



## Charity Law: Being a Trustee

It is important that those in the Church of Scotland who are charity trustees have a basic knowledge of their duties, which both the 'Charity and Trustee Investment Act 2005' (the Act) and the common law impose on charities and charity trustees. The Act also sets up the 'Office of the Scottish Charity Regulator' (OSCR) as the body responsible for overseeing Scottish Charities.



### Who are the Charity Trustees?

The Act defines the Charity Trustees as:

'the persons having the general control and management of the administration of a charity.'

In the Church of Scotland, each congregation is a charity and the Charity Trustees are the members of the Kirk Session, together with the members of any separate Financial Board (e.g. the Congregational Board, Deacons' Court or Board of Managers). Elders who are not on the Session, having resigned perhaps due to age or other commitments, are not charity trustees.

### What is expected of Charity Trustees?

The Act sets out a number of general duties that the Charity Trustees must fulfil. They must:

- act in the interests of the charity, putting its interests above their own interests or those of any other person or organisation
  - This is the fundamental duty and other duties flow from it. The Act contains restrictions designed to stop Trustees or close relatives benefiting personally and improperly from the charity. Furthermore, Trustees finding themselves in a conflict of interest situation are expected to declare an interest and not participate in decision making on the issue. They should also absent themselves from the prior discussion if the conflict is significant.
- operate in a manner consistent with the charity's purposes. Trustees should carry out their duties in accordance with their governing document
  - A congregation's purpose is the advancement of religion and the governing document is their constitution read together with relevant Church law.
- act with due care and diligence
  - Trustees should take such care of their charity's affairs as is reasonable to expect of someone who is managing the affairs of another person.



- ensure that the charity complies with the provisions of the Act and other relevant legislation.
  - This will include Health and Safety, Data Protection, employment law if the congregation has paid staff and, where regulated work with children and protected adults is being carried out, Safeguarding legislation.

The Act also has a number of specific duties, namely that Charity Trustees must:

- update the charity's details to keep the Charity Register up to date
- comply with the statutory duty to supply information via the Annual Return and the Trustees' Report and Annual Accounts and about certain changes e.g. change of constitution, contact details
- keep specified accounting records and have them independently examined
- if using a professional fundraiser, comply with relevant regulations about this
- provide certain information to the public.

The last duty includes giving out copies of accounts if asked for these and putting the charity's legal name and number on the congregation's websites, notepaper and other literature. HMRC also require charity trustees to meet the 'fit and proper person' test.

### **What if things go wrong?**

If Trustees breach any of the above duties, this can amount to misconduct which the Act defines as including mismanagement, i.e. Trustees may be culpable for 'both fiddles and muddles'.

All Trustees are equally responsible in law. However, OSCR has indicated that, whilst much depends on the seriousness of the position, it will be proportionate in its response to any finding of misconduct and apply 'balanced and consequential sanctions' where appropriate.



The Church of Scotland has the status of being a 'Designated Religious Charity' (a 'DRC'). This means that it is accepted that it has its own system of discipline and internal controls and that any misconduct on the part of Church office bearers can be dealt with solely by the relative Church authorities rather than OSCR. In the case of a charity trustee of a congregation, this will be the Presbytery. If, therefore, a complaint alleging misconduct is made to OSCR about a Church charity trustee, OSCR will refer it to the Church Offices and a report will be sought from the Presbytery. However, were OSCR to take the view that this system of 'self-regulation' was not working, it could seek removal of DRC status which would have significant constitutional ramifications for the Church.



The Council of Assembly has therefore been charged by the General Assembly to exercise the supervisory function required by the Church's Designated Religious Charity status.

### **Could I be financially liable if things go wrong?**

A congregational office bearer could be personally liable for losses arising from misconduct or mismanagement. However, the risk of this has been reduced by requiring congregations to maintain insurance to meet claims (and the costs of defending them). These policies relate to public and employers' liabilities, breach of duty and charity trustees indemnity. The existence of such policies should not of course be taken by office bearers as a green light to act negligently or recklessly. Indeed, some such actions could result in criminal penalties, e.g. serious Health and Safety breaches. Charity trustee indemnity insurance will not provide cover for negligent or criminal acts and fines.

### **Further reading and resources**

[www.churchofscotland.org.uk/law\\_circulars](http://www.churchofscotland.org.uk/law_circulars) - especially for:

- charity law, trustees' duties and potential liabilities
- remuneration issues affecting congregations
- the References in Documents regulations
- use of congregational monies, the making of gifts and collections for other charities

Guidance on the Act and charity trustees' duties - [www.oscr.org.uk](http://www.oscr.org.uk)

(Please note that the OSCR guidance does not currently cover the special position of charity trustees of DRCs.)

Alternatively, speak to

- Your Presbytery Clerk
- At the Church Offices - the Finance or Law Departments.