Charity Law Overview For Members of General Assembly Councils and Committees

Charity law is a complex subject but, as the Councils and Committees set up by the General Assembly with associated General Assembly bodies together comprise a Charity, it is important that members of them have a working knowledge of the duties which both the new statutory regime and the common law imposes on charity trustees.

Firstly however why be a charity?

The main advantage are of course the tax benefits. There is exemption from most of the burdens of taxation -- from income tax, corporation tax, capital gains tax, Stamp duty land tax etc but, sadly, only limited reliefs from VAT. Very important from the Church's point of view are tax recoveries made via Gift Aid and from tax on interest and investments.

Secondly, being a charity leads to other financial concessions – for example exemption from fees payable for Landlord registration. There are various rating remissions which charities can claim -- although, in fact, the 100% rating remission which Church buildings and Church Halls receive is in terms of other legislation specifically for such property.

Thirdly, being a charity provides an access route to receiving grants from both commercial bodies and from other grant-giving charities. The “charity brand” provides to donors an assurance that the money they give will be used in a good cause.

The Historical Position

To understand the current legislative provisions, it is necessary to know a little of the historical background. The notion of there being certain purposes worthy of legislative preference was first found in an English Act of Parliament dating from the time of Elizabeth the First which included in the list of good causes the repair of Church buildings. This was further developed in an English taxation case in 1891 which provided that "charity" in its legal sense comprised four charitable purposes or heads: the relief of poverty, the advancement of religion, the advancement of education and a more general category, namely purposes beneficial to the community, not falling under any of the preceding heads. In addition, the purpose had to be for the public benefit with this, however, being presumed to be the case in the first of the three heads.

In England and Wales a body known as the Charity Commission was established to regulate charities and provide them with advice and guidance. No such equivalent body existed in Scotland and, as a result, it was left to the Inland Revenue to determine whether new bodies should receive charitable status and to try to monitor existing charities - which was done on a very haphazard basis. The Inland Revenue also maintained a filing system of Tax Claim Files, each file having its own “CR” number and which included the name of contact details for the charity. However, as no attempt was made to update this on a consistent basis, it was, at best, of limited use. The Lord Advocate as the guardian of the public interest also had a role under the common law but, except in cases of blatant abuse, this was little exercised.
Attempts were made to improve matters by the inclusion of a section on charities in the Law Reform Miscellaneous Provisions (Scotland) Act 1990. This firstly introduced new accounting requirements. It required the Inland Revenue to create the Scottish Charity Index and to issue charities with Scottish Charity numbers for the first time. It also gave the Lord Advocate and the Court of Session statutory powers to take action where misconduct or mismanagement was suspected. These powers included powers of enquiry and to take steps via the Court to have those persons concerned in the management or control of the charity suspended and, where appropriate, permanently removed from exercising such functions. The Court was empowered to make orders restricting a charity from carrying out certain transactions. It could appoint a Judicial Factor to take over the management of the charity. Powers to disqualify from holding any office in any charity were also enacted.

There was considerable alarm within the Church at the possibility -- albeit hopefully a remote one -- of office bearers and in particular ministers being suspended or indeed disqualified from holding office within the Church by authority of the State. Following lobbying with reference to the provisions of the Church of Scotland Act 1921, a compromise was reached by the creation of "designated religious body" status. The criteria for a body obtaining such status were set out as being:

- Having the promotion of a religious objective as its principal purpose and its principal activity being the regular holding of Acts of public worship;
- being established in Scotland for not less than 10 years;
- having a membership of not less than 3000 persons resident in Scotland aged 16 years of age or more; and
- having the internal organisation so that one or more authorities in Scotland exercised supervisory and disciplinary functions in respect of the component elements of the body -- in particular -- as to the keeping of accounting records and auditing of accounts.

Designated religious bodies were exempted from the regulatory provisions in the Act and from most of the accounting requirements. Following the passing by the General Assembly of new accounting regulations for both congregations and Presbyteries, the Church of Scotland was duly designated.

The Scottish Charity office was established as a Division of the Crown Office to implement the provisions of the Act. When fully staffed, however, it consisted of three persons and, as a result, in the opinion of many, there remained a deficit in regulatory control so far as charities in Scotland were concerned.

**The Position post April 2006**

Such views prevailed and led to the enactment of new legislation in the form of the Charities and Trustee Investment (Scotland) Act 2005, the provisions of which mostly came into force in April 2006.

**OSCR’s Functions**

The Act set up a new statutory body corporate known as the Office of the Scottish Charity Regulator ("OSCR"). It confers on OSCR a number of key functions in relation to charities.
• to determine whether organisations should have charitable status;

The Act contains a new legal definition of "charity" in Scotland. This is a two-stage test. Firstly the organisation has to have exclusively charitable purposes, there being 15 such purposes listed in the Act. The advancement of religion is one of these purposes. The organisation then has to demonstrate that it provides public benefit. The previous presumption of this in the case of some charitable purposes has been removed. When OSCR is deciding whether a body provides or intends to provide public benefit it has to have regard to the following (to quote the Act):

(a) how any --
   (i) benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public) and
   (ii) disbenefit incurred or likely to be incurred by the public,
   in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and
   (b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.

Obviously, this is quite a difficult definition to administer and, although OSCR issued guidance as to how it intended to proceed, there was originally considerable speculation as to whether some charities – for example fee paying schools -- might lose their charitable status in Scotland. However, the position to date is that almost all active charities have retained their status. Where OSCR has considered that the public benefit test is not being met, the approach has been to give charities a set period to endeavour to put their house in order. This has also been the case with a number of bodies such as colleges which were considered to lack independence of government or local authorities and which have required to amend their constitutions to remove the possibility of such control.

Originally, OSCR indicated that it would over time individually reassess the charitable status of all charities on a rolling basis. Due no doubt to resource issues, OSCR has departed from this and instead is adopting a risk based approach looking at categories of charities where there are thought to be particular problems say with charitable purposes, public benefit, independence etc.

• to keep up a public Register of Charities;

To be a charity operating in Scotland, you have to be listed on the Register and there are provisions to ensure that it is kept up-to-date. In practice, this means that there is a statutory obligation on charities to notify OSCR when details included in their entry change.

• to encourage, facilitate and monitor compliance by charities with the provisions of the Act;

From a practical point of view, OSCR largely monitors charities via the requirement that all charities have to lodge their Accounts and an Annual Return with OSCR within 9 months of the close of their financial year.
to identify and investigate apparent misconduct (which is defined as including mismanagement) in the administration of charities and to take remedial or protective action;

OSCR has powers of supervision and intervention aimed to enable it to act effectively where it believes there is misconduct or mismanagement in the administration of a charity. It has had transferred to it the powers previously vested in the Lord Advocate and, subject to a right of appeal, can remove charities from the Register where it considers that the Charity no longer meets the charity text. Effectively, OSCR’s powers are limited to a period of six months and where action over a longer period is required, it has to ask the Court of Session to exercise the powers conferred on the Court under the Act. Where OSCR decides to launch an enquiry into a particular charity —whether or not as a result of a complaint, the primary purpose of an inquiry will be to ensure that charity assets are protected and remain for use in the furtherance of a charity’s objects.

Charity Trustees and their Duties

Charity trustees are defined in the Act as "the persons having the general control and management of the administration of the charity". Depending on the legal form the charity has, these can therefore be the board members, company directors, management committee members, trustees or whatever is relevant to the Charity. In the Church, they will be members of Presbytery (if a charity) or at congregational level —Kirk Session members, plus - where there is a separate Financial Board —non-elder members of the Congregational Board, Deacons Court or Board of Management. In the case of the central church, Charity number SC011353 the Charity Trustees were originally regarded as being all the members of the various Councils and Committees which comprise the standing committees of the General Assembly. Clearly this is a very large number of persons and, having regard to the Council of Assembly’s remit with respect to the monitoring of the other standing committees and the work done over time to exercise this role effectively, the Council of Assembly brought a proposal to the General Assembly of 2009 to declare the Charity trustees as being its voting members. The Assembly agreed to set up a Special Committee to look into this and the Committee’s recommendation to the 2010 Assembly that the Council of Assembly’s proposal be approved was duly agreed. As the same time however the Assembly instructed that the members of the other Assembly appointed Councils and Committees should continue to apply to their duties the same standards applicable to charity trustees. It is therefore important for all members to have a good grasp of what these duties and standards are.

The 2005 Act sets out specific duties for charity trustees. They 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 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 directions, requirements, notices or duties imposed on it by virtue of the Act.

These duties are similar to but not identical to those which were expected under the common law of charity trustees. There has been much debate as to whether or not they are more onerous. OSCR
has issued guidance in regard to Trustees’ duties which can be viewed by clicking on the link on the OSCR web-site home page (www.oscr.org.uk) or by clicking on: http://www.oscr.org.uk/PublicationItem.aspx?ID=5b7d7df4-8d70-4aa7-af64-2d65c21ae22d

(However, when reading the guidance, you should keep in mind the Church’s exemptions as detailed in the relative paragraph below.)

It should also be noted that the Act prohibits charity trustees (and those “connected” to them) being remunerated except in certain defined circumstances. Lastly, the Act sets out those people who cannot act as charity trustees. This includes those convicted of an offence involving dishonesty, those who are undischarged bankrupts and those who have been removed from office under the previous or present legislation or who are disqualified from acting as company directors.

The Special Provisions for Designated Religious Charities

Designated religious body status has been replaced by Designated Religious Charity (“DRC”) status and the conditions for qualification are effectively the same as in terms of the 1990 Act. Whilst however some of the regulatory provisions are disapplied for DRCs -- for example the powers of OSCR and the Court to suspend Trustees and the provisions setting out the disqualifications which bar someone from acting as a charity trustee -- the Court now has powers to freeze the bank account of a DRC if misconduct is established. It should also be noted that OSCR still has “teeth” if misconduct in a DRC is established as it can then remove DRC status, opening up the religious body concerned to the full range of regulatory controls which apply to secular charities. In addition, a DRC requires to notify changes both in regard to itself and its component elements (if they have separate charitable status as is the case with congregations) which would affect the Charity Register and to seek prior approval to any change of name. DRCs are subject to the same monitoring regime so far as accounts and annual returns are concerned and as to remuneration.

On a transitional basis all bodies having charitable status were entered onto the Charity Register when the 2005 Act came into force. Similarly, all designated religious bodies automatically became designated religious charities. The Act however required Designated Religious Charity status to be reassessed. In the case of the central Church bodies operating under Charity number SC011353 which of course includes all the Councils and Committees of the Assembly, this exercise was carried out during 2007 and in October 2007 the Church’s eligibility as a Designated Religious Charity was confirmed as was its continued entitlement to charitable status, having “passed” the 2005 Act charity test. As mentioned, OSCR continues to check the continued eligibility for charitable status of certain charities and in due course it may be that congregations and other church bodies which are charities will be subject to reassessment although not necessarily on a case by case basis. Similarly, particularly if there has been cause for concern, the Church’s eligibility for DRC status may be reassessed.

Miscellaneous Provisions

The Act also deals with or enables regulations to be made in a number of other important areas: --
• The Act contains provisions regulating the **payment of remuneration to charity trustees** and their close relatives. For further information about this, see the Law Department circular which can be viewed at:


• **Detailed regulations have been enacted as to the format of accounts.** Those passed in 2006 simplified the preparation of accounts so far as a large number of charities were concerned. Those charities whose gross income is under £100,000 need only to produce accounts on a receipts and payment basis. An audit of accounts was only required where the gross income was £500,000 or over. Under that threshold, an "independent examination" is all that is needed. If gross income is between £100,000 and £500,000 SORP Accounts are required and have to be independently examined by a member of a professional accountancy body. The Charities Accounts (Scotland) (Amendment) Regulations 2010 have increased the thresholds for receipts and payment accounts from £100,000 to £250,000 for accounting periods beginning on or after 1st April 2011.

• The Act gives charities **widened powers of investment.** The old restrictions under the Trustee Investment Act 1961 which required investments to be split between narrower and wider ranges have been swept away. Charity trustees are also given powers to delegate investment decisions to professional investment managers.

• A new legal form has been introduced for incorporating charities -- **the Scottish Charitable Incorporated Organisation ("SCIO")**. It will likely replace the incorporating of charities as companies limited by guarantee as it gives the benefit to charity trustees of a limitation of legal liability whilst removing the need for regulation by both Companies House and OSCR. SCIOs will only be regulated by OSCR. A number of existing charities, both incorporated and unincorporated, have also chosen to convert to become SCIOs.

• Regulations came into force in April 2008 setting out the need to include a **reference to the body's charitable status in legal and other documents.** For further information, see the Law Department’s circular at:


• Regulations simplifying the arrangements for **reorganising charities** have been enacted. These can be used where the charity purposes need to be amended or other constitutional changes are required which the charity’s constitution currently does not permit.

• Regulations were also made in 2012 to enable OSCR to approve a **variation or removal of a restriction** which has been placed on the use of an asset by the donor(s). That means that charities that were given funds for a particular purpose now outmoded for example - a Council/Committee which was given or left money to provide mission to “Coolies” - have been able to modernise those funds and put them to good use in a more modern context, subject to certain conditions and limitations. In the past this would have required an application to the Court of Session which in many cases was not cost effective. A number of such reorganisations have already been carried out by the Law Department. Councils and
Committees should therefore be reviewing their restricted funds with a view to seeking approval to “updating” what they can be used for.

- Finally, regulations have been enacted about **fundraising and public collections**. These aim to give charities greater control over those fundraising on their behalf and will require professional fundraisers and commercial participators to have a written agreement with the charity before fundraising on their behalf. Regulations about public collections have been promised but are yet to appear.

**More legislation**

It quickly became obvious that there were a number of problems with the 2005 Act. A number of provisions relating to charities were therefore included in **Public Services Reform (Scotland) Act 2010**.

For example, the way that the remuneration provisions in the 2005 Act were framed prevented many charities from insuring their charity trustees against personal liability although OSCR responded quickly to make it clear it would turn a “blind eye” to those which did. The Act included a power entitling charity trustees to effect Trustees indemnity insurance.

What therefore are the **key issues** for you as Council or Committee members?

Those of you who serve on the Council of Assembly are one of the charity trustees of the Church of Scotland SC011353. In regard to those on other Councils and Committees, your fellow members and you are collectively the trustees of your Council and Committee and you are corporately responsible for decisions made by your Council/Committee. Therefore you have to keep firmly in mind the need to comply with trustees’ statutory duties. You must be careful to work within your Council’s remit and to ensure that none of the assets of the Council are applied to any non-charitable purpose.

You will be relieved to know however that, corporately, you are no longer responsible as to decisions made in the other Councils and Committees.

Over time, it is clear that OSCR will be looking to charities -- particularly the larger ones -- to improve generally on their governance arrangements. This includes the devising of appropriate induction and training of new Council members. At the very least, you should spend 30 minutes or so going over the remit of the Council or Committee, the Guidance Notes for new members of General Assembly Council and Committee members, the and your Council/Committee’s Code of Conduct/Expenses Policy. You should raise with your Convener or the Council/Committee secretary any queries you have about these.

You should familiarise yourself with the statutory provisions about remuneration of charity trustees and those “connected” to a trustee. In the case of voting members of the Council of Assembly, if they or any close relative of a member is being paid whether directly or for providing services for the Council, this has to be permitted in terms of the legislation and a Remuneration Agreement has to be entered into with the trustee. It would be good practice for other Councils and Committees to follow...
a similar policy and for relevant declarations of interest to be made. You should be diligent in attending meetings and reading meeting papers. You should be ready to “challenge” and only make decisions where you feel you have all the facts necessary to make informed and sensible ones.

Whilst charity governance is not all about money, you should make it your business to be aware - with reference to the monthly management accounts - how your Council or Committee is performing against its agreed budget. That may of course be less relevant in “Committees without funds” such as the Nomination Committee.

You should make sure that you understand the Church’s expenses policy and be scrupulous in ensuring you comply with it.

If using professional fundraisers, again, care should be taken to enter into a Fundraising Agreement.

A useful general publication entitled “the Hallmarks of an effective charity” published by the Charity Commission for England and Wales which provides helpful guidance can be downloaded at:

http://www.charity-commission.gov.uk/Publications/cc10.aspx