

# CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) ACT 2005

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## EXPLANATORY NOTES

### COMMENTARY ON PARTS

#### Part 1: Charities

#### *Chapter 9 – Charity trustees*

#### Charity trustees: general duties

79. The term “charity trustees” (which is defined in [section 106](#)) is used throughout the Act to describe those persons having general control and management of the administration of a charity. Depending on the form of the body, this term will generally refer to the directors, the members who form a management committee or group, the trustees of a trust, or if it is an unincorporated association, the persons who normally direct the managers of the body. The term is merely used as a generic term within this Act and does not change other legislation. Hence the directors of a charitable company remain directors but take on duties as “charity trustees” under this Act.
80. [Section 66](#) sets out the general duty of care that charity trustees must follow. These are a codification of existing law and practice. [Subsection \(1\)](#) requires a charity trustee to act in the interests of the charity. In particular they have to seek to ensure that the charity acts consistently with its purposes and that they act with a level of care and diligence that is reasonably expected of someone managing another’s affairs. [Subsection \(1\) \(c\)](#) requires a charity trustee to avoid a conflict of interest which may arise between the charity and any person responsible for their appointment as a charity trustee. If such circumstances arise, the charity trustee must put the interests of the charity before those of the person responsible for their appointment. Where another duty prevents them from doing that, the charity trustee must disclose the conflicting interest to the charity and not participate in any decision of the other charity trustees with respect to the matter in question. A charity trustee has a duty to ensure that a charity complies with any requirements of this Act ([subsection \(2\)](#)). However, [subsection \(3\)](#) provides a caveat that none of the above duties require a charity trustee to act otherwise than is imposed on them by other enactment. Hence, the general charity trustee duties do not exempt them from acting, for instance in accordance with health and safety legislation, or for charitable companies, with companies legislation. A breach of the general duties (to act in the interests of the charity, and to ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of the Act) is to be treated as misconduct in the administration of a charity, although OSCR must act proportionately in taking any action where it appears that misconduct has occurred. OSCR has a general duty (under [section 1\(9\)](#)) to act proportionately and only in cases in which action is needed in all its regulatory activities. In addition, (under [section 31\(10\)](#)), OSCR may not suspend a charity trustee if it considers they have acted honestly and reasonably and ought to be fairly excused. [Subsection \(5\)](#) requires all charity trustees to act collectively, taking steps that are reasonably practicable to ensure that any breach

of general duty by a charity trustee is corrected by that trustee and not repeated, and also that the trustee is removed as a trustee if they have been in serious or persistent breach of those duties.

## **Remuneration**

81. **Section 67** provides that a charity trustee may not normally be paid for carrying out the duties and functions of being a charity trustee, unless specific authority for this is provided. This stems from the existing position that charities are generally understood to be voluntary organisations and that charity trustees will offer their services as such with no payment. However, under certain circumstances, it is acceptable that a charity trustee may be paid for being a trustee or for carrying out additional services on behalf of the charity, i.e. services that another person (not a trustee) might otherwise undertake for payment. In these circumstances, and where the conditions set out in **subsection (2)** are satisfied, this “service provider” may be remunerated from the charity’s funds for those services. The conditions are that the maximum amount of the remuneration is set out in a written agreement, is reasonable, that the charity trustees are satisfied, prior to entering into the agreement that it is in the interests of the charity, that a minority of trustees are either paid in this way or connected to trustees who are, and that the constitution of the charity allows it to occur. Despite the above, **subsection (5)** ensures that a charity trustee or other service provider may receive remuneration from a charity if they are entitled to receive it under a specific authorising provision in the charity’s constitution (in force on 15 November 2004 - the day that the Bill for this Act was introduced to the Parliament), as a result of a court order, or under any enactment. This means that charities could not make changes to their constitution merely to allow payment of charity trustees before this Act came into force and that trustees may be paid if other legislation or a court order specifically allows it.
82. **Section 68** sets out definitions for terms which are referred to in parts of **section 67**, such as those who would be considered to be connected with a trustee. Such a person is defined as “connected” to a charity trustee if they are married to them, are their civil partner, are living as if married, or if they are a close family relative (i.e. a child, stepchild, parent, grandchild, grandparent, brother or sister of them or their spouse). Also an institution or body cooperate is considered to be “connected” with a charity trustee if it is controlled by them or a “connected” relative, or if they have a substantial interest the body. **Section 105** sets out when a charity or person is considered to have control of another body.

## **Disqualification**

83. **Section 69** sets out the types of person who are disqualified from serving as a charity trustee. These are: anyone convicted of an offence involving dishonesty or an offence under this Act, an undischarged bankrupt, anyone removed from serving as a charity trustee or in management or control of a charity (under previous charity law), by the Charity Commission in England and Wales, by the English courts, or disqualified from serving as a Company Director. **Subsection (4)** allows OSCR to waive the disqualification of a person, allowing them to serve as a charity trustee, unless this would prejudice the operation of the Company Directors Disqualification Act 1986 or the Company Directors (Northern Ireland) Order 2002. Under **section 70**, it is an offence to act as a charity trustee while disqualified from doing so. An offender is liable to either a fine up to level 5 (£5000) or imprisonment for up to 6 months on summary conviction or an unlimited fine or up to 2 years imprisonment, or both, on conviction on indictment.