

# **Memorandum of Understanding between the Scottish Charity Regulator and the Crown Office & Procurator Fiscal Service**

## Purpose of the Memorandum of Understanding

The purpose of this memorandum of understanding is to set out the arrangements for the Scottish Charity Regulator and the Crown Office and Procurator Fiscal Service to work together under the Charities and Trustee Investment (Scotland) Act 2005 and in the discharge of their respective functions.



## **1. Objective of the Memorandum**

1.1 The primary objectives of the Memorandum are to:

- provide for the circumstances in which OSCR will liaise with the COPFS in the investigation of allegations of criminal conduct on the part of those involved in the charities sector;
- provide initial guidance as to the action which will be taken by the Crown Office;
- provide for the circumstances in which OSCR and the COPFS will share relevant information;
- liaise over the provision of guidance on their respective areas of competence.

## **2. Context**

### **2.1 Role of Crown Office and Procurator Fiscal Service**

2.1.1 The Crown Office and Procurator Fiscal Service (“COPFS”) has as its strategic aim - serving the public interest, prosecuting cases independently, fairly and effectively.

2.1.2 The COPFS is the sole public prosecuting authority in Scotland, which, in the public interest, ensures that all crimes made known to the Procurator Fiscal, including cases of serious and complex fraud, are investigated and that effective and consistent use is made of the range of prosecution options and provisions for the confiscation of proceeds of crime. Part of that role is to investigate allegations of criminal conduct on the part of those involved in the charities sector.

2.1.3 The decision whether there exists a sufficiency and quality of evidence such that an investigation or prosecution is carried out is within the sole discretion of COPFS. This Memorandum of Understanding sets out the likely course of action in particular circumstances, although such provisions will not limit the ultimate discretion of COPFS in its decision making.

### **2.2 Role of the Scottish Charity Regulator**

2.2.1 OSCR is established under the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act) and is the registrar and regulator of charities in Scotland. Section 1 (5) of the 2005 Act sets out OSCR’s general functions:

- To determine whether bodies are charities
- To keep a public register of charities
- To encourage, facilitate and monitor compliance by charities with the provisions of the 2005 Act

- To identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct
  - To give information or advice, or to make proposals, to the Scottish Ministers relating to OSCR's functions.
- 2.2.2 OSCR vision is of charities you can trust and that provide public benefit. Conduct of investigation and appropriate enforcement is a critical element of this role.

### **3. OSCR Powers**

- 3.1 Section 28 of the 2005 Act provides that OSCR may at any time make inquiries, either generally or for particular purposes, with regard to a charity, body or person (body or person being further defined in subsection 1).
- 3.2 The 2005 Act has provided OSCR with a range of specific powers of intervention, some of which can only be exercised with the consent of the Court of Session. OSCR may also apply to the Court of Session to request that the Court exercise certain powers. A summary of OSCR's powers is set out in Appendix 1. Further information on these powers can be obtained directly from OSCR in terms of its Inquiry Policy.

### **4. Liaison between COPFS and OSCR**

- 4.1 OSCR and COPFS recognise that in order to meet the stated aims of this Memorandum, effective liaison will be necessary and agree that:

- **OSCR**  
OSCR will contact COPFS when they need guidance or involvement of COPFS due to the likely emergence of information of suspicion of criminal conduct, or evidence indicative of criminal conduct, on the part of any party involved in the management or supervision of a charity.
- **COPFS**  
COPFS will contact OSCR where, during the course of any investigation carried out by them or under their direction, they become aware of the need to bring to the attention of OSCR information that might require OSCR to exercise their statutory functions or that may be relevant to their regulation of charities.

- 4.2 Contact Points are attached at Appendix 3.

### **5. Investigation of criminal conduct**

- 5.1 The section below outlines the circumstances in which OSCR will liaise with the COPFS in the investigation of allegations of criminal conduct on the part of those involved in the charities sector.

- 5.2 The 2005 Act outlines a number of criminal offences. These offences are outlined in Appendix 2. OSCR will report any such offences via the Specialist Reporting Agency online portal. The Serious and Organised Crime Division at Crown Office will ensure that appropriate guidance on relevant charity law is available to Procurators Fiscal.
- 5.3 Where there is evidence or suspicion of any other criminal conduct identified in the exercise of OSCR statutory powers or which is brought to their attention by a third party, OSCR will report the matter to the Head of the Serious and Organised Crime Division at Crown Office.
- 5.4 Where OSCR suspects that there is criminal conduct which requires further investigation, they shall report this to the Head of the Serious and Organised Crime Division at Crown Office, who shall then consider the available information and instruct any necessary further enquiry.
- 5.5 OSCR will assist COPFS by providing a summary of the investigation undertaken and the conclusions reached. OSCR may continue investigations or take civil action. COPFS may at any time institute its own enquiry.
- 5.6 In any case where OSCR suspects that there is criminal conduct, they will make available to the Serious and Organised Crime Division any evidence and productions they have recovered which gives rise to the suspicion of criminal conduct. Such evidence or productions will be retained by COPFS until the conclusion of any investigation including any prosecution. Return of such evidence or productions will be made at the conclusion of any investigation or prosecution in consultation with OSCR. While COPFS retains control of any such material, it will provide OSCR with such copy information, statements and affidavits as OSCR may require in connection with the exercise of its statutory powers, including any application to the Court of Session.
- 5.7 OSCR staff shall report any allegation or suspicion of criminal conduct to the Head of the Serious and Organised Crime Division at Crown Office within 28 days of concluding that there is a reasonable cause to suspect such criminal conduct.

## **6. Action by COPFS**

- 6.1 The factors that COPFS will consider in deciding whether to further investigate and/ or instigate criminal proceedings will include:
  - the nature and gravity of the alleged criminal conduct;
  - the availability of credible, reliable and sufficient evidence;
  - the extent to which those involved in the alleged criminal conduct are persons in management or control of the charity;
  - the impact of the offence on the victim and other witnesses and the attitude of the victim and other witnesses;

- the extent to which OSCR has already conducted investigations and the scope of those investigations; and
  - the public interest in any prosecution.
- 6.2 COPFS will consider each case on its merits. Decisions to further investigate or instigate criminal proceedings are for COPFS alone.
- 7. Circumstances in which COPFS will liaise with OSCR**
- 7.1 To enable OSCR to fulfil its statutory functions COPFS will bring to the notice of OSCR any concerns, which reflect on the good governance of bodies within the charitable sector or where there is reason to believe there has been mismanagement, criminal activity or any other misconduct within the sector.
- 7.2 Any report to be made in these circumstances will be submitted to OSCR's Head of Enforcement within 28 days of such information becoming available.
- 7.3 Evidence or productions will be retained within the control of the COPFS until the conclusion of any criminal investigation including any prosecution.
- 8. Information disclosure**
- 8.1 Section 24 of the 2005 Act permits OSCR to disclose information to any office holder or public body in the UK or elsewhere if this disclosure is made for any purpose connected with either OSCR's functions or to enable or assist with the exercise of the relevant office holder's or public body's statutory functions.
- 8.2 Similarly, section 24 of the 2005 Act permits any office holder in the Scottish Administration, Scottish Parliamentary Corporate Body, local authority, constable or other Scottish public authority with mixed functions or no reserved functions to disclose information to OSCR for the purpose of enabling or assisting OSCR to exercise any functions.
- 8.3 OSCR and COPFS will ensure that any disclosure of information under the terms of this MOU is carried out in a manner that is efficient, proportionate and fully compliant with the 2005 Act, Human Rights Act 1998, the Data Protection Act 1998, the Freedom of Information (Scotland) Act 2002.
- 8.4 Any decisions that require to be made in respect of information requested under the Freedom of Information (Scotland) Act 2002 relating to any investigations carried out involving both COPFS and OSCR shall have regard not only to the public interest test, but also any exemptions that may apply having regard to the nature, stage and currency, or otherwise, of any investigation.

## **9. Engagement**

- 9.1 OSCR and COPFS will provide reciprocal training opportunities in order to ensure that OSCR and COPFS staff have a full understanding of the work of the other body and to assist in ensuring that this Memorandum is effective.
- 9.2 OSCR and COPFS will collaborate on external communications or handling external media interest where there is a matter of mutual interest. Both organisations will also have regard to the other in the production of guidance and where applicable agree strategies for dissemination.
- 9.3 Representatives of OSCR and COPFS will make contact as appropriate either by telephone or email and where major issues arise meetings may be arranged.

## **10. General**

- 10.1 Whilst it is intended that the arrangements in this MOU should apply generally, it is recognised that some circumstances will require specific handling. Nothing in this MOU prevents the making of arrangements to meet specific exceptional needs.
- 10.2 Any disagreement arising from the interpretation of this MOU will be referred to the Chief Executive of OSCR and Crown Agent of COPFS who will endeavour to resolve it within the spirit implicit in the co-operation arrangements. The MOU will be amended if necessary to reflect the agreed outcome of the referral.
- 10.3 This MOU came into effect on October 2015. In addition, the MOU will be reviewed:
  - In the event of any significant changes to the legislative framework for each organisation.
  - At the request of either organisation.

David Robb  
Chief Executive  
The Scottish Charity Regulator

Catherine Dyer  
Crown Agent  
The Crown Office

Date: October 2015

## **Appendix 1 – OSCR Powers**

Under section 1 of the Charities and Trustee Investment (Scotland) Act 2005 (2005 Act), OSCR is the independent regulator and registrar of charities in Scotland. OSCR is responsible for the operation of an effective regulatory framework in Scotland including the granting of charitable status, maintenance of a public register of charities, the investigation of apparent misconduct and facilitation and monitoring of compliance with the 2005 Act.

### **Summary of Powers and relevant provisions under Chapter 4 of the Act – Supervision of Charities etc**

<b>Section 28 – Inquiries about charities etc</b>	OSCR may at any time make inquiries, either generally or for specific purposes. 28(3) – OSCR may direct a charity not to undertake specified activities for a period of up to 6 months
<b>Section 29 – Power of OSCR to obtain information for inquiries</b>	OSCR may by notice require any person to provide it with any information, any document, extract from documents, documents of any type for the purposes of inquiries conducted under section 28.
<b>Section 30 – Removal of a charity from Register where it no longer meets charity test.</b>	Where it appears to OSCR as result of inquiries under section 28, that a charity no longer meets the charity test OSCR can direct the charity to take such action in order for that charity to meet the test, or remove that charity from the register.
<b>Section 31 – Powers of OSCR following inquiries</b>	Powers include:- <ul style="list-style-type: none"><li>• Suspension of person concerned in management and control for up to 6 months</li><li>• Prevention of misrepresentation as a charity for up to 6 months.</li><li>• Restriction of transactions for up to 6 months.</li><li>• Restriction in the movement of assets for up to 6 months.</li></ul>

<b>Section 32 – Suspensions and directions: procedure</b>	Procedure for suspensions and directions.
<b>Section 33 – Reports on inquiries</b>	<p>OSCR must publish a report on the subject matter of inquiries made under section 28 if they result in the giving of a direction (s30/s28 (5-9)) or suspension (s31 (4)).</p> <p>They must also do so if they are requested by the person in respect of whom the inquiries were made.</p> <p>OSCR may also publish a report on the subject matter of any inquiries under section 28 where it considers this to be in the public interest.</p>
<b>Section 34 – Powers of Court of Session</b>	Ten powers of the Court of Session in cases of misconduct.
<b>Section 35 – Transfer Schemes</b>	OSCR can apply to Court of Session for approval of a transfer of assets from one body to another. The Regulations necessary to use this power are not yet in force.
<b>Section 36 – Powers in relation to English &amp; Welsh charities</b>	Role for OSCR and the Court of Session in relation to the moveable property of English and Welsh charities.

## **Appendix 2 – Offences to be reported directly to COPFS Initial Case Processing**

Brief Description of Offence	Mode of Prosecution	Sentence
Provision of false or misleading information.  Deliberately altering, suppressing, concealing or destroying information. (s26)	Summary Conviction	Level 5 fine or 6 months imprisonment or both.
Refusal or failure to comply with a direction given by OSCR in terms of section 28(3) not to undertake activities. (s28)	Summary Conviction	Level 4 fine or 3 months imprisonment or both.
Refusal or failure to provide information required by notice from OSCR. (s29)	Summary Conviction	Level 4 fine or 3 months imprisonment or both.
Contravention of OSCR suspension or refusal or failure to comply with a direction in terms of section 31(5) to (9). (s32)	Summary Conviction	Level 5 fine or 6 months imprisonment or both.
Refusal or failure to comply with a requirement of a person appointed by OSCR to prepare statement of account. (s45)	Summary Conviction	Level 3 fine.
The signing or issuing, by a charity trustee of a SCIO or a person on the SCIO's behalf, of a document which does not state the name of the SCIO or the fact that a SCIO is a SCIO. (s53)	Summary Conviction	Level 3 fine.
Act as a charity trustee while disqualified by virtue of Section 69.	(a) Summary Conviction	(a) Level 5 fine or 6 months imprisonment or both.

(s70)	(b) Conviction on Indictment	(b) 2 years imprisonment or a fine or both
Failure to comply with fundraising regulations. (s83)	Summary Conviction	Level 5 fine
Organise a public benevolent collection without gaining local authority consent. (s85)	Summary Conviction	Level 3 fine.
Failure to comply with public benevolent collections regulations. (s90)	Summary conviction	Level 3 fine
Failure to comply with collection of goods regulations. (s91)	Summary conviction	Level 5 fine

### **Appendix 3: Contact Points**

#### **Office of the Scottish Charity Regulator**

Laura Anderson  
 Head of Enforcement,  
 OSCR,  
 Quadrant House  
 9 Riverside Drive  
 Dundee  
 DD1 4NY

Telephone: 01382 220 446  
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#### **Crown Office & Procurator Fiscal Service**

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 Head of Serious and Organised Crime Division,  
 Crown Office,  
 25 Chambers Street,  
 Edinburgh  
 EH1 1LA

Telephone: 0131 243 8203