



# The legal aspects of being a Board Member

Brenda Scott, Partner, Brodies LLP

# The legal aspects of being a Board Member

- Applicable legislation
- Duties flowing from the legislation
- Ethical standards in public life
- Code of Good Governance for Scotland's Colleges

# Applicable Legislation

- Further and Higher Education (Scotland) Act 1992
- Further and Higher Education (Scotland) Act 2005
- Post -16 Education (Scotland) Act 2013
- Ethical Standards in Public Life etc. (Scotland) Act 2000
- Charities and Trustee Investment (Scotland) Act 2005

# Further and Higher Education (Scotland) Act 1992

- Cessation of local authority control –called “incorporation”
- The Scottish Ministers can establish/merge/close colleges/boards of management –section 3
- Establishes a body corporate known as “Board of Management of ...”
- What is a body corporate?

# 1992 Act continued

- The duty of a **Board of Management** is to manage and conduct their college – section 12
- Section 13 outlines powers – for example (inserted by the Post-16 Act) to pay the chair of a regional college
- A board cannot do certain things without the consent of Scottish Ministers/SFC
  - borrow money, give a guarantee or indemnity, or create any trust or security over property
  - effect any material change in the character of their college
  - disposal of exchequer funded land
- Mismanagement by Boards

# 1992 Act continued

- Schedule 2 sets out further constitutional arrangements
- Board composition
- Tenure of office
- Board proceedings
- Committees
- Execution of Documents
- and other matters

---

# Further and Higher Education (Scotland) Act 2005

- Merged the funding councils
- Established the Scottish Funding Council
- Deals with funding and fundable bodies
- Now also deals with functions of Regional colleges and designation of those

## 2005 Act continued

- General duty of a **Regional College**
- Planning, consultation and collaboration
- Improvement of economic and social well-being
- Must have regard to particular matters – e.g. skills needs in locality
- Assigned colleges –information and directions

# Post-16 Education (Scotland) Act

- College reorganisation
- Regional colleges
- Regional strategic bodies
- Principles of good governance
- Amends the 1992 and 2005 to deal with above

---

# Charities and Trustee Investment (Scotland) Act 2005

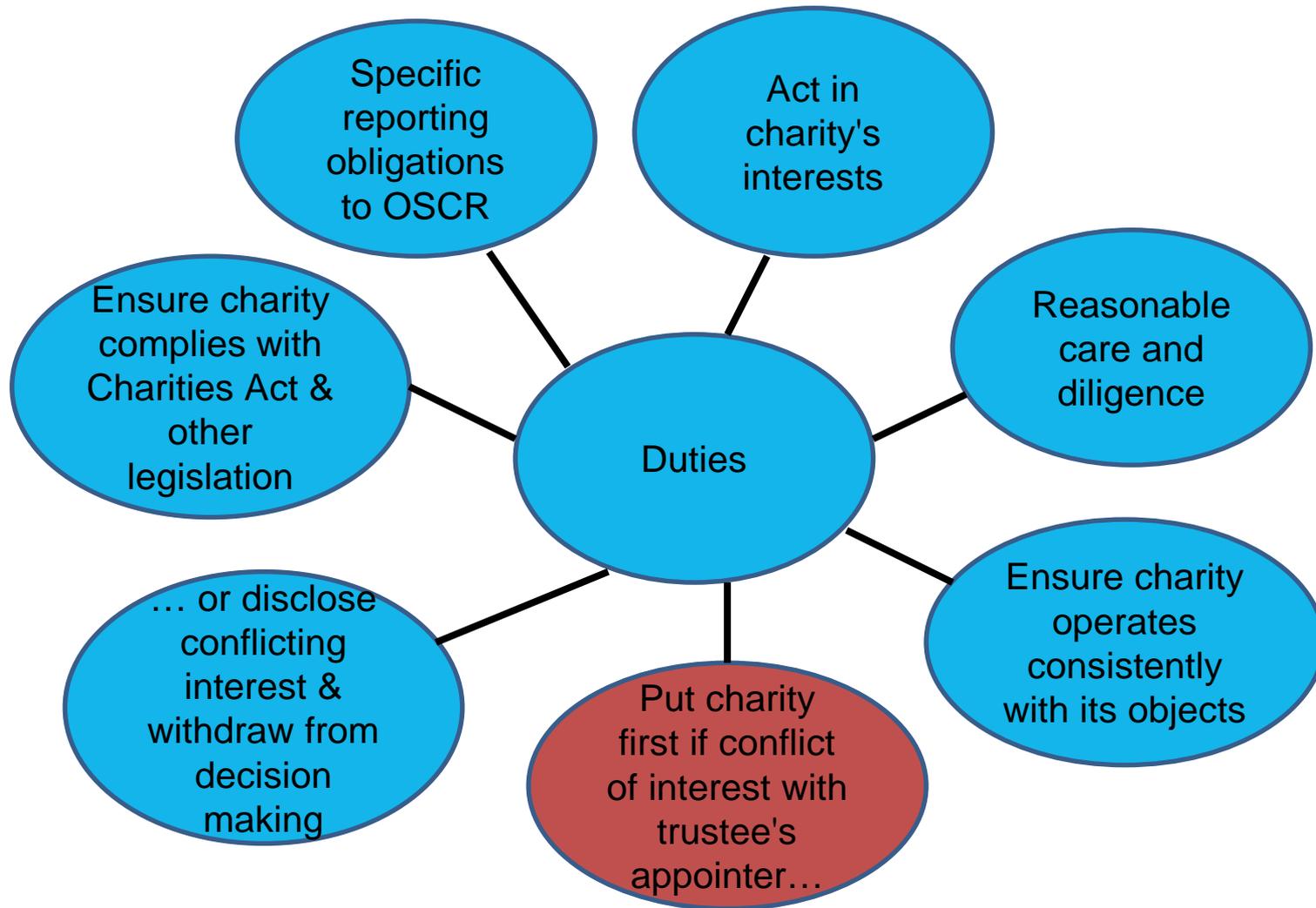
- Charities and Trustee Investment (Scotland) Act 2005 ("the Act")
- Established the Office of the Scottish Charity Regulator ("OSCR")
- Changed the "charitable test"
- Introduced the concept of charity trustees with specific duties
- Keeps a public register of charities
- Annual monitoring
- Notifications and information
- Accounts
- Investigates complaints, misconduct and breach of charity trustee duties

# Duties of charity trustees

## Personal Responsibility

- Who is a charity trustee?
- Section 66 of the Act sets out a number of general duties
- A charity trustee must act in the interests of the charity and must
- ensure the charity acts in a manner consistent with the charity's purpose
- act with care and diligence
- must ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of the Act
- where circumstances potentially generate a conflict of interest:
- Put the interests of the charity first
- Where any other duty prevents them from doing so, disclosing the conflict and refrain from any deliberations etc with the other charity trustees on the matter
- Breach is misconduct in the administration of the charity

# Charity Trustee Duties



---

# **Ethical Standards in Public Life etc. (Scotland) Act 2000**

## **Personal Responsibility**

- Model Code of Conduct
- Register of Interests
- Conflicts of Interests
- Standards Commission
- Investigations and Sanctions

# Code of Good Governance

- Condition of SFC grant
- UK Corporate Governance Code
- Adapted to fit 1992 Act and 2005 Act
- Code for the Board

---

# Other legislation from a governance perspective

- Health and Safety
- Data Protection
- Employment – discrimination/harassment
- Anti-bribery
- Mainly reputational and heavy fines

# Decision Making

When making decisions, do you consider

- your duties as a charity trustee?
- conflicts?
- your charitable purposes – advance education?
- your Board’s duties under the “Education” Acts and Code of Good Governance?

# Essential Reading

- OSCR – Guidance for Charity Trustees
- OSCR – Who's in Charge (about independence)
- Model Code of Conduct
- Code of Good Governance
- Financial Memorandum and SFC Conditions