CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) ACT 2005

Relevant Extracts

Charity trustees: general duties

66

(1) A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular-

(a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes,

(b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person, and

(c) in circumstances capable of giving rise to a conflict of interest between the charity and any person responsible for the appointment of the charity trustee-

(i) put the interests of the charity before those of the other person, or

(ii) where any other duty prevents the charity trustee from doing so, disclose the conflicting interest to the charity and refrain from participating in any deliberation or decision of the other charity trustees with respect to the matter in question.

(2) The charity trustees of a charity must ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of this Act.

(3) Subsections (1) and (2) are without prejudice to any other duty imposed by enactment or otherwise on a charity trustee in relation to the exercise of functions in that capacity.

(4) Any breach of the duty under subsection (1) or (2) is to be treated as being misconduct in the administration of the charity.

(5) All charity trustees must take such steps as are reasonably practicable for the purposes of ensuring-

(a) that any breach of a duty under subsection (1) or (2) is corrected by the trustee concerned and not repeated, and

(b) that any trustee who has been in serious or persistent breach of either or both of those duties is removed as a trustee.

Disqualification

69 Disqualification from being charity trustee

(1) The persons specified in subsection (2) are disqualified from being charity trustees.

(2) Those persons are any person who-

(a) has been convicted of-

(i) an offence involving dishonesty,

(ii) an offence under this Act,

(b) is an undischarged bankrupt,

(c) has been removed, under section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40) or section 34 of this Act, from being concerned in the management or control of any body,

(d) has been removed from the office of charity trustee or trustee for a charity by an order made-

(i) by the Charity Commissioners for England and Wales under section 18(2)(i) of the Charities Act 1993 (c.10), section 20(1A)(i) of the Charities Act 1960 (c.58) or section 20(1) of that Act (as in force before the commencement of section 8 of the Charities Act 1992 (c.41)), or

(ii) by Her Majesty's High Court of Justice in England,

on the grounds of any misconduct in the administration of the charity for which the person was responsible or to which the person was privy, or which the person's conduct contributed to or facilitated,

(e) is subject to a disqualification order or disqualification undertaking under the Company Directors Disqualification Act 1986 (c.46) or the Company Directors Disqualification (Northern Ireland) Order 2002 (S.I.2002/3150).

(3) A person referred to in subsection (2)(a) is not disqualified under subsection (1) if the conviction is spent by virtue of the Rehabilitation of Offenders Act 1974 (c.53).

(4) OSCR may, on the application of a person disqualified under subsection (1), waive the disqualification either generally or in relation to a particular charity or type of charity.

(5) OSCR must notify a waiver under subsection (4) to the person concerned.

(6) OSCR must not grant a waiver under subsection (4) if to do so would prejudice the operation of the Company Directors Disqualification Act 1986

(c.46) or the Company Directors Disqualification (Northern Ireland) Order 2002 (S.I.2002/3150).

70 Disqualification: supplementary

(1) A person who acts as a charity trustee while disqualified by virtue of section 69 is guilty of an offence and liable-

(a) on summary conviction, to imprisonment for a period not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both,

(b) on conviction on indictment, to imprisonment for a period not exceeding 2 years or a fine or both.

(2) Any acts done as a charity trustee by a person disqualified by virtue of section 69 from being a charity trustee are not invalid by reason only of the disqualification.

(3) In section 69(2)(b), "undischarged bankrupt" means a person-

(a) whose estate has been sequestrated, who has been adjudged bankrupt or who has granted a trust deed for or entered into an arrangement with creditors, and

(b) who has not been discharged under or by virtue of-

(i) section 54 or 75(4) of the Bankruptcy (Scotland) Act 1985 (c.66),

(ii) an order under paragraph 11 of Schedule 4 to that Act,

(iii) section 279 or 280 of the Insolvency Act 1986 (c.45), or

(iv) any other enactment or rule of law subsisting at the time of the person's discharge.

EXPLANATORY NOTES

Relevant Extracts

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 (Office of the Scottish Charity Regulator) 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.

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.