

# CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) ACT 2005

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## EXPLANATORY NOTES

### COMMENTARY ON PARTS

#### Part 1: Charities

#### *Chapter 4 – Supervision of charities*

#### **Inquiries about charities etc.**

41. **Section 28** gives powers to OSCR to make inquiries about charities, other bodies or a person appearing to represent themselves as, or as acting for, a charity, for either general or particular purposes. Under **subsection (3)**, OSCR may direct a person or body in regard to its inquiries, not to undertake specified activities for a period of up to 6 months. **Subsection 6** provides that it is an offence to fail to comply with such a direction without reasonable excuse and **subsection (7)** sets the level of fine to be level 4 (currently £2500) or imprisonment not exceeding 3 months, or both.

#### **Power of OSCR to obtain information for inquiries**

42. Under **section 29**, OSCR may require, by notice, any charity to provide it with documents or information which it considers necessary for its inquiries, unless the charity would be entitled to refuse on the grounds of confidentiality in the Court of Session. **Subsection (4)** prevents OSCR from disclosing any information or explanation obtained under this section except for the purposes of its inquiries. **Subsection (5)** allows OSCR to pay a person expenses reasonably incurred in providing information under subsection 1. **Subsection (6)** provides that it is an offence to fail to comply with a notice without reasonable excuse and sets the level of fine to be level 4 (currently £2500) or imprisonment not exceeding 3 months, or both.

#### **Powers of OSCR where a charity no longer meets charity test**

43. **Section 30** requires OSCR to take actions if it appears to OSCR, as a result of inquiries, that a charity no longer meets the charity test. OSCR must either direct the charity to take steps OSCR considers necessary to meet the test (which may include applying to OSCR for approval of a reorganisation scheme to reform the charity's constitution) or remove the charity from the register. If the charity fails to comply with the direction OSCR must remove it from the register.

#### **Other powers of OSCR following inquiries**

44. **Section 31** sets out further powers which OSCR may use following inquiries which have been made under **section 28**. If it appears to OSCR that there has been misconduct (which **section 106** defines as including mismanagement) in the administration of a charity or that it is necessary for action to be taken to protect a charity's property or ensure that property is used for charitable purposes, OSCR may (**subsection (4)**)

suspend a charity trustee, agent or employee. However, subsection (10) prevents OSCR from suspending a person if it considers the person has acted honestly and reasonably in relation to the misconduct concerned and ought fairly to be excused. This is intended to ensure that OSCR only takes proportionate action in relation to any misconduct of which it becomes aware. Alternatively OSCR may (**subsection (6)**) give a direction to restrict the transactions or the payments that may be made in the administration of the body without OSCR's consent. This is intended to protect the assets of a charity or a body that was representing itself as a charity. OSCR may also (**subsection (7)**) direct a financial institution (i.e. bank) or person holding property for a charity not to part with it without OSCR's consent. This will allow OSCR to ensure that assets raised for charitable purposes are not removed from a charity or body, protecting them for use for those purposes.

45. Where it appears to OSCR, following inquiries, that a body has been falsely representing itself to be a charity, it may direct (**section 31(5)**) the body or person to stop doing so.
46. Where it appears to OSCR, following inquiries, that a person has been claiming to act for a charity, it may (**section 31(8)**) direct the person to stop representing itself as a charity and to pay to the charity or body any assets that it had collected. OSCR may also direct a bank to pay sums collected for the charity or not to part with the property without OSCR's consent. This will ensure that OSCR has powers to require any assets raised in the name of a charity to be passed on to that charity.
47. **Section 32** provides details concerning the making and delivery of directions and notices in **section 31**. The maximum period for which OSCR may make directions is 6 months and if longer term action is considered necessary, OSCR may apply to the Court of Session for it to take action under **section 34**. **Subsection (5)** provides that it is an offence to fail to comply with a section 31 direction from OSCR, with the maximum penalty on summary conviction being level 5 on the standard scale (currently £5000) or maximum of 6 months imprisonment, or both.

### **Reports on inquiries**

48. Under **section 33**, if OSCR takes direct action following inquiries under **section 28** it must prepare a report about the inquiry and send a copy to the person in respect of whom the inquiry was made and publish it as it sees fit. Under **subsection (1)(b)** OSCR must also (unless it has previously prepared a report on the subject of those inquiries) prepare a report if it is requested to do so by the person of whom the inquiries were made. A report prepared under this section by OSCR may relate to two or more inquiries, meaning that for instance, OSCR may prepare a single report on the results of inquiries into a group of charities or on an annual monitoring exercise involving all charities. It is assumed that such reports will be published on the OSCR website. OSCR may also prepare reports about other inquiries it makes under **section 28**. In preparing these reports, **subsection (4)** provides that OSCR must not identify the name of any person except those in respect of whom the inquiry is made or publish any particulars that could identify any person unless OSCR is satisfied that it is required to avoid impairing the effectiveness of the report.

### **Powers of Court of Session**

49. After making inquiries, OSCR may (as described in relation to **sections 28 to 31**) take certain actions directly for a maximum period of 6 months. However, under **section 34**, following its inquiries OSCR may apply to the Court of Session for certain other or further actions to be taken. If it appears to the court that misconduct has occurred, to protect the property of the charity or to ensure that property is used for the charity's purposes it may interdict the charity from taking prescribed actions, appoint a judicial factor to manage the charity's affairs, appoint a trustee to a charitable trust, suspend or remove a trustee or manager of a charity, freeze its bank account and property. If

*These notes relate to the Charities and Trustee Investment (Scotland)  
Act 2005 (asp 10) which received Royal Assent on 14 July 2005*

it appears to the court that a body has been representing itself as a charity when it is not, it may interdict the body from this action, and also take similar actions that it may do against a charity.

50. Hence, if OSCR considers that action is required to be taken against a charity or body for longer than 6 months or to remove a trustee or appoint a factor, it must apply to the Court of Session.

### **Transfer schemes**

51. **Section 35** allows the Court of Session, if OSCR applies to it, to transfer the assets of a charity, or a body that has been representing itself as a charity, to another charity on certain conditions set out in **subsection (2)**. These are that there has been misconduct or the transfer is necessary to protect the charity's assets or merely to better achieve the charity's purposes.

### **Powers in relation to English and Welsh charities**

52. **Section 36** allows the Court of Session to take action to protect the assets of a charity registered in England and Wales or a body not required to register (e.g. an exempt or excepted body under the Charities Act 1993) which are held in Scotland. The procedure is that the Charity Commission would request OSCR to apply to the court, and if satisfied that misconduct has taken place and that the assets require protecting, the court may order the person or institution holding the assets not to part with them without the court's consent.

### **Delegation of functions**

53. **Section 38** allows OSCR to delegate certain of its regulatory functions to other regulators with devolved powers, hence the reference to a Scottish public authority with either mixed functions or no reserved functions. It may only delegate those functions relating to the supervision of charities in **sections 28 to 35** (except **section 30**) (i.e. inquiries about charities, obtaining information and powers following inquiries). Where OSCR's functions are delegated, **subsections (9 and 10)** ensure that the information-sharing provisions provided by **sections 24, 25** and 26 and also the duty for auditors etc. to report matters (under **section 46** to OSCR, also apply to the body to which the functions are delegated).
54. **Section 38(1)** places OSCR's powers for its regulatory functions in relation to charitable registered social landlords in Scotland with the Scottish Ministers. It is intended that this function will be carried out by Communities Scotland on the Scottish Ministers' behalf.