

Wild Fisheries Reform: a response to the report of the Wild Fisheries Review

Response from the Scottish Charity Regulator

1. Background

1.1 The Scottish Charity Regulator

The Scottish Charity Regulator (OSCR) is established under the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act) as a Non-Ministerial Department forming part of the Scottish Administration. OSCR is the registrar and regulator of over 23,800 charities registered in Scotland, including a number of Fishery Trusts. Underpinning all we do (and therefore our response to this consultation) is our overall vision of “charities you can trust and that provide public benefit”.

OSCR welcomes this opportunity to comment on the Scottish Government’s response to the Wild Fisheries Review. Our response is focused on Chapter 4 ‘Local management bodies’, and the issues that should be considered should these bodies consider application for charitable status. If you have any questions about our response, please contact Nicola McBain, Engagement Manager (Policy and Partnerships) on nicola.mcbain@oscr.org.uk.

2. Consultation Response

2.1 Question 3: Do you agree that FMOs should be charitable bodies?

2.1.1 Context

The consultation paper proposes a new management system for wild fisheries: a national unit to fulfil national functions, as well as local management bodies (known as FMOs) determining local priorities and local delivery. A number of options for legal constitution of the FMOs have been considered, but the consultation proposes they should be charitable bodies.

In terms of background we would note that, currently, all 26 of the Rivers and Fisheries Trusts of Scotland are registered charities, and the District Salmon Fisheries Boards are not (DSFBs). The purposes of the Rivers and Fisheries Trusts are generally protecting and improving the fish species, undertaking and promoting research and running various education programmes. These fall under the following charitable purposes in terms of the 2005 Act:

- Advancement of education
- Advancement of environmental protection or improvement
- Advancement of animal welfare

2.1.2 The charity test

For FMOs to obtain charitable status they will have to apply to OSCR and pass the [charity test](#).

The charity test has two main parts. An organisation has to show:

1. that it has only charitable purposes as set out in the 2005 Act
2. that its activities provide public benefit in achieving those purposes

In considering whether applicants for charitable status provide public benefit, OSCR must consider the following factors:

- private benefit does anyone benefit from the organisation's activities as a private individual, rather than as a member of the public? How does this private benefit compare to any benefit the organisation provides to the public?
- disbenefit to the public from its activities – how does any detriment or harm likely to be incurred by the public as a result of the organisation's activities compare with the public benefit it provides?
- Are there any unduly restrictive conditions on accessing the benefit the organisation intends to provide? We consider any charges and fees the organisation imposes, as well as restrictions on who can benefit and the geographical area of benefit.

It is not yet clear from the consultation what the purposes of the FMOs would be and what their activities would be. We will of course be happy to discuss these further as proposals develop. A couple of observations may be helpful here:

- We would note that it is relatively unusual for a charity to undertake enforcement or regulatory functions as seems to be envisaged for the FMOs, but it is not entirely unprecedented – the Scottish Society for the Prevention of Cruelty to Animals (SSPCA) is for instance a specialist reporting agency to the Crown Office and Procurator Fiscal Service and its inspectors have powers of entry and search.
- The Review of Wild Fisheries Report does note that in most cases the FMOs will evolve out of the existing system and arise out of a merger between the DSFBs and the local Fisheries Trust. As stated currently the DSFBs are not registered charities, and therefore the merger of these organisations' different activities may have implications on any application for charitable status.
- If charitable status is an aim it may be worth considering closely for instance how the activities of the FMOs would relate to the private interests of holders of riparian rights.

Importantly, the 2005 Act also provides that an organisation cannot become a charity if its constitution allows Scottish Ministers to direct or otherwise control its activities (though Ministers may disapply this requirement by making an order). If charitable status is to be sought for the FMOs, this requirement should be borne in mind in considering FMOs' relationships with the proposed national unit and with Ministers.

2.1.3 Charity Trustees

The people in the overall control and management of the charity will be considered as [‘charity trustees’](#) (here most likely to be the Board members) and they have specific duties under the 2005 Act that they should be aware of. Section 66 of the 2005 Act sets out the duties of charity trustees. If charitable status is to be sought for FMOs it will be important to consider whether their structure and the way charity trustees are appointed will allow them to fulfil these duties. A charity trustee must:

- Act in the interest of the charity. Operate in a manner consistent with the charity’s purposes.
- Act with due care and diligence. Trustees should take care of their charity’s affairs as is reasonable to expect of someone who is managing the affairs of another person.

Where a conflict of interest arises between the interests of the charity and the interests of those who have appointed the charity trustee, the charity trustee should put the interests of the charity first, or take no part in decision-making on the matter in question.

2.2 Question 4: Do you have any comments about the WFR’s view that FMOs should be Scottish Charitable Incorporated Organisations rather than charitable companies?

In stating FMOs should be charitable, it is also proposed that they should be registered as [Scottish Incorporated Organisations \(SCIOs\)](#). SCIOs are a legal form unique to Scottish charities and there are important differences between a SCIO and any other type of body with charitable status in Scotland. OSCR has detailed guidance on SCIOs outlining fully the difference and specific requirements of SCIOs that should be considered before application. Key considerations are:

- A SCIO becomes a legal entity only when it is entered in the Register and ceases to exist if it is removed.
- Legislation sets out the basic information and rules which set out the minimum requirement of how the SCIO should be governed. If this is not included in the organisation’s constitution OSCR must refuse the application. For example this includes:
 - Name and charitable purposes for which the SCIO is established
 - Membership rules
 - Charity trustee rules
 - Any restrictions on the powers of the SCIO
 - Procedures for meetings
 - Procedures for dealing with conflicts of interest
- Membership of a SCIO may not be transferred from one member to another, and members of a SCIO are subject to some of the general duties of charity trustees. Specifically they must act in the interest of the SCIO and seek, in good, faith, to ensure the SCIO acts in a manner consistent with its charitable purposes.

It may be worth considering particularly the requirements around membership and conflicts of interest in FMOs if the intention is to set them up as SCIOs.

Applications for SCIOs are assessed in a very similar way to applications from any other type of body wishing to register as a charity; that is they must pass the charity test as outlined at 2.1.2 above.

2.3 Question 5: Do you agree that in order to ensure appropriate governance and fitness for purpose, FMOs should operate to a model constitution?

Model constitutions are commonplace with many other types of charities, for example Building and Conservation Trusts and Student Associations. If FMOs apply to be SCIOs it must be remembered that there are a set of basic requirements that must be included in any model constitution.

2.4 Question 6: What do you consider is an appropriate balance of interest on the board and wider membership of FMOs?

In order to ensure that a charity is well run it is important that it has a board that operates effectively. The trustees must have the relevant skills and knowledge to run the charity and be free to act in the best interest of the charity. A balanced representation of stakeholders is also important, but it is vital that there should be a balance of skills and the trustees should be well informed.

2.5 Question 13: Do you agree that bodies designated as FMOs should be able to deliver analogous work on behalf of local or national interests?

In terms of analogous work, if FMOs register as charities they must remember that all the activities they undertake must be in furtherance of the charitable purposes stated within their constitutions.

2.6 Question 14: Are there any potential conflicts of interest in this approach?

Here we would refer back to what is stated under section 2.1.3. The charity trustees as those in overall control and management of the charity and will have to consider whether delivering analogous work is in the best interests of the charity and whether there are any conflicts. This decision should also be taken in reference to their other duties outlined above.

3. Conclusion

OSCR welcomes the opportunity to comment on this consultation. Should the intention be to establish FMOs as charitable bodies, we would urge that full consideration is given to the points we have raised above, specifically the Charity Test and requirements of application to be a SCIO, and how these will fit with the planned structure and activities of FMOs.