

DEMYSTIFYING TRUSTS GUIDANCE NOTE

commissioned by

**Highlands & Islands Enterprise
&
Development Trusts Association Scotland**

Burness 
242 West George Street
Glasgow
G2 4QY

Telephone : 0141 248 4933
FAS: 8859

www.burness.co.uk

INTRODUCTION

There are many organisations that call themselves Trusts. The use of the word 'trust', by its very dictionary origins, seems to imply a social as much as an economic purpose to the organisation, yet many Trusts are simply a particular form of incorporation for a specific business purpose.

For many years investigating officers within the Highlands and Islands Enterprise (HIE) network have wrestled with definitions of corporate status whenever the Network is approached for assistance by a body with the word 'trust' in the name. This has been a particular problem for us because historically we assist both community groups and business groups alike, but we had slightly different approaches to cases where the output was social as against cases where the output was economic.

However, this doesn't work anymore. Increasingly the dividing line between social and economic purpose has become blurred, and, as the social enterprise sector expands, seemingly exponentially, it is difficult to distinguish between them, and the Network, in common with the rest of the public sector, is having to develop a more homogenous approach. This has thrown the definition of the corporate status of applicant organisations into sharper relief, and it became apparent to us some while ago that we needed to be as clear about trust status as we were about other legal forms. The appearance on the scene in recent years of the burgeoning development trusts movement, with which the Network has a close relationship, has also asked important questions of our systems, since very few if any of the members of DTAS are legally trusts, but nearly all of them are functioning businesses, but with overt social purpose.

Accordingly HIE joined forces with DTAS, for whom this is inevitably a frequently asked question, to see if we could pin down more precisely what is and is not in law a trust, and just as importantly, what are the legal restrictions, implications, or advantages of having the word in an organisation's name. This document is the result. Stephen Phillips of Burness, one of the leading experts in this field in Scotland, has produced for us a succinct, clear and readable survey of the issues, which should act as an authoritative guide, both for those seeking guidance on the appropriate legal structure for their own organisation, and for those in support agencies, both social and economic, who are approached by trusts, and have decisions to take about how to respond to the approach, or even if they should.

Thanks go to Stephen for his hard work on this and for his skills in setting out the potentially complex legal issues in such a comprehensive, and comprehensible, fashion.

Disclaimer

The contents of the report are the best information to us at the time the study was carried out, but neither the authors nor the sponsors can take any responsibility for decisions taken by readers based on the contents. In all cases proper legal advice should be sought.

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NOTE:

THE INFORMATION SET OUT IN THIS GUIDANCE NOTE REFLECTS THE PROVISIONS OF SCOTS LAW. THE POSITION WITH REGARD TO CERTAIN POINTS MAY BE DIFFERENT UNDER ENGLISH LAW. ALSO, WHILE THE GUIDANCE NOTE IS ACCURATE AS AT SEPTEMBER 2005, THE LAW IN THIS, AS IN OTHER AREAS, REMAINS SUBJECT TO CONTINUAL CHANGE. IN PARTICULAR, THE SCOTTISH LAW COMMISSION HAS RECENTLY UNDERTAKEN WORK WHICH MAY LEAD TO REFORM OF SCOTTISH TRUST LAW AND THERE ARE OTHER LEGAL DEVELOPMENTS (EG THE ISSUE OF REGULATIONS UNDER THE CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) ACT 2005) WHICH COULD ALSO HAVE A BEARING ON A NUMBER OF THE ISSUES WHICH ARE MENTIONED.

1 MAIN CHARACTERISTICS OF A TRUST

- 1.1 There are a large number of legal structures which can legitimately be referred to as “trusts” – and that can often cause confusion. There is, however, a common thread running through these various types of organisation – and in trying to identify that, it may be helpful to consider the key characteristics of the most traditional form of trust – that is to say, the model round which the courts have built up a body of what would be regarded as trust law.
- 1.2 Essentially, the traditional trust involves a situation where an individual or body - or, more commonly, a number of individuals – are holding funds and/or property for a purpose which benefits others. The essential point is that there is a document¹ which specifically states that the assets are being held “in trust” for a particular person or persons or for a particular purpose or purposes ie. the property is no longer “theirs” in the normal sense, since the way in which they deal with the property is limited by what is allowed for under that document.

So far as the terminology is concerned:-

- the people who are holding the assets are referred to as “trustees”
 - the purposes for which the assets are to be held and applied are referred to as the “trust purposes”
 - the statement that the assets are to be held for these purposes can *either* take the form of a a document issued by the person or persons who are setting up the trust (a “trust deed”) *or* can be issued by the people who are holding the assets (a “declaration of trust”)².
- 1.3 Following on from the basic principles underlying any form of trust relationship, the law has built up a number of key principles:-

duty to act in good faith

- given that the trustees are administering assets which do not belong to them, they have a legal duty to act with good faith ie they must administer the trust assets in a way which serves the interests of the trust rather than their own personal interests; they must not draw remuneration unless this is specifically authorised by the trust documentation; and so on

¹ (although, strictly speaking, the existence of a trust can, in terms of the legal principles, be proven by a statement under oath that the property is being held in trust)

² (in certain contexts, the trust provisions are set out in another kind of document eg where a building is transferred to a number of people to be held on trust, the trust provisions can sometimes be found in the disposition ie the document transferring title to the building)

duty to exercise proper care and skill

- having regard to the need to ensure that the trustees focus on the interests of the trust (since they will not normally be deriving any personal benefit from acting as trustees), the law imposes a duty on them to exercise proper care and skill in managing the assets; the same principle applies in relation to their other actions and activities as trustees

protection of trust assets

- in view of the fact that the assets are not in any practical sense “owned” by the trustees personally, if any trustee becomes insolvent in a personal capacity his/her creditors will be unable to get access to any part of the trust property to pay off the debts which are owed to them

liability of trustees

- again, given that a trustee in carrying out his/her duties is really acting for the trust rather than for himself/herself, he/she will normally not be liable in relation to contracts with third parties providing he/she made clear, at the time of entering into the contracts, that he/she was acting solely as a trustee² ; this is akin to limited liability in the context of a limited company, although the position in the case of a trust is less clearcut

requirement to comply strictly with trust documentation

- having regard to the most common context – that is, where someone placed property in the hands of trustees so that they could apply it for particular purposes over an extended period, the trustees are unable, in terms of the legal principles, to depart from the strict terms of the trust documentation without the sanction of a court decree³.

1.4 The above principles pre-date the creation of limited companies as a legal model – but when limited companies became available, the courts tended to reflect these principles, in determining the duties of directors in a limited company context. The principles were also considered to be relevant in the context of public bodies set up through legislation; and they were also adopted as principles of charity law, as applying not just to charitable trusts but to other legal entities which were recognised as charities.

² (although there is a principle which states that a trustee is deemed to warrant ie. guarantee that there will be sufficient within the trust's assets to meet the payments falling due under the contract... and that could therefore form the basis of a claim against the trustee personally if the trust was ultimately unable to meet those payments)

³ (it is fairly common, as a matter of modern practice, for a trust deed to allow the trustees to vary the provisions of the trust deed without having to apply to the courts – but it is very unusual to find a provision of that kind within traditional trust deeds, except to the extent of allowing minor variations directed towards improving administration of the trust; see also further comments on this topic in paragraph 3.2.4).

It is perhaps not surprising, therefore, that a number of charitable companies refer to their directors as “trustees” (and the same approach is taken by some voluntary associations, in referring to members of their management committee); that in discussing the duties of those serving on the boards of public sector bodies, mention is often made of the principle that they are effectively holding funds “in trust”; and that the new Scottish charities legislation³ refers to those serving on the board (or other main decision-making organ) of any charitable body as “charity trustees” (again, irrespective of whether the charity is or is not a trust in the legal sense). The word “trust” conveys the sense that property is being held on behalf of others or for a purpose which does not directly benefit the people who are holding the property – and, in even more basic terms, people tend to *trust* a “trust”, because of the association with holding property for the public benefit, trustees acting selflessly in managing such property and so on.

- 1.5 It is essential to note, however, that irrespective of the common themes outlined above, there are in fact very significant *differences* between the various bodies which are commonly referred to as “trusts” - and, more particularly, that these bodies can reflect very different approaches in relation to matters such as the extent to which they pursue public benefit objectives; the extent to which they are subject to principles of democratic accountability; and, of course, where they are placed in the public, voluntary or private sectors. These various differences are explored in more detail in sections 2 and 3.

2 TYPES OF TRUST

- 2.1 As previously noted, there are a large number of legal structures which can be referred to as “trusts”. These fall into three broad categories:-

- traditional trusts ie. having the legal form of a trust in the traditional sense
- trusts set up by legislation
- other legal entities which use the word “trust” in their name (or use the word “trust” in describing the category of organisation into which they fall).

2.2 Traditional trusts

- 2.2.1 A traditional form of trust can be used in quite a number of contexts:-

- It can be used to hold property within a family. *One example might be funds and investments which were being held by trustees for a child, paying him/her out the income but on the basis that he/she would not gain access to the capital until he/she had reached the age of 21. Another example would be a trust set up to support a member of the family who had serious learning difficulties.*

³ Charities and Trustee Investments (Scotland) Act 2005

- It can be used to ensure that, where property is gifted to the local community for a particular purpose, it continues to be used for that purpose. *The most common example of this would be in relation to a community hall, where the original landowner specifies through trust provisions the use to which the property must be put (and, in particular, trying to ensure that at some future date someone would not gain personal financial benefit through selling off the hall for housing or some other purpose).*
- It can be used as a focus for raising money for charitable causes and thereafter distributing it to appropriate charities or beneficiaries. *One example of this would be a charitable trust set up by a wealthy individual and often bearing his/her name. Another example would be a trust set up to form the focus for a disaster appeal, often established by prominent members of the local community.*

2.3 Trusts created by legislation

2.3.1 A number of bodies which include the word “trust” in their name were created by legislation or by way of Royal Charter. Examples of that kind of body include harbour trusts, established under the Harbours (Scotland) Act 1982. Until the NHS reorganisation in April 2005, the NHS structure in Scotland included Primary Care Trusts, Hospital Trusts and so on.

2.3.2 Although bodies of the kind referred to in paragraph 2.3.1 all use the word “trust” in their name, they are not trusts in the true legal sense of that word. Effectively, they are statutory bodies like any other – and the word “trust” has been used in labelling the body so as to carry with it the idea that those taking decisions within the body are effectively acting as trustees on behalf of the general public.

2.4 Other entities which use the word “trust” in their name

2.4.1 A large number of voluntary sector organisations use the word “Trust” in their name, without adopting the legal form of a trust. These bodies may be voluntary associations (unincorporated bodies operating under a constitution); or they may be companies limited by guarantee which have adopted a name which includes the word “Trust”. This may be confusing for those dealing with these organisations – but it is not in any sense illegal (subject to the points noted in paragraph 2.4.2), nor would it necessarily be considered bad practice. The essential point to note, however, is that having the word “Trust” in the name of a voluntary association or a company limited by guarantee does *not* alter the type of legal entity involved; it has exactly the same characteristics as any other voluntary association or company limited by guarantee but just happens to have the word “Trust” in its name.

2.4.2 The ability to use the word “Trust” in the name of a business (whether carried on by a sole trader, a partnership, a company or some other entity) is regulated by specific legislation. As a matter of practice, the most common instance where

this becomes evident is at the point of forming a new company which is to include that word in the name (or in the context of changing the name of a company); Companies House will not form the company (or carry the change of name into effect) unless it is satisfied that the company fulfils the appropriate requirements. In the case of a community-based company which is seeking to use the word “Trust” in the name, there will be a need to confirm to Companies House that the objects are charitable and that there is a non-profit distributing clause (normally also an assurance that HM Revenue & Customs (Charities) has issued a letter informally approving the draft memo and articles from the point of view of charitable status). There are other requirements in relation to companies which are to have the characteristics of educational/artistic trusts, enterprise trusts, investment trusts, pension trusts, and so on.

2.4.3 In addition to the possibility of an *individual* organisation adopting a name which includes the word “Trust”, it should also be recognised that certain *categories* of organisation within the voluntary sector are described in a manner which might suggest that the type of legal entity involved was a trust; these include

- community development trusts
- community land trusts
- environment trusts
- community safety trusts

Again, however, the use of the word “trust” may be slightly misleading for those who are unfamiliar with voluntary sector legal structures. The vast majority of these bodies are constituted either as voluntary associations or as companies limited by guarantee eg. out of the community development trusts which are members of DTAS, *none* take the legal form of a trust. It should be emphasised that, the fact that an organisation within one of the categories mentioned above has adopted a legal structure which does not take the legal form of a trust is not something which should be queried as representing bad practice; on the contrary, the legal form of a trust is almost always *inappropriate* in relation to these applications.

3 KEY POINTS TO CONSIDER IN RELATION TO VARIOUS KINDS OF TRUST

3.1 Family trusts

- 3.1.1 Family trusts are set up for the benefit of members of a particular family. The intention may be to ensure that younger members of the family are able to have the benefit of income from the property but without access to the capital until they are at an age when they are able to take more responsible decisions; alternatively, the intention may be to allow those responsible for the overall management of the assets (the trustees) to exercise judgement with regard to the needs of the respective family members, so that the level of the payments made to each beneficiary reflects his/her circumstances over the years as compared with the other beneficiaries. There is often an element of tax planning associated with the use of trusts of this nature. Sometimes the person setting up the trust will set aside a part of his/her property and put that into the trust while he/she is alive, to be administered in accordance with the trust document. Alternatively, the trust may be created through provisions in a will.
- 3.1.2 It is important to note that a trust of the nature described in paragraph 3.1.1 is, essentially, no more than a means of holding, managing and allocating the private property of a particular family. This is one of the oldest applications of the trust concept in Scotland; trusts were used, for example, to provide some protection for family lands against forfeiture in the context of the Jacobite rebellions in the eighteenth century. The fact that the legal form is a trust should *not* be taken to imply that there is any wider community benefit. Certainly, the provisions of the trust documentation will often include power for the trustees to make donations for a charitable purpose or purposes – but that will generally be very much ancillary to the main trust purposes; and, as a matter of practice, would be used only for the purpose of relatively small donations or to cover a situation where all the primary beneficiaries had died, such that there was a need to do something with the residue of the trust assets.
- 3.1.3 There is one notable exception to the principles set out in paragraph 3.1.1 - and that is, that a particular individual (or family) can sometimes set up a family *charitable* trust, often with a name which reflects the identity of the person who set it up, followed by the word “Trust” or “Foundation”. That type of trust can readily be distinguished from other kinds of family trust, in that it will have a Scottish charity number; HM Revenue & Customs (Charities) will not recognise as charitable a trust which includes only members of a particular family as beneficiaries. Clearly, a family charitable trust is operating for the benefit of the general public – but, from the point of view of certain grant funders, the absence of any form of democratic input into decision-making may mean that such a trust would not satisfy their grant criteria if these are based on the principle of giving support to community organisations.

- 3.1.4 It should be noted that – except in the case of those trusts which are recognised as Scottish charities⁴ – trusts of the type outlined above are essentially “private”. In line with that principle, there is no obligation on the trustees to file the trust documentation or annual accounts with any public registrar⁵ ; nor any obligation to supply a copy of the trust document or copy accounts to any member of the public who asks for them. Where the trust is applying for funding, however, it would of course be appropriate for the potential funder to insist on sight of these as a precondition to considering the application. Trusts which are Scottish charities are subject to the obligations of any Scottish charity in relation to supply a copy of the constitutional document and annual accounts to any member of the public on request, and will fall within the requirements of the new charities legislation⁶ as regards annual returns etc, once these provisions of the legislation are activated.

3.2 Trusts relating to land/buildings

- 3.2.1 A number of trusts were originally created in the context of a particular individual gifting a building (or the site for a building) for the benefit of the local community. As with family trusts (see above), this use of the trust concept in this sort of context has a long history; it had particular prevalence in the Victorian era, with the growth of public philanthropy. The individual making the gift was (understandably) concerned to ensure that future generations continued to use the building for similar purposes and that no-one derived personal profit in the future through a sale of the building. This kind of trust would be created through provisions in the document transferring the title (the disposition or feu disposition); the document would contain provisions transferring the property to certain named individuals, with a statement that they and their successors (ie future trustees) must hold the property as trustees for certain specified purposes (eg. use as a community hall). The disposition or feu disposition might then go on to set out the process by which new trustees would be appointed (or the identity of future trustees could be expressed by reference to holding particular positions eg. the minister from time to time of the local church), the powers of the trustees, and the procedures associated with trustees’ meetings. Alternatively, these ancillary aspects could be referred to as matters to be dealt with in a separate trust deed.

- 3.2.2 One of the key features which made the use of a trust structure attractive to someone gifting land/buildings was the fact that it set a rigid framework for the use of the land or buildings in question, which would continue into the indefinite future ie. giving a (virtually) watertight assurance that his/her wishes would continue to be respected by future generations. This rigidity, however, can create a number of significant problems in practice:-

- where there is insufficient income from the permitted use of the building to pay for essential repairs, there may be a desire to let part of the building out

⁴ (technically, there is a category of “public trusts” under Scots law which extends beyond charitable trusts – but the implications of that are not relevant in relation to the issues addressed in this Guidance Note)

⁵ (as a matter of practice, most formal trust deeds are registered in a public documents registry (the Books of Council & Session), but without details of date of registration etc, obtaining copy trust deeds from that source is far from straightforward)

⁶ Charities and Trustee Investments (Scotland) Act 2005

to, say, a commercial business, to provide a flow of rental income; that may not be permitted under the trust provisions

- more radically, it may be that the building is no longer suitable for the purpose or that it would be more realistic from the point of view of financial viability to sell the building and use the proceeds to construct a more modest community facility – again, that may not be permitted
- the specific use laid down in the trust provisions may be too restrictive by reference to the level of demand in the local community – but use of the building for wider purposes may not be permitted even where these clearly fall within the wider category of community benefit
- where trustees are described by reference to the posts which they hold in outside bodies (ie. the trustees are *ex officio* trustees), those posts may have disappeared (eg. a reference to the local colliery manager may no longer have any meaning if the local colliery has closed); if that is combined with a quorum for trustees' meetings which can no longer be met, the trust is then legally unable to make valid decisions
- the trustees may consider that decisions relating to the balance of uses within the community hall and/or other aspects of management should be in the hands of a democratically-elected management committee, so as to allow for input from a wider cross section of the community; that, however, may not be permitted by the trust provisions and/or by general principles of trust law relating to the extent to which trustees can properly delegate their powers.

3.2.3 Problems of the nature referred to in paragraph 3.2.2 cannot safely be ignored. The general principle is that trustees have no legal power to do anything which is not authorised by the terms of the trust documentation or principles of trust law – and therefore something which may seem to be a common-sense extension of something expressed in the trust deed cannot safely be pursued unless there is express wording covering the matter in question. Trustees can be personally liable for acting outwith the scope of the trust deed. Beyond that, where a sale or lease of the property (or the granting of a security over the property) is involved, a solicitor acting for the prospective purchaser, tenant or lender will simply refuse to accept the validity of the transaction unless it is clearly covered by the wording in the trust documentation.

3.2.4 Following on from the points mentioned in paragraphs 3.2.2 and 3.2.3, it should be noted that there can be serious difficulties in amending the provisions of trust documentation – where (as in the case of most trust deeds) there is no specific provision within the trust document itself allowing the trustees (or the party/parties who set up the trust) to make amendments. Except in the case of charitable trusts with very limited assets, there will normally be a need to apply to the Court of Session for a court order – and this process is likely to take some months and involve legal costs of over £5000. The new charities legislation⁷ offers the prospect of a quicker and cheaper process for trusts which are Scottish charities, involving procedures carried through by OSCR (the Scottish charities regulator) without court sanction – but the criteria which will apply in

⁷ Charities and Trustee Investment (Scotland) Act 2005

determining whether a trust can make use of this procedure will remain uncertain until such time as regulations are issued under the Act.

- 3.2.5 Reference should be made to the material in paragraph 3.1.4 in relation to access to trust documentation and trust accounts – which apply equally to trusts of the nature referred to in this section 3.2.

3.3 Charitable trusts

- 3.3.1 As previously noted (see paragraph 2.4.1) it is quite common for voluntary sector organisations and companies to use the word “Trust” in their name, without adopting the legal form of a trust. Many of these organisations will also have charitable status. A charitable trust in the *true* sense involves a traditional trust (ie. a legal entity of that nature) which has been recognised by HM Revenue & Customs (Charities) as a Scottish charity.
- 3.3.2 So far as eligibility for receipt of grant funding is concerned, it should be recognised that although a charitable trust is clearly pursuing objectives which are directed towards public benefit, the nature of a trust is essentially undemocratic – in that the element of accountability to an annual general meeting (also the concept of election and periodic retiral/re-election of directors or management committee members) is absent. Certainly, a trust deed may include provision for *ex officio* trustees (see paragraph 3.2.2), which can improve linkages between the body of trustees and the community (or community of interest) which it serves – but that still falls below the standards of accountability which would generally be regarded as appropriate in the context of a community organisation.
- 3.3.3 From a technical point of view, care should be taken to ensure that the project for which a charitable trust is seeking funding falls clearly within the statement of trust purposes contained within the trust documentation – as the implications where trustees act outwith the scope of the trust documentation are potentially more significant in the case of, say, a company acting outwith its objects clause. In particular, there is a risk that if the project falls outwith the trust purposes, any contract relating to that project (which could include funding contracts) could be held to be unenforceable.

3.4 Others

- 3.4.1 Other circumstances in which a trust (in the sense of a body having that specific legal form) may be found in the context of community-based projects include the following:-

- a trust set up to hold property on behalf of a voluntary association

This arrangement is sometimes adopted to cover a situation where a voluntary association wishes to hold land/buildings but for some reason does not want to follow the route (which is normally more advisable) of adopting a company limited by guarantee as its legal structure. One of the technical problems

associated with the use of a voluntary association as the structure for a community project is that a voluntary association is not recognised for most legal purposes as having a legal existence in its own right. The intent in setting up the trust, therefore, is to solve that particular technical problem. The terms of the trust document will make clear that the land/buildings are to be held for specific purposes – tying in with the objects within the constitution of the voluntary association. Some difficulties can, however, arise in relation to a framework of this kind. One potential issue relates to the boundary between matters which fall within the responsibilities of the trustees on the one hand, and those which fall within the responsibilities of the management committee – though this can be addressed by clarifying the respective responsibilities in the documentation. Beyond that, the trustees, as the people holding the property interest, are potentially exposed to liabilities to third parties (eg. in a case where someone was injured as a result of a defect in the building, it is likely that the claim would be pursued against the trustees rather than the members of the management committee) and it is therefore important that the relevant insurances are in name of the trustees (ideally in addition to cover for the management committee) and that the trustees have a level of control over matters which, if not properly dealt with by the management committee, could involve them in liabilities. On a slightly different theme, there may be an expectation on the part of the management committee that they can direct the trustees on how particular aspects are to be approached; that is not entirely compatible with the general principle under trust law that a trustee must exercise his/her own discretion in exercising his/her powers as a trustee.

- A trust set up to hold title to, and administer, a pier serving the needs of local fishermen etc

This application of the trust model is fairly common in a rural setting. It could be argued that a company limited by guarantee would represent a more satisfactory vehicle in many cases, as it provides a better mechanism for ensuring input from a wider group in relation to changes of a constitutional nature and also democratic processes in relation to election/re-election of those serving on the board; there would also be the advantage of limited liability for those involved. The trust model, on the other hand, may be seen as simpler – and, certainly where the pier (and/or other facilities) are already in place and the issue of liability in relation to major works of construction/repair etc does not arise, the use of a trust may be seen as adequate (providing of course that all appropriate insurances are maintained).

4 USE OF A TRUST FOR A NEW COMMUNITY-BASED PROJECT

- 4.1 In the context of a new community-based project, it is very unlikely that a traditional trust (as distinct from a body - such as a community development trust - which might have the word "Trust" in the name) would represent the most appropriate vehicle. Where the organisation will be employing people, taking on property leases, contracting with local authorities (or other public sector bodies) for the delivery of services, entering into contracts with subcontractors etc., the use of a corporate vehicle will represent the most appropriate option, since it provides a clearer legal entity (contracts entered into by a trust need to be in name of the trustees at the time, and their successors as trustees) and provides limited liability for those involved (the principles associated with liability for trustees – where, for example, the trust was unable to meet payments due under a contract - are rather less clearcut). The corporate vehicle could be either a company limited by guarantee or (more rarely) an industrial and provident society; or, once this is available, it could take the form of a Scottish charitable incorporated organisation (SCIO).
- 4.2 A trust may, however, be of some value:-
- In setting up a body which is intended purely to access funds and then distribute them to other charitable organisations (although the absence of a democratic structure may still be a source of concern; and often a company limited by guarantee will be more satisfactory from that perspective)
 - In setting up a structure whereby the title to land/buildings is held in name of trustees (as "guardians" of the overall ethos of the project), but with the operational elements (including management of the facility) being carried on by another entity (most likely a company limited by guarantee). This structure may appear to provide a more robust framework from the point of view of dedicating the facility to the local community for future generations – but, given the increased powers available to the Scottish charities regulator (OSCR) under the new charities legislation to reorganise charitable organisations⁸, the more rigid nature of a trust (as compared with eg. a company limited by guarantee) from the point of view of future alterations to the trust purposes etc. may be more apparent than real.
- 4.3 It will be noted, therefore, that unless there are exceptional circumstances, the use of the word "Trust" by a steering group in describing the type of structure which they are seeking to put in place is more likely to point towards a company limited by guarantee – falling within the category of a community development trust – than a trust in the true legal sense.

⁸ see paragraph 3.2.4