



Charity Trustees, liabilities and OSCR ^{1***}

The General Assembly of 2007 approved a statement that the charity trustees of a congregation comprise the parish minister and elders who sit on the Kirk Session and also - if there is a separate Financial Board - the members of the Board (however termed). This coupled with the enactment of the Charities and Trustees Investment (Scotland) Act 2005 which “coined” the term “charity trustee” has perhaps naturally produced considerable apprehension among some elders as to what liabilities, financial and other they may incur.

In fact, although the term “charity trustee” was not used in the legislation which preceded the 2005 Act, congregational office bearers were charity trustees prior to this Act although the term “trustee” was not often applied. The charity trustees are “the persons having the general control and management of the administration of a charity.” Albeit that each have their own role, the Session and Financial Board are the governing bodies whose decisions direct the life of the congregation.

The Church’s expectations of office-bearers and in particular elders have not therefore changed although these have clearly been brought into sharper focus by the 2005 Act. One could go back to the Second Book of Discipline (1578) with its injunction that “the office of the elders is severally and conjunctly to watch over the flock committed to their charge, both publicly and privately, that no corruption of religion or manners enter therein.” Indeed, Scripture itself addresses the standards expected of church officials, particularly in 1st and 2nd Timothy and Titus, with calls to “hold to the standard of sound teaching”, to “guard the good treasure entrusted to you” and to “do your best to present yourself to God as a worker who has no need to be ashamed.” (2 Timothy 1: 13 and 2: 15). Reference is also made to the general Guidance Notes for Congregational Office bearers issued some time ago which can be downloaded from :

http://www.churchofscotland.org.uk/_data/assets/pdf_file/0020/2837/law_congregational_officebearers.pdf

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 take action against charity trustees where misconduct on their part was 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 in common with a number of other Christian denominations in Scotland, the Church has however been designated as a “designated religious charity” (“DRC”). Effectively, therefore, the Church is given the right to regulate and discipline its office bearers and the main monitoring powers of OSCR and the Courts do not apply. This includes the power of suspension and disqualification of trustees.

*** 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 Presbytery of Europe, the law of the country concerned will be the applicable one.

For a fuller explanation, see the Charity Law Overview for congregational office bearers circular which can also be downloaded from the link above.

Before OSCR could take action directly 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 and has not changed as a result of the legislation

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 certainly 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 - and indeed hold 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 uncertain and indeed is a matter the Scottish Law Commission has recommended should be reformed. Both the Model and Unitary constitutions of course 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. 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 the question as to whether individual office bearers might be required to meet such debts from their own resources has never arisen. It is to be anticipated that with the wish to protect "unlucky" office bearers and protect the good name of the Church, the wider Church may "rally" round and meet any liabilities incurred - except of course in cases where fraud or other criminal activity on the part of office bearers was established and perhaps also where there had been persistent and wilful failure to follow directions from Presbytery in regard 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 - in full and (2) all its other legal commitments. Further information about this can be found in the Circular on Offerings, Donations and Gifts.

Liability can of course also be incurred due to negligence - such as wrongful acts or omissions leading to third parties being injured or suffering damage to property. Office bearers should of course themselves take steps regularly to assess risk and put in place appropriate steps to mitigate it. The General Assembly however requires all congregations to have in place public and employers liability insurance in the form of the standard policies of the Church of Scotland Insurance Company. In addition, a special breach of duty policy has been written to cover special risks and is also compulsory. Further details about the cover offered by these policies can be obtained from the Insurance Company. In addition, following upon the Legal Questions Committee investigating Trustee Indemnity Insurance, a proposal to require all congregations to effect such insurance was approved by the General Assembly of 2009. The policy provides indemnity for each claim of £500,000 with an aggregate limit under the policy of £5m. 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 COSIC or can be downloaded from the COSIC website - see pages 20 and 21 of the Church Scheme Policy Summary at: <http://www.cosic.co.uk/policy-summary>

“Emeritus” Elders

With regard to the question of “inactive” elders, in his introduction to Practice and Procedure in the Church of Scotland, Rev Gordon McGillivray states that they continue to be “corporately responsible for Session decisions”.

See http://www.churchofscotland.org.uk/about_us/church_law (*this section was under revision and therefore unavailable at the time this circular was updated*)

However, the cure for this 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, may retain 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.

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