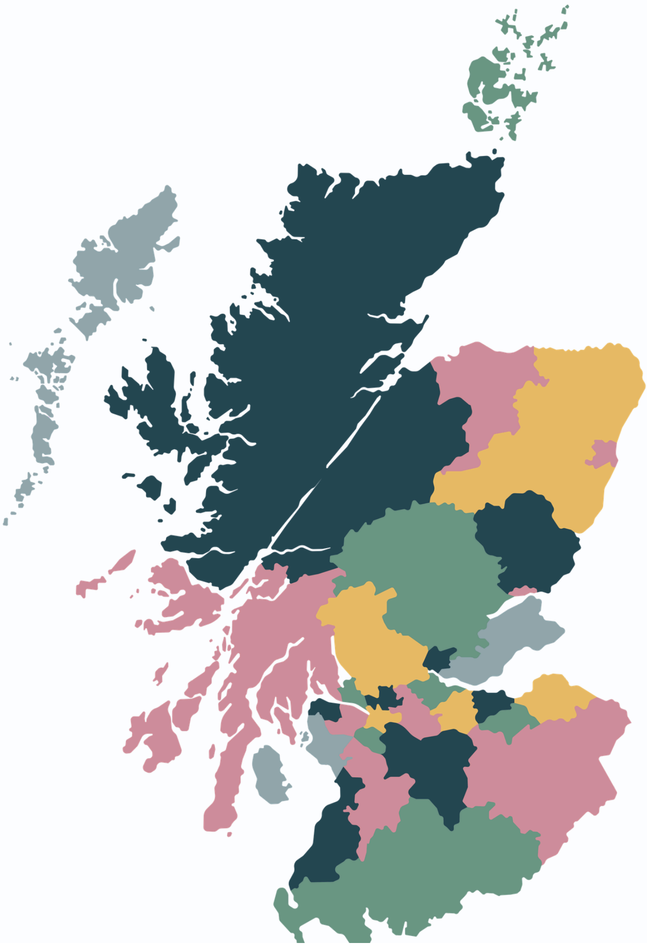
Development Trusts Association Scotland

A Thriving Community-led Network



DIRECTORS HANDBOOK

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INTRO

Welcome to Development Trusts Association Scotland's Directors' Training Program (DTA Scotland). This training booklet is designed as an essential guide for individuals who are taking on the pivotal role of serving as directors of a Company Limited by Guarantee and as trustees for those registered with OSCR (Office of the Scottish Charity Regulator) as a registered charity or SCIO (Scottish Charitable Incorporated Organisation).

At DTA Scotland, we recognize that leading a development trust requires a deep understanding of dual positions' diverse roles and responsibilities. As a director of a Company Limited by Guarantee with charitable status, you are simultaneously a director under the Companies Act and a charity trustee under Scottish charity legislation. This intersection of roles places you under the purview of company, charity, and general law, each carrying its unique set of legal obligations and ethical duties.

A duty in these roles is not just a commitment but a legal obligation. The consequences of failing to adhere to these duties can be severe, including potential fines and personal liability. Thus, it is vital for anyone considering becoming a director of a development trust or acting as a trustee for a registered charity or SCIO to be fully aware of their role and responsibilities.

This document aims to provide a comprehensive overview of the main duties and responsibilities that come with being a director/trustee of a development trust. These roles are critical in guiding your organization in accordance with its mission while ensuring compliance with the legal frameworks governing charities and companies in Scotland.

It is important to note that the specific Articles of Association of your trust and any additional regulations applicable to registered charities or SCIOs may impose further obligations beyond those outlined in this booklet. You should be able to familiarise yourself with these specific articles and regulations, as they are tailored to your organisation's unique governance structure and operational context.

Through this training, we encourage you to engage deeply with the material, understanding the significant impact of your role on both the trust and the broader community it serves. DTA Scotland is dedicated to supporting you in this journey, equipping you with the necessary knowledge and resources to excel as a director and a trustee.

Together, we can ensure that development trusts across Scotland and their charitable counterparts continue to make a positive and meaningful contribution to our communities.

BOARD ROLES AND RESPONSIBILITIES

The Board must clearly understand its own roles and responsibilities and those of its officers. It is essential to operate strategically, guiding the organisation with foresight rather than responding to situations as they arise.

Key Responsibilities of the Board include:

- Articulating and upholding the organisation's vision, mission, and strategic aims.
- Ensuring a comprehensive grasp of its role, fostering constructive and efficacious working relationships, and circumventing conflicts or ambiguities within the Board or with senior management.
- Performing a supervisory role, offering necessary oversight, and holding key personnel accountable.
- Acquiring knowledge of and adhering to all statutory and regulatory mandates.
- When required, offer critical feedback to individual board members.
- Championing the organisation’s cause and enhancing its public image.
- Formally delegating decision-making powers while safeguarding the integrity and transparency of decision-making processes, risk management, and reporting systems.
- Observing the constitution and operating within the stipulated powers.
- Managing the organisation's financial resources prudently and mitigating risks effectively.
- Monitoring the organisation’s performance meticulously.

The Board's Involvement in Appointments:

- The Board plays a critical role in appointing new Board members and senior staff, ensuring a diverse and skilled team that aligns with the organisation's needs and goals.

Oversight and Strategic Direction:

- The Board governs the organisation's affairs, prioritising the best interests of all stakeholders and beneficiaries, ensuring its long-term vitality and success.
- It is responsible for shaping the organisational structure, encompassing paid personnel and volunteers and ensuring their ongoing development.

Balancing Information and Operational Involvement:

- The Board must balance being well-informed and avoiding becoming entangled in day-to-day management.

Compliance and Governance:

- Board members must be fully aware of their compliance obligations and the broader governance framework of the organisation.
- There should be regular self-assessment by the Board to confirm its effectiveness and fitness for purpose.

This guidance is crafted to ensure that, as a Board member, you are equipped to significantly and positively impact the organisation’s trajectory and governance.

RESPONSIBILITIES OF BEING A BOARD MEMBER

Being a Board member is a voluntary role which carries legal responsibilities that are the same as those of a company director.

These include:

- Using the skills, experience and judgement to help make the business successful
- Following the company's rules and ensuring it meets its legal obligations
- Making decisions for the benefit of the company
- Declaring personal interests and conflicts of the Board members
- Ensuring that the company keeps accurate records
- Making sure the accounts present a 'true and fair view' of the company's finances
- Complying with the law (e.g. health and safety; employer responsibilities)
- These responsibilities are reflected in the role description and the Code of Conduct that the Board must sign annually.

Board Members must:

- understand their role
- have the information to fulfil the role effectively
- know the organisation's governing documents
- understand its structure, the roles and responsibilities and their own individual legal responsibilities

If the organisation is also a charity, this means that Board members are Charity Trustees with additional legal responsibilities, which include:

- Acting in the charity's best interests at all times
- Ensuring that the charity's activities comply with its aims and objectives
- Acting with care and diligence
- Complying with all relevant legislation
- Ensuring that the charity fulfils its reporting obligations to the Office of the Scottish Charity Regulator (OSCR), including submitting an annual return and accounts.

CODE OF CONDUCT

It is advisable that Directors sign up to a Code of Conduct which reflects these duties. Such a document should contain the following principles:

1 Selflessness

The Board must act in the best interests of the organisation at all times and must take decisions that support and promote the strategic plan, aims and objectives. Members of the governing body should not promote the interests of a particular group or body of opinion to the exclusion of others.

2 Openness

Board members must be transparent in all actions, and they must declare and record all relevant personal and business interests and must be able to explain actions.

3 Honesty

Board members must ensure that they always act in the organisation's best interests and that all activities are transparent and accountable.

4 Objectivity

Board members must consider all matters on their merits, base decisions on the information and advice available, and reach their decision independently.

5 Integrity

Board members must actively support and promote their values and not be influenced by personal interests in exercising their roles and responsibilities.

6 Accountability

Board members must take responsibility for and be able to explain their actions and demonstrate that their contribution to governance is effective.
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7 Leadership

Board members must uphold the principles and commitment to delivering good outcomes for tenants and other service users and lead the organisation by example.

MAIN DUTIES OF A COMPANY DIRECTOR

The Companies Act 2006 sets out a statement of directors' duties; the nine key elements (focussing on companies limited by guarantee) are as follows.

Note: It is usually the case in development trusts that most directors are also company members. Just to let you know, the duties outlined below do not apply in your role as a member; for example, at a general meeting, directors (in their capacity as members) may vote as they wish.

It is also worth noting that company directors cannot delegate any duties or other responsibilities under Company Law to another person (for example, staff or independent advisors). This does not mean they cannot delegate the functions of the company (i.e. work that the Board have agreed is required) but that responsibility for the overall management and smooth operation of the company remains with the directors. In practical terms, this means that directors must ensure any person they delegate work to has the appropriate skills, qualifications and experience to carry this out to an appropriate standard, as the directors would ultimately be responsible for that decision if there was any liability arising from it. Directors of a limited company have statutory duties that they must adhere to, as outlined over the next couple of pages.

1 Duty to act within powers

Directors must act within their powers as set out in the governing document of the company and only exercise these powers for the furtherance of the company's purposes as set out in the articles of association.

2 Duty to promote the success of the company

Directors of a company with charitable status (or other public benefit objectives) must act in a way that they consider, in good faith, would most likely promote the company's success in furthering its purposes.

"Success" will generally mean a long-term increase in value, but fundamentally, it is up to each director to decide, in good faith, whether it is appropriate for the company to take a particular course of action. When considering the charity law view, success will not necessarily be in monetary value but in the ability to meet its purposes.

The directors must exercise this duty whilst having regard to the following list of factors (amongst others):

- The likely consequences of any decision in the long term (e.g. on the long-term value of the company or it achieving its purpose in the long term)
- The interests of the company's employees
- The need to foster the company's business relationships with suppliers, customers and others (e.g. other community organisations or partners)
- The impact of the company's operations on the community and environment
- The desirability of the company to maintain a reputation for high standards of business conduct
- There is a need to act fairly between members of the company.

It should be noted that the list of factors to which the directors of the company must have regard in exercising this duty is non-exhaustive; for example, when a company becomes (or is becoming) insolvent, a director's first duty is to act in the best interests of the company's creditors (the persons to whom it owes money) and to minimise the potential loss to them.

This duty is to the company. This means that a director must not place the interests of any individual members, employees or beneficiaries above the company's interests.

This duty can be particularly relevant when directors have "divided loyalties" due to their association with another organisation. Each director of a development trust must always ensure that when they are making a decision in their capacity as a director of the development trust, they are voting in such a way as they consider, in good faith, is most likely to promote the achievement of the company's purposes (and not necessarily in the manner which best serves the interests of any other body with which they are connected).

In practice, one way of enabling directors to comply with this duty is to ensure they are presented with papers at board meetings that allow them to consider the above factors. For example, if a decision could have environmental consequences, then papers setting out information relevant to this should be made available to the directors. When a decision involves the Board considering particular or competing factors, the Board may want to record its consideration of those factors and the conclusions reached.

For development trusts, it is usually the case that most directors are also company members. The duties outlined above do not apply in your role as a member; for example, at a general meeting, directors (in their capacity as members) may vote as they wish.

3 Duty to exercise independent judgement

The directors have a duty not to act in accordance with the will of others, whether through delegation or by simply acting in accordance with the wishes of others; rather, they must exercise independent judgement on matters affecting the company.

This does not prevent directors from properly delegating matters to committees or appropriate individuals. Directors can also seek expert advice, provided they still make independent decisions.

This duty does not prevent directors from relying on the judgement of others when considering matters in which they do not have expertise; in fact, in certain circumstances, it would be irresponsible (and a breach of directors' duties) for the directors to proceed without first obtaining external professional advice. It is important, however, that the directors should not blindly follow the advice of third parties; they should exercise their own independent judgement in deciding whether to follow the advice given, as responsibility for decisions ultimately rests with them. For example, if the Company encounters an employment law issue, it would be good practice for the directors to seek expert advice.

4 Duty to Exercise Reasonable Care

This duty is of particular relevance in relation to the directors' role in monitoring the company's activities, especially the company's financial position.

A director of a company must exercise the care, skill and diligence that a reasonably diligent person with both would exercise:

- the general knowledge, skill and experience that may be expected of a person in that role and
- any general knowledge and skills that that director has.

This means directors must act carefully and responsibly or they may be considered negligent.

As a general guide, directors should:

- ensure that the company is run properly, responsibly and lawfully, complying with relevant legislation (e.g. covering companies, health & and safety, employment, equal opportunities, and data protection);
- ensure the company is solvent when trading;
- ensure the Board is fit for purpose and working together for the benefit of the company as a whole;
- apply care, skill and diligence in matters relating to paid staff and volunteers;
- exercise good business sense, and consider taking appropriate professional advice as and when necessary;
- attend as many board meetings as possible to ensure that they are aware, at all times, of how the company is performing

For example, the Board should, in terms of best practice:

- agree a scheme of financial delegation, set annual and project budgets, and monitor financial performance on a regular basis;
- agree and implement a programme of training for directors;
- agree and monitor a framework for managing and supporting paid staff and volunteers.

5 Duty to avoid conflicts of interest

A director of a company must avoid a situation in which they have or can have, a direct or indirect interest that conflicts, or might conflict, with the interests of the company. This applies to the exploitation of any property, information or opportunity (regardless of whether the company could take advantage of that property, information or opportunity). This is slightly different from declaring interests (see below), although it is usually treated in a similar way.

Directors must not allow their personal interests or any other body's interests to override the company's (even where they were appointed as a Director on the basis that that other body had nominated them).

This duty could come into play where particular pieces of information are available to the company (for example, information about a forthcoming development opportunity) that might be exploited by a director for personal financial gain or the benefit of any other organisation with which they are involved.

It also relates to a situation where a director proposes to take on a directorship (or similar role) with another organisation, which might, for example, be competing with the company for grant funding.

It is possible that difficulties could arise when a director sits on the Board of more than one company and is therefore subject to a duty of confidentiality to two or more companies. Directors should be encouraged to seek independent legal advice if in any doubt as to whether a conflict of interest may exist.

A Director may be associated with another organisation, which may give rise to ‘divided loyalties’, but they may not stand to gain financially. If this is the case, the Director should declare it and ensure that it is minuted, and when deciding their capacity as a Director, they must always vote in such a way as they feel will be in the best interests of the company and not necessarily the other organisation on whose governing body they also sit.

Some companies’ Articles of Association will state that, even where the issue is one of divided loyalties rather than conflict of interest in the narrower sense referred to above, the Director is still debarred from voting – and that would be considered best practice if full transparency in decision-making is being sought.

This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement between the director and the company (other principles cover that type of conflict). Further, this duty is not infringed:

(1) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or
(2) if the directors have authorised the matter. Board authorisation may be given only if:

- Nothing in the company’s articles of association would invalidate board authorisation;
- Any quorum requirement is met without counting the interested director(s);
- Authorisation is given excluding any vote(s) cast by the interested director(s).

Please also refer to the guidance below on the duty to declare an interest in a proposed transaction or arrangement.

6 Duty not to accept benefits from third parties

A director must not accept any benefits from third partiesthat arise because of their office as a director, or equally through their doing, or not doing, anything in their capacity as a director. This does not apply to any transaction approved by the members of the company or one for which the company's governing document states that approval is unnecessary.

In this context, a "third party" means a person other than:

- the company;
- an associated corporate body or;
- a person acting on behalf of the company or an associated corporate body.

This obligation continues beyond the point where a director ceases to hold office, and a person can be held liable regarding things he did or did not do during their past office as a director.

There is no minimum threshold (in terms of financial value) above which directors must not accept a benefit from a third party, but the duty is not infringed if accepting the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest. It is worth considering whether it would be appropriate for the company to issue guidance to directors on what would be regarded as acceptable levels of benefits that may be received.

This duty is treated differently from the duty to avoid conflicts of interest in that a director obtaining a benefit from a third party can only be authorised by the company's members rather than by their fellow directors.

7 Duty to Declare a (Financial) Interest

This duty relates to a situation where a company director has a financial interest in or stands to gain (or lose) financially from a contract, transaction or arrangement entered into by the company. Financial interest or gain can apply to money and anything with a monetary value (e.g., information). Examples could be where the company is looking to buy a service or goods from a Director or an organisation that a Director is involved with in any way (e.g. partner, Director, etc).

This duty is not infringed where:
(1)the director is not aware or ought reasonably to be aware of the interest or of the transaction or arrangement in question;
(2)the matter cannot reasonably be regarded as giving rise to a conflict of interest;
(3)the other directors are aware or ought reasonably to be aware of the interest;
(4) it concerns their service contract, which was considered at a board (or committee) meeting.

If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, they must declare the nature and extent of that interest to the other directors at any time before the company enters into the transaction or arrangement. (However, directors do not have any duty to avoid such an interest, as they have in relation to transactions or arrangements with third parties).

Directors should also be aware of an additional obligation under section 182 of the Companies Act 2006 whereby directors must declare an interest in any existing transaction or arrangement with the company (whether legally binding or not). Failure to make such a declaration is a criminal offence.

7 Duty to Declare a (Financial) Interest - con't

This duty also applies where any person connected to the Director has a financial interest in or stands to gain (or lose) financially from a contract, transaction or arrangement entered into by the company (known as indirect interests). Under the Companies Act 2006, the people that a director is considered to be connected to include their spouse, civil partner, parents, children or step-children of any age, a partner in an enduring family relationship and a partner's children or step-children (if under 18 years and living with the director).

All conflicts of interest must be declared at the earliest possible opportunity. They can be declared:
(a)at a full meeting of the Directors (not a sub-committee), or
(b)by way of a notice to the directors (either in relation to a specific matter or by way of a general notice)

Any declaration of interest under this duty must be made before the company enters the transaction or arrangement. Further, if a declaration of interest in accordance with this duty proves to be, or becomes, inaccurate or incomplete, a further declaration must be made (but only if the company has not yet entered into

The transaction or arrangement when the director becomes aware, or ought reasonably to have become aware, of the inaccuracy or incompleteness of the statement).

A director must not take part in any decision relating to an issue in which they have a conflict of interest and does not count as part of the quorum at a Board meeting where such a decision is to be taken.

There are various special rules for substantial property and other transactions involving directors - legal advice should be sought in these circumstances.

8 Duties in Insolvency

This is of particular importance! The duties of a director come into sharp focus - and have significant practical implications - when a company is, or is becoming, insolvent.

The main statutory provisions in this area (referred to as the "wrongful trading provisions") are fairly complicated, but the basic principle is that a director could be ordered to contribute (out of their own funds) to help satisfy the debts of the company if it had gone into liquidation but only if they allowed the company to increase the loss to creditors (normally by running up more debt) beyond the point where there was no longer a reasonable prospect of the company pulling through.

It is important to note that the obligation to take steps to minimise further loss to creditors is not something that arises only when the company runs out of money. The directors' duty to take steps to address the situation (and normally that would involve closing down) is likely to have arisen much earlier, at the point when it became clear that there was no realistic hope of financial survival. If directors are becoming concerned about the company's financial position, it is worth consulting a solicitor and/or accountant. There are, however, two useful tests (though not conclusive) in determining whether there is a significant issue of solvency:

- Cash Flow test: if the company cannot pay the money it owes when payment is due, or if this is likely to occur within the foreseeable future (generally the next 12 months).
- Balance Sheet test: if the value of its total assets is less than its total liabilities. This includes prospective liabilities.

8 Duties in Insolvency - con't

If an organisation is able to pay its debts as they fall due but fails the balance sheet test, it is said to be 'technically insolvent'. Advice in this case should be sought – but as noted above, if there is ever a question mark over the ability of the company to avoid insolvent liquidation, it is important to

- Carefully weigh up the positive and negative factors (including savings you might make and potential additional income).
- Ensure that you have full and reliable financial information.
- Decide whether pulling through is reasonable (not merely an outside chance).
- Try to obtain firm written commitments from funders or others if there is a reliance on these.
- Ensure that the discussions at the board level are carefully minuted to show that the issues were recognised and that any decision to allow the company to continue its activities was made after due consideration by the board.

A Director is expected to act in these circumstances on the basis of:

- The general knowledge, skills and experience that might reasonably be expected of a person carrying out that particular Director's function.
- The general knowledge, skills, and experience that the Director actually possesses.

Ignorance is not a defence! At the very least, this means that all Directors must ensure they receive proper financial information and have the skills to identify problems that could lead to insolvency. If any Director feels they lack the appropriate skills, the company should be asked to arrange training and/or seek advice from a solicitor and/or accountant.

9 Duty to attend meetings

The Articles of Association make reference to the number of missed meetings that could result in directors being asked to stand down from that role. Directors must attend whenever 'reasonably able to do so'. A director who does not attend over an extended period of time could be held in breach of their duty of care. If the company becomes insolvent, a director who has consistently failed to attend could be disqualified from becoming a company director of any other company for a period of years.

Liabilities

Directors are responsible for their own breaches and defaults. Directors can be relieved of the consequences of their liability if their company or the courts decide.

Companies are separate legal entities from their officers, so a director would normally not be liable for a company 's debts. However, a director may be personally liable if they caused the breach by the company, e.g. by entering a contract outside of their powers.

If directors breach their general duties, they will normally be required to compensate the company for any loss they have suffered or to relinquish any gain due to their breach. Each duty imposed on a director carries its own punishment for breach. In most cases, a director will be liable to a fine, but in some cases, they may also be imprisoned – although this is very rare. A director can also be disqualified from being a director for breaching company legislation.

When a company is in liquidation, an action can be raised against a director for their conduct before and during the liquidation. The most important examples are:

Misfeasance - misapplying, retaining or becoming otherwise accountable for any money or other property of the company or being accountable for breach of any fiduciary duty or other duty imposed by the company.

Fraudulent trading - knowingly carrying on business with the intention of defrauding the company's creditors or any other person or for any fraudulent purpose.

Wrongful trading – as shown above under note 8.

The court can require the director to contribute to the company's assets in all of the above cases. A director can also be disqualified if their conduct renders them unfit or appear to have been involved in or found guilty of fraudulent or wrongful trading.

THE MAIN DUTIES OF A TRUSTEE OF A SCOTTISH CHARITY

The Scottish charities legislation (the Charities and Trustee Investment (Scotland) Act 2005) sets out certain specific duties which apply to directors of companies which are recognised as Scottish charities (referred to in the legislation as “charity trustees”).

The key points are as follows:

- Charity trustees must act in the interests of the charity; and must in particular
  - seek in good faith to ensure that the charity exercises its functions in a manner which is consistent with its purposes·
  - act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person
  - in circumstances where a conflict of interest may arise, put the interests of the charity first (or, where some other duty prevents that, disclose the conflict and take no part in the deliberations/decision)

- In addition, the charity trustees must ensure that the charity complies with any direction, requirement, notice or duty imposed upon it by virtue of the 2005 Act.

- Breach of trustees’ duties specified above is to be treated as misconduct in the administration of the charity.

- All charity trustees must take such steps as they reasonably can for the purposes of ensuring that any breach of the above duties by the trustee concerned is not repeated and that any trustee who has been in serious or persistent breach of any of the above duties is removed as a trustee.

In addition, the legislation includes provisions specifically addressing a situation where a charity trustee provides services to a charity. The main points are as follows:-

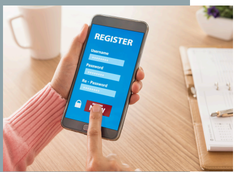
- Where a charity trustee provides services to a charity or might benefit from any remuneration paid to a connected party for such services, then (unless otherwise provided in any constitution which was in force prior to the 2005 Act)
  - The maximum amount of the remuneration must be specified in a written agreement and must be reasonable·
  - The charity trustees must be satisfied that it would be in the interests of the charity to enter into the arrangement (taking account of that maximum amount)
  - Less than half of the charity trustees must be receiving remuneration or benefit from remuneration
  - The remuneration must not be expressly prohibited by the constitution

- Remuneration contrary to the above will be recoverable.

OPERATIONAL RESPONSIBILITIES

Register of Members

The following details must be recorded:



- Full name and address of each member
- The date on which they became a member and the eventual date when they ceased to be a member
- If there are more than 50 members, the register must record them alphabetically.
- The register must be kept in a safe place where it cannot be amended without proper authority.
- The register must be open for inspection by members free of charge.

Annual Returns and Annual Accounts

The Company must file an Annual Return at Companies House on the relevant form each year. Companies House will issue a pre-printed annual return in advance of the return date in each case – so all that is needed is to check that the details are correct and notify them of any discrepancies. There is a small filing fee for an annual return payable to Companies House. Either a Director or the Company Secretary may sign the form. It is also possible to file annual returns electronically; a reduced fee is payable if that facility is used.

Directors (and the Company Secretary) could be held personally liable for a fine if an annual return is late.

Annual accounts must be filed with Companies House, normally within nine months after the accounting reference date (financial year end) (though special rules apply to the first accounts). This is taken very seriously by Companies House; a series of reminders are issued – but if accounts are late, the company will automatically be liable for a civil penalty of £100 to £1000 depending on the length of delay – and the Directors and the Company Secretary could also find themselves personally liable for fines.

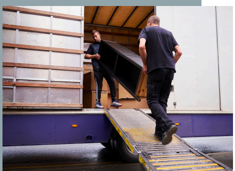
In addition to the annual return to Companies House, a company recognised as a Scottish charity must also file an annual return with OSCR and a copy of their accounts (which must comply with the relevant Charities Accounts Regulations).

The Annual Return and Accounts must be signed by a charity trustee and dated at the meeting they were approved. Charities with an annual income of £25,000 or above must also complete a monitoring return.

Changing directors

You must notify Companies House within 14 days of any change of Directors (or a change in a Director's details) on the relevant form - form AP01for the appointment of a director, form TM01 for the resignation of a Director (or someone ceasing to be a Director for any other reason), and form CH01 for a change in a Director's details (e.g. change of home address). This must be signed by a new Director or new Company Secretary but does not need to be signed by a departing Director (or Company Secretary). It is also possible to file these forms electronically with Companies House. New directors can either be co-opted by the board or elected at the AGM in accordance with the procedures set out in the Articles.

Removing Directors



The Articles set out certain circumstances in which a Director can be removed or will automatically cease to hold office. This may be, for example, because the Director has missed more than a specified number of board meetings. There is also a statutory right for members to remove a Director; a fairly convoluted procedure is involved, but ultimately, the resolution will be passed if a majority of the votes cast at the EGM or AGM are in favour. Where the majority of the board is not in favour of removal, the members can still force the issue – since 10% of the membership can formally request the board to convene an EGM for this purpose – and the board is legally obliged to give effect to a requisition of that kind.

Keeping company records

In addition to the register of members, you must keep a register of Directors showing the following:

- Full name
- Former names (not maiden)
- Date of birth
- Nationality
- Residential address
- Business occupation (if any)
- Particulars of Directorships (including a former Directorship – identified as such – if held within the preceding five years)
- The date on which each person became a director – and the date when they ceased to be a director

You must also keep a register of company secretaries (if you have a company secretary - see below).

- Full name
- Former names (not maiden)
- Residential address
- The date on which each person became secretary – and when they ceased to be secretary.

In each case, the register must be available for inspection by the membership.

Under the Charities and Trustee Investment (Scotland) Act 2005, charities must keep accounting records for at least six years from the end of the financial year to which they relate.

Appointing a Company Secretary

It is no longer a statutory requirement for a company (other than a PLC) to have a Company Secretary, but almost all community development trusts do continue to have a Company Secretary - as it helps to ensure that important administrative requirements under the Companies Acts and the Articles are not overlooked, and generally contributes to good governance.The duties of a Company Secretary normally include:

- Being present at meetings.
- Taking minutes (unless you appoint a minute secretary).
- Issuing notices of meetings to directors and members.
- Maintaining the register of members, register of directors, register of secretaries, minute books and other company records.
- Making all necessary returns to Companies House, OSCR and HM Revenue & Customs.

The Company Secretary is not a voting position on the board unless the Company Secretary is also a Director. It is possible to appoint an employee or pay someone to carry out the role of the Company Secretary.
The Company Secretary can be changed by the directors whenever they wish. This is in contrast to the chair, vice chair (if any), and treasurer, for whom there are normally special provisions for their appointment; occasionally, an appointment is by way of election at the AGM, but more commonly in a company context, it is for the board to elect their own office-bearers from their own number.

Appointing Auditors

Only certified or chartered accountants can be auditors. The directors appoint the first auditors and will normally continue in office yearly unless steps are taken to change them. It should be noted that the requirement to re-appoint auditors at the Annual General Meeting no longer applies unless this is specifically required under the articles of association; the Companies Act 2006 provides that (in general terms - the detailed provisions are fairly complex) unless the directors appoint a different firm as auditors during the 28-day period that follows the filing of the annual accounts with Companies House, the existing auditors will be deemed to be re-appointed.

If you wish to change auditors, this is normally dealt with via the resignation of the existing auditors – with the board then filling the vacancy by appointing another firm as auditors. If auditors resign, they must make a written statement of any circumstances connected with their resignation that ought to be brought to the attention of the members or creditors. If the existing auditors refuse to resign, a more complicated procedure can be followed, involving removal at a General Meeting.

Role of an Auditor

Auditors have the right to free access to any documents, books or other records necessary to conduct the audit. They are entitled to proper explanations and information from the board to enable them to perform their duties and to receive notices, as if they were members, of all General Meetings of the company. They can attend and be heard - but not vote - at company general meetings on any business with which they are concerned.

The auditors will normally prepare a balance sheet and income and expenditure account. Once the audit process is completed, the accounts must be approved by the Directors, and the balance sheet must be signed and dated by a director; the auditors then sign their audit certificate on the accounts, and the report and accounts are then normally put before the AGM. A copy of the audited accounts is usually sent to all members along with the notice of each AGM (in terms of the statutory requirements, the accounts must be sent to the members on or before the last date on which it has to file accounts with Companies House or (if earlier) the date on which it actually files the accounts with Companies House).

Auditors have a duty to report to OSCR anything of material significance to OSCR carrying out its role as the charity regulator. They may report anything that may be of interest to OSCR.

Directors Annual Report

The directors must prepare a report each year attached to the Annual Accounts. This must:

- Give a fair review of the developments that have gone on in the company during the financial year
- Give the names of all the directors
- Set out details of all the activities of the company for the year
- Identify any significant change in the activities or the fixed assets of the company

It must also give details of important events after the financial year-end and any likely future developments. Finally, it must set out the charitable contributions made by the company.

REGISTERED OFFICE

The company must, at all times, have a registered office. This is an office where all formal communications and notices to the company will be addressed. This is why it must appear on all company stationery and there should be a notice outside your office saying that this is the company's registered office. This does not prevent you from having another address (say that of the company secretary) where you want day-to-day correspondence to be sent.

You can change the registered office whenever you like by a decision of the directors but the necessary form (form AD01) must be lodged within 14 days with the Registrar of Companies. If you are operating from a different office, you must have a notice of your registered office displayed outside your business address.

COMPANY STATIONERY

As a charitable company, all letterheads, invoices, orders and publications must contain the following:

- The company name.
- The place of registration (i.e. Scotland) and your company registration number (from your certificate of incorporation).
- The address of the registered office.
- The fact that you are a Scottish charity and your Scottish charity number.
- If the word “Limited” (or “Community Interest Company”/”CIC”) does not appear in the company name, the fact that you are a company.

All chequebooks must state the full name of the company. If they do not, any person signing a cheque on the company’s behalf may be liable if the company does not pay.

As a charitable company, all the above documents must state that the company is a charity.

PLACE OF BUSINESS

The name of the company must appear clearly outside the place of business.

Types of Meetings

General Meetings are meetings of the company membership. Prior to the Companies Act 2006, any General Meeting that was not the Annual General Meeting (AGM) was referred to as an "Extraordinary General Meeting" (EGM) - although that terminology is not used in the Companies Act 2006. The rules in relation to calling General Meetings are as follows:

- AGMs: The statutory requirement to hold an AGM was removed (other than for PLCs) by the Companies Act 2006, but for virtually all development trusts, it is important that AGMs should continue to be held in the interests of democratic accountability. Your Articles of Association will state that AGMs must be held - and if they are not, it would be as well to alter the Articles so that they make that clear. The usual requirement under Articles of Association - following the position that applied prior to the Companies Act 2006 coming into force - is that AGMs should be held no more than 15 months apart, with the first AGM being held no later than 18 months after the company is incorporated.

- The directors call Other General Meetings at any time they feel one is required or, as set out earlier, must be called at the request of 10% of the membership.

The membership, via a General Meeting, has the ultimate control of the company; some important decisions, such as a change to your name, Articles of Association (also a winding-up resolution), can only be made at General Meetings (or through a written resolution signed by 75% or more of the total membership). However, the board can make day-to-day decisions about the company's running. They are, however, bound to follow a specific direction issued by the members at a General Meeting; that would normally, however, involve a special resolution, with due notice of the resolution being given, and in practice, it is extremely rare.

Notice of Meetings

The Articles of Association set out who should be notified of a General Meeting and how they should be notified. The minimum period of notice is 14 days.

Every notice of a General Meeting must give the following information:

- The place, time and date of the meeting
- The manner in which members can vote by proxy (even if your Articles do not allow for proxy voting, that is now overridden by the Companies Act 2006 ie. All members have the right to vote by proxy even if the Articles say otherwise)
- If it is an AGM, it must say so
- If it is proposed to move a special or extraordinary resolution, the notice must state that and set out the exact words of the resolution.
- If it is a notice of an AGM, it is normal to send out the audited accounts and directors' report with the notice.

Conduct of General Meetings

The quorum specified in the Articles of Association must be present at all times. A chair must properly conduct the meeting and preserve order and may insist that a member leave if they become disorderly or abusive.

The chair has no power to dissolve or adjourn meetings unless agreed by the majority of members present - except where they need to do so to preserve order.

It is the chair's duty to ensure that the meeting only discusses matters that fall within the scope of the notice convening the meeting. This need not prevent a free and general discussion after the completion of formal business - although that sort of discussion cannot involve the passing of formal resolutions.

A member may propose an amendment to a resolution without advance notice, but only if it does not completely alter the original nature of the proposal. However, special or Extraordinary resolutions must not be amended – other than to correct a typographical error.

Types of Resolution

Two different types of resolution vary according to the size of the majority required and the amount of notice to be given. They are:

- Ordinary resolution - which is passed by a simple majority
- Special resolution - which needs a three-quarters majority, i.e. three-quarters of the votes actually cast, must be in favour.

Special resolutions are required, for example, to change the company's name, objects or Articles of Association.

In calculating the three-quarters majority, only the votes cast for and against are counted, and those who are absent (without having appointed a proxy to vote in their place) or abstain are disregarded.

Within 15 days of a Special Resolution being passed, a typed copy of the resolution must be sent to the Registrar of Companies.

There are two kinds of resolution which require 'special notice' to be given. These are:

- A resolution to remove a director
- A resolution to remove an auditor

The member intending to propose the resolution must give 28 days' notice of that intention to the company. The company, having received the notice, then gives 14 days' notice of the resolution to the members (where possible, at the same time as it gives notice of the meeting).

Fines

To ensure that the various duties of a Company Secretary and directors are complied with, there are penalties in the form of fines. However, in practice, it is extremely rare for fines to be levied – other than in relation to annual returns and accounts. If the offences are persistent and numerous, the person may be disqualified from acting as a director – but again, that is very rare.

LEGAL OBLIGATIONS

Directors are responsible for ensuring that the company complies with its obligations relating to the health, safety, and welfare of its workers at work, under health and safety legislation. Similarly, obligations arise under environmental legislation, anti-corruption legislation, employment law, and Data Protection. Compliance with these ensures that the risk of personal liability is reduced further.

Health and Safety

Responsibility for health and safety matters is the company's responsibility rather than individual directors. However, where a ‘body corporate’ commits a health and safety offence with the consent or connivance of a director or the offence is attributable to neglect, they are liable to be prosecuted. (In this context, consent means knowing of the circumstances and the risks, whilst connivance means knowing and not doing anything about the risks. Neglect means unreasonable breaching of a duty of care.)

Under the Health and Safety Executive's ("HSE") enforcement policy statement, one of its purposes is to ensure directors are brought to account before the courts if they fail in their health and safety responsibilities. HSE Inspectors have been asked to consider, in particular, the management chain and role played by individuals in any health and safety breaches. Organisations and individuals found guilty of health and safety breaches will be annually named in the HSE’s annual report.

The HSE and the Institute of Directors have published guidance as to the health and safety responsibilities of company directors, recommending that each board must:

- accept its collective role in providing health and safety leadership in their organisation;
- nominate a director to champion health and safety issues;
- ensure that each member accepts individual responsibility and makes sure that their actions and decisions at work reinforce the messages in the board's health and safety;
- make sure all decisions reflect the intentions in the organisation's health and safety policy;
- encourage workers at all levels to become actively involved in health and safety;
- keep up to date with relevant health and safety risk management issues and review its health and safety performance regularly, at least annually.

LEGAL OBLIGATIONS

Employment laws

A company acts through two tiers of decision-making – through the membership and the delegated authority given to the board of directors. The board of directors are in charge of the management of the company's business; they make the strategic and operational decisions of the company and are responsible for ensuring that the company meets its statutory obligations. Under the duty to promote the company's success, the board must also protect the interests of the company's employees.

The limited company acts as the employer, which brings responsibilities such as:

- Fair recruitment practices
- Written particulars of employment (usually in the form of a contract)
- Health and Safety
- Working Time Regulations and Annual Leave
- Minimum Wage
- Fair treatment which prevents claims of discrimination
- The duty to consider requests for flexible working
- The duty to grant maternity leave and pay/paternity leave and pay/parental leave and allow staff to return to the same job
- Abiding by express and implied contractual terms
- Informing and consulting when changes are made
- Auto-enrolment into a pension
- Terminating a contract fairly

Employers have a duty of care to their employees, meaning they should take all reasonable steps to ensure their health, safety and wellbeing.

Legally, employers must abide by relevant health & safety and employment law, as well as the common law duty of care. They also have a moral and ethical duty not to cause, or fail to prevent, physical or psychological injury, and must fulfil their responsibilities with regard to personal injury and negligence claims.

Requirements under an employer's duty of care are wide-ranging and may manifest themselves in many different ways, such as:

- Clearly defining jobs and undertaking risk assessments
- Ensuring a safe work environment
- Providing adequate training and feedback on performance
- Ensuring that staff do not work excessive hours
- Providing areas for rest and relaxation
- Protecting staff from bullying or harassment, either from colleagues or third parties
- Protecting staff from discrimination
- Providing communication channels for employees to raise concerns
- Consulting employees on issues which concern them.

LEGAL OBLIGATIONS

General Data Protection Regulations

Compliance with the data protection regime requires the commitment of every function within an organisation. It has long been recognised that data protection breaches are most commonly caused by human error rather than external cyber-attacks.

The GDPR requires organisations to have “appropriate technical and organisational measures in place.” This requires implementing and maintaining secure systems, training and robust policies on all aspects of data handling.

Further, the GDPR introduced a new principle of accountability which requires organisations to not only comply with the data protection principles but, at any time, to be able to demonstrate this. The role of directors will be to properly understand, prioritise and implement the changes needed to comply with the data protection regime.

Once a data breach has been identified, the organisation may be required to notify the Information Commissioner’s Office (ICO) and the data subjects within 72 hours of being made aware of the incident. Upon learning of a breach of data protection legislation, the ICO has broad investigation powers, including the service of production orders and the exercise of search warrants.

Under the GDPR, there is a range of criminal offences relating to data protection, including unlawfully obtaining, disclosing or selling data and various offences relating to exercising the ICO’s statutory powers. There are also new offences under the Data Protection Bill, including altering or destroying data to prevent information disclosure to a data subject.

Directors may be liable for the criminal offences of the company where these were committed with their “consent, connivance or neglect.” Whilst prosecutions of directors under the DPA were rare, directors should be conscious of the possible criminal offences an organisation may commit and the possibility of the ICO prosecuting individuals.

At present, the company will be liable as an entity and no separate provisions make directors individually liable for non-criminal breaches of the legislation. However, directors should be mindful that this may change in future.

Bribery Act 2010

The Bribery Act 2010 extends the crime of bribery to cover all private sector transactions (previously, bribery offences were confined to transactions involving public officials and their agents).

- The Act creates four separate offences:
- a general offence of offering, promising or giving a bribe;
- a general offence of requesting, agreeing to receive or accepting a bribe
- a distinct offence of bribing a foreign public official to obtain or retain business;
- A strict liability offence for commercial organisations that fail to prevent bribery by those acting on their behalf, where the bribery was intended to obtain or retain a business advantage for the commercial organisation.

The Corporate Manslaughter and Corporate Homicide Act 2007

Companies and individuals (including the directors and managers of a company) are subject to the common law offence of manslaughter by gross negligence, which applies where:

- the defendant owed a duty of care to the deceased;
- there had been a breach of this duty of care;
- The breach was so grossly negligent that the defendant can be deemed to have had such disregard for the deceased's life that the defendant's conduct should be seen as criminal and deserving of punishment.

A conviction of an individual for gross negligence manslaughter carries a maximum sentence of life imprisonment.

The Corporate Manslaughter and Corporate Homicide Act 2007 creates an offence of corporate manslaughter (known as corporate homicide in Scotland) in the UK, which replaces the common law offence of manslaughter by gross negligence for companies, partnerships, trade unions and other organisations. An organisation will be guilty of corporate manslaughter if:

- the way in which its activities are managed or organised causes a person’s death;
- the death results from a gross breach of a duty of care owed by the organisation to that person;
- The senior management had organised or managed the organisation’s activities in such a way as to be a substantial element of the breach.

The Corporate Manslaughter and Corporate Homicide Act does not apply to individuals, but an organisation will be subject to an unlimited fine if found guilty.

Competition law

The Competition Act 1998 (CA98) imposes two key prohibitions on anti-competitive conduct.

- Agreements that may actually or potentially distort competition
- The abuse of a dominant market position

Competition law, under applicable European and UK law (in common with comparable jurisdictions around the world), prohibits certain practices that will or may have the effect of reducing competition between competing undertakings.

Competition laws also include prohibiting the state from selectively granting advantages to companies (“state aid”) and rules relating to government tender procedures. In Europe (and elsewhere), a breach of competition law can lead to severe fines, the nullity of any affected contract, and damages claims from affected third parties.

For companies (and charities) to be compliant with competition law, Boards need to be aware that:

- In any collaborative arrangements where you engage in economic activity, for example, agreeing on speaking rates for senior representatives or agreeing to boycott certain suppliers would raise competition concerns.
- In applying for government and other tendered contracts. It is not permissible to “rig” the outcome of a tender process by, for example, agreeing with a third party that they should not participate so as to increase your chances of winning the tender. Further, in the EU, state aid rules may apply in relation to running social projects and providing public benefit services.

RESOURCES

- Example Code of Conduct
- OSCR Duties and Responsibilities of Trustees
- Management of Conflict of Interests
- ASK ME — Example Board of Directors Register of Interests
- ASK ME — EXAMPLE WORKING GROUP REMIT
- ASK ME — Example Delegation of Power
- Persons with Significant Control (PSC) Register
- Good Governance Health Check
- Online Training

ASK ME — Please speak to your Development Officer at DTA Scotland for a copy of these resources

Welcome to the Development Trusts Association Scotland's Directors' Training Handbook, a vital resource for directors of Companies Limited by Guarantee and trustees registered with OSCR. Embracing the dual roles under company and charity law, directors are entrusted with various responsibilities to ensure the charity's integrity and adherence to its mission. This handbook serves as a roadmap to navigate the complexities of governance, statutory compliance, and strategic leadership.

Directors are guardians of the organisation's vision and values, steering it towards its strategic objectives while cultivating a culture of transparency, accountability, and excellence. The Board's duties extend from rigorous oversight of organisational performance to the prudent management of resources, embodying principles of selflessness, honesty, and integrity.

Beyond providing guidance, DTA Scotland commits to supporting its members in fulfilling their roles effectively, fostering the positive and meaningful impact of development trusts across Scotland.

This summary encapsulates the essence of the handbook, which outlines detailed legal obligations and the commitment required to uphold the highest standards of governance and leadership. Directors and trustees are encouraged to engage with this material comprehensively, ensuring their actions align with the broader objectives of their organisations and the communities they serve.

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A Thriving Community-led Network

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