of the investment powers and responsibilities, trustees should seek professional legal advice.*

Section 7 Breach of duty

If there is evidence of misconduct, OSCR has a statutory duty to act, and will do so according to the principles of good regulatory practice. Quite what happens will depend on the seriousness of the circumstances. OSCR will be proportionate in its approach and offer, where appropriate, compliance support to charity trustees who have difficulties with understanding or fulfilling their obligations.

Nevertheless OSCR, as the regulator, has a duty to be fair overall, as well as proportionate. It would not be fair to those charity trustees who are taking their responsibilities seriously if OSCR does not take any action where other charity trustees are in serious breach of their responsibilities.

As is proper for a regulator, OSCR will apply balanced and consequential sanctions where appropriate. In extreme cases this can include the issue of directions and suspension orders. Information about these must be published with the charity's entry in the Scottish Charity Register.

The most effective way of approaching worries about possible breaches of duties is to implement good practice (see section 8 for more details). Misconduct is very unlikely to occur if charity trustees:

- understand their duties
- put the interests of the charity first
- act reasonably
- operate within the charity's constitution
- comply with the law and directions of regulators
- seek advice when it is needed to make good decisions
- seek to ensure the charity has enough money, or other resources, to meet any liabilities that might arise as part of contracts of employment or for services or goods

If charity trustees have any problems with their duties under the Act or with complying with any further regulations they should seek support and advice as soon as possible. Sources of advice and support are listed in section 9.

Section 8 Checklist of duties and responsibilities with examples of good practice

This section provides guidance on good practice for charity trustees. It is not essential that each charity demonstrate that they have adopted all the examples and the fact that the charity has not done so will not of itself be considered a breach of the legislation. However, adopting good practice will:

- assist charity trustees in ensuring that they are compliant with their statutory duties
- provide a clear record if the charity trustees' actions are challenged
- help incoming charity trustees understand the practical implications of their statutory duties
- enhance the effectiveness of the charity

Whilst this guidance gives examples of good practice, some charities may wish to go further and implement higher standards of governance. Whether or not to aspire to higher standards of governance is for charity trustees to decide. OSCR has a role in contributing to the debate about good practice and higher standards of governance, but the detail of development lies with organisations such as the Association of Chief Officers of Scottish Voluntary Organisations (ACOSVO), the Scottish Council for Voluntary Organisations (SCVO), The Management Development Network Scotland (MDNS) and with specialist advisors such as lawyers and accountants.

Duties, responsibilities, and good practice

The following four tables summarise the responsibilities of charity trustees under the four fundamental duties, and offer examples of good practice that will help ensure they fulfil those duties and responsibilities.

The four tables can be used as a checklist of the key duties and responsibilities that charity trustees must be aware of and with which they must comply.

Act in the interests of the charity

Responsibilities	Examples of good practice
<p>Put interests of charity first</p> <p>Declare any conflict of interest and do not take part in any discussion or decision if there is an irreconcilable conflict of interest between the charity trustee and any person responsible for their appointment</p> <p>Manage conflict of interest of fellow charity trustees and take steps to remove charity trustees in serious or persistent breach of their duties</p> <p>Ensure any remuneration of charity trustees complies with the conditions set out in the Act</p> <p>Individual charity trustees must ensure they are not disqualified from being a charity trustee</p>	<p>Charity trustees declare any conflict of interest and do not take part in any discussion or decision on the matter</p> <p>Adopt a charity trustee “Code of Conduct” which includes commitment to upholding aims of the charity and guidelines on conflicts of interest</p> <p>Potential charity trustees to confirm they are not disqualified</p> <p>New charity trustees to declare any interests that may give rise to conflicts of interest</p> <p>Maintain up-to-date register of charity trustees’ interests</p> <p>Charity trustee misconduct procedures formulated and applied</p> <p>Review the constitution to ensure the power to remove charity trustees who are in serious or persistent breach of the Act is available</p> <p>Adopt a charity trustee remuneration policy and procedures which ensure any remuneration complies with the conditions set out in the Act</p>

Operate in a manner consistent with the charity’s purpose

Responsibilities	Examples of good practice
<p>Ensure that all activities of the charity fall within the charity’s purposes</p> <p>Ensure charity adheres to its constitution or governing document</p> <p>Ensure assets are not applied to non-charitable purposes</p>	<p>All charity trustees have a copy of and be familiar with the charity’s constitution or governing document</p> <p>Induction pack given to all new charity trustees which includes the constitution or governing document, up to date information about the activities of the charity and any statement of the values of the charity</p> <p>Refer to the charity’s purposes when developing and agreeing strategic plans</p>

Act with care and diligence

Responsibilities	Examples of good practice
<p>Ensure charity is run properly, responsibly and lawfully</p> <p>Act as guardians of the charity’s assets</p> <p>Ensure the charity is solvent</p> <p>Ensure board of trustees are “fit for purpose” and the charity trustees are working together</p> <p>Apply a duty of care to paid staff and volunteers</p>	<p>Agree and regularly review the strategy and policies of the charity</p> <p>Agree financial delegation and budgets, and monitor financial performance</p> <p>Agree framework for support and management of paid staff and volunteers</p> <p>Ensure procedures are in place to keep up-to-date with legal responsibilities, e.g. employment legislation</p> <p>Agree expectations of charity trustee attendance at meetings and what to do if these are not met</p> <p>Annually review the progress and effectiveness of the charity and agree priorities for improving performance</p> <p>Include in charity trustee’s induction pack the role, responsibilities and liabilities, and the remit of any sub-committees</p> <p>Agree and implement programme for charity trustee training, board building and renewal</p> <p>Agree and apply process for managing serious differences between charity trustees, and between charity trustees and staff</p> <p>Consider any constitutional change that may be appropriate, e.g. permitting remuneration of trustees or changes in selection and rotation of trustees</p> <p>Delegate, by the Board, a specific area of oversight (e.g. investment, trustee training) to each trustee</p> <p>Regularly review board procedures for: receiving reports, confidentiality, managing risks, tackling issues of poor performance and overseeing compliance with regulations</p> <p>Take professional legal or financial advice if required</p>

Ensure charity complies with the provisions of the Act, and any other relevant regulation

Responsibilities	Examples of good practice
<p>Ensure details of the Charity on the Scottish Charity Register are accurate</p> <p>Submit to OSCR an Annual Return, Monitoring Return (if appropriate) along with a copy of the charity's accounts signed by a charity trustee</p> <p>Obtain consent if changing the charity's name or purposes, or if amalgamating or winding up the charity</p> <p>Notify OSCR of changes to the constitution within 3 months of them being made</p> <p>Keep financial records, prepare an annual statement of accounts and subject these to external scrutiny as required by the Accounting Regulations</p> <p>Keep accounting records for at least 6 years</p> <p>Establish a formal agreement between the charity and any professional fundraiser or commercial organisation carrying out fundraising for the charity, and adhere to forthcoming Fundraising Regulations</p> <p>Provide a copy of the charity's constitution or governing document, or annual accounts to members of the public if requested to</p> <p>Adhere to the forthcoming regulations on how charities should refer to themselves in their documents and on publicity materials</p> <p>Adhere to other relevant legislation and regulation (e.g. employment law, health and safety, data protection, etc.)</p>	<p>Establish board meeting cycle to allow for consideration of the accounts</p> <p>Establish board meeting cycle to allow for reporting to OSCR</p> <p>Adopt Institute of Fundraising codes of practice</p> <p>Join the self regulation scheme developed by the Fundraising Standards Board</p> <p>Ensure procedures are in place to keep up-to-date with legal responsibilities, e.g. employment legislation</p> <p>Regularly review board procedures for overseeing compliance with regulation</p>

Section 9 Sources of advice and support

9.1 Websites

The following list of resources and organisations is provided to point charity trustees to sources of possible advice and support. Although they may be helpful OSCR cannot be held liable for the quality of advice or support received. Materials and resources that originate from outside Scotland should be read in conjunction with the relevant Scottish legislation.

Topic/Organisation	Website address
The Charities and Trustee Investment (Scotland) Act 2005	www.opsi.gov.uk/legislation/scotland/acts2005/20050010.htm
SCVO: Good practice for the voluntary sector	www.scvo.org.uk/governance
Charity Commission (England and Wales)	www.charitycommission.gov.uk
Law Society of Scotland	www.lawscot.org.uk
Governance	www.governancehub.org.uk
Management Development Network (network of independent specialists in management in voluntary organisations)	www.mdn.org.uk
Companies Acts	www.companieshouse.gov.uk
Data Protection	www.dataprotection.gov.uk
Access to Information	www.informationcommissioner.gov.uk
Directory of Social Change Publications	www.dsc.org.uk
Institute of Fundraising	www.institute-of-fundraising.org.uk
Fundraising Standards Board	www.fsboard.org.uk
Institute of Chartered Secretaries and Administrators	www.icsa.org.uk
Health and Safety Executive	www.hse.gov.uk
Equal Opportunities Commission	www.eoc.org.uk
Commission for Racial Equality	www.cre.gov.uk/scotland
Employment issues	www.acas.gov.uk
Employment issues	www.dti.gov.uk/employment/index.html
Volunteer Development Scotland	www.vds.org.uk
Volunteering England	www.volunteeringengland.org.uk
Association of Chief Executives of Voluntary Organisations	www.acevo.org.uk
Association of Chief Officers of Scottish Voluntary Organisations	www.acosvo.org.uk

9.2 Publications and other resources

Publications

Big Picture. 2003. SCVO. ISBN 1 870904 75 3. Contact: www.scvo.org.uk or 0131 556 3882

Boards that Work: A Guide for Charity Trustees. By David Fishel, 2003, Directory of Social Change: ISBN 1 903991 16 1. Contact: www.dsc.org.uk or 020 7209 4949.

Care, Diligence and Skill. The Scottish Arts Council, 2002, Scottish Arts Council: ISBN 1 85119 105 4

Constitutions and Charitable Status. SCVO Guide, 2004. ISBN 0 9546930 0.
Contact: www.scvo.org.uk or 0131 556 3882

Committee Members Handbook. Scottish Federation of Housing Associations, 2003, SFHA: ISBN 1 904322 14 X

Good Governance: A Code for the Voluntary and Community Sector. 2005; The National Hub of Expertise in Governance. Contact: www.governancehub.org.uk or phone 020 7713 6161

Good Governance Action Plan. By Sandy Adirondack. 2002. NCVO. ISBN 0 7199 1603 8.
Contact: www.ncvo-vol.org.uk or 020 7713 6161

Governance Stories: A practical guide to setting up your management committee and sustaining its work. By Shirley Otto & Jo Clifton, 2005, Russell House Publishing: ISBN 1 903855 63 2

Practical Guide to Financial Management for Charities. By Kate Sayer, 2nd edition, 2002, Directory of Social Change: ISBN 1 903991 29 3. Contact: www.dsc.org.uk or 020 7209 4949.

The Charity Treasurer's Handbook. By Gareth Morgan, 2002, Directory of Social Change: ISBN 1 900360 89 6. Contact: www.dsc.org.uk or 020 7209 4949.

The CHAIR Pack: Chairperson's Aids and Information Resource. Edited by Eddie Palmer, 2000, SCVO. Contact: www.scvo.org.uk or 0131 556 3882

The Complete Guide to Business and Strategic Planning. 2nd Edition, by Alan Lawrie, 2001, Directory of Social Change: ISBN 1 900360 87 X

The "Getting to Grips with Governance" Toolkit. SCVO. Contact: www.scvo.org.uk or 0131 556 3882

The Governance of Public and Non-Profit Organisations: What do boards do? Edited by Chris Cornforth, 2003, Routledge, ISBN 0 415 35992 9

Voluntary Sector Legal Handbook. By Sandy Adirondack and James Sinclair Taylor. 2001, Directory of Social Change, ISBN 1 900360 72 1. Updates from: www.sandy-a.co.uk. Contact: www.dsc.org.uk or 020 7209 4949

Your Mission ... Governance. SCVO. Contact: www.scvo.org.uk or 0131 556 3882

Guidance for Charity Trustees

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Other resources

Office of the Scottish Charity Regulator. Updates, information and guidance. Contact: OSCR, Quadrant House, 9 Riverside Drive, Dundee DD1 4NY or 01382 220446 or visit www.oscr.org.uk

National Occupational Standards for Trustees and Management Committee Members. UK Voluntary Sector Workforce Hub. Contact: www.ukworkforcehub.org.uk or 020 7713 6161

Institute of Fundraising, Codes of Fundraising Practice. Contact: Institute of Fundraising, Park Place, 12 Lawn Road, London SW8 1UD or 020 7840 1000 or visit www.institute-of-fundraising.org.uk

Local Authorities. All local authorities have a Community Education Service (sometimes called Community Support or Community Development) or other staff who can provide support to charities. Details can be obtained direct from the local authority.

Councils for Voluntary Service. Every local authority area has a Council for Voluntary Service (CVS) that provides advice, information and assistance to charities. Their contact details can be found in the phone book, libraries or the CVS Network website at www.scvo.org.uk/cvsnetwork/Home/Home.aspx

The Scottish Council for Voluntary Organisations (SCVO). SCVO is the national body representing the voluntary sector and works to advance best practice. Contact: SCVO, Mansfield Traquair Centre, 15 Mansfield Place, Edinburgh EH3 6BB or 0131 556 3882 or www.scvo.org.uk

Annex 1. Section 66 of the Charities and Trustee Investment (Scotland) Act 2005

66 Charity trustees: general duties

- (1) A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular—
 - (a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes,
 - (b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person, and
 - (c) 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—
 - (i) put the interests of the charity before those of the other person, or
 - (ii) 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.
- (2) 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.
- (3) Subsections (1) and (2) are without prejudice to any other duty imposed by enactment or otherwise on a charity trustee in relation to the exercise of functions in that capacity.
- (4) Any breach of the duty under subsection (1) or (2) is to be treated as being misconduct in the administration of the charity.
- (5) All charity trustees must take such steps as are reasonably practicable for the purposes of ensuring—
 - (a) that any breach of a duty under subsection (1) or (2) is corrected by the trustee concerned and not repeated, and
 - (b) that any trustee who has been in serious or persistent breach of either or both of those duties is removed as a trustee.



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