

Charity Law Overview for Church of Scotland Congregational Office bearers

Charity law is a complex subject but, as your congregation comprises a Charity, it is important that you and your fellow office bearers have a working knowledge of the duties which both the new statutory regime and the common law imposes on charity trustees.

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, 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 History

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 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 snappily titled Law Reform Miscellaneous Provisions (Scotland) Act 1990. This firstly introduced new accounting requirements. It also resulted in the Inland Revenue setting up a Charity index on which the names and contact details of charities was given. It was at this stage that Scottish Charity numbers were first issued. However, as no attempt was made to update the index, it was, at best, of limited use. The 1990 Act 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.

Such views prevailed and led to the passing of the Charities and Trustee Investment (Scotland) Act 2005, whose provisions mostly came into force in April 2006.

The Position now

The Act set up a 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.

Clearly this is quite a difficult definition to administer and, although OSCR has issued guidance as to how it would intend to do so, only time will tell if any charities will lose their charitable status in Scotland. In practice, those charities that so far have been “tested” have “passed” although some, such as independent schools and charities connected with Councils/government have had to make changes to their constitutions or ways of working to retain their charitable status.

- *to keep up a public Register of Charities;*

To be a charity operating in Scotland, the charity has to be listed on the new Register established by the Act 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.

The Register which can be searched and viewed on line on OSCR’s website (www.oscr.org.uk) and contains the following information for each charity :

Its number, name, the address of its official correspondent, its constitutional form (which in the case of a congregation will be unincorporated association), annual return status, accounting period end date, gross income, geographical spread, main operating location, date entry last updated and its charitable purposes.

The OSCR web-site is also a very useful resource for guidance of all aspects of the legislation.

- *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 each year with it.

- *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 is given enhanced powers of supervision and intervention so that it can act effectively where it believes there is misconduct or mismanagement in the administration of a charity. It had transferred to it the powers previously vested in the Lord Advocate and, subject to a right of appeal, can even remove charities from the Register where it considers that the Charity no longer meets the charity test. 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.

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 Council members, members of Presbytery or, at congregational level -- session members, members of the Congregational Board, Deacons Court etc. The Act sets out specific duties for charity trustees. They must act in the interests of the Charity. They must seek, in good faith, to ensure that the Charity operates in a manner that is consistent with its purposes. They must act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person. They have to 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. OSCR has issued guidance in regard to Trustees' duties by OSCR 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/publications-and-guidance/guidance-for-charity-trustees/> <http://www.oscr.org.uk/publications-and-guidance/easy-read-guidance-for-charity-trustees/> easy read version.

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

It should also be noted that the Act prohibits charity trustees being remunerated except in certain defined circumstances. (For further information about this, see our separate circular which can be downloaded from the website). 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 under the previous legislation or who are disqualified from acting as company directors.

The Church's Designated Religious Charity Status

Designated religious body status has been replaced in the 2005 Act 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 disappplied 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 as other charities so far as accounts and annual returns are concerned.

On a transitional basis all charities were entered onto the Charity Register. The Act however required both charitable and DRC status to be reassessed. A review of DRC status was carried out in 2007 as a result of which the Church's continued entitlement to that status was confirmed. At the same time, OSCR also assessed the unincorporated Councils and Committees of the General

Assembly with regard to the new charity test and confirmed their continued eligibility for charitable status.

OSCR has indicated that it will continue to review the charitable status of other charities on an ad hoc basis. OSCR originally planned a "rolling review" of all charities on the Register but these plans have been scaled back. It appears that OSCR intends to prioritise those sectors where it is considered there is a greater risk of non-compliance with the charity test. It is now thought there will not be a comprehensive review of all congregations and other 'Church of Scotland' charities but from time to time a Church of Scotland charity may find itself the subject of a review of its status by OSCR.

The Act, and Regulations following thereon, also contains other miscellaneous provisions: --

- detailed Regulations were enacted as to the format of accounts. At present those charities whose gross income is under £100,000 only have to produce accounts on a receipts and payments basis. An audit of accounts is only required where the gross income is £500,000 or over. Under that threshold, an "independent examination" is all that is needed (unless the charity's constitution specifically requires an audit to be carried out). OSCR has issued helpful guidance on independent examiners which can be downloaded from its web site. . 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 payments accounts from £100,000 to £250,000 for accounting periods beginning on or after 1st April 2011. The General Assembly Regulations for Congregational and Presbytery Finance will be amended by the General Assembly of 2012 to reflect these changes and further guidance on this topic will be issued by the Stewardship and Finance Department to Congregational Treasurers. The current guidance can be viewed on the Church's website

- 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 was introduced in 2011 for incorporating charities -- the Scottish Charitable Incorporated Organisation (SCIO). It is anticipated that in a lot of cases this will replace the incorporating of charities as companies limited by guarantee as it removes 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, are also likely to convert to become SCIOs although companies will require to wait until 2012 to do so.
- There are regulations setting out the need to include a reference to the body's charitable status in legal and other documents. See the separate circular on this topic which can also be downloaded from the website.
http://www.churchofscotland.org.uk/resources/subjects/law_circulars#charitylaw

- The Act sets out detailed conditions regarding the remuneration of charity trustees - see the separate circular on this topic which can also be downloaded from the website.
http://www.churchofscotland.org.uk/resources/subjects/law_circulars#charitylaw
- There are also regulations simplifying the arrangements for reorganising charities. At present OSCR does not have powers to reorganise trusts and bequests held by charities. The primary legislation allowing such reorganisations was enacted in 2010, the Public Service Reform (Scotland) Act 2010, but secondary legislation is required before such reorganisations can take place.
- Finally, regulations have been enacted about fundraising. These aim to give charities greater control over those fundraising on their behalf and require professional fundraisers and commercial participators to have a written agreement with the charity before fundraising on their behalf. OSCR has issued guidance about the regulations. See:
<http://www.oscr.org.uk/publications-and-guidance/benevolent-fundraising-guidance/>
It is intended that regulations will also be enacted to cover public collections.

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 as a result included in **Public Services Reform (Scotland) Act 2010** although not all these changes have so far been brought into force.

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. One change in force is a new power entitling charity trustees to effect Trustees indemnity insurance. Trustee indemnity insurance is an automatic add on for congregations with policies provided by the Church of Scotland Insurance Company. Another of the most important prospective changes is a new power exercisable by 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, e.g. a congregation which was given or left money to provide coal for the poor at Christmas, will be 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 require an application to the Court of Session which in many cases was not cost effective. This provision should also assist Councils and Committees in reviewing their restricted funds and to update what they can be used for. Regulations will be issued – hopefully in the very near future - setting out the procedures to be followed.

What therefore are the key issues for you and your colleagues as congregational office-bearers? Depending on how your congregation is constituted, Session and Financial Board members will be the persons having the general control and management of the administration of the charity. Therefore you have to keep firmly in mind the need to comply with trustees' statutory duties. You must be careful to ensure that none of the assets of the congregation are applied to any non-charitable purpose.

It is likely that the OSCR will be looking to charities to improve generally on their governance arrangements. It is important therefore to arrange appropriate induction and training for new elders and Board members. At the very least, 5-10 minutes should be spent going over these and the Guidance Notes for congregational office bearers with new and indeed perhaps existing office bearers.

You should familiarise yourself with the statutory provisions about remuneration of charity trustees and those “connected” to a trustee. If any office bearer or any close relative of an office bearer is being paid whether directly or indirectly for providing services for the congregation, e.g. for carrying out repairs to the church building, you should ensure that a Remuneration Agreement is entered into with the trustee. See the separate circular on this topic referred to above.

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

It is appreciated that the new statutory responsibilities placed on office bearers - although similar to those which previously existed at common law – may seem very daunting. You will be reassured to know that the General Assembly has therefore made it compulsory for all congregations to have Trustees Indemnity insurance via a block policy arranged by the Church of Scotland Insurance Company. Further details about this can be obtained from the Company (tel 0131 220 4119)

The Law Department is happy to advise further should any particular points of difficulty arise. Please contact us if you wish to change the name of your congregation as the consent of OSCR is required in advance. The Law Department will deal with the application for consent on your behalf. If you are changing the form of constitution under which your congregation operates either in terms of the Act anent Congregational Constitutions (GA Act XIX, 1964 as amended) or on uniting with another congregation, the Law Department when the new constitution is issued by the Delegation of Assembly will also notify OSCR of the change.

In the event that OSCR decides to review the charitable status of a charity, one of the documents which has to be submitted to OSCR is the charity’s constitution. OSCR is familiar with and has “master” copies of both the Model Deed and the Unitary Constitutions. Those congregations operating under different constitutional arrangements should take the opportunity of reviewing the constitution under which they operate and it is **highly** recommended that they should consider changing either to the Model Deed or Unitary Form.