

## CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) ACT 2005

### Relevant Extracts

#### Charity trustees: general duties

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

- (a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes,
- (b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person, and
- (c) in circumstances capable of giving rise to a conflict of interest between the charity and any person responsible for the appointment of the charity trustee-
  - (i) put the interests of the charity before those of the other person, or
  - (ii) where any other duty prevents the charity trustee from doing so, disclose the conflicting interest to the charity and refrain from participating in any deliberation or decision of the other charity trustees with respect to the matter in question.

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

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

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

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

- (a) that any breach of a duty under subsection (1) or (2) is corrected by the trustee concerned and not repeated, and
- (b) that any trustee who has been in serious or persistent breach of either or both of those duties is removed as a trustee.

## **Disqualification – summary**

The full grounds for automatic disqualification of individuals from serving as charity trustees are set out below in the extract from the legislation and include:

- unspent convictions for offences involving dishonesty
- undischarged bankrupts
- individuals removed from trustee positions by the law courts.
- convictions for bribery, acts of terrorism, money laundering, perjury
- individuals on the sexual offences register

### **69 Disqualification from being charity trustee**

(1) The persons specified in subsection (2) are disqualified from being charity trustees (but see also subsection (2A))

(2) Those persons are any person who-

- (a) has been convicted of-
  - (ai) an offence specified in section 69A,
  - (i) an offence, not specified in section 69A, involving dishonesty
  - (ii) an offence under this Act,
- (b) (i) is an undischarged bankrupt (see section 70(3))
- (b) (ii) subject to a specified bankruptcy-related measure (see section 70(4))
- (c) has been removed, under section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40) or section 34 of this Act, from being concerned in the management or control of any body,
- (d) has been removed as a trustee, charity trustee, officer, agent or employee of a charity by a relevant order in England and Wales (see section 70(5)(a))
- (da) has been removed from the office of charity trustee or trustee for a charity by a relevant order in Northern Ireland (see section 70(5)(b))
- (db) is subject to an order made by the Charity Commission for England and Wales under section 181A of the Charities Act 2011 disqualifying the person in relation to all charities
- (e) is subject to a disqualification order or disqualification undertaking under the Company Directors Disqualification Act 1986 (c.46) or the Company Directors Disqualification (Northern Ireland) Order 2002 (S.I.2002/3150).
- (f) has been found to be in contempt of court by a court in England or Wales in civil proceedings for making a false disclosure statement, or making a false statement in a document verified by a

statement of truth, or causing (in either case) such a statement to be made,

(g) has been found guilty of disobedience to—

(i) an order or direction of the Charity Commission for England and Wales on an application to the High Court of Justice in England and Wales under section 336(1) of the Charities Act 2011,

(ii) an order of the Charity Commission for Northern Ireland on an application to the High Court of Justice in Northern Ireland under section 174 of the Charities Act (Northern Ireland) 2008,

(h) is a designated person for the purposes of—

(i) regulations 8 to 12 of the ISIL (Da'esh) and Al-Qaida (United Nations Sanctions) (EU Exit) Regulations 2019 (S.I. 2019/466),

(ii) regulations 11 to 15 of the Counter-Terrorism (International Sanctions) (EU Exit) Regulations 2019 (S.I. 2019/573),

(iii) regulations 11 to 15 of the Counter-Terrorism (Sanctions) (EU Exit) Regulations 2019 (S.I. 2019/577),

(i) is subject to the notification requirements of Part 2 of the Sexual Offences Act 2003

(2A) Where—

(a) a person is subject to an order made by the Charity Commission for England and Wales under section 181A of the Charities Act 2011, and

(b) the order disqualifies the person in relation to a particular charity or type of charity,

the person is also disqualified from being a charity trustee in relation to that charity or type of charity.

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

(4) OSCR may, on the application of a person disqualified under subsection (1) or (2A), waive the disqualification either generally or in relation to a particular charity or type of charity.

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

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

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

(7)The Scottish Ministers may by regulations—

(a) modify this section so as to add or remove a person, or a description of a person, to or from the persons for the time being mentioned in or falling within this section as a person who is disqualified from being a charity trustee,

(b) modify the definitions in section 70 as Ministers consider appropriate in consequence of any modification of this section or otherwise

### **69A Disqualification: specified offences**

(1) The following offences are specified for the purposes of section 69(2)(a)(ai)—

(a) an offence under this Act,

(b) an offence under section 77 of the Charities Act 2011 (offence of contravening certain orders),

(c) an offence under section 13 or 19 of the Terrorism Act 2000 (wearing of uniform etc, and failure to disclose information),

(d) an offence specified under section 41 or 42 of the Counter-Terrorism Act 2008 as an offence to which Part 4 of that Act applies,

(e) a money laundering offence within the meaning of section 415 of the Proceeds of Crime Act 2002,

(f) an offence under any of the following provisions of the Bribery Act 2010—

(i) section 1 (bribing another person),

(ii) section 2 (offences related to being bribed),

(iii) section 6 (bribery of foreign public officials),

(iv) section 7 (failure of commercial organisations to prevent bribery),

(g) an offence of perverting the course of justice (by whatever means and however the offence is described), including in particular—

(i) false accusation of a crime,

(ii) perjury,

(iii) prevarication on oath,

(iv) prison breaking,

(v) subornation of perjury,

(h) an offence of wilful neglect of duty by a public official,

(i) an offence, under the law of England and Wales, of misconduct in public office.

(2) An offence which has been superseded (whether directly or indirectly) by any offence specified in subsection (1) is also specified for the purposes of section 69(2)(a)(ai).

(3) In relation to an offence specified in subsection (1) or (2), the following offences are also specified for the purposes of section 69(2)(a)(ai)—

(a) an offence committed by aiding, abetting, counselling, procuring or inciting the commission of the offence,

(b) an offence committed by attempting or conspiring to commit the offence.

(4) The Scottish Ministers may by regulations modify this section to add or remove an offence

### **69B Disqualification from holding office with senior management functions**

(1) While a person is disqualified by virtue of section 69 from acting as a charity trustee in relation to a charity, the person is also disqualified from holding an office or employment with senior management functions in the charity.

(2) But where a person is disqualified by virtue of section 69 from acting as a charity trustee in relation to a charity by reason of an order made by the Charity Commission for England and Wales under section 181A of the Charities Act 2011, the person is not disqualified under subsection (1) to the extent that the order does not apply—

(a) in relation to holding an office or employment with senior management functions in a charity, or

(b) in relation to a particular office or employment or to any office or employment of a particular description.

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

(4) A waiver under subsection (3) may relate to a particular office or employment or to any office or employment of a particular description.

(5) OSCR must notify a waiver under subsection (3) to the person concerned.

(6) A function of an office or employment held by a person (“P”) is a senior management function if—

(a) it relates to the management of the charity, and P is not responsible for it to another officer or employee (other than a charity trustee), or

(b) it involves control over money and the only officer or employee (other than a charity trustee) to whom P is responsible for it is a person holding an office or employment with senior management functions other than ones involving control over money

**70 Disqualification: supplementary**

(1) A person who acts as a charity trustee while disqualified by virtue of section 69, or (as the case may be) holds an office or employment with senior management functions in the charity while disqualified by virtue of section 69B, is guilty of an offence and liable-

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

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

(2) Any acts done—

(a) as a charity trustee by a person disqualified by virtue of section 69 from being a charity trustee,

(b) by a person holding an office or employment with senior management functions in a charity while disqualified by virtue of section 69B from holding such an office or employment in the charity are not invalid by reason only of the disqualification.

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

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

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

(i) section 137, 138 or 140 of the Bankruptcy (Scotland) Act 2016

(ii) . . .

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

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

(4) For the purpose of section 69(2)(b)(ii), "specified bankruptcy-related measure"

means—

(a) a bankruptcy restrictions order, interim order or undertaking under the Bankruptcy (Scotland) Act 2016, the Insolvency Act 1986 or the Insolvency (Northern Ireland) Order 1989 (S.I. 1989/2405),

(b) a debt relief restrictions order, interim order or undertaking under the Insolvency Act 1986 or the Insolvency (Northern Ireland) Order 1989 (S.I. 1989/2405),

(c) a moratorium period under a debt relief order under either of those enactments.

(5) For the purposes of section 69(2)(d) and (da), a "relevant order" is—

- (a) in England and Wales, an order made—
  - (i) by the Charity Commission for England and Wales under section 79(4) of the Charities Act 2011 or by the Commission or the Charity Commissioners for England and Wales under a relevant earlier enactment, or
  - (ii) by the High Court of Justice in England and Wales, on the grounds of any misconduct or mismanagement in the administration of the charity for which the person was responsible, or which the person knew of and failed to take any reasonable step to oppose, or which the person's conduct contributed to or facilitated,
- (b) in Northern Ireland, an order made—
  - (i) by the Charity Commission for Northern Ireland under section 33(2) of the Charities Act (Northern Ireland) 2008, or
  - (ii) by the High Court of Justice in Northern Ireland, on the grounds of any misconduct or mismanagement in the administration of the charity for which the person was responsible, or to which the person was privy, or which the person's conduct contributed to or facilitated.
- (6) In subsection (5)(a), a “relevant earlier enactment” means—
  - (a) section 79(2)(a) of the Charities Act 2011 (as in force before the commencement of sections 4 and 9 of the Charities (Protection and Social Investment) Act 2016),
  - (b) section 18(2)(i) of the Charities Act 1993 (power to act for protection of charities),
  - (c) section 20(1A)(i) of the Charities Act 1960, or
  - (d) section 20(1)(i) of the 1960 Act (as in force before the commencement of section 8 of the Charities Act 1992)

## EXPLANATORY NOTES

### Relevant Extracts

#### *Charity trustees: general duties*

79. The term "charity trustees" (which is defined in **section 106**) is used throughout the Act to describe those persons having general control and management of the administration of a charity. Depending on the form of the body, this term will generally refer to the directors, the members who form a management committee or group, the trustees of a trust, or if it is an unincorporated association, the persons who normally direct the managers of the body. The term is merely used as a generic term within this Act and does not change other legislation. Hence the directors of a charitable company remain directors but take on duties as "charity trustees" under this Act.

80. **Section 66** sets out the general duty of care that charity trustees must follow. These are a codification of existing law and practice. **Subsection (1)** requires a charity trustee to act in the interests of the charity. In particular they have to seek to ensure that the charity acts consistently with its purposes and that they act with a level of care and diligence that is reasonably expected of someone managing another's affairs. **Subsection (1)(c)** requires a charity trustee to avoid a conflict of interest which may arise between the charity and any person responsible for their appointment as a charity trustee. If such circumstances arise, the charity trustee must put the interests of the

charity before those of the person responsible for their appointment. Where another duty prevents them from doing that, the charity trustee must disclose the conflicting interest to the charity and not participate in any decision of the other charity trustees with respect to the matter in question. A charity trustee has a duty to ensure that a charity complies with any requirements of this Act (**subsection (2)**). However, **subsection (3)** provides a caveat that none of the above duties require a charity trustee to act otherwise than is imposed on them by other enactment. Hence, the general charity trustee duties do not exempt them from acting, for instance in accordance with health and safety legislation, or for charitable companies, with companies legislation. A breach of the general duties (to act in the interests of the charity, and to ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of the Act) is to be treated as misconduct in the administration of a charity, although OSCR (Office of the Scottish Charity Regulator) must act proportionately in taking any action where it appears that misconduct has occurred. OSCR has a general duty (under **section 1(9)**) to act proportionately and only in cases in which action is needed in all its regulatory activities. In addition, (under **section 31(10)**), OSCR may not suspend a charity trustee if it considers they have acted honestly and reasonably and ought to be fairly excused. **Subsection (5)** requires all charity trustees to act collectively, taking steps that are reasonably practicable to ensure that any breach of general duty by a charity trustee is corrected by that trustee and not repeated, and also that the trustee is removed as a trustee if they have been in serious or persistent breach of those duties.

### *Disqualification*

83. **Section 69** sets out the types of person who are disqualified from serving as a charity trustee. These are: anyone convicted of an offence involving dishonesty or an offence under this Act, an undischarged bankrupt, anyone removed from serving as a charity trustee or in management or control of a charity (under previous charity law), by the Charity Commission in England and Wales, by the English courts, or disqualified from serving as a Company Director. **Subsection (4)** allows OSCR to waive the disqualification of a person, allowing them to serve as a charity trustee, unless this would prejudice the operation of the Company Directors Disqualification Act 1986 or the Company Directors (Northern Ireland) Order 2002. Under **section 70**, it is an offence to act as a charity trustee while disqualified from doing so. An offender is liable to either a fine up to level 5 (£5000) or imprisonment for up to 6 months on summary conviction or an unlimited fine or up to 2 years imprisonment, or both, on conviction on indictment.

## **EXPLANATORY NOTES FOR THE CHARITIES (REGULATION AND ADMINISTRATION) (SCOTLAND) ACT 2023 (which broadened the 2005 Act)**

Disqualification from being charity trustee etc.

Section 4 – Disqualification: offences

20. Under section 69 of the 2005 Act, various persons are automatically disqualified from acting as a charity trustee (though it is possible to obtain a waiver at OSCR’s discretion).

Prior to this Act, the disqualification criteria consisted broadly of the following—

- conviction for an offence of dishonesty or for an offence under the 2005 Act,
- being an undischarged bankrupt,
- having been removed (or treated as having been removed) from office under section 34 of the 2005 Act or its predecessor legislation,
- having been removed from office as a charity trustee on the grounds of misconduct under the law of England and Wales,
- being subject to a director disqualification order or undertaking anywhere in the UK.

21. This section of the Act expands the disqualification criteria substantially in relation to criminal offences. The first bullet point listed in the paragraph above instead becomes, essentially, conviction for an offence of dishonesty or for an offence specified in inserted section 69A. In turn, an offence under the 2005 Act is moved to the new list in inserted section 69A so there is no change to the substance in that regard. However, a number of additional offences are listed in this new section as well. Some of these might previously have been captured by dint of being an offence involving dishonesty, but some will be captured for the first time.

22. The newly listed offences cover terrorism, money laundering, bribery, perverting the course of justice and a public official being derelict in their duty. The list also covers an offence under section 77 of the Charities Act 2011 which is, broadly speaking, the offence of contravening an order which was made under section 76 of that Act for the purpose of protecting charitable property (for example, an order to a person not to part with property without the approval of the Charity Commission for England and Wales).

23. Superseded offences are captured by the list too, as is aiding, abetting, counselling, procuring or inciting the commission of any of the listed offences. Similarly, attempted offences and conspiracy to commit an offence is captured also.

24. However, as with the original disqualification criteria, it will continue to be possible for a person to apply to OSCR for a waiver where the disqualification relates to the criteria being added by this section of the Act in just the same way as applied under the 2005 Act previously.

25. The Scottish Ministers are given a power to amend this new section 69A by adding or removing an offence. The use of this power would be subject to parliamentary approval by affirmative procedure.

26. Finally, a minor adjustment is made to section 69(3) of the 2005 Act. That section provides that a person is not disqualified if a conviction is spent for the purposes of the Rehabilitation of Offenders Act 1974. The change made by subsection (2)(b) of this section of the Act simply clarifies that in the case of spent convictions, the person is not disqualified by reason of the spent conviction (i.e. implicitly recognising that it is still possible that they may be disqualified separately on other grounds).

#### Section 5 – Disqualification: other cases

27. This section makes further modifications to the disqualification criteria, beyond the expansion relating to criminal offences already covered by section 4 of the Act (see paragraphs 20 to 25 of these notes).

28. Section 69(2)(b) of the 2005 Act is expanded to cover not just being an undischarged bankrupt but also being subject to various other bankruptcy-related measures. Specifically, this paragraph (as read with the definitions inserted into section 70) now also covers—

- being subject to -a bankruptcy restrictions order, interim order or undertaking (which is where the period for which a person is subject to restrictions is extended because of dishonest or blameworthy behaviour before or after their bankruptcy),
- being subject to a debt relief restrictions order, interim order or undertaking (which is similar but applies in the context of a debt relief order),
- being subject to a moratorium period under a debt relief order (which is a process which does not apply in Scotland but is broadly the equivalent of minimal asset bankruptcy in Scotland).

29. Section 69(2)(d) of the 2005 Act is refined to take account of changes to charity legislation in England and Wales. It continues to be the case that it covers a person who has been removed by an order made by the Charity Commission for England and Wales, but the provision is updated to take account of changes to the location and basis of the removal power. More substantively, it is also extended to cover removal not just as a charity trustee but also removal as an officer, agent or employee. As in the 2005 Act originally, removal under predecessor legislation also continues to be covered, but the detail of this is now moved to section 70 along with the definition of the removal order itself.

30. A new section 69(2)(da) is also inserted into the 2005 Act to cover the equivalent removal process under the law of Northern Ireland (as now defined in section 70). However, as at the date of publication of these notes (August 2023), the Northern Irish process does not provide for the possibility of removal as an officer, agent or employee.

31. In addition, new section 69(2)(db) provides that a person who is subject to an order in England and Wales barring them from being a charity trustee there in respect of any charity is disqualified in Scotland as well. The circumstances in which such an order can be issued include where the person has been convicted of certain offences abroad, where HM Revenue and Customs has found the person not to be a fit and proper person, or where the person's conduct is damaging to public trust in charities. While the provision here only covers an order which applies without limitation in England and Wales, provision is made elsewhere dealing with an order which is more restrictive (see paragraph 33 of these notes).

32. The existing disqualification criteria are also extended in new paragraphs (f) to (i) to cover broadly the following—

- having been found in contempt of court in England and Wales,
- having being found by the court to have disobeyed an order or direction of the Charity Commission for England and Wales (see section 336 of the Charities Act 2011) or the Charity Commission for Northern Ireland (see section 174 of the Charities Act (Northern Ireland) 2008),
- being a designated person under terrorist asset freezing orders,
- being subject to notification requirements under Part 2 of the Sexual Offences Act 2009.

33. Finally, at new section 69(2A) of the 2005 Act, provision is made disqualifying a person from being a charity trustee in relation to a specific named charity, or type of

charity, if they are barred from being a charity trustee in respect of that charity or type of charity in England and Wales. The types of reasons that such orders can be granted are set out at paragraph 31 of these notes. However, unlike the rules in section 69(2), section 69(2A) does not disqualify a person in respect of all charities; instead, the disqualification is tailored to cover only those charities covered by the order in England and Wales. Where the disqualification is in respect of a named charity only, that will be relevant in Scotland only if it is a cross-border charity.

34. Again, as with the original disqualification criteria, it will continue to be possible for a person to apply to OSCR for a waiver where the disqualification relates to the criteria being added by this section of the Act in just the same way as applied under the 2005 Act originally. A minor consequential amendment is made to ensure that the ability to apply for a waiver covers new subsection (2A) as well as subsection (2) as amended.

35. Further, a person who would otherwise be disqualified by reason of a contempt of court finding will not be disqualified for that reason if, had their conduct been dealt with as an offence instead, the sentence they received was such that the offence would now be considered to be spent under the Rehabilitation of Offenders Act 1974.

36. The Scottish Ministers are then given a power to amend section 69 of the 2005 Act by adding or removing a person or description of person. This power can also be used to amend the related definitions in section 70 – either in consequence of section 69 being amended or not. The latter option would allow, for example, the definition of “undischarged bankrupt” to be updated even though that would not necessitate a change to the list in section 69. The use of this power would be subject to parliamentary approval by affirmative procedure.