

# J&H Mitchell <sup>WS</sup>

SOLICITORS & ESTATE AGENTS

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## THE ROLE OF THE CHARITY TRUSTEE

*This Fact Sheet, which is one of a series we provide to assist Charities, is aimed at all Charity Trustees, but particularly anyone who has recently been nominated, elected or appointed as a Trustee of a Charity.*

### 1 SOME DEFINITIONS TO START WITH

- “constitution”
  - the constitution of an unincorporated association; or
  - the trust deed of a charitable trust; or
  - the Memorandum & Articles of Association of a guarantee company’; or
  - the constitution of a SCIO
  
- “Companies Act” The Companies Act 2006, which is available online at: [www.opsi.gov.uk/ACTS/acts2006/ukpga\\_20060046\\_en\\_1](http://www.opsi.gov.uk/ACTS/acts2006/ukpga_20060046_en_1)
  
- “CTI(S) Act” the Charities and Trustee Investment (Scotland) Act 2005 (as amended by the Public Services Reform (Scotland) Act 2010), which is available online at: [www.opsi.gov.uk/legislation/scotland/acts2005/20050010.htm](http://www.opsi.gov.uk/legislation/scotland/acts2005/20050010.htm)
  
- “guarantee company” a company limited by guarantee, but without a share capital (a non-profit-distributing company)
  
- “OSCR” the Office of the Scottish Charities Regulator  
2nd Floor, Quadrant House, 9 Riverside Drive, Dundee DD1 4NY  
[www.oscr.org.uk](http://www.oscr.org.uk)
  
- “SCIO” the Scottish Charitable Incorporated Organisation, introduced by the CTI(S) Act, brought into being from 1 April 2011 for new SCIOs (and from 1 January 2012 for mergers of SCIOs and transfers from guarantee companies to SCIOs)

## 2 TYPES OF CHARITY

There are a number of different types of charity. Currently, the most common are:

- **an unincorporated association** (also known as a voluntary association or club)
- **a charitable trust** (a Deed of Trust usually granted by one or more individuals)
- **a guarantee company** (incorporated under the Companies Act 2006) - please see our separate Fact Sheet entitled '*What is a Guarantee Company*', and
- **a Scottish Charitable Incorporated Organisation (SCIO)**, intended as a more convenient alternative to the guarantee company for charities which seek limited liability without being regulated as limited companies - please see our separate FactSheet entitled '*What is a SCIO?*'.

There is also the **Registered Society (IPS)**. This type of organisation is governed by the Co-operative and Community Benefit Societies Act 2014 and is registered with and regulated by the Financial Conduct Authority. It can either be a Co-operative Society (as a business run by, and for the benefit of, its members), or a Community Benefit Society (as a business run for the benefit of the community). The Community Benefit Society (sometimes referred to as a 'Bencom') has become a little more popular as a choice for a charity given that, in certain circumstances, shares can be issued.

The **Community Interest Company (CIC)** was introduced by The Companies (Audit, Investigations and Community Enterprise) Act 2004 and is intended for social enterprises and for small-scale community-based social entrepreneurs. However, it is not available for charities. Although it has been used by a number of community organisations, almost because it has the word "community" in the title, and can enable some financial return to 'investors', it is quite specific in its scope and intent and should be used carefully and after full consideration of the advantages and disadvantages.

We are always happy to advise on which type of organisation is most suitable in each case.

## 3 TYPES OF CONTROLLING BODY

The CTI(S) Act defines (in section 106) the charity trustees as "*the persons having the general control and management of the administration of a charity*". A charity trustee of any type of charity is part of the controlling body responsible for its overall control, strategy and, except perhaps where there are senior managers employed by the charity, its management too.

That controlling body may be called a number of different labels, including:

- Board of Directors
- Board of Trustees
- Board of Governors
- Management Committee
- Executive Committee

In this Fact Sheet they are referred to collectively as 'the Board of Trustees' and individually as 'the Charity Trustee(s)'.

Even in the case of a guarantee company, it is usual to call the Board a 'Board of Trustees'. In this case, the Charity Trustees are actually directors of a limited company, but the label 'Director' is usually avoided owing to its connotations of salary, bonus and other profit schemes, which are inappropriate to the charity world. The position can be further confused by the practice of some charities which call their principal employee 'Director', in preference to 'Chief Executive' or other label. However, it is important to remember that Trustees of a guarantee company, whatever their label, are also company directors and therefore have responsibilities imposed upon them by the Companies Act.

Although Trustees acting under a Deed of Trust and the Management Committee of an unincorporated association do not have these statutory responsibilities as directors, the CTI(S) Act makes no distinction and expects the same level of understanding, direction and responsibility from *all* Charity Trustees and it is on this basis that the remainder of this Fact Sheet explains the role and responsibilities of the Charity Trustee.

#### **4 TYPES OF MEMBERSHIP**

An organisation intending to be a charity can either be two-tier (with a membership, usually democratically elected) or single-tier (with no membership, although in most cases the Trustees are also the members for circumstances where members are required to act in terms of the relevant legislation).

A charity with a membership has a two-tier structure, the first tier being the members and the second tier being the Board of Trustees (who will usually or mostly be selected by democratic election from the membership).

Open membership will usually mean that anyone interested in the charity's Charitable Purposes may become a member, but this is not necessarily the case and it is quite possible to restrict membership by applying certain criteria, for example, requiring members to be residents of a particular geographic community.

A charity with no separate membership has a single-tier structure, where the members and Charity Trustees are one and the same people (and with new Charity Trustees probably being appointed by the existing Board of Trustees in what is termed a 'self-appointing oligarchy').

A charity must always consider whether it is necessary and appropriate to have an active membership and, if so, what advantage there is for individuals and/or organisations to be involved as a member of the charity. Any restrictions on membership will have to be considered carefully, so as to ensure that they are not too restrictive, especially where the members of the charity are also its main beneficiaries.

#### **5 WHO CAN BE A CHARITY TRUSTEE?**

In Scotland any individual, of any nationality, aged 16 or over can be a Charity Trustee. Sections 1 and 9(f) of the Age of Legal Capacity (Scotland) Act 1991 prevent anyone under the age of 16 from being a Charity Trustee; this is now repeated in section 157 of the Companies Act 2006 with regard to company directors.

Section 69 of the CTI(S) Act lists those who cannot be Charity Trustees, namely anyone who is:

- convicted of an offence involving dishonesty (unless the conviction is spent)
- convicted of an offence under the CTI(S) Act
- an undischarged bankrupt
- removed from being concerned in the management or control of any charity by the Court of Session
- removed from the office of charity trustee by the Charity Commissioners for England and Wales or by the High Court of Justice in England
- disqualified by the Court from acting as a company director by virtue of the Company Directors Disqualification Act 1986 (see Section 11 below).

If OSCR learns that a charity has chosen as a Charity Trustee someone who is disqualified from acting, they can act to remove that person as a Charity Trustee. This is one of one two cases where OSCR can act peremptorily, without giving a chance for the charity to rectify the situation. It will therefore appear as a Direction on the charity's entry in the Scottish Charity Register. Better therefore to check and ensure that no prospective Charity Trustee is in fact disqualified (see next Section).

## 6 SELECTION AND APPOINTMENT OF A NEW CHARITY TRUSTEE

How a potential Charity Trustee is selected for consideration as a candidate will perhaps depend on how dynamic the charity is. The more dynamic and the higher its profile, the easier it would usually be for a charity (and specifically its Board of Trustees) to recruit new Charity Trustees. Conversely some charities, perhaps relatively small and working in less glamorous sectors, may find that they receive few approaches which means that they have to be pro-active in their search for candidates, by word of mouth, through personal contacts or as a result of advertising.

It is helpful to the process if a charity has an idea of the profile of the type of candidate it seeks in respect of the skills appropriate to its own work and taking account of the existing skills already on its Board of Trustees. For this reason, it is good practice for a charity to ask its Charity Trustees to complete a skills matrix on an annual basis, so as to set out the skills it needs (perhaps in a prioritised way) and to assess the skills of existing Charity Trustees against its needs; in this way, it is possible to see where the skills gaps are.

There is an expectation that Boards should be diverse and inclusive and that they should strive to be gender equal ("*50:50 by 2020*"), in line with the Scottish Government's own initiative in this respect. This may affect the way Boards advertise and recruit, how they encourage and assess future Charity Trustees to encourage Equality, Diversity and Inclusion (EDI).

In addition, whilst recruitment and assessment have focussed greatly upon IQ, education and what a candidate has done and achieved, there is an increasing recognition that EQ (emotional intelligence) is as important in assessing a candidate's empathy and personal qualities in relation to team-working, team-building and inter-relating with others.

Increasingly, a candidate for trusteeship is asked to submit a CV or, in the case of democratic elections, a statement (perhaps up to 150 words) to support his/her candidature (particularly relevant for charities where the members do not know each other). In general, a Charity Trustee should be selected because of what he or she can contribute by way of skill, knowledge, contacts and expertise.

Section 66(5) of the CTI(S) Act ensures that a Board of Trustees has a collective responsibility. Because of this, it is recommended that the Board of Trustees consider obtaining a written Declaration from any new Charity Trustee which, at the least, confirms:

- his/her identity and address
- that his/her application details and CV are true and correct
- that he/she is not disqualified from acting as a Charity Trustee (see Section 5 above)
- that he/she undertakes to declare any conflicts of interest as and when they arise
- that he/she has read and understood any guidance issued by OSCR about Charity Trustees, and
- that he/she agrees to undergo an induction process with the charity.

It may be helpful in introducing a Declaration from new Charity Trustees if all the existing Charity Trustees also agree to complete such a Declaration. We can advise on the content and terms of such a Declaration on a case-by-case basis.

Additionally, if the new Charity Trustee is also a director of a charitable guarantee company, a Form AP01 will require to be completed and signed by him/her to confirm his/her consent to act as a company director. This has to be filed with the Registrar of Companies within 14 days of the appointment.

How a Charity Trustee is appointed will depend upon the type of charity in question, its constitution and whether it is a membership (two-tier) body. The main ways of appointment are:

- **election** democratically by the membership (usually at the annual meeting);
- **nomination** by a specific outside organisation authorised to do so by the terms of the charity's constitution (for example, a Local Authority or Community Council having power to nominate one of its Councillors onto the Board of Trustees) - but see below;
- **appointment** by the Board of Trustees, where there is no membership, so that the Board appoints a new Charity Trustee each time a vacancy arises (as a 'self-appointing oligarchy');
- **co-option** by the Board of Trustees (which will usually last only until the charity's next annual meeting).

Where a Charity Trustee has been appointed by a specific outside organisation, it is vital that the Charity Trustee, once appointed, always acts in the best interests of the charity as a whole and not in the interests of the organisation which appointed him/her (section 66(1)(c) of the CTI(S) Act).

This tenet of course applies to all the Charity's Trustees, that they must act individually and collectively in the best interests of the charity.

## 7 INDUCTION OF A NEW CHARITY TRUSTEE

Induction of a new Charity Trustee is not only good practice but is essential to enable him/her to hit the ground running.

Examples of items which might be included in an Induction Pack are:

- the charity's constitution (and any supporting guidelines or regulations)
- the last Annual Report (and any other explanatory leaflet, brochure or prospectus issued by the charity)
- the last audited accounts, the current Budget and the most recent (monthly or quarterly) Management Accounts
- copies of the last three Board Minutes and the Agenda for the next Board meeting (and a note of any future meeting dates)
- any Code of Conduct or Board Policies in existence
- details of any Conflicts of Interest requirements
- details (or organogram) of the Committee and staff structures and reporting processes.

The Induction Pack should be followed up, where applicable, by an induction visit to the charity or, if the charity is not building-based, a meeting with its senior employees.

Additionally, it is increasingly good practice for a Board to offer a mentor to a new Charity Trustee. One of the existing Charity Trustee would be allocated by the Board to look after the new Charity Trustee for a suitable time as mentor to guide, explain and support.

The charity should operate an appraisal (or self-appraisal) system, or at least one where the Chair meets individually with each Charity Trustee on an annual basis. The charity may arrange an annual training week-end for its Charity Trustees and/or an annual strategy

meeting. A Charity Trustee might choose to go on specific training courses – we can arrange these on a tailor-made basis, so please enquire.

Any or all of the above enable induction to be seen as a never-ending process of gaining skills and evaluating performance, so as to ensure that the whole Board (and each individual Charity Trustee) is being effective.

## 8. THE RISK OF THE SHADOW TRUSTEE

Great care has to be taken to ensure that it is the Charity Trustees who are truly in control of the charity. There can be situations where one or more people, who are not formally appointed as Charity Trustees, can and perhaps do exert influence upon and even control over a charity, such as:

- the dominant spouse of a person who is a Charity Trustee of a small charitable trust
- meetings of the Management Committee of an unincorporated association which are regularly attended by someone not on the Committee who influences outcomes or becomes involved in making decisions
- a forceful executive who exerts control over a weak Chair and/or a disinterested Board
- an Advisory Committee which is set up to provide advice, perhaps on technical matters, but exceeds its remit by stipulating conditions of management and strategy which are accepted without question.

In such circumstances, anyone who is not a Charity Trustee but who exercises “*control and management*” over the charity can be treated retrospectively as though a Charity Trustee, by virtue of section 106 of the CTI(S) Act, and found to be liable as such, in the event of any investigation which examines the position (with the benefit of hindsight) when things go wrong and blame requires to be apportioned.

This can also be the case with guarantee companies, where a person with influence who, although not formally appointed as a director, can be confirmed subsequently to have been a “shadow” director and thus as liable as if he/she had indeed been a company director and Charity Trustee.

## 9 RETIRAL, RESIGNATION OR DISMISSAL OF A CHARITY TRUSTEE

The charity's constitution will list the various events upon which resignation by a Charity Trustee will - or be deemed to - take effect. These may include:

- his/her written notice of resignation
- his/her becoming bankrupt or insolvent
- his/her becoming incapable for medical reasons of fulfilling the duties of a Charity Trustee
- his/her being directly or indirectly interested in any contract with the charity and failing to declare that interest
- his/her being assessed as making a significant or persistent breach of the statutory duties – see Section 11 below
- his/her being absent from a number of consecutive Board meetings without consent.

In addition, a Charity Trustee may become disqualified whilst in office, if one of the events listed in section 69 of the CTI(S) Act applies - see Section 5 above.

In the normal event, retirement will take place by rotation (whereby each Charity Trustee serves for one, two or three 'terms' of office, each term usually being of three, four or five years). It is usually good practice for retirement of Charity Trustees by rotation.

Where the constitution does not provide for a regular rotation of Trustees, retirement may be prompted by:

- a recognition by the Charity Trustee that he/she should retire
- the Charity Trustee's reaching a retirement age set out in the constitution
- the Chair having a word with a long-serving Charity Trustee who is now less effective (this is where an annual appraisal or assessment of Charity Trustees can play an important role)
- the Board of Trustees invoking a power (if within the constitution) to remove a Charity Trustee for good reason (such as prompted by section 66(5) of the CTI(S) Act)
- the involvement of OSCR to remove a Charity Trustee where there has been misconduct or mismanagement.

## 10 THE ROLE OF A CHARITY TRUSTEE

The quick description is that a charity's Board of Trustees is responsible for controlling its strategy and overseeing the management within the context of its Charitable Purposes and the terms of its constitution. The role of the Charity Trustee is not a position of honour without responsibility; it requires time, understanding, vigilance and effort.

### Delegation of Duties

Generally, a Charity Trustee cannot delegate his/her responsibilities to others. Although many charities will of course delegate some duties to sub-committees (sometimes called Work Groups, Steering Groups, Task Forces, etc.), or nominated individuals, to look after specific aspects of a charity's governance (e.g. finance, fund-raising, marketing, property, etc.), the ultimate responsibility for taking decisions vests in the Charity Trustees acting together as the Board of the charity.

Where delegation occurs, it is strongly recommended that:

- the sub-committee, or individual, is given a clear, written remit
- the sub-committee, or individual, is not generally able to bind the Board (unless in certain specific situations)
- the sub-committee, or individual, is required to report back regularly (in the case of a sub-committee by circulating its minutes promptly not only to its own members but to the whole Board, and
- is at least one Charity Trustee, but preferably more, on each sub-committee (although not necessarily as its Convenor).

### Main Roles

The main roles of a Charity Trustee are:

- to ensure that the charity is run properly, responsibly and lawfully in the interests of its members in accordance with its constitution
- to ensure that all its activities fall within its Charitable Purposes
- to consider whether there is any unnecessary duplication of activities with other charities;
- to ensure that the charity acts openly, transparently and accountably by fulfilling its Charitable Purposes and by providing Public Benefit
- to ensure the integrity and independence of the charity
- to develop and agree the strategy and policies of the charity
- to agree a financial budget and monitor financial performance
- to ensure that the charity has adequate resources to carry out its Charitable Purposes

- to guard against the liabilities of the charity exceeding its assets
- to ensure effective and accountable management in terms of the agreed strategy
- to appoint, support and review the performance of (senior) employees
- to respond efficiently and properly to all donors and beneficiaries
- to keep up-to-date with relevant skills and knowledge
- to report accurately and promptly to OSCR and, if a guarantee company, to the Registrar of Companies
- to report accurately and at least annually to the members of the charity.

At specific times, a Charity Trustee will focus on different issues. These will of course depend on circumstances, but the following will usually be relevant:

#### **At commencement**

- be fully conversant with the constitution
- be fully conversant with the CTI(S) Act and the duties of a Charity Trustee thereunder
- consider whether any policies or guidelines should also be adopted
- consider and become acquainted with other charities working locally or in the same sector
- establish a written development plan and a mechanism for its assessment and review
- consider the composition of the Board of Trustees
- consider employment of any staff.

#### **In the early years**

- review Board skills
- review staff skills
- review Charitable Purposes specifically and the constitution generally
- assess and review the development plan and measure its outcomes
- explore funding (without compromising independence and staying always within the Charitable Purposes)
- set Board Policies (see later section) as required
- consider trading - and whether a separate trading subsidiary requires to be established
- consider, where relevant, the issues relating to the purchase or letting of property
- work collaboratively with other charities.

## **11 THE MAIN DUTIES OF A CHARITY TRUSTEE**

The statutory duties of a Charity Trustee are spelt out in the CTI(S) Act (section 66) as being:

- *“to seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes”* [please note that members of a SCIO, unlike the members of a guarantee company, also have to uphold this specific statutory duty]
- *“to act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person”*
- *“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 –*
  - put the interests of the charity before those of the other person, or*
  - 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”*; and
- *“to ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of [the CTI(S)] Act”*.

The principal duties of a Charity Trustee who is also a director of a guarantee company are spelt out in the Companies Act (sections 171-177), namely:

- to act in accordance with the company’s constitution, and only exercise the powers of the company for the purposes for which they are conferred

- to act in the way which, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to:
  - (a) the likely consequences of any decision in the long term,
  - (b) the interests of the company's employees,
  - (c) the need to foster the company's business relationships with suppliers, customers and others,
  - (d) the impact of the company's operations on the community and the environment,
  - (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
  - (f) the need to act fairly as between members of the company;
- to exercise independent judgment
- to exercise reasonable care, skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and the general knowledge, skill and experience that the director has
- to avoid a situation in which he or she has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company (this applies in particular to the exploitation of any property, information or opportunity), unless it is a matter which has been authorised by the Board
- not to accept a benefit from a third party conferred by reason of his or her being a director, or his or her doing (or not doing) anything as director, and
- to declare an interest in a proposed transaction or arrangement, where a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company.

In implementation of these statutory duties, additional duties of a Charity Trustee include:

- to give proper time and attention to the task of being a Charity Trustee
- to undertake initial and regular training in order to be and remain a skilled and effective Charity Trustee
- to account to the members of the charity for its current well-being and future development
- to obtain regular, accurate and informative, budgets, forecasts, budgetary controls, cash flows and Accounts
- to act in good faith and with honesty, prudence and competence in what he/she considers to be the charity's best interests
- to assess all risks relating to the charity (financial, health & safety, training needs), to consider the probability and impact of each and to address the likely outcomes
- to ensure that statutory documents, including the Annual Return and Accounts, are lodged timeously
- not to put himself/herself in a position where personal interests might or do conflict with those of the charity
- not to receive any personal benefit or profit from the office of Charity Trustee (except as permitted - see Section 14 below)
- not (as a general rule) to be an employee of the charity (see Section 14 below)
- not to allow the charity to trade when he/she knows – or ought to have known – that it was insolvent (that is, where its liabilities exceed its assets, which is known as 'wrongful trading', )
- to calculate and maintain an appropriate financial reserve
- to comply (as relevant) with the formalities of the CTI(S) Act and the Companies Acts (see below)
- to respond timeously and fully to any enquiries by and requests from OSCR.

Specifically in accordance with the terms of the CTI(S) Act, each Charity Trustee must, ensure that:

- the consent of OSCR is obtained for any change in the charity's name (section 11 of the CTI(S) Act)
- the consent of OSCR is obtained in respect of any amendment to the charity's Charitable Purposes, its proposed amalgamation or reorganisation or its proposed winding up (section 16 of the CTI(S) Act)
- all assets of the charity are applied exclusively to its Charitable Purposes
- upon dissolution, the charity's assets remain in the charitable domain (section 19 of the CTI(S) Act)
- OSCR is notified (in terms of section 17 of the CTI(S) Act) of any changes in:
  - the charity's principal office (or, where there is no principal office, its Principal Contact Person)
  - its entry details on the Register of Charities
  - its constitution (other than a change in its Charitable Purposes - where OSCR's consent is required)
  - any administrative or winding up order;
  - the appointment of a Receiver;
- he/she ensures that the charity states that it is a charity (including reference to its Scottish Charity Number) on all letters, e-mails, website, brochures, newsletters, leaflets, accounts, contracts, invoices, leases, title deeds, etc.
- he/she gives no false or misleading information to OSCR - section 26(3) of the CTI(S) Act (not restricted to a charity trustee)
- he/she neither refuses nor fails, without reasonable excuse, to supply any document, information or explanation to OSCR - section 29(6) of the CTI(S) Act (not restricted to a charity trustee)
- proper accounting records are maintained, annual accounts are prepared, which are either audited or independently examined, and a signed set lodged timeously with OSCR (section 44(1) of the CTI(S) Act)
- he/she neither refuses nor fails, without reasonable excuse, to comply with a requirement of an "*appointed person*" - section 46(6) of the CTI(S) Act (not restricted to a charity trustee)
- he/she does not act as a Charity Trustee whilst disqualified (section 68 of the CTI(S) Act)
- the accounting records of the charity are retained safely for a minimum of six years (section 44(2) of the CTI(S) Act), with due precaution taken against fire, flood or computer password loss.

As mentioned in Section 6 above, the Charity Trustees share a collective responsibility, effectively to police each other. In terms of section 66(5) of the CTI(S) Act, the Board must ensure that any breach by any Trustee of the principal duties listed in section 66 (quoted at the top of this Section) is "*corrected....and not repeated*" and that, if the breach is persistent or serious, the Board should ensure that the Trustee in question is "*removed*". This means that it is prudent to ensure that the charity has the power to remove a Trustee in specific circumstances – see Section 9 above.

## 12 THE LEVEL OF A CHARITY TRUSTEE'S DUTY OF CARE

A Charity Trustee's duty of care is to exercise such care and skill as is "*reasonable to expect of a person who is managing the affairs of another person*" (section 66(1)(b) of the CTI(S) Act).

If a Charity Trustee has any specialist or professional knowledge or experience which he or she holds out as having, that additional level of knowledge or skill is not taken into account in terms of the CTI(S) Act. However, it remains to be seen whether a Court would consider, with the benefit of hindsight, that such additional skill or knowledge should be taken into account,

potentially raising the level of that Charity Trustee's own duty of care to a level reasonable to expect of a person with that skill or knowledge.

In connection with a guarantee company, section 252(2) of the Companies Act confirms that a person is not to be regarded as a shadow director by reason only that the directors act on advice given by him or her in a professional capacity.

### 13 BEING AN EFFECTIVE CHARITY TRUSTEE

- read all the Board papers
- clarify information needed (quality not quantity) and questions to pose – generate a “*culture of enquiry*”
- in event of any proposal:
  - check against charity's Charitable Purposes specifically and constitution generally
  - check against relevant legislation and regulations
  - check against current strategy
  - check impact upon current budget
  - check availability of relevant skills for delivery – Board, management, external
  - check appropriate monitoring process
- ensure appropriate monitoring and measurement of charity's activities
- undergo self-assessment or annual performance review
- review governance (after all “*governance is a journey*”), the charity's constitution (see Item 20 below) and the way the Board and its committees operate with a view to assessing and implementing Equality, Diversity and Inclusion (EDI)
- keep an eye on the big picture and assess external factors
- act at all times as the charity's ambassador.

### 14 OSCR AND THE CHARITY'S DUTY OF PUBLIC ACCOUNTABILITY

The Board of Trustees reports not only to its members (where the charity is a two-tier membership organisation) but also to OSCR on behalf of the public as to its stewardship of the charity's funds in the annual accounts, which will include the Board's detailed annual report, as a coherent package. Thereby the Board discharges its duty of public accountability.

The accounts provide financial information as to income and resources, their application in furtherance of the Charitable Purposes and the position of the charity's assets and liabilities.

The annual report enables the Board to demonstrate that it understands and is working to achieve the Charitable Purposes. It explains what the Board is trying to do, how it is going about it, what it has done in the year in question and what it plans to do in the immediate future. Rather than being seen as a chore, or as a matter to be left to the accountants to prepare, the annual report should be addressed with care and be prepared by the Board itself as it is a critical opportunity for the charity to convey a positive message, in what will become an increasingly important ‘shop window’, about its activities and achievements and its future intentions and targets, bearing in mind that it is likely to be read by potential members, donors, funders, service contractors and beneficiaries.

Charity accounts require care in their preparation and have to conform to the current accounting requirements (particularly as embodied in section 44 of the CTI(S) and the Charities Accounts (Scotland) Regulations 2006) and, where applicable the current Statement of Recommended Practice (SORP).

Subject to the terms of the new Accounting Regulations (and the Companies Act), and unless a higher requirement is specified in its own constitution (or is required by a funding body), a charity's accounts must comply as follows:

- a charity (other than a company - see below) which has annual incoming resources of:
  - up to £250,000 can provide receipts and payments accounts and have these approved by an independent financial examiner (who, in terms of Regulation 11(1), is reasonably believed by the charity to have the requisite ability and practical experience to carry out a competent examination of the accounts)
  - between £250,000 and £500,000 can provide accruals accounts and have these approved by a qualified independent financial examiner (who must be a member of one of the organisations listed in Regulation 11(2)), and
  - over £500,000 - or which has an aggregate value of its assets (before deduction of liabilities) in excess of £2.8 million (to increase to a threshold figure of £3.26 million from 1st April 2011) - requires to provide audited accounts which are audited by a registered auditor;
- a charity which is a guarantee company which has annual incoming resources of:
  - up to £500,000 (and gross assets of less than £3.26 million) can provide accruals accounts and have these approved by a qualified independent financial examiner, and
  - more than £500,000 (and/or gross assets of more than £3.26 million) requires to provide audited accounts which are audited by a registered auditor.

A charity is under a legal duty to provide a copy of its latest accounts (and of its constitution if that is also requested) to any member of the public within one month of such request. It can charge reasonably for the cost of so doing (photocopying and postage).

A charity has to lodge a signed set of its accounts with OSCR within 9 months after its year end (in terms of Regulation 5) *and*, if also a charitable company, with the Registrar of Companies also within 9 months after its year end.

In addition, a charity must lodge a signed Annual Return with OSCR and, if also a charitable company, an annual Confirmation Statement with the Registrar of Companies. Both OSCR and the Registrar of Companies provide pre-populated versions of their Annual Return, based on the information submitted during the previous year, which has to be checked, verified and, if necessary, amended by the charity before being returned timeously.

Larger charities also have to complete and file a Supplementary or Full Monitoring Return with OSCR. Those charities with annual incoming resources of £25,000 - £100,000 will complete a Supplementary Monitoring Return and those with annual incoming resources greater than £100,000 have to complete the Full Monitoring Return.

OSCR conducts a 'rolling review' to ensure that in the case of each charity:

- its Charitable Purposes fall within the list of charitable purposes in section 7(2) of the CTI(S) Act and that all of the activities it has undertaken are exclusively charitable and fall within its own declared Charitable Purposes
- it provides Public Benefit in terms of section 8 of the CTI(S) Act (and, if so, that there is no condition on obtaining benefit which is "*unduly restrictive*")
- its name is not objectionable in terms of section 10 of the CTI(S) Act, and
- none of its Charity Trustees is disqualified in terms of section 69 of the CTI(S) Act.

Charity Trustees must be aware that the charity's own auditors or independent financial examiners are under a duty (in terms of section 46 of the CTI(S) Act) to report on the activities or affairs of either the charity or any "*connected body*" (such as a trading subsidiary) where they encounter any matter which is likely to be of "*material significance*" to OSCR in carrying out its functions. This 'whistleblowing' provision is further extended in that, optionally, the auditors or

independent financial examiners may report any other matter which they believe is likely to be “*relevant*” to OSCR in carrying out its functions.

Charity Trustees may also become involved with OSCR as a result of a complaint being made to OSCR against them or about the charity, leading to OSCR’s carrying out enquiries or an investigation.

## 15 PERSONAL REMUNERATION OF A CHARITY TRUSTEE

The general difficulty which some charities face in recruiting individuals with relevant skills to serve as Charity Trustees is doubtless exacerbated by the fact that, in most cases, a charity cannot remunerate a Charity Trustee for his/her acting as a Trustee.

Whilst the safest rule to follow is that a Charity Trustee should not be remunerated for being a Charity Trustee and that, in consequence, an employee of should also not serve as a Charity Trustee, this is not prohibited by the CTI(S) Act.

In terms of section 67 of the CTI(S) Act, provided that there is no prohibition in the charity’s constitution against its remunerating a Charity Trustee, remuneration can be given to a Charity Trustee (or to someone “*connected to*” a Charity Trustee) in certain specific circumstances. The full list of those “*connected to*” a Charity Trustee is given in section 68(2) of the CTI(S) Act; it includes partners, immediate family and organisations in which the Charity Trustee is involved.

If the charity’s constitution pre-dates 15 November 2004 and, at that date, permitted remuneration to a Charity Trustee, remuneration can be given, or continue to be given, by the charity to any of its Charity Trustees without further ado.

Otherwise, remuneration can be given to a Charity Trustee (or to someone connected to a Charity Trustee), in terms of section 67, only on the following conditions, that:

- the maximum amount of the remuneration is set out (as a specific sum or ascertainable by formula) in a written agreement between the charity and the Charity Trustee
- the maximum amount of the remuneration is reasonable in the circumstances
- the Board of Trustees is satisfied that it would be in the interests of the charity for the agreement to be entered into for specific services to be carried out by the Charity Trustee in question (or by someone connected to that Charity Trustee) for that maximum remuneration
- less than half of the Board of Trustees is receiving remuneration, or is “*connected to*” someone who is receiving remuneration.

We can provide detailed advice on the applicability and content of individual Remuneration Agreements.

## 16 PERSONAL LIABILITY OF A CHARITY TRUSTEE

A charity will take collective responsibility for the actions of its Board of Trustees and its employees, for example where there are insufficient funds to pay the bills, or where a claim arises out of a contract. That collective responsibility may require the charity to cease trading and to wind up its affairs.

If a guarantee company, the charity will in most cases simply require its members (including its Trustees) to pay a minimum set out in its Memorandum (usually £1 each). If it is a SCIO, its members do not have to make any financial contribution at dissolution. If an unincorporated

association or a charitable trust, it is possible that the Trustees (and members if there are any) will proportionately be liable for the charity's debts - this is the reason why limited liability, as afforded by a guarantee company, is so attractive.

It is possible for Trustees to obtain indemnity insurance in respect of their actings, provided that the constitution specifically enables the charity to pay such premiums from its resources. Such indemnity insurance will not cover certain actings by Charity Trustees and particularly those which are wrongful, negligent or fraudulent.

However, any Charity Trustee (even where the charity is a guarantee company) runs the risk of financial penalties and/or personal liability if he/she:

- causes loss to the charity by acting unlawfully or outwith its Charitable Purposes and/or powers
- commits the charity to debts which amount to more than its assets ('wrongful trading')
- commits the charity to take on a debt when knowing that the charity would not be able to pay it back ('reckless trading')
- commits the charity to act fraudulently ('fraudulent trading')
- acts negligently (which can be a negligent act or a negligent omission to act)
- allows a conflict of interest to develop where personal gain, or gain for a family member or friend, is obtained at the expense of the charity
- fails to advise the Registrar of Companies of changes to Directors, Company Secretary or Registered Office
- fails timeously to provide the Registrar of Companies with Accounts and an Annual Return;
- fails to comply with certain elements of the CTI(S) Act (see Section 11 above) or of obligations or requirements thereunder due to OSCR.

## 17 THE ROLE OF THE CHAIR

The role of the Chair is not governed or even made distinct in any legislation relating to charities of companies. The Chair is usually considered to be "*first amongst equals*" and his or her role is usually one of implied consent rather than specific instruction by the remainder of the Board, although increasingly it is recommended that the role or expectation of what the Chair will do is committed to writing so that there are no misunderstandings.

That said, the role, where implied or express, includes:

- providing leadership and vision
- ensuring good communications throughout the charity's organisation
- ensuring the key two-way relationship with the charity's senior employee(s)
- ensuring that all Charity Trustees are involved, are effective and are sufficiently briefed and trained
- being a facilitator and co-ordinator of Trustees' views
- aiming to be fair (rather than popular)
- encouraging a Board to evolve as an effective team which makes good decisions
- ensuring a good mix of Charity Trustees on the Board and encouraging recruitment and retirements as appropriate
- undertaking (either formally or informally) an annual appraisal of each Charity Trustee
- providing for a reasonable succession within the Board generally and specifically in respect of a future Chair
- deciding upon the content of Agendas, whether there is to be Private Business, what items will be discussed under Any Other Business and the general conduct of meetings
- assessing and managing any conflicts of interest, and
- managing key relationships with stakeholders and funders.

## 18 BOARD POLICIES & REGISTER OF INTERESTS

The Board of Trustees is likely to adopt a Policy for each of a number of specific matters. For larger charities, where the SORP applies, some of these will be mandatory.

Board Policies may, for example, include:

- Board evaluation and appraisal
- Bribery (compulsory for incorporated charities – SCIOs and Guarantee Companies)
- Complaints Handling
- Confidentiality
- Conflicts of Interest (compulsory for SCIOs within their constitutions, and strongly recommended for all other types of charity)
- Data Protection
- Decision-making Authorities
- Equality, Diversity and Inclusion
- Expenses
- Financial Controls
- Fraud
- Freedom of Information
- Health & Safety
- Insurances
- Investment (and any restrictions on investment)
- Recruitment Procedures, Equal Opportunities and Employment Issues
- Reserves
- Risk Assessment and Risk Management.

The Board of Trustees will also, in selecting appropriate policies to formulate and endorse, be mindful of current legislation relevant to the scope of the charity's operations, for example in relation to disabilities, children, etc.

Many charities may see the setting up of these policies as a chore, but these should be considered carefully and be relevant for and specific to the charity in question. We can provide advice and assistance with regard to the relevance and content of such Board policies.

It is good practice for a charity to establish and maintain a Register of Interests in which Charity Trustees (and usually employees also) record details of employment/self-employment; ownership of land and buildings; substantial ownership of companies; and other material influences. Such a Register, once established, should be updated regularly (at least annually) and be available for inspection by the Charity Trustees, the charity's members and, in certain circumstances, members of the general public.

If the charity's constitution is silent (a SCIO's Constitution cannot be so) as to how to manage conflicts of interest as they arise potentially or actually, it is good practice for a Board to have a policy in this respect. The constitution of a SCIO must make provision for the management of conflicts of interest. Such a policy will explain what a Charity Trustee should do if he or she finds that a conflict of interest may potentially arise or is actually arising and how the Board should react, for example and depending upon the circumstances, to determine whether the conflict simply be noted in the Minutes, or whether the Trustee in question, whilst being permitted to remain in the meeting, must not partake in discussions or decisions relating to such matter, or whether the Trustee in question should require to be absent from that particular element of the meeting.

We can provide detailed advice on Board Policies, Register of Interests and/or Codes of Conduct.

## 19 COMMON PROBLEM AREAS

Inevitably, with over 20,000 active charities in Scotland alone, there is a knowledge-base of the type of problems which recur and the reasons for these, which include:

- insufficient range of skills and training within the Board of Trustees
- poor relationship and/or lines of communication between the Chair and principal employee
- inadequately trained employees
- inadequate monitoring of employees (trusting them too much)
- insufficient financial information being provided on a regular basis to Trustees
- Charity Trustees relying on everyone else to get it right
- failure to maintain the charity's independence
- lack of basic internal administrative and financial controls
- a failure to keep ring-fenced or specific project funding (technically referred to as 'Restricted Funds') separate from general funds available for the charity's general purposes ('Unrestricted Funds')
- no or insufficient risk assessment and risk management
- no or poor complaints-handling procedures
- Charity Trustees not understanding the charity's business.

It is important to be aware of such failings in order to take steps to avoid them.

## 20 REVIEW OF CHARITABLE PURPOSES AND CONSTITUTION GENERALLY

Charity Trustees should always have in mind, and review regularly, the effectiveness of the Charitable Purposes under which they are caused to operate, as well as the more detailed administrative provisions within their charity's constitution. Wherever possible within the terms of the existing constitution, steps should be taken from time to time (perhaps at least once every five years and/or whenever there are significant changes of policy, strategy or direction) to modernise and update the constitution.

This is not a sign of failure of an existing constitution but rather an acknowledgement that a charity can and should grow dynamically and is therefore a manifestation of the Board's acumen in recognising where the charity is at any given time and where it is going and then ensuring that its constitution continues to be tailor-made for all current and prospective needs.

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*Although carefully prepared, this Fact Sheet is intended as a guide only.  
Specific and specialist legal advice should be sought on individual situations,  
including the precise content of any charitable constitution,  
Policies, Register of Interests, Remuneration Agreement, etc.*

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*Accredited by the Law Society of Scotland as a specialist in Charity Law*

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