



CHARITY TRUSTEES, LIABILITIES AND OSCR¹

Congregational charity trustees

The trustees of a charity are, in terms of the Charities and Trustees Investment (Scotland) Act 2005, the people who are responsible for the general control and management of its administration.

The General Assembly of 2007 resolved that the charity trustees of a congregation comprise the parish minister and the elders who sit on the Kirk Session and also - if there is a separate Financial Board - the members of the Board (however termed) as, albeit that each have their own role, the Session and Financial Board are the governing bodies whose decisions direct the life of the congregation.

OSCR

The 2005 Act created the Office of the Scottish Charity Regulator (“OSCR”) which replaced the former Scottish Charities Office and gave it, in conjunction with the courts, extensive powers to monitor charities and to take action against charity trustees where misconduct is established. These powers include the right to suspend/remove charity trustees from their position and indeed to disqualify them from holding office in any charity. Breaches of some directions from OSCR may constitute an offence and the person can be subject to criminal sanctions - for example for continuing to act whilst suspended.

In recognition of its special constitutional position and internal regulatory controls, and in common with a number of other Christian denominations in Scotland, the Church of Scotland has been designated as a “designated religious charity” (“DRC”). Effectively, this gives the Church the exclusive right to regulate and discipline its office bearers and one of the consequences of this is that the power of suspension and disqualification of trustees by OSCR does not apply to office-bearers within the Church.

Before OSCR could take direct action against congregational office bearers for alleged misconduct or other breaches of the 2005 Act, it would require to take steps to remove the Church’s DRC status. Currently, therefore, elders and the members of Financial Boards remain answerable solely to their Session and to Presbytery, all in accordance with the law of the Church.

Financial Liability

The question of financial liability to third parties is a separate matter from statutory obligations under the 2005 Act.

¹ Please note that this circular has been prepared with reference to those congregations subject to Scottish charity law and regulation by OSCR. Those congregations in England and Wales which are not registered with OSCR will be subject to regulation by the Charity Commission for England and Wales. For congregations within the International Presbytery, the law of the country concerned will be applicable.

As an ancient organisation with a special constitutional position, the Church's structure is an interesting and complex one and is difficult to analyse from a legal point of view. "The Church of Scotland" as a body, has elements of being both a corporate and an unincorporated body and encompasses a number of bodies with differing legal status. Congregations and indeed Financial Boards are regarded as being unincorporated associations, whereas Sessions are legally courts, with the status of being courts of the land.

In the case of an unincorporated association, the extent of the liability of members and officials under contracts with third parties, including staff, is not clear-cut. Both the Model and Unitary constitutions contain provisions in terms of which contracts and other obligations are not to be entered into without funds being "available or assured". Some contracts however, by their nature, impose continuing obligations and clearly from time to time even the most diligent and prudent office bearers may find themselves in the position of having to meet an unexpected liability.

A congregation itself cannot be sued because, as an unincorporated association, it has no legal personality of its own, separate from its members. So far as is known, no congregation has ever found itself in the unhappy position of being unable to meet its debts to third party creditors and thus the question as to whether individual office bearers might be required to meet such debts from their own resources has never arisen. This would, however, certainly be the case should negligence or fraud on the part of office bearers be established and perhaps also where there had been persistent and wilful failure to follow directions from Presbytery which had contributed to the incurring of the liability.

The reference in the above paragraph to an "unexpected liability" should be noted. Office bearers must be careful to ensure that they do not allow the congregation to drift into a situation where it reaches or may shortly reach a critical situation of not being sustainable financially. Whilst it is tempting to get by on reserves, office bearers require to be prudent and responsible. They should be looking to the future and taking appropriate steps to increase income and/or reduce expenditure so that the congregation can return to living within its means. If this is thought not to be achievable within a realistic time-frame, advice and help should be sought from the Presbytery or the Stewardship and Finance Department at the Church Offices.

It should also be remembered that church law permits congregational income to be donated to other charities and projects only in very limited circumstances. In particular, any allocation of congregational funds to outside bodies/projects can only be made if the congregation is meeting (1) its contributions to the Parish Ministries and Mission and Renewal Funds (its Ministries and Mission Contributions) and (2) all its other legal commitments. Further information about this can be found in the Circular on Offerings, Donations and Gifts: https://www.churchofscotland.org.uk/_data/assets/pdf_file/0005/22559/Offerings-Donations-and-Gifts.pdf

Insurance

Liability can also be incurred due to negligence, in circumstances where wrongful acts or omissions lead to third parties being injured or suffering damage to property. Office bearers should take steps regularly to assess risk and put in place appropriate steps to mitigate it. The General Assembly requires all congregations to have in place public and employers liability insurance in the form of the standard policies of Church of Scotland Insurance Services Ltd ("COSIS"). In addition, a special breach of duty policy has been written to cover special risks

and is also compulsory, as is trustee indemnity insurance. The policy provides indemnity for each claim up to £1m with an aggregate limit under the policy of £10m. With all congregations participating, the premium per congregation is very substantially reduced compared to congregations seeking equivalent cover on an individual basis. Further details of the policy terms are available to congregations from COSIS or can be downloaded from the COSIS website - see the Church Scheme Policy Summary at: <http://www.cosic.co.uk/policy-summary>

“Emeritus” Elders

With regard to the question of “inactive” elders, such elders continue to be corporately responsible for Session decisions. This is clearly an unsatisfactory situation and the cure for it is that such elders should formally resign from the Kirk Session. In doing so they would retain the status of elder, just as a retired minister who elects not to have a seat in Presbytery retains the status of a minister. The Principal Clerk has advised that elders’ names should be entered on one or other of two lists: (1) elders who are members of the Kirk Session and (2) elders who are not members of the Kirk Session. This latter category would include those who have retired, but could also include any who, perhaps for work or family reasons, wished to take some time out. Those on this second list would have no responsibility for Session decisions but could remain “useful” to the life of the congregation - perhaps by undertaking pastoral visits and other similar duties.

Further Guidance Notes

Additional useful information can be found in the general Guidance Notes for Congregational Office bearers which can be downloaded from http://www.churchofscotland.org.uk/_data/assets/pdf_file/0020/2837/law_congregational_officebearers.pdf

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