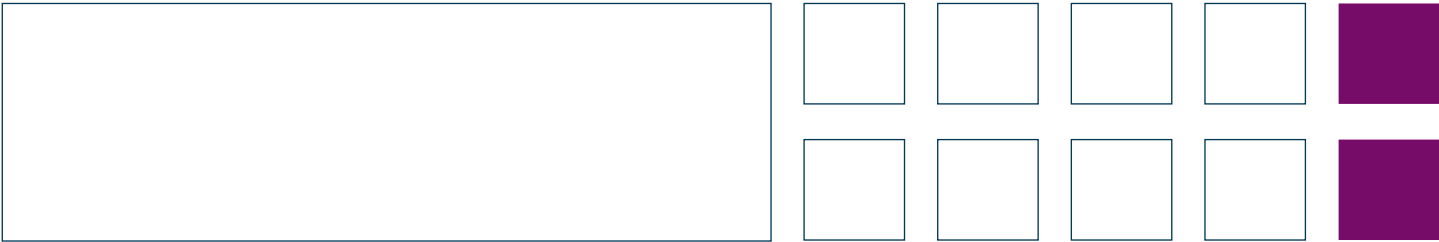


Who's In Charge:
Control and
Independence in
Scottish Charities

OSCr
Office of the Scottish **Charity Regulator**

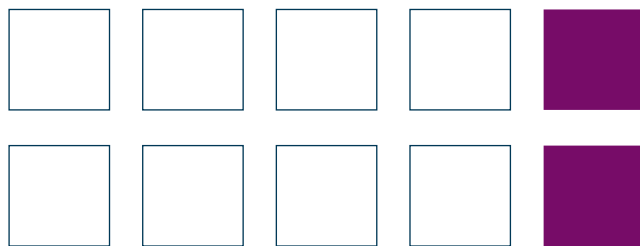
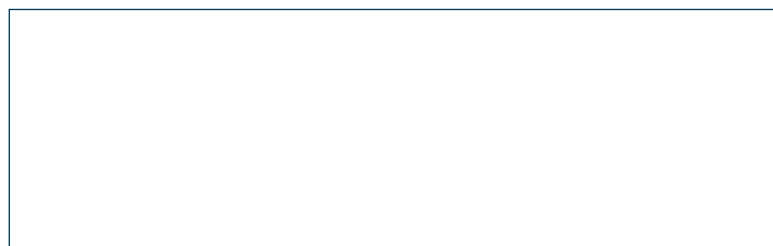
The logo consists of the letters 'OSCr' in a dark blue sans-serif font, with the 'r' in a lighter blue. Below it, the text 'Office of the Scottish Charity Regulator' is written in a smaller, dark blue sans-serif font. To the left of the text is a horizontal row of five colored squares: purple, teal, pink, yellow, and dark blue.



Contents

	Page
Executive Summary	4
Chapter 1.	8
Chapter 2.	10
Chapter 3.	24
Chapter 4.	30
Chapter 5.	33
Further Reading	35

When it is unclear who is in charge of a charity, serious governance problems can develop and harm the charity's activities and reputation. This guidance explains why clarity about who is in charge of a charity is crucial. We also set out how the duties of charity trustees and the principles of the charity test dictate the way that people in charge of charities must behave.



Executive Summary

Chapter 1 – Underlying principles

When it is unclear who is in charge of a charity, serious governance problems can develop and harm the charity's activities and reputation. This guidance explains why clarity about who is in charge of a charity is crucial. We also set out how the duties of charity trustees and the principles of the charity test dictate the way that people in charge of charities must behave.

We explain that:

- A.** A charity must be managed and controlled by charity trustees who are acting in the interests of the charity
- B.** A charity must have only charitable purposes and must provide public benefit through its activities, even when it is linked to, or working with, other bodies
- C.** A body will fail the charity test if its constitution allows Scottish Ministers or a Minister of the Crown to direct or control its activities.

Chapter 2 – What to watch out for

Our experience as the Scottish charity regulator shows that there are certain structures and relationships that are more likely to lead to problems for charities as regards control and independence. In this chapter, we aim to ensure that charity trustees put safeguards in place so they can always act to achieve the charity's objectives. A charity must establish clear boundaries for decision making by charity trustees. We set out some of the situations we have encountered and indicate key learning points and good practice for charity trustees and others in such situations:

A. A charity has links to central government. **In these cases:**

- » A charity's constitution must not allow Ministers to direct or control the charity (although Scottish Ministers may by order disapply this statutory restriction)

- » In considering relationships with charities, Government Departments should beware of seeking constitutional and operating provisions which may jeopardise their charitable status.

B. A charity has links to other bodies. For instance:

- a. Where the same people are managing two bodies, one of which is a charity:**
 - » It may be difficult to demonstrate that the charity is being governed independently in its own best interests
 - » Decision-making procedures and practical arrangements should demonstrate that conflicts of interest are dealt with appropriately.
- b. When the charity is closely linked to another body and many of the same people are on the two Boards:**
 - » The make-up of a Board, where it is dominated by members from a linked body, can lead to an inherent risk of recurrent conflict of interest
 - » A conflict of interest policy should be applied in all situations where there is a conflict or potential conflict.
- c. Where a charity is established by another body:**
 - » Ideally, a majority of charity trustees should be independent of that body, that is, the majority should be neither Board members nor employees of that other body
 - » If linked and independent charity trustees are evenly balanced on the Board, it is good practice that the Chair be one of the independent charity trustees
 - » Contracts and property arrangements between the bodies should be clearly in the interests of the charity, whether it is making use of another body's assets, or supplying its assets for use by another body.

d. Where a charity is largely funded by another body or carries out work for another body as a major part of the charity's activities:

- » Charity trustees must take decisions in the interests of the charity and should be able to demonstrate that they have done so. One way to do this may be by taking appropriate independent professional advice, where the scale of the decision and the risk to the charity requires this
- » Funders of charities may place conditions on funds offered to a charity but the charity trustees must decide whether these conditions are acceptable; the same principle applies where another body commissions the charity to carry out work which will form a major part of the charity's activities.

C. Control is not clear. Ambiguity or confusion about who is in charge of a charity may arise when:

a. A charity has a complex governance structure:

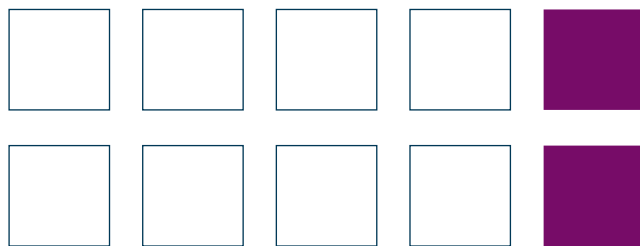
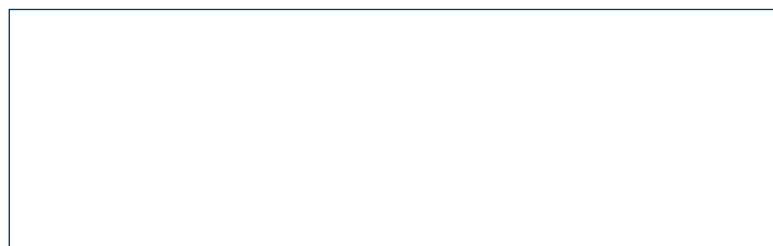
- » A charity's constitution should set out clearly who are the charity trustees and ensure that they are able to control and manage the charity. They should have final responsibility for strategic planning and oversight of how that strategy is implemented
- » Complex internal structures can hinder clear decision making and leave it open to challenge, make governance and management overly time-consuming, and increase the likelihood of damaging internal disputes. It should be clear where the authority for decisions lies.

b. Lines of authority and accountability are blurred:

- » Charity trustees should have oversight of major projects, recognising the reputational, financial and practical implications of these, whether internally managed or contracted externally
- » Charity trustees should ensure that they put in place clear and robust lines of authority when running any major project, and that all staff and charity trustees understand these.

c. When charities have umbrella bodies or are in a branch structure and it is not clear who is in charge:

- » A charity's constitution should clearly set out lines of authority, including what authority, if any, an umbrella body has over a branch charity
- » If charity trustees are delegating authority to others to run part of a charity's affairs either within a nation or across borders, the charity trustees should set out in writing the limits and terms of this delegation of powers and communicate these clearly.



Chapter 3 – Ensuring independent decision making – a practical guide

Charities and charity trustees should behave in a way that demonstrates they are acting independently to protect the public perception of their charity. This guidance also includes a question and answer guide on good practice for charities and charity trustees that urges them to:

- » Choose charity trustees for their suitability and the skills they bring to a charity, including their capacity to exercise independent judgement
- » Ensure the charity's constitution sets out who is in control and communicates the lines of authority
- » Review the constitution as regularly as necessary to keep it current and suitable to the charity's needs
- » Conduct charity trustee meetings separately from those of any other body

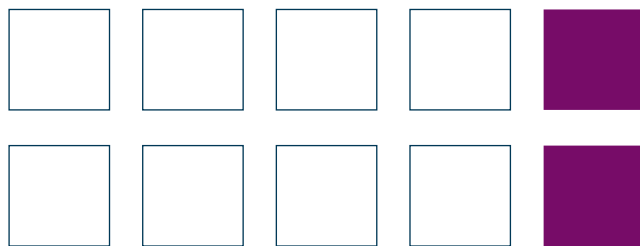
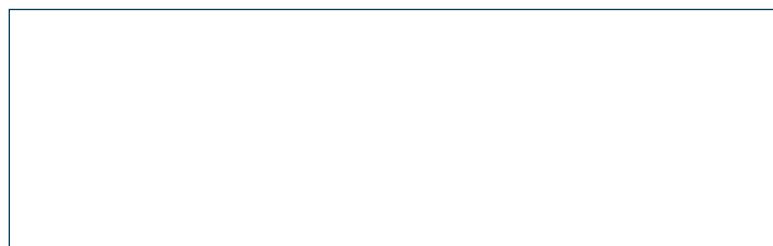
- » Keep independent financial records
- » Demonstrate that decisions are taken independently in the interests of the charity. One way would be to take independent professional advice when appropriate, for instance when negotiating significant contracts with a linked body
- » Adopt and observe a clear, documented conflict of interest policy for any conflict or potential conflict
- » Show clear control of charity communications, for instance, with an independent website.

Chapter 4 – Checklist for charity trustees

This checklist is for charity trustees to keep and use, to ensure that they fulfil their duties.

Chapter 5 – Glossary

This chapter provides a glossary of useful terms and is followed by suggestions for further reading.



Introduction

Whether a charity is small or large, working alone or in partnership, the answer to the question 'Who's in charge?' should always be 'the charity trustees'.

The law says that a charity must be run by charity trustees acting in the interests of the charity. That principle also points to good working practice. Where charity trustees are not clearly in charge, a charity may become unmanageable, lose sight of its charitable purpose and charitable assets can be put at risk. A charity's reputation may suffer, and it is likely to lose public support and confidence.

This guidance derives from our experience as Scotland's charity regulator. Over the last few years, we have seen how uncertainty, ambiguity or disagreement about who is in charge of a charity has caused problems for individual charities.

Questions about 'who's in charge' will become even more important as the environment within which charities work becomes increasingly complex. More charities are working closely with bodies that are not charities. Some charities receive funding from government bodies or from commercial companies; some enter into contracts with local authorities to provide services; others undertake activities formerly carried out by local or central government. Charities' internal structures may become more complex as they expand or respond to differing contexts and demands. Some may find that ambiguity about who is in charge has unwanted consequences such as confusion over perceived identity or, at a practical level, a reduction in public donations.

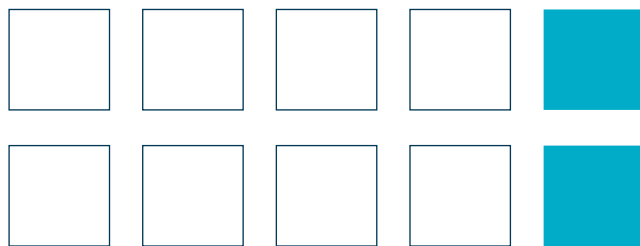
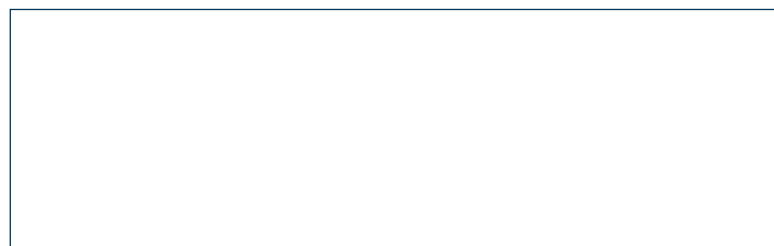
These issues can be difficult for charities to navigate in practice. Also, bodies working with charities may not be aware of all the characteristics of charities, their role, and the duties that charity trustees must fulfil. This guidance is intended to help charities protect their charitable status and implement good governance, and help other bodies working with charities to do so in a way which is mutually productive but respects the charity's position.

Use of 'must' and 'should' in this guidance

Where we use '**must**', this indicates a legal requirement. Where we use '**should**' we are providing examples of good practice, based on our regulatory experience, which will help to demonstrate that charity trustees are fulfilling their duties and responsibilities. These examples are illustrations of how a legal requirement may be achieved in a given set of circumstances. Good practice may be specific to the context in which it is applied.

This guide will be of particular use to:

- » the charity trustees of large and complex charities
- » the charity trustees of charities with close connections with local authorities, with central government, with companies that are not charities, or with other third parties
- » the charity trustees of charities delivering public services or seeking grants from donors
- » people and bodies advising such charities
- » chief officers of charities
- » local authorities, central government, companies, funders or other bodies which have close links to charities or work in partnership with them.



Chapter 1

Underlying principles

This section sets out the principles that underpin the role and duties of charities and of charity trustees. The main source of these principles is the Charities and Trustee Investment (Scotland) Act 2005 (referred to from now on as the 2005 Act), which sets out the current law on charities in Scotland. We also cite other OSCR guidance, reports and policy statements.

A. Charity trustee duties – what charity trustees must do

What's the principle?

Charity trustees must act in the interests of the charity.

Charity trustees are the people who have the general management and control of the administration of a charity. Depending on the individual charity's constitution, they may be called Board members, directors, management committee members, charity trustees, governors or patrons.

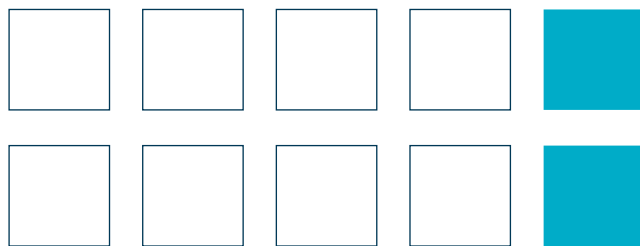
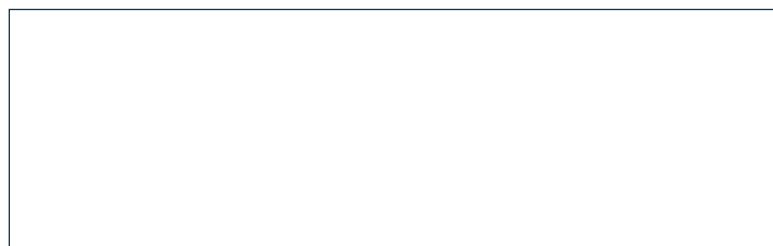
The underlying principles are contained in section 66 of the 2005 Act, which sets out charity trustees' general duties. The charity trustees must act in the interests of the charity. Most relevantly they must:

- » Seek to ensure that the charity acts consistently with its purposes
- » Act with care and diligence; charity trustees must manage the affairs of their charity with the same care and diligence that it is reasonable to expect of someone managing the affairs of another person

- » In circumstances capable of giving rise to conflict of interest between the charity and any person responsible for their appointment, put the interests of the charity first or, where the charity trustee considers they cannot give priority to the charity's interests, they must disclose the interest and not take part in any discussion or decision on the matter.

This section also provides that charity trustees must seek to ensure that any breach of duty regarding the conflict of interest above is corrected and not repeated, and that any charity trustee in serious or persistent breach is removed. If charity trustees fail to carry out their duties as set out above, this is regarded as misconduct in the administration of the charity. As regulator, OSCR is required to identify and investigate any apparent misconduct, and, having due regard to best regulatory practice and principles, may take action to correct this and protect the charity and its assets, where appropriate.

If a charity is a company, then charity trustees must also fulfil their duties under company law. Where these duties overlap with those of being a charity trustee, charity trustees must comply with whichever are the more stringent requirements. The same is true of other legal forms where duties of those in management and control are contained in statute or common law.



B. Charity test – the criteria for being a charity

What's the principle?

A charity must have only charitable purposes and must provide public benefit through its activities.

Charities must only advance charitable purposes. A charity's purposes will usually be set out in its constitution and must be able to be related clearly and directly to one or more of the 16 charitable purposes listed by the 2005 Act (section 7(2)). The OSCR guidance booklet 'Meeting the Charity Test' has more information. The charitable purposes are listed in the glossary in this guidance.

In addition, a charity must demonstrate that its activities provide public benefit in furtherance of those charitable purposes. A charity cannot use its assets for any non-charitable purpose. Where a charity's activities appear to be directed at achieving non-charitable purposes, this will call into question the body's underlying purpose, and therefore charitable status.

In considering whether a charity provides public benefit, we must consider:

- » Any disbenefit (harm or detriment) arising from the charity's activities
- » Any private benefit gained by individuals or bodies other than as beneficiaries of the charity
- » Any undue restriction on access to the benefit provided.

These considerations apply throughout the life of a charity. Charity trustees must ensure that the charity always seeks to act solely in pursuit of its charitable purposes and for public benefit.

C. Ministerial direction and control

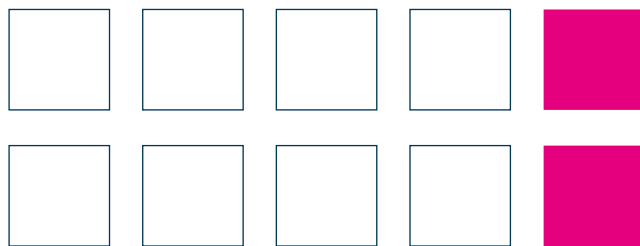
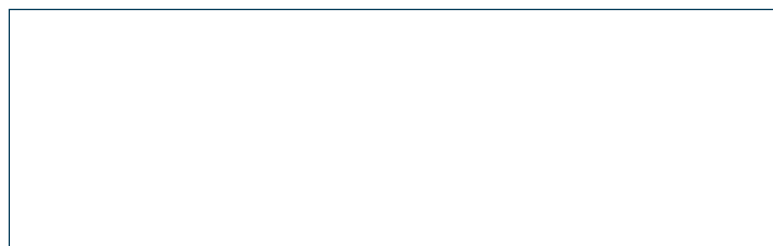
What's the principle?

A body will fail the charity test if its constitution allows Scottish Ministers or a Minister of the Crown to direct or control its activities.

Even if a body has charitable purposes and provides public benefit it cannot become a charity if its constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities (though Scottish Ministers do have the power to make an order disapplying this statutory restriction). We interpret 'control', in this instance, as the ability for a Minister to intervene in a body's activities in order to ensure that these activities are carried out as the Minister wishes. We have identified three ways that a constitution might permit this to happen:

- » By creating direct mechanisms, such as giving Ministers a power of direction
- » By including specific references to legislation, regulations or orders, to which the charity is subject
- » By providing that certain actions require Ministerial consent or approval.

Where a constitution contains such mechanisms, we will consider whether, if they were to be used, this would allow Ministers to control the charity's activities.



Chapter 2

What to watch out for

This section looks at those structures and situations where charity trustees should take particular care to ensure they remain in charge. Our aim is to ensure that charities put safeguards in place so that charity trustees can always act to achieve their charity's objectives. Charity trustees should be aware that certain structures or relationships are more likely to lead to problems, such as conflicts of interest, or may lead charities to stray from their charitable purpose. They should also be on their guard about funding arrangements that might unduly influence or control their activities.

Other bodies involved should remember that while they may have taken a part in setting up a charity, have contracted with it, fund it, or have strong historic links to it, none of these factors mean that they may expect charity trustees to disregard their duty to put the interests of the charity first.

A. A charity has links to central government

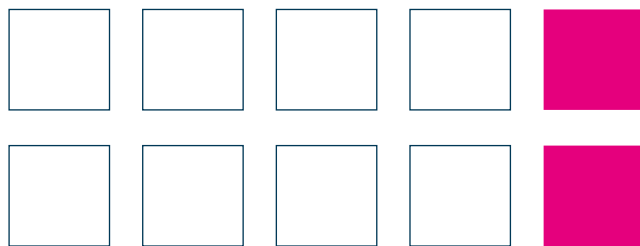
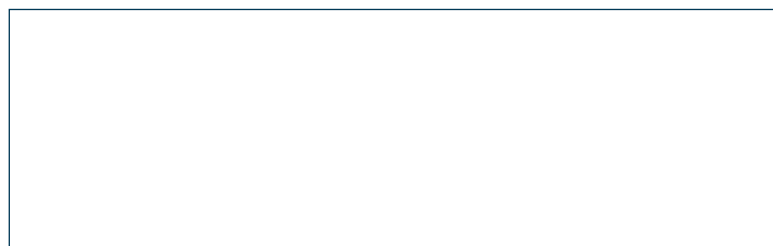
Where charities are set up by Ministers or have close relationships to UK or Scottish Government bodies, care should be taken that their constitutions do not permit Ministers to direct or control their activities since this will cause them to fail the charity test.

In individual cases, we would consider what the practical effect would be of any Ministerial powers provided for in the constitution. If a body's constitution gives a Minister the right to direct the activities of a charity, it would generally be considered that it fails the charity test. Where a Minister derives powers over a body from statutory provisions referred to in the constitution, OSCR will weigh the nature and effect of such provisions and decide whether or not these amount to control. In some cases where we have investigated Ministerial powers, these have not amounted to control over the charity.

What OSCR considers:

- » If the powers in the constitution were used, would they allow the Minister actually to control what the body does?
- » Is the element that is being controlled significant in terms of the charity's overall activities?
- » Is the Minister intervening only in response to a certain event or circumstance, or does the constitution give him or her power to intervene at will?
- » Can the Minister intervene at any time or only in certain, limited, circumstances?
- » Overall, are the charity trustees able to act independently of Ministers, or not?

(From OSCR guidance on 'Meeting the Charity Test' pp17-18)



Case study: Scottish Natural Heritage

Scottish Natural Heritage (SNH) is a Government-funded conservation body set up by an Act of Parliament and under the charitable rules existing at that time was classified as a registered charity. It was entered into the Charity Register by OSCR in 2006, when the 2005 Act commenced. As regulator, OSCR has a duty to review bodies on the Register, from time to time, to ensure they continue to meet the charity test. Bodies set up by government have a potential risk of failing the charity test because they might be subject to ministerial control. SNH was, therefore, one of the charities OSCR selected for early review. The body has charitable purposes, such as promoting care for and improvement of Scotland's natural heritage, and also appeared to benefit the public through its work.

However, SNH's constitution (an Act of Parliament), said the Secretary of State was allowed 'to give SNH directions of a general or specific character with regard to the discharge of its functions; and it shall be the duty of SNH to comply with such directions.' OSCR decided that this meant that SNH was subject to direction by Ministers. OSCR directed SNH to remove this clause from its constitution if it wished to remain a charity. SNH indicated that the direction could not be complied with and consequently OSCR removed it from the Register in April 2007.

Key points for charity trustees:

- » A charity's constitution must not allow Ministers to direct or control the charity

For Government Departments:

- » In considering relationships with charities, Departments should beware of seeking constitutional or operating provisions which may jeopardise charitable status

B. A charity has links to another body

Many charities have links to other bodies. Sometimes these relationships can be very close and significant to the charity, for instance where:

- » The two bodies share personnel and either:
 - » All the charity trustees serve on the Board of the other body
 - » The majority of the charity trustees have a duty to the other body as members or employees
- » The other body was instrumental in setting up the charity
- » The charity is largely funded by, or carries out significant work for, the other body.

When a charity is linked closely to another body, we have found there are particular risks. Among these are the possibilities that:

- » A charity may be pursuing non-charitable purposes
- » There may be a lack of independent decision making or restrictions on independent decision making
- » There may be a conflict of interest that is not being managed
- » There may be public distrust because charity trustees are not seen to be taking decisions independently.

OSCR's regulatory work has identified a number of charities facing situations where close links with other bodies heightened these risks.

a. The charity trustees are identical to those of the other linked body

When the charity trustees are identical to the people in control of a related body there is a greater risk of conflict of interest. There is a risk that the charity is, or is seen as being, controlled by the other body and that the two bodies operate, to all intents and purposes, as though they are one and the same.

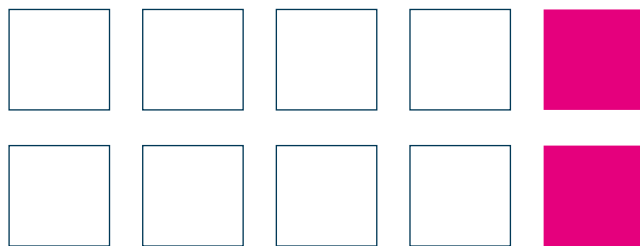
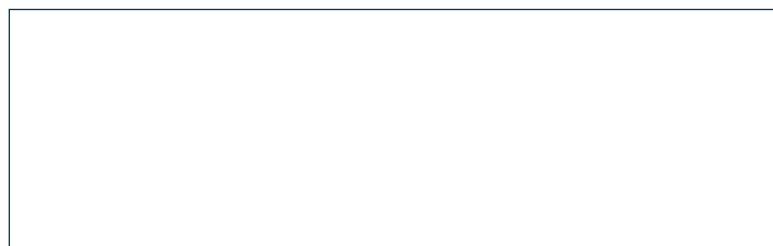
One example is NHS charities where the charity trustees are usually the same as the members of the related NHS Board and the two bodies have identical purposes. This makes it even more important to demonstrate how the two bodies are separate in order to ensure that, even though the same people are managing both bodies, the way they manage charitable assets is handled differently to the way they manage the assets of the NHS Board. There are different rules governing charitable assets, which must only be used for the purposes of the charity and for charitable ends.

Case study: Lothian Health Board Endowment Fund

In 2010 OSCR examined the charitable status of Lothian Health Board Endowment Fund as part of a review of the charitable status of selected charities on the Register. The governance and administration of the charity was also considered. NHS charities such as Lothian Health Board Endowment Fund are linked closely to regional Health Boards, which have statutory duties.

It was found that:

- » The charity's purposes, though charitable, were identical to those of the relevant NHS Board



- » All of the charity trustees also sat on the NHS Board and were appointed *ex officio*, that is only by virtue of being appointed to the Health Board
- » During the recruitment process for NHS Board members (through the Public Appointments process), the candidates were not made aware that by taking up an NHS Board post they automatically became a charity trustee as well (although there was specific induction training for charity trustees once appointed).

OSCR was concerned that the way the charity was established and governed did not allow its charity trustees to demonstrate their independence from the NHS Board. The charity said that its practice was to use its funds only for goods and services that were not provided for by statutory funds. Given that the charity and the NHS Board had the same purposes, however, it was considered that there might be a conflict of interest if the NHS Board were to wish to use the charity's resources to cover statutory provision.

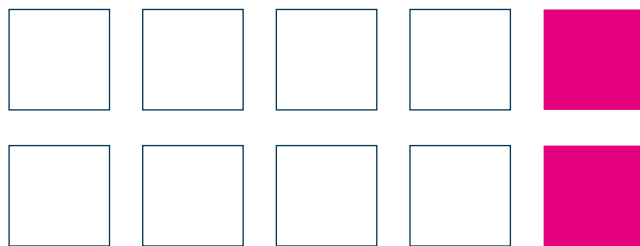
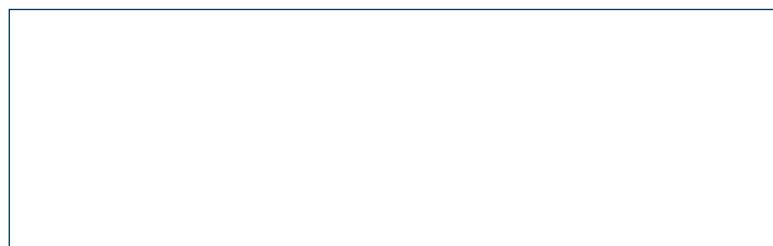
In September 2010 we finished our review and confirmed that the charity did meet the charity test. However, our recommendation was that the charity should take steps so that its charity trustees could demonstrate they were able, at all times, to fulfil their duties under the 2005 Act. The charity had to be able to show that, in a situation of conflict where the charity trustees' duty to the other body might influence how it used its funds, the charity trustees would decide only on the basis of the charity's interests and not the needs of the other body. The charity's own strategic review had identified weaknesses in its governance structure and it was already working to address these.

We asked the charity to:

- » Review its constitutional structure (although changes would require the amendment of legislation)
- » Seek to ensure that during the appointment process it is made clear to candidates what a charity trustee's role and responsibilities are
- » Ensure the induction process for charity trustees remains separate from that for the NHS Board and is appropriate for charity issues
- » Put in place a conflict of interest policy to ensure the decision-making process is independent, where both the NHS Board and the charity have an interest
- » Make practical arrangements to show the public that it is acting autonomously, for example by taking its own independent legal advice and holding meetings separately from those of the NHS Board (some of these measures are in fact already in place).

Key points for charity trustees and other bodies

- » Where the same people are managing two bodies it is likely to be difficult to demonstrate that each is being governed in its own best interests
- » In such situations it is vital that decision-making procedures and practical arrangements demonstrate that conflicts of interest are dealt with appropriately.



b. A charity with links to another body must actively manage conflict of interest

When a charity's trustees are all or mostly members or employees of another body they are likely to face situations where their ability to take independent decisions is called into question.

Establishing an appropriate structure and governance arrangements for a charity is only the first step. Charity trustees should demonstrate through day-to-day practice that they are acting in the best interests of the charity.

They should show publicly that:

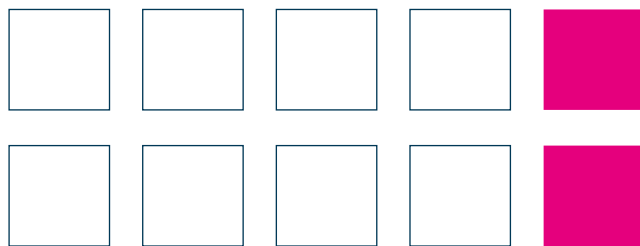
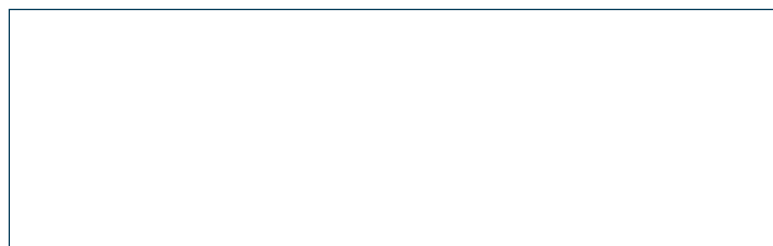
- » They are aware of, and managing, any conflict of interest and can demonstrate this
- » Where there is a conflict, that the decision on the matter was taken in the charity's best interests
- » In any situation where a charity trustee is unable to give priority to the charity's interests, he or she should consider withdrawing in order for the decision to be made by other charity trustees who are not affected by such conflicts
- » The charity remains able to carry on its business. The charity should have a governance structure in place which would allow quorate decisions to be made even if a number of trustees had to withdraw.

Case study: Shetland Charitable Trust

In 2008 and 2009 we received two complaints about Shetland Charitable Trust (SCT). These called into question the way in which the charity was making decisions and how it was managing any potential conflict of interest for charity trustees who were mostly also local authority councillors.

Our investigation found that the charity's structure made it extremely difficult for it to demonstrate its independence from the local authority and for charity trustees to comply with their duties under section 66 of the 2005 Act.

- » The charity had 24 charity trustees, of whom 22 were councillors, one was the Lord Lieutenant, and one was the headteacher of the local high school
- » All of the charity trustees had been assumed into that role because of the offices they held, and in 23 out of 24 cases they owed a duty to the local authority as well as to the charity
- » In its day-to-day business, the charity was not showing the public that there was a clear separation from the council. For instance, the chief executive of the council was originally also the chief executive of the charity. The council's website included a page that provided contact details for the charity and references to the charity did not make it clear that it was a separate body
- » The charity had a conflict of interest policy but it was not clear it was being invoked in all the circumstances where it was relevant
- » Ambiguity around who was in control of the charity had led to problems in preparing the accounts of the local authority involved. Audit Scotland has qualified the accounts of Shetland Islands Council since 2006/7 on the grounds that the council should have consolidated the charitable trust's accounts with its own accounts.



Accepting the importance of being seen to be independent, SCT addressed some, but not all, of these issues. It appointed a separate chief executive. It developed a website that was hosted by a private company.

We closed the inquiry into the specific complaints we had received but notified the charity we were continuing to focus on its governance. We considered that there was a high in-built risk of irreconcilable conflict of interest where (effectively all) councillors were SCT trustees. We also considered, given the risk of public mistrust in the charity's decisions, the charity must consider how its decision-making process and practice appeared to others outside the trustee body.

In July 2010, we imposed strict monitoring requirements on the charity. This means that the charity must give us notice of how it deals with all conflicts of interest and we will monitor this closely. We reminded the charity trustees that if we were to find inappropriate actions, we may use our powers, which allow us to prevent charity trustees from carrying out certain transactions.

Key points for charity trustees and other bodies

- » The make-up of a Board, where it is dominated by members from a linked body, can lead to an inherent risk of recurrent conflict of interest
- » Conflict of interest policy should be applied in all situations where there is a conflict or potential conflict
- » The charity should consider whether it is advisable to maintain a Board where conflict of interest arises so frequently that charity trustees must withdraw thus preventing effective management of the charity
- » Charity trustees should always demonstrate that they are behaving in the best interests of the charity and be conscious of how their actions appear to the public.

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c. Establishment of charities by other bodies

Charities are often set up by other bodies, such as a local authority. In recent years, this has happened occasionally with charities providing services under contract that were previously provided directly by local authorities, and numbers may increase over the next few years.

When another body is setting up a charity, it must consider the charity's structure and constitution to ensure that it is organised in a way that allows the charity trustees always to act in the interests of the charity, rather than the body which established it. Where the two bodies are expected to have an ongoing relationship we also look at the following:

- » Who has the power to appoint the charity trustees, and to remove them?
- » Are there arm's length provisions to appoint or assist with the selection of the charity trustees?
- » What is the balance of independent charity trustees and those with a duty or loyalty to the other body?
- » Is there a conflict of interest policy?
- » Where the body establishing the charity is intending to move certain assets to a related charity, are the assets being transferred outright, or leased?
- » If assets are leased, what are the terms? Who is responsible for investment into the assets over the period of the lease, and what happens to assets in the case of a wind up?
- » Do the terms of the agreement between the two allow the charity trustees sufficient discretion over the services it would provide and who the beneficiaries of these would be?

- » Where the charity is contracting to provide services to the establishing body what are the terms of this contract? Are they clearly in the interests of the charity?
- » Does the contract set out broad purposes and goals or does it allow the establishing body to specify terms in so much detail that the charity is not able to make independent decisions on services and beneficiaries?
- » Is the charity providing benefits to the body that set it up? If so, do these clearly further the charity's purposes?

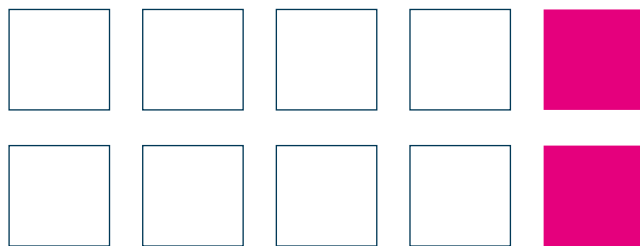
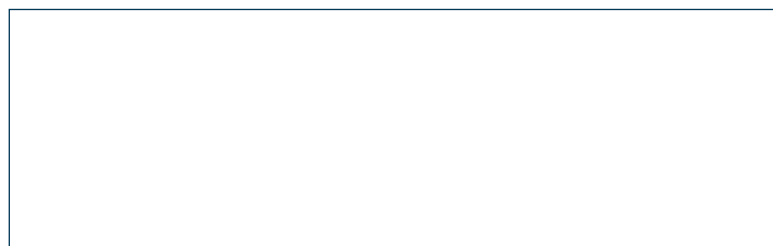
Case study: Fife Sports and Leisure Trust Limited

In late 2007, Fife Council decided to set up a company limited by guarantee to which it planned to transfer the operations of its sports and leisure services. The new company, Fife Sports and Leisure Trust Limited, intended to apply to be a charity that would run the sports and leisure facilities under a contract with the council. As regulator, we had to make sure that the new company would meet the charity test and that, despite its links to the council, it could still operate independently and fulfil the purposes it was set up for. These included advancing public participation in sport, health and education, particularly through sports and active recreation.

In reviewing the application to be a charity, we found the following:

- » The constitution of the new company allowed the council to be its sole member.

As such, the council would be able to change the governing rules of the company and appoint and dismiss all of its directors. Best practice would have been for a majority of directors to be selected independently of the council, perhaps



through an impartial nominations committee appointed to sift candidates, and for the council not to have such scope to dismiss charity trustees.

However, on balance, OSCR's view was that the existing arrangements did not necessarily prevent its charity trustees from acting independently, given other factors in its governance:

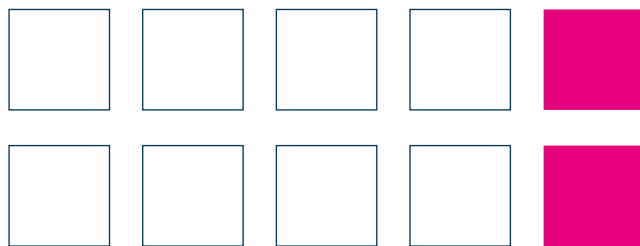
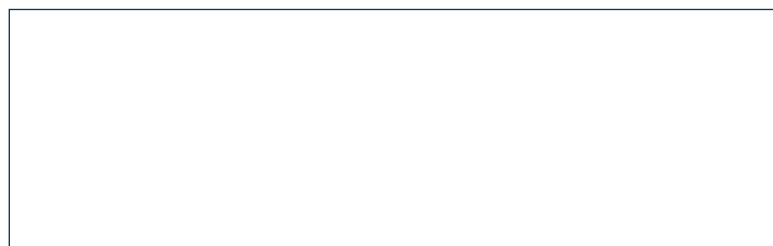
- » A majority of the directors – that is seven out of thirteen – were to be independent of the council and the Chairperson of the Board would be one of these independent directors
- » The company had clear conflict of interest provisions that obliged any of the directors, including those who were linked to the council, whether as employees, officers or elected members, to withdraw and refrain from voting in any discussion in which they both had an interest and they considered that they could not, in this instance, put the interests of the charity first.

We accepted that, as long as the charity trustees fulfilled their individual duties and followed the conflict of interest policy, they could still act in the company's own interests.

Governance was not our only consideration with this application. The company also answered our questions on how it would provide public benefit and choose beneficiaries, and showed it would establish an independent policy for charging for its services. We were also satisfied that investments in the leased facilities would mostly come from council funds, making it unlikely that charitable assets would be used to add value to non-charitable property. We granted the company charitable status in April 2008.

Key points for charity trustees and other bodies

- » Bodies that set up or forge strong links with a charity should be aware that this does not necessarily give them control over all of the charity's activities. Where bodies such as local authorities set up bodies which are intended to seek charitable status, the bodies' structure and the nature of their activities must allow them to pass the charity test and enable their charity trustees to fulfil their duties to the charity
- » A majority of charity trustees in a charity established by another body should ideally be independent of that body, that is, the majority should neither be its members nor its employees
- » If linked and independent charity trustees are evenly balanced on the Board, it is good practice that the Chair be one of the independent charity trustees
- » Contracts and property arrangements between the bodies should be clearly in the interests of the charity whether it is making use of another body's assets, or supplying its assets for use by another body.



d. Relationships with funders

Donors and funders provide welcome resources for charitable activity, but they should not unduly influence or control the activities of the charity. When a charity has a single or main source of funding, it should decide whether any conditions attached to funding might compromise the charity trustees' ability to take independent decisions about the running of the charity.

Case study:

Lloyds TSB Foundation for Scotland

Following a complaint, we investigated the decision by Edinburgh-based grant-giving charity, Lloyds TSB Foundation for Scotland, to reject a proposed change to its funding covenant with Lloyds Banking Group, which was the charity's principal source of income.

Following the economic crisis, and in view of the possibility that the banking group might report losses in the future, the banking group proposed new funding terms. This meant it would share a reduced specified percentage of the group's pre-tax profits among the four independent Lloyds TSB foundations in the various parts of the UK and Channel Islands, including Lloyds TSB Foundation for Scotland. The other three foundations agreed new terms with the banking group, but, having taken independent financial and legal advice, Lloyds TSB Foundation for Scotland did not.

We looked at whether the charity trustees had failed in their duty to act in the charity's best interests.

We found that:

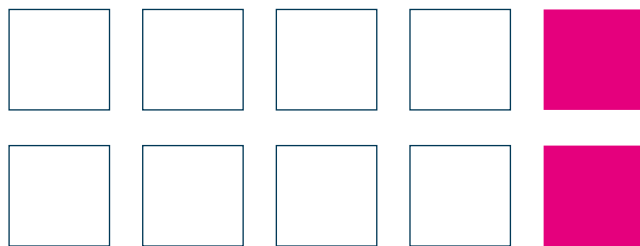
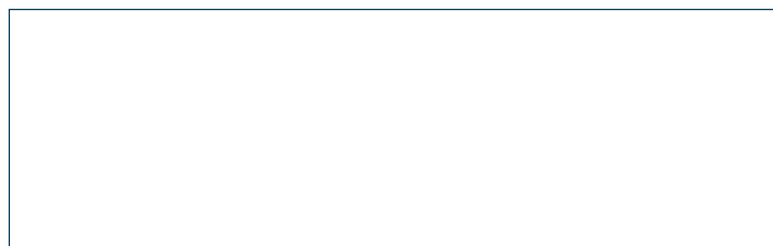
- » The charity trustees had taken appropriate professional legal and financial advice about the proposed funding agreement and about its governance structure.

- » The charity had turned down the changes, saying it did not believe these were in the best interests of the charity. The proposed changes related both to the way the funds for the charity would be calculated and included other provisions that would have aligned some of the charity's grant-giving with the company's corporate social responsibility strategy
- » The charity trustees had engaged in negotiations with the banking group, but it was not clear how open the bank was to amending proposals
- » Following our inquiries, we closed the complaint finding that the charity trustees had acted within their powers. We found no evidence to suggest that the charity trustees had not acted in good faith, nor that they had failed to act in their decisions regarding their charity's affairs with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another.

Charity trustees are best placed to decide what is in the best interests of their charity. It is important that they have the freedom to discharge that responsibility acting within their powers and duties.

Key points for charity trustees and funders

- » Charity trustees must be able to show that they have taken a decision in the interests of the charity. For example they may consider that taking independent professional advice is required where a particularly important or high risk matter is being decided
- » Funders of charities may place conditions on funds offered to a charity but the charity trustees should decide whether these conditions are acceptable. A charity should ensure that a funding agreement does not unreasonably limit its ability to make decisions in the overall interests of the charity about how best to fulfil its charitable purposes.



C. Control is not clear

a. Complex structures

Complex governance structures can result in management problems in a charity because it is not clear who is responsible for certain decisions. It is a basic first step of ensuring adequate governance that everyone in a charity, and those dealing with that charity, should know exactly who the charity trustees are – that is, who is in general management and control of the administration of the charity.

There are bodies which, often for historical reasons, have more than one group of individuals having some management responsibilities such as strategic planning and ensuring that the charity is fulfilling its business objectives.

OSCR's view is that it is usually more effective for there to be a single charity trustee body which has responsibility for strategy and oversight, as well as any other powers it needs to manage and control the administration of the charity.

Case study: National Trust for Scotland

We received a number of enquiries and complaints about the way that the National Trust for Scotland (NTS) was being governed, and about decisions it had taken.

While examining the complaints against NTS we noted:

- » NTS had complex and unusual governance arrangements. This charity apparently had two main groups with a governance role – the Board and the Council – with 87 members between them and more than 100 other advisers working on panels and committees

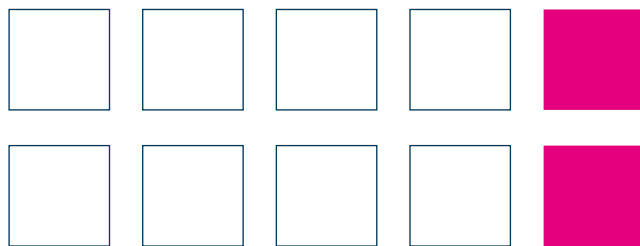
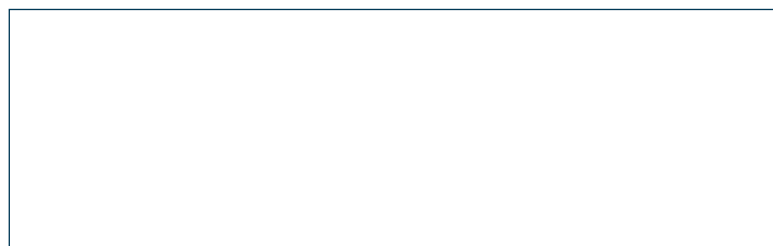
- » The functions normally carried out by charity trustees appeared to be shared between the Council, the Board and the Audit and Risk Management committees. This made it difficult for the charity both to determine policy and to carry it out
- » The complex governance arrangement had resulted in uncertainty about the retention and delegation of powers between the two main groups, which had an impact on the speed and clarity of the decision making processes.

We decided that the confusion over lines of accountability and reporting at NTS would be addressed most effectively from within the charity itself, rather than by a formal series of inquiries. We urged NTS to bring forward its plans to hold a formal review of its governance structure. We asked that our letter recommending such a review be circulated to all charity trustees.

NTS subsequently began an independent strategic review. The outcome of the review reflected the concerns we had communicated to the charity.

The key findings and recommendations of the review were that:

- » NTS's complex governance arrangements had impeded its ability to operate: the array of people and bodies involved in its governance meant there was no great certainty about who its charity trustees were
- » Governance arrangements must be changed significantly before other problems could be properly addressed
- » The number of charity trustees should be reduced to a maximum of 15, sitting as a single Board of Trustees
- » None of these charity trustees should be representatives of other bodies, as had previously been the case

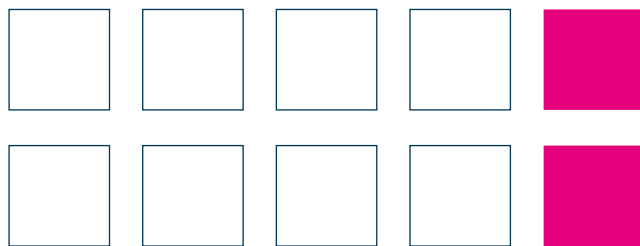
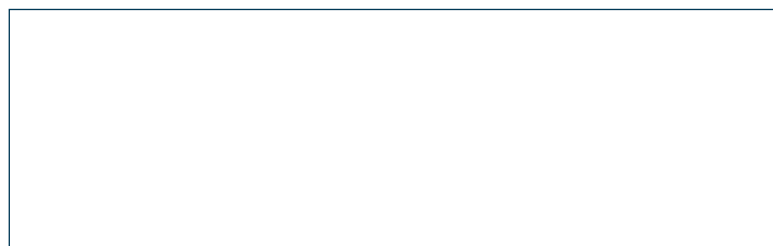


- » Taking into consideration the charity's membership structure, the review proposed that ten trustees should be elected following public advertisement for candidates, and the other four co-opted by the Board to ensure the right mix of skills and experience
- » NTS's management team should be separate from the Board. While the Board would focus on longer-term strategy, the management team would work towards annual business objectives.

OSCR welcomed the Review findings and NTS is currently working through the recommendations of the Review.

Key points for charity trustees

- » A charity's constitution should set out clearly who the charity trustees are and ensure they are able to control the charity. Charity trustees should have final responsibility for strategic planning and oversight of how the resulting strategy is implemented
- » Complex internal structures can hinder clear decision-making, make governance and management overly time-consuming, and foster damaging internal disputes
- » A simple structure with a single governing body usually streamlines decision making and makes it clear who is accountable for decisions.



b. Lines of authority and accountability are blurred

Just as everyone should know who is in charge, the charity trustees should be aware they always have final responsibility for managing their charity properly. They should ensure the charity's structure, constitution and practices give them sufficient powers to exercise their control.

Sometimes charity trustees choose to create a new committee or group for a specific purpose such as fundraising. Charity trustees may delegate responsibilities to that group, but must ensure that there is a well-defined mechanism for retaining control over its affairs.

Case study: The Sick Kids Friends Foundation

We investigated an Edinburgh charity following press reports suggesting shortcomings in a fundraising campaign. We initially looked at the charity, The Sick Kids Friends Foundation (SKFF), to establish whether the relatively high level of expenditure against return was planned as a long-term strategy or whether this indicated there were governance issues within the charity.

The findings were that:

- » There was a considerable overspend on the campaign and actual funds raised were significantly less than planned
- » The charity trustees, however, had sought professional advice in developing the campaign strategy, sought to put in place the appropriate skills and experience necessary with a robust recruitment process for a campaign director, and aimed to monitor and control progress diligently

- » Perceptions of management arrangements varied between some campaign staff and charity trustees
- » Some questions raised by charity trustees about the campaign were not answered fully and a more robust approach to following through these issues may have been appropriate
- » There was a lack of clarity in the charity's governance structure with unclear lines of authority between the charity's Council and the charity trustees. The constitution stated that the Council had responsibility for strategy and the Management Board had responsibility for governance – it was unclear as to where the responsibility for some decisions actually lay.

After our inquiries, we were satisfied that there was no misconduct in the administration of the charity by the charity trustees. However, the inquiry did highlight areas where charity trustees could strengthen SKFF's governance.

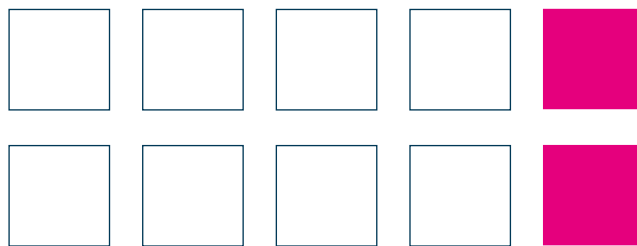
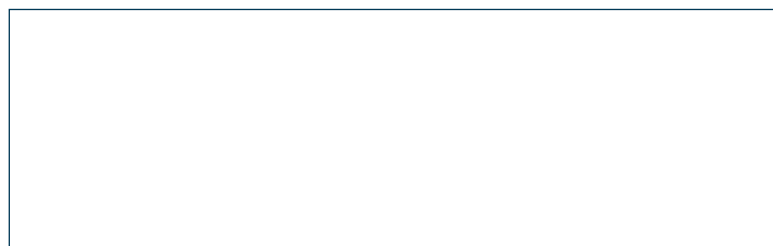
We made the following recommendations to the charity trustees (some of which the charity was already working to address):

- » Review the charity's constitution to make sure everyone involved understood who was responsible for decisions and who was in charge of making these
- » Assess whether the two-tier structure, which included splitting strategy and governance, weakened their charity, given that the determination of strategy is pivotal to the effective governance of a charity. Separating these out can weaken the role of charity trustees and undermine their authority
- » Put in place strong and clear lines of authority and reporting responsibilities when running fund-raising initiatives so that everyone involved knows who is in charge from the start

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Key points for charity trustees

- » Charity trustees should have and retain oversight of major projects, recognising the reputational, financial and practical implications of these, whether internally managed or contracted externally
- » When embarking on new projects, charity trustees should consider the most appropriate structure for the activities being undertaken; it is not always necessary to create new structures - indeed to do so may generate new risks
- » Charity trustees should ensure that they put in place clear and robust lines of authority when running any major project and that all staff and charity trustees understand these
- » In exercising their control and management of projects, charity trustees should actively seek verification of any areas of concern from staff and volunteers and address any concerns robustly.



c. Umbrella bodies and branch structures

Charities that are linked either to an umbrella body or to other charities in a branch structure should be clear about whether or not one body has any authority to control the other. Where charities in a branch structure are unclear about who is in charge, disputes can arise, and the reputations and assets of the charities may be put at risk.

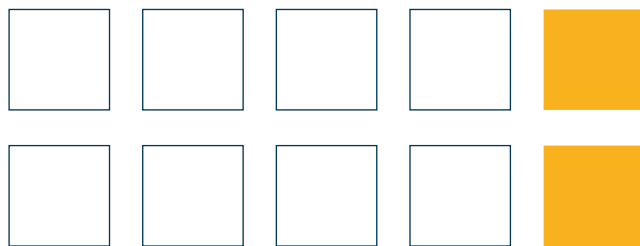
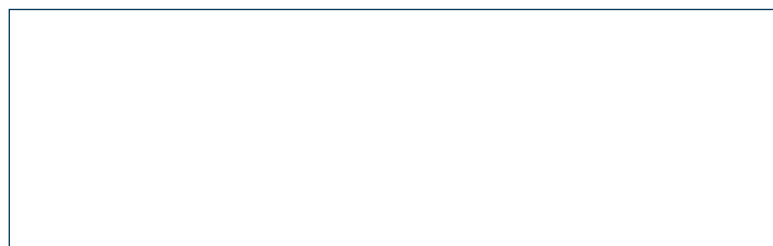
Charities often operate in partnership with other regional or national branch charities, parent charities or umbrella bodies. The relationship between one charity and another might be that of cooperation towards a shared aim by separately run bodies; or of being constituent parts of the same body based in different places or nations such as Scotland, England and Wales. Charities should define whether regional committees have governance powers.

Conflicts may arise when practices become accepted which are inconsistent with the charity's constitution and place within the branch structure. This may happen, for instance, when charities have regional or cross-national structures. A branch, believing it has ultimate authority over its own affairs, may decide to disregard instructions from a national body.

Often, the key in these disputes is to examine who is in charge. In deciding whether a group of people are charity trustees, we would look at where they derived their authority from. For instance, does the charity's constitution specifically give them control of the charity, or has that authority been delegated to them by the parent charity's trustees under its constitution?

Key points for charity trustees

- » A charity's constitution should set out clearly who is in charge of it and what authority, if any, an umbrella body (or 'parent') has over a branch charity. This should be communicated clearly to all concerned
- » Charity trustees should be aware of the powers they have under the constitution to run a charity's affairs and where their authority is derived from
- » If a charity is delegating authority to others to run part of its affairs, the charity trustees should set out in writing the limits and terms of this delegation of powers, communicate these clearly to all those involved, and observe these in practice
- » Charities that operate across a number of different legal jurisdictions should understand the different regulatory requirements of each jurisdiction. Where they set up bodies registered in another region or part of the UK, they should be explicit about whether the new body is expected to operate as a separate body or a constituent part of the original charity
- » Charity trustees should review their constitution and delegated powers regularly to ensure that these remain up to date and in line with accepted working practices. If this does not happen it can become unclear over time who is entitled to run a charity's affairs.



Chapter 3

Ensuring independent decision making – a practical guide

In this section we present some practical guidance on how charities and charity trustees can ensure they are continuing to act in the charity's best interests.

We outline some of the key documents and practices that charities should examine, explain what they should look for and what they should ask, and suggest ways of demonstrating best practice.

A. Setting up and appointing charity trustees

How should a charity's trustees be chosen?

Our experience, and good practice, suggest that to enable good governance a charity's governing body or Board should have a certain mix of skills and experience to manage a charity's affairs. It is essential that charities identify the necessary skills and seek to make sure that the governing body of the charity includes people with these.

Each charity should decide how it selects charity trustees to achieve the right mix of skills and experience for the particular type and size of charity. This may be by combining charity trustees chosen either by members or stakeholders with others who are co-opted for their expertise, or by giving its charity trustees the appropriate training to strengthen their governance skills.

The appointments process for charity trustees should be designed to identify the best people for the needs of the charity. What the needs of the charity are will depend on its context and activities, and these may make it appropriate to bring in charity trustees who can provide links to stakeholders, whether beneficiaries or other bodies with whom the charity is involved. Such charity trustees must act in the interests of the charity, as must all charity trustees. Where there are links to another body, a transparent arm's length selection process for independent charity trustees, such as an independent nominations committee may be appropriate and help to ensure real and perceived

independence. In a branch structure with a geographical basis, representatives may be elected onto the national or parent body.

When should a charity's governing body be appointed?

Sometimes a third party involved in setting up a charity does not appoint a governing body or Board until after it has established the charity's purposes, written a business plan and drawn up funding arrangements for the proposed body. Since the Board should be responsible for the charity's strategy and activities, this process may prevent the charity trustees, once appointed, from acting in the best interests of the charity. For example, a local authority may build in an obligation for the charity to contract with it for a particular service, such as providing sports facilities, rather than with other suppliers. It would be good practice to adopt some arrangement, such as a steering group, perhaps composed of people who will eventually serve as charity trustees, which will allow broad policies to be addressed appropriately before the formal establishment of the charity.

Should a linked body be able to appoint some or all of a charity's trustees?

The law does not prevent a linked body from appointing some or all of a charity's trustees, nor prevent the appointment of charity trustees ex-officio (that is, because of another post or role they have). However, a charity trustee, once appointed, must act only in the charity's best interests and cannot act merely as a delegate for another body or group of stakeholders.

Good governance means these should be people able to take decisions independently, based on their own judgement. We recommend that a charity's Board should have a majority of independent trustees and that the chair of a charity should be independent of any linked body.

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What should be done if a charity trustee is not fulfilling their duties under the 2005 Act?

Charity trustees need to remember that they are collectively responsible for decisions made and for ensuring compliance with the provisions of the 2005 Act. To fulfil this duty, they should therefore ensure that the charity's constitution sets out the procedure for dealing with a charity trustee who has consistently failed to act appropriately in the interests of the charity and, if appropriate, removing them. Good practice would be that a majority of charity trustees (sometimes this is set as a two-thirds majority, to protect against arbitrary action) would have the power to remove a charity trustee if they were satisfied that a charity trustee had failed in his or her duties.

Should an external body be able to remove a charity trustee?

A charity's constitution will set out the conditions under which a charity trustee can be removed. Charity law does not prevent a charity's constitution from allowing an external body to remove a charity trustee. Where a constitution gives an external body power to appoint a charity trustee, it would be usual for that body to have similar power to remove the charity trustee. However where the extent of such power of appointment and removal jeopardises the benefit being provided by the charity, charity trustees should seek to review the charity's relationship with the external body and if necessary introduce changes. There are specific circumstances where the external body is a Scottish Minister.

B. Drawing up a governing document

What should a constitution contain to ensure charity trustees can fulfil their duties?

A constitution should set out clearly who is in charge of a charity to avoid any doubt or dispute within the charity or with any other body. The charity trustees must be in management and control and should have all the powers they need over strategy and management to ensure they can carry out their duties.

Where the charity trustees have the power to delegate their authority, the terms under which this can happen should be set out in the constitution.

The constitution should contain a conflict of interest code, or impose an obligation on the charity trustees to comply with a code of conduct which they will adopt. (The latter would give greater flexibility and would be easier to update.) This should, among other things, define what conflicts of interest are and set out the measures charity trustees should take to deal appropriately with them, such as withdrawing from discussions in which they have a personal interest and where they consider they cannot give priority to the interests of the charity.

Charity trustees should review the charity's constitution regularly to ensure that the charitable purposes are those the charity wants to pursue and that they are current. They should also review and update any part of the constitution that does not reflect the lines of responsibility and accountability at the charity.

There should be clear communication of the terms of the constitution and the charity's purposes to all charity trustees, employees, volunteers and donors.

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What are the practical effects of the way my charity is set up?

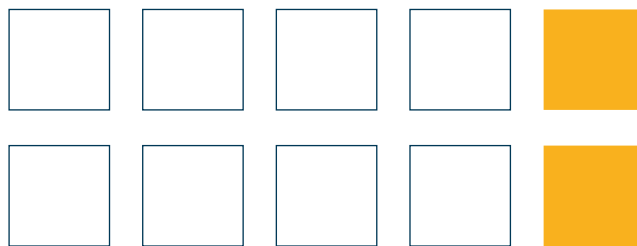
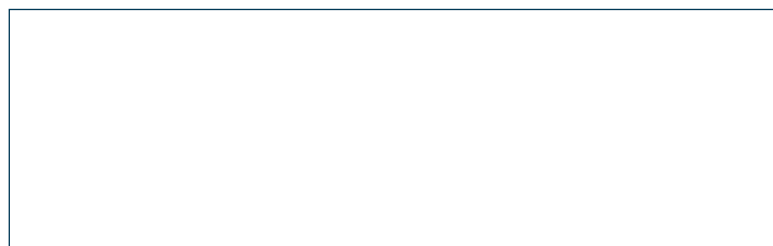
The legal structure of a charity will have practical effects in determining which regulatory bodies the charity will have to report to, in addition to OSCR, and the manner in which it must report. For instance, if a charity chooses to be a company it will have to adhere to the Companies Act 2006 and the reporting requirements of Companies House, as well as those of the charity regulator.

A charity's structure and the nature of its links to other bodies are also important in determining how accounts should be presented. Any ambiguity about control being exercised over a charitable body that has links to another body may lead to confusion as to what type of accounts should be prepared. The person who is preparing or auditing accounts for a body with a controlling or influencing relationship with a charity may take the view that these accounts should be consolidated with the accounts of the charity. This will depend on how they interpret the regulations in the current accounting framework in the UK which specifies when this must happen. (You can read more about this in the Charities Statement of Recommended Practice 2005.)

When consolidated accounts like these are prepared, the charity is treated as a subsidiary of the other body. The charity trustees may consider that this is an undesirable consequence of how the charity is structured and its relationship(s) with other bodies. For example, in the charity sector, there may be concern about the public perception if a charity is treated as a subsidiary of a public body, and the charity trustees may fear a decrease in public donations. This may lead the charity to consider whether it needs to review its constitution.

If a charity is a membership body or has affiliated members, what rights do its members have to appoint or dismiss charity trustees and direct charity trustees to act in particular ways?

A charity's constitution should clearly define the rights of its members or affiliated bodies regarding the appointment and removal of charity trustees and of giving directions to the charity trustees. In many charities, charity trustees are accountable to the membership or other stakeholders in varying degrees. Some constitutions allow members' involvement in making key decisions that its charity trustee board must carry out. When members exercise such a power to direct the management and control of the charity, however, OSCR may consider that they are acting as the charity trustees. A charity should look at the implications of this when writing a governing document since the duties and responsibilities of charity trustees under the 2005 Act may in such situations rest with its membership. A constitution should allow charity trustees (whoever they are deemed to be in a particular case) to be free to take those decisions required to administer the charity in its best interests.



C. Day-to-day: How to behave in a way that shows independent decision making

How can a charity show it is taking decisions independently?

Since charities may benefit from public donations and work for the public benefit, the public's perception of their operations is extremely important. Charity trustees should ensure that they run the charity as a separate body and show this in practice. As a separate body the charity must ensure it has its own accounts, including the trustees' annual report. It should also make sure it has its own business plan, minutes, meeting papers and a register of charity trustees' interests (in line with its conflict of interest policy). Some of the ways the charity can demonstrate publicly the independence of its operations are to:

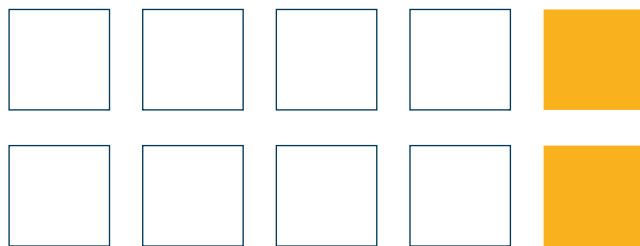
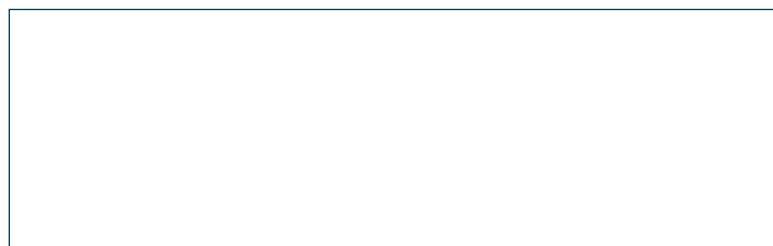
- » Provide a separate induction process for charity trustees
- » Ensure the charity's business is conducted separately. The only matters discussed at the charity trustee meetings should relate to the charity. If the charity is linked to another body, the charity should not hold its meetings as part of those of the other body, but have its meetings at a different time
- » Consider how Board papers are made available to Board members. If charity trustees are linked to another body, should Board papers go to that business address or to a different address?
- » Establish and observe a conflict of interest policy and keep records to show how it is being implemented
- » Keep independent financial records. Even if charity trustees wish to, or are required by other authorities to include its charity accounts with those of another body, the charity must also keep separate financial records and comply with the statutory requirements to file accounts with OSCR

- » Ensure its funds are administered properly. When charity trustees manage charitable funds and also other funds as members of another body, they should be clear about the different rules that apply to charitable funds. Charitable assets must only be used for charitable purposes, even if a charity winds up. As regulator, we must monitor charitable assets and how they are being spent or used
- » Make sure that the ways in which the charity's public face is presented, such as a website, do not allow it to be seen inappropriately as part of another body. There may be financial benefits from having a charity's web pages hosted within the website of a linked body or a funder. However, charity trustees should balance these benefits against any impact on its image or reputation if, by doing so, this would affect the public's perception of the charity
- » Use only the charity's own headed notepaper. Scottish charities must comply with legislations regarding how they show their charitable status on their literature and other documents. A charity must not use another body's stationery for its correspondence.

How should a charity trustee act to demonstrate independent decision making?

A charity trustee must act in accordance with a charity's constitution and always make decisions based only on the charity's interests and not his or her own, or those of any body to which he or she might also have a duty.

A charity trustee's main duty is to make every decision in the interests of the charity. To do so, charity trustees should be aware of personal interests in any decision the charity makes and ensure that they declare in advance any conflict of interest and, when they consider they cannot give priority to the charity's interests, withdraw from a discussion and from voting.



In order to make the best decision on a significant matter involving a linked body, the charity trustees should consider engaging independent professional advice, if the scale of the decision and risk associated with it merits this. When taking advice, the charity trustees should make it clear it is intended only for the charity. Nevertheless, the final decision should always rest with the charity trustees and be based on their judgement of what course is in the best interests of the charity.

Significant negotiations with a linked body should be carried out at arm's length: one way of demonstrating this is if an independent third party, such as a legal professional, confirms that terms are reasonable and at market value.

What kind of 'interests' would amount to a potential conflict?

Charity trustees should be seen to be acting clearly in their charity's best interests. To demonstrate transparency, charity trustees should declare in advance any potential conflict of interest. The term interest goes far beyond direct financial benefit to a charity trustee personally. A charity trustee would potentially have an interest if his or her charity were discussing a contract or any business arrangement with a body to which they owe a duty because they are either an officer or an employee, or to which they have family links. The kinds of issues where the two bodies' interests are potentially different are:

- » When negotiating, or renegotiating, the terms and conditions of any contract
- » During discussions relating to any contractual disputes.

What constitutes an appropriate conflict of interest policy?

A conflict of interest policy should set out:

- » What a conflict of interest is, detailing any particular conflicts likely to be relevant to the charity
- » Duties and mechanisms for declaring interests
- » Procedures for dealing with conflict of interest, such as the circumstances where a conflicted charity trustee should withdraw from decision making and the procedures for decision making in such a case.

When should a charity trustee consider withdrawing from a meeting?

The charity's constitution or other governing documents should set out the procedure when there is a conflict of interest such as those detailed above, or state that the procedure will be regulated by a code of conduct or standing orders.

Where a charity trustee is aware that he or she is subject to a conflict of interest between the interests of the charity and those of another person or body who appointed them, and where they are unable, because of their duty to that other person or body to put the interests of the charity first, then they must withdraw from the discussion or decision concerned. It may also be appropriate for charity trustees to withdraw from discussions in other circumstances of conflict of interest. Where they do not do so, they should be able to demonstrate that they have acted in the interests of the charity. In doing so, procedures such as the recording

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of discussions and decisions, and the consideration of appropriate professional or other advice will be relevant. Considerations of confidentiality may also be relevant. It is in the charity's interests that any discussion about any contract to which it is party should be confidential. Charity trustees with an interest in the other party to a contract should be able to show they have acted appropriately to protect the charity's interests.

What happens if a charity trustee has to withdraw from discussions frequently?

A charity trustee will have to consider whether their interests mean that conflicts will be regular and recurring, and, particularly if, in terms of the charity's constitution or code of conduct or of good practice they find themselves frequently having to withdraw from significant charity decisions. Is this preventing them from usefully carrying out their charity trustee duties? In such a situation, it may be appropriate for them to stand down and be replaced by a charity trustee who does not have the same conflicts.

There is no legal reason why charity trustees may not have an interest in another connected body as long as they are able to give priority to the interests of the charity. It is up to the individual charity trustee then to decide in the light of the circumstances whether the scale of the conflict means they should not join, or remain, on a charity Board.

What are the responsibilities of charity trustees when another charity trustee has a conflict of interest?

They must act in accordance with their duties under section 66(5) to protect the interests of the charity. This provides that the other charity trustees must take practical steps to ensure that a specific breach of duty is corrected by the charity trustee and not repeated. If there is serious or persistent breach of the duty between the charity trustee and the person who appointed them, then the charity trustee concerned should be removed.

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Chapter 4

Checklist for charity trustees

This checklist provides a reference for charity trustees to keep and use.

Charity Trustee Duties

A duty is a legal obligation; something that charity trustees must do. Charity trustees' general duties are set out in Chapter 1.A of this guidance and in section 66 of the 2005 Act. We list below the duties most relevant to the issue of independence and control in Scottish charities.

Good practice

Here we list questions to help charity trustees to check whether they are applying good practice to meet their duties in terms of demonstrating control and independence.

Act in the interests of the charity.

Does our constitution allow the charity trustees to be in control of the administration of the charity, independently determine the charity's strategy and manage its governance?

Where our charity is linked to another body, is there an arm's length process for the assumption and removal of charity trustees?

How many of our charity trustees owe a duty to any other body and will this cause a significant, or inherent, conflict of interest?

Where some of our charity trustees owe a duty to another, linked, body, do we have an independent Chair?

Have we ensured that we not only act independently when making decisions, but also are seen to be acting independently? For instance, do we hold our meetings separately from those of any other body, have an independent website and independent financial records?

When considering funding or service agreements, are we able to say 'no' if we do not consider a proposal to be in the overall best interests of the charity?

When considering any contract or property arrangement, are these on fair terms for the charity?

Do we have a conflict of interest policy for all potential and actual conflicts of interest that will safeguard the interests of the charity?

Is this policy observed and clearly documented so that charity trustees can demonstrate their decisions have been taken in the best interests of the charity?

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Do any of the terms of our contracts or business arrangements restrict us from making decisions on future plans or on how best to fulfil our charitable purpose?

Are we risking or spending any charitable assets for non-charitable purposes, whether through contracts, investments in subsidiaries or disposal of assets?

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Manage conflicts of interest between the charity and anyone who has a role in the appointment of its charity trustees.

Does our conflict of interest policy acknowledge the existence of possible conflicts with those who have a role in the appointment of charity trustees?

Does it expressly provide that such conflicts must be disclosed and that any charity trustee with such a conflict must refrain from participating in any deliberation or decision of the charity on the matter?

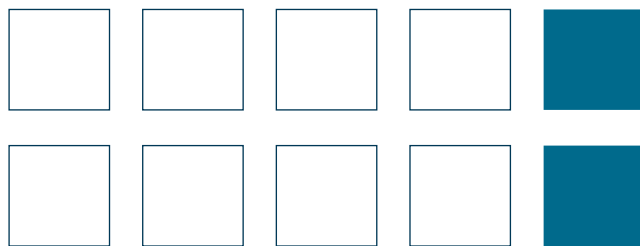
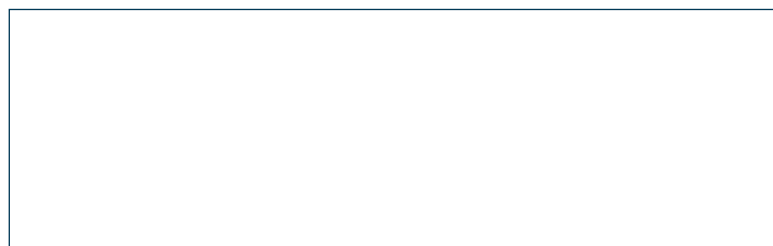
How many of the charity trustees owe a duty to another person who has a role in their appointment and will this cause a significant, or inherent, conflict of interest?

Ensure that any breach of duty is corrected and not repeated and that any charity trustee in serious or persistent breach is removed.

Are all of the charity trustees aware of and fully informed about their legal duties towards the charity?

Do we have a mechanism to remove a charity trustee who is in breach of their duties?

Are we reviewing our constitution and any delegated powers as frequently as necessary to ensure these remain up to date and consistent with the way we operate?



Chapter 5

Glossary

Arm's length negotiation - A negotiation that ensures the two sides involved act as independent and equal parties, even if they are connected in some way. One way to demonstrate this is to employ a disinterested third party, such as a professional adviser in the relevant field, who can ensure transactions or contracts are agreed at market value.

Charitable purposes - These are the charitable objects recognised in Section 7(2) of the Charities and Trustee Investment (Scotland) Act 2005, namely:

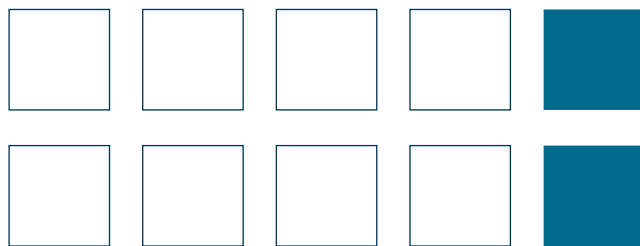
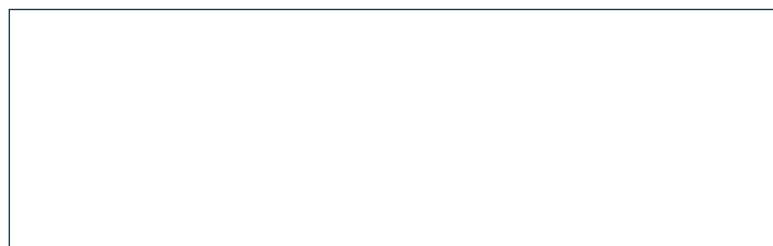
- a) The prevention or relief of poverty.
- b) The advancement of education.
- c) The advancement of religion.
- d) The advancement of health.
- e) The saving of lives.
- f) The advancement of citizenship or community development.
- g) The advancement of the arts, heritage, culture or science.
- h) The advancement of public participation in sport.
- i) The provision of recreational facilities, or the organisation of recreational activities with the object of improving the conditions of life for the persons for whom the facilities or activities are primarily intended.
- j) The advancement of human rights, conflict resolution or reconciliation.

- k) The promotion of religious or racial harmony.
- l) The promotion of equality and diversity.
- m) The advancement of environmental protection or improvement.
- n) The relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage.
- o) The advancement of animal welfare.
- p) Any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.

Charity - A charity in Scotland is a body that is entered in the Scottish Charity Register. A body can only become a charity if it meets the charity test.

Charity test - The test under the Charities and Trustee Investment (Scotland) Act 2005 that determines whether a body can be granted charitable status, which means the body must show that it has only charitable purposes and that it benefits the public. In addition, it may not be a political party, nor can its constitution permit Government Ministers to control its activities, or allow it to distribute or otherwise apply any of its property (on being wound up or at any other time) for a purpose which is not a charitable purpose.

Charity trustees - The people having the general management and control of the administration of a charity. This is usually those people who are elected members of its governing body. Depending on the charity's legal structure they may also be known as Board members, directors, management committee members, charity trustees, governors or patrons.



Constitution or founding document - The document or instrument which establishes the charity and sets out its purposes, how its charity trustees are appointed and how the charity will operate. All bodies applying for charitable status need to submit a copy of their constitution. The type of constitution a charity has will depend on its legal structure. Unincorporated associations will generally have a constitution, trusts will have a trust deed or declaration of trust, and charities formed as companies (usually limited by guarantee) will have articles of association. Sometimes a charity's constitution may be a charter or an Act of Parliament, or some other type of document or combination of documents.

Conflicts of interest - Any situation in which an individual or a body is in a position to exploit a professional or official role in some way for their personal or corporate benefit. Having a conflict of interest does not mean that anyone has necessarily acted improperly. A conflict may be described as a 'conflict of roles' or 'conflict of duty'. A person with two roles, such as an individual who holds shares and who is also a Government official, may experience situations where those two roles conflict. A charity trustee who is also an employee of a company that the charity is doing business with may experience a 'conflict of duty'. The conflict can be managed but it still exists.

Consolidated accounts - Accounts prepared by a company or body that amalgamate and adjust its financial results with those of other bodies considered to be under its influence or control. When deciding to prepare consolidated (or group) accounts, the person preparing the accounts must determine whether the company or body can significantly influence the operating and financial policies of the other bodies before including their accounts.

Control - The ability to intervene in a body's activities to ensure that these activities are carried out as the controller wishes.

Disbenefit - Any harm or detriment caused by an activity.

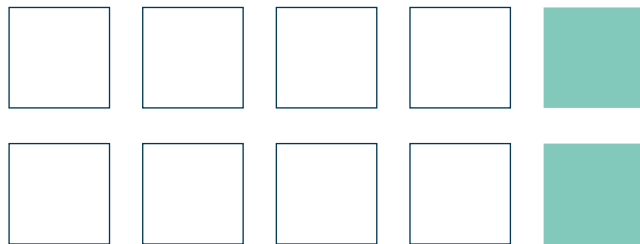
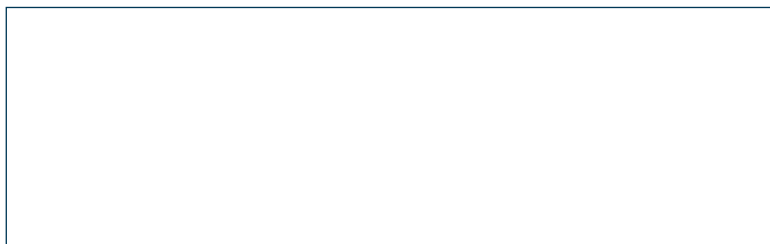
Ex officio appointment - An appointment made on the basis of a post, office or role.

Governance - Governance covers the systems and processes concerned with ensuring the overall direction, effectiveness, supervision and accountability of a body. This is carried out by a governing body which may be called the Board, the management committee, the executive committee, the trustees or directors, depending on the structure of the body. In a charity, good governance is the responsibility of the charity trustees.

Member - In relation to companies, a legal term for those who have acquired the status of member because they have an interest in the company and have fulfilled any criteria for becoming a member: a company member may exercise a degree of control in that they have the right to vote at general meetings and to elect Board members. Similarly an unincorporated association may have a membership structure which entitles members to vote at general meetings and frequently to elect the management committee. In certain situations, where the membership has the power to direct the Board of a charity to act, OSCR might consider the members to be acting in these instances as charity trustees.

Public benefit - To become a charity in Scotland, a body must show it will provide identifiable benefit to the public or a section of the public. In looking at whether public benefit is provided, we take into account the following:

- » how any private benefit is balanced against benefit to the public
- » how any disbenefit to the public is balanced against benefit to the public
- » whether there are any unduly restrictive conditions on obtaining the benefit the body provides.



Further reading

'OSCR 4 Guidance for Charity Trustees: acting with care and diligence' - OSCR, August 2006

'OSCR Summary Guidance - Meeting the Charity Test' - OSCR, October 2008

Charities and Trustee Investment (Scotland) Act 2005

Report of the Strategic Review of the National Trust for Scotland - NTS, August 2010

P. 01382 220446
E. info@oscr.org.uk
W. www.oscr.org.uk

APS Group Scotland 176286 (04/11)



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