

## Charities and Trustee Investment (Scotland) Act 2005

### Guidance for Free Church of Scotland Charity Trustees

The Charities and Trustee Investment (Scotland) Act 2005 established the Office of the Scottish Charity Regulator, known as OSCR. The general functions of OSCR are to determine charitable status, keep a public register of charities, encourage, facilitate and monitor compliance with charity legislation, investigate misconduct and take remedial or protective action if necessary and to advise and make proposals to the Scottish Ministers in matters relating to its functions.

This Guidance Note is intended to highlight some of the main duties of charity trustees of the Free Church and its individual congregations arising from the Act. It is not intended to be exhaustive. Detailed information is available on the OSCR website at [www.oscr.org.uk](http://www.oscr.org.uk).

#### The Register of Charities

Section 3 of the Act provides that OSCR must keep a public register of charities. All Scottish charities must be on the Register. The Register is available on the OSCR website and shows brief details for each congregation which is a registered charity. These details include:

- the name of the charity;
- the principal office or the name and address of one of the charity trustees;
- the charity's purposes;
- whether the charity is a designated religious charity;
- the charity's constitutional form (which will be unincorporated association in the case of congregations);
- the accounting period end date;
- gross income;
- geographical spread;
- main operating location;
- the date the entry was last updated; and
- the Register entry for each individual congregation should also show the name of the "parent charity", namely "Free Church of Scotland" and the charity registration number of the Free Church of Scotland as the parent charity.

#### The Charity Test

The Act establishes a "charity test" that must be satisfied by every organisation on the Register. This test consists of 2 parts:

- 1) the purposes of the organisation must be exclusively charitable; and
- 2) the organisation must provide public benefit.

The Act goes on to define what are considered to be "charitable purposes", one of which is "the advancement of religion". OSCR will be continuing to review all charities on the Register, including congregations, by way of their Rolling Review of existing charities. It is therefore important for congregations to be able to demonstrate that they meet the charity test. General governance issues will also be important and therefore each congregation should ensure that its accounts and accompanying Trustees' Report are prepared in accordance with the requirements of the Act and the associated accounting regulations.

## Who are the Charity Trustees of a congregation?

The term “charity trustees” is used in the Act to describe those persons having general control and management of the administration of a charity. Therefore, the charity trustees of a Free Church congregation will be all members of either the Deacons’ Court or the Finance Committee.

## The duties of Charity Trustees

The Act sets out the general duties of charity trustees. Charity trustees must act in the interests of the charity and must, in particular:

- seek to ensure that the charity acts consistently with its purposes.
- act with the level of care and diligence that is reasonable to expect of someone managing the affairs of another person.
- avoid any conflict of interest. If circumstances arise where there is potential for there being a conflict of interest, a charity trustee must put the interests of the charity first. If for any reason an individual charity trustee is in a position where he cannot do this, then the trustee concerned must disclose the conflicting interest to the charity and not participate in any decision of the other charity trustees regarding the particular matter in question.
- ensure that the charity complies with the requirements of the Act.

## Remuneration for Services

It is very important for all charity trustees to be aware of the rules about the remuneration of charity trustees which are set out in the Act.

A charity trustee may not normally be remunerated for services provided to the charity, unless certain conditions are met. It is important to remember that this rule applies not only to direct payments to the charity trustee personally but also to payments made to any person with whom that trustee is “connected.” Persons defined in the Act as being connected to a charity trustee include the spouse of a trustee and also children, stepchildren, parents, grandchildren, grandparents, brothers or sisters of a trustee (and a spouse of any such person). A Company is considered to be connected to a charity trustee if it is controlled by the trustee or by a person to whom the trustee is connected, or if the trustee or connected person has a substantial interest in the Company. A Partnership is considered to be connected to a charity trustee if the trustee or a person to whom the trustee is connected is a partner in the firm.

Under certain circumstances, however, it is acceptable for a charity trustee to be paid from the charity’s funds for providing services to the charity. The conditions are:

- that the maximum amount of the remuneration is set out in a written agreement;
- that the amount of the remuneration is reasonable;
- that the charity trustees are satisfied, before 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.

In light of the above certain steps must be taken by a congregation on any occasion where:

- 1) they employ one of their charity trustees or a person connected to a trustee, for example as a church officer or cleaner; or
- 2) other types of services are to be provided by a charity trustee or a person connected to a trustee, for example a tradesman undertaking a repair or other work for the congregation.

In such cases, the Deacons' Court or Finance Committee must ensure that they have an appropriate written agreement with the charity trustee or connected person in place and that all of the above conditions are satisfied. They will have to agree that the proposed remuneration is reasonable in the circumstances and that it is in the interests of the congregation that the services be provided by the named charity trustee or connected person (which may be a Company or Partnership). All these matters will have to be appropriately minuted. In the event of employment of a charity trustee any future increase in salary will have to be minuted and confirmation made that such an increase is reasonable.

### **Designated Religious Charity Status**

The Free Church has been granted the status of a "designated religious charity" and is therefore exempted from some of the supervisory powers of OSCR and the courts under the Act. Effectively, this means that 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. This special status is restricted to those religious charities whose internal structures offer an acceptable degree of self regulation. However, in terms of the Act, OSCR may withdraw the designated religious charity status in certain circumstances, for example if misconduct were to be established. This would open the Church up to the full range of regulatory controls which apply to secular charities. It is therefore important that the Church shows itself to be capable of regulating itself to the extent permitted by the Act.

### **The Charities References in Documents (Scotland) Regulations 2007 (as amended)**

Information on these Regulations has already been circulated to all congregations, who are reminded of the need to comply. Full guidance on the up to date application of the regulations is available on the OSCR website as detailed above.

### **Summary**

All charity trustees of individual congregations should therefore:

- remember at all times the need to comply with their statutory duties as charity trustees.
- familiarise themselves with the provisions of the Act regarding charity trustees and conflicts of interest.
- be careful to ensure that none of the assets of the congregation are used for any non-charitable purpose.
- familiarise themselves with the provisions of the Act regarding remuneration of charity trustees and those "connected" to charity trustees as defined in the Act. In particular if any office bearer or person connected to an office bearer is being paid, either directly or indirectly, for providing a service or services to the congregation it is imperative that an appropriate Remuneration Agreement is in place.
- be aware of the Charities References in Documents (Scotland) Regulations 2007 (as amended).
- arrange appropriate training for new office bearers who will be assuming the role of a charity trustee. It is recommended that in addition to this brief Guidance Note, all office bearers should have read and be familiar with the more detailed guidance provided by OSCR, "Guidance for Charity Trustees", which is available on the OSCR website as detailed above.

Advice in respect of specific situations can of course be obtained from the Free Church Offices who will always be happy to assist.