



**Cross-border charity regulation in Scotland**  
Guidance on statutory requirements and  
reporting to  
the Office of the Scottish Charity Regulator

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# Guidance on Regulation by the Office of the Scottish Charity Regulator (OSCR) for cross-border charities

## 1. Introduction

The Office of the Scottish Charity Regulator (OSCR) is responsible for:

- granting charitable status
- maintaining a public register of charities
- the investigation of apparent misconduct and
- encouraging, facilitating and monitoring compliance with the Charities and Trustee Investment (Scotland) Act 2005 (the CTI(S) Act 2005).

This guidance replaces the previous Guidance on Registration with the Office of the Scottish Charity Regulator (OSCR) for English and Welsh charities. It addresses areas of interest to cross-border charities registered with both the Charity Commission for England and Wales and OSCR. Separate OSCR guidance exists on the registration requirements for English and Welsh charities and such organisations should read that publication as well as this one to fully understand the requirements and associated implications of registration.

This guidance has been developed on the basis that the Charity Commission for England and Wales will act as 'lead regulator' for cross-border charities with the aim of minimising the burden of regulation on such charities.

Generally speaking the regulatory regime for charities in Scotland applies equally to **all** charities entered in the Scottish Charity Register. The following sections explain the key elements of Scottish charity regulation that cross-border charities need to be aware of and understand. Further guidance may be found within OSCR's detailed guidance publications which are referenced throughout.

## 2. Monitoring

### 2.1 Reporting Requirements

All charities registered with OSCR are required to submit an Annual Return, which allows OSCR to update the basic Register information which must be in the public domain (s. 3 and s.1(5)(b) of the CTI(S) Act 2005). In addition, all charities must lodge their annual accounts with OSCR (s. 44(1)(d) of the CTI(S) Act 2005). The deadline for submission of the Annual Return will therefore be tied in with the accounting reference date of the charity and is 9 months after that date.

Cross-border charities are also required to complete an Information Return which is designed to provide OSCR with some baseline data on the activities that cross-border charities are undertaking in Scotland. The Information Return replaces the Supplementary Monitoring Return which is completed by charities with income over £25,000 that are registered solely with OSCR.

Section A of the Information Return (which focuses on objectives and activities of the charity that are specific to Scotland) should be completed on an exception-only basis. This means that where the requested information is already contained in the Trustees' Annual Report within the accounts that the charity is filing with the Return, there will be no need for the charity to complete those sections of the Return – it is sufficient to simply cross refer to the existing disclosure within the accounts. All cross-border charities are required to complete Section B of the Return (a snapshot of financial information for Scotland relative to the finances of the entire charity).

The final part of the Return is an extended declaration with a series of tick boxes where charity trustees are asked to positively confirm that they are aware of and understand their responsibilities in respect of the CTI(S) Act 2005 in relation to OSCR's current key monitoring priorities.

## 2.2 Accounts

As stated in our previous guidance, OSCR does not insist on separate Scottish accounts from cross-border charities. OSCR will accept consolidated UK accounts, although we will expect charities operating in Scotland to provide some narrative in their charity trustees' report of activities in Scotland.

It is important to note that cross-border charities are not exempt from the statutory requirements of the CTI(S) Act 2005 and the Charities Accounts (Scotland) Regulations 2006 (as amended) (the Scottish Accounting Regulations).

In practical terms, there is little difference in the format of accounts between the two sets of regulations, particularly in relation to fully accrued accounts. However, for accounting periods starting before 1 April 2011, there are some differences that will need to be taken into account by those charities affected in relation to the financial thresholds that apply to the preparation of accounts.

These differences effectively mean that for a small number of cross-border charities, the requirements under the Scottish Accounting Regulations are more stringent compared to the Accounting Regulations for England and Wales.

For accounting periods starting on or after 1 April 2011, the thresholds are aligned.

External scrutiny requirements in Scotland are slightly different in that all charities require external scrutiny regardless of income. In addition, charitable companies must always be examined by a qualified person.

For ease of reference, Appendix 1 contains tables showing the requirements for the format and external scrutiny of accounts under both sets of Accounting Regulations that cross-border charities will need to take account of when preparing their annual accounts.

Further details of the reporting and accounting regime for charities in Scotland can be found within our guidance publication, 'Scottish Charity Accounts – An updated guide to the 2006 Regulations'.

## 2.3 Filing deadline

Under the provisions of the Scottish Accounting Regulations, charities entered on the Scottish Charity Register must file their accounts with OSCR within 9 months of the financial year end of the charity. This deadline is consistent with that applicable under the Companies Act 2006 for charitable companies. The accounts should be submitted to OSCR at the same time as the Annual and Information Return forms.

## 2.4 Guidance for auditors and independent examiners of cross-border charities

In 2011 the UK Auditing Practices Board (APB) published a revised version of its practice note for charities – **Practice Note 11 (Revised)**: The Audit of Charities in the United Kingdom. OSCR and the Charity Commission for England and Wales both provided input in the updating process and have worked together in the drafting of the requirements relevant to cross-border charities. The APB has also published **Bulletin 2010/2** which provides example audit reports for UK charities including examples that may be used for cross-border charities.

Independent examiners acting for cross-border charities may wish to refer to the existing Charity Commission for England and Wales guidance on independent examination (CC32) which contains example independent examiner's reports for cross border charities. The guidance is available from the **[Charity Commission website](#)**.

### **3. Enquiries and Investigation**

#### **3.1 OSCR's supervisory powers**

OSCR has the power to conduct enquiries (s. 28(1) of the CTI(S) Act 2005) for general or specific purposes in relation to:

- Any charity
- Any body controlled by the charity e.g. a trading company
- Any body holding itself out as a charity

For further details, please see our guidance '[Charity Regulation in Scotland – an Overview](#)'.

#### **3.2 Joint working between OSCR and the Charity Commission**

Where a charity is also registered with the Charity Commission for England and Wales, the intention is that on receipt by OSCR of a complaint or internal referral, OSCR will contact the Charity Commission in its capacity as 'lead regulator' to determine whether enquiries should be delegated or whether, in the circumstances, a joint enquiry is appropriate. Similarly, the Commission will contact OSCR where a complaint is made to the Commission about an English and Welsh charity that is registered in Scotland.

Another example of these joint working arrangements might be where the Charity Commission for England and Wales receives a Serious Incident Report from a cross-border charity and this is also highlighted to OSCR via the declaration on the Information Return. In this situation, OSCR will contact the Charity Commission in order to understand whether the issue reported is one of interest to OSCR in the performance of its functions. For example, where the incident is one that:

- Directly affects activities in Scotland
- Relates to the charity trustees/board of management (i.e. a central governance issue)
- May pose a risk to the reputation of the charity or the charity sector

In such circumstances, OSCR would work with the Charity Commission in addressing the identified issue where appropriate.

Under the Memorandum of Understanding, effective information sharing and joint working arrangements between OSCR and the Charity Commission for England and Wales will be operated, specifically in the following areas:

- Complaints
- Serious Incident Reporting
- Whistleblowing – refer to section 3.3 below
- Any other material governance and compliance issues that are identified by the Charity Commission particularly relating to the current key monitoring priorities for OSCR:
  - Payments to charity trustees
  - Relationships with connected trading companies
  - Fundraising

A copy of the Memorandum of Understanding (MOU) between OSCR and the Charity Commission for England and Wales is available on the OSCR website.

#### **3.3 Whistleblowing**

Whistleblowing is the statutory duty or right to report to the regulator which is placed on auditors and independent examiners of charity accounts where, in the course of their work, they identify a matter of material significance or a matter which they believe should be reported to the regulator to assist in the fulfilment of the regulator's functions.

OSCR and the Charity Commission for England and Wales have developed joint guidance on whistleblowing that is available on the website of both organisations. In relation to cross-border charities, neither OSCR nor the Charity Commission is considered to be the lead regulator for this purpose and auditors/independent examiners should report to both regulators who will determine which regulator takes forward the issues raised in the report. The joint working arrangements between the two regulatory bodies are crucial in this respect.

### **3.4 Memoranda of Understanding with other organisations**

As well as the MOU that exists between OSCR and the Charity Commission for England and Wales, both OSCR and the Charity Commission have an MOU with the Fundraising Standards Board and there is also an MOU in place between OSCR and HM Revenue & Customs (HMRC).

The MOU between OSCR and HMRC details specific information exchanges that take place on a quarterly basis and includes provisions on liaison at both policy and operational levels. These information exchanges seek to facilitate effective investigation as well as promoting co-operation between staff of both organisations in relation to operational matters.

OSCR and the Fundraising Standards Board (FRSB) have a MOU in place that includes provisions applicable to fundraising complaints. These provisions seek to minimise the burden of any dual regulation on fundraisers in Scotland working with charities and ensure that both organisations can fulfil their respective duties in the most effective way. The MOU between the Charity Commission for England and Wales and the FRSB is similar in its aims and provisions. For further information in relation to fundraising, please refer to section 7 below.

## **4. References to charitable status**

The Charities References in Documents (Scotland) Regulations 2007 (as amended) introduced requirements for charities registered with OSCR regarding the information they must ensure is stated on certain documents issued on their behalf.

In order to comply with the Regulations, all charities entered on the Scottish Charity Register must clearly state the following information on all relevant documents:

- the charity's name as entered in the Register
- any other name by which the charity is commonly known
- the charity's Scottish Charity Number allocated to it at the time of registration, which begins SC0
- if the charity's name does not contain the word 'charity' or 'charitable', a statement or description of the fact that it is a charity.

Charities which were already entered in the Scottish Charity Register when the Regulations came into force on 1 April 2007 are obliged to ensure that any of the specified documents issued or signed on behalf of the charity after 31 March 2008 comply with the requirements of the Regulations.

For new charities that are entered in the Register on or after 1 October 2007, the Regulations will come into effect 6 months after the date of their entry in the Register.

Further details on the requirements of the Regulations and the type of documents which they affect can be found within our guidance publication, 'References to Charitable Status' (amended guidance).

In England and Wales, under the provisions of the Charities Act 1993, similar provisions apply to charities with a gross income of over £10,000. There are no exemptions to the 2007 Regulations for charities entered on the Scottish Charity Register.

## 5. Consents

All charities registered with OSCR must notify OSCR of a range of changes (s.17 of the CTI(S) Act 2005), the most common of which is a change in the address of the principal office or the contact charity trustee of the charity.

Sections 11 and 16 of the CTI(S) Act 2005 further require a charity registered with OSCR to seek OSCR's consent if it wishes to:

- Change its name
- Amend its constitution so far as it relates to its purposes
- Amalgamate with another body
- Wind itself up or dissolve itself
- Apply to the Court in relation to any of the above actions

OSCR's guidance '[Consents and Notifications](#)' gives full details of this process.

OSCR will not generally provide individual guidance for or advice to charity trustees on specific decisions they may wish to make, although OSCR has issued general guidance on matters such as charity trustee duties and we will indicate if we believe a particular course of action to be a breach of the law.

## 6. Charity Trustees and their duties

### 6.1 Trustee duties

Section 106 of the CTI(S) Act 2005 defines charity trustees as 'the persons having the general control and management of the administration of a charity'. In England and Wales section 97 of the Charities Act 1993 defines charity trustees in the same way.

Charity trustee duties are set out in section 66 of the CTI(S) Act 2005. These include a requirement that the charity trustees must ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of the Act (s. 66(2)). Any breach of this duty is to be treated as being misconduct in the administration of the charity.

Section 66 describes four general duties of charity trustees which are fundamental to their role as a charity trustee. Charity trustees are required to comply with these while carrying out their functions as a charity trustee.

A charity trustee must:

- act in the interests of the charity
- seek, in good faith, to ensure that the charity operates in a manner that is consistent with its objects or purposes
- act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person
- ensure that the charity complies with the provisions of this Act, and other relevant legislation

### 6.2 Trustee remuneration

As there are slightly different rules in this area, cross-border charities should ensure that they are familiar with the requirements under both sets of legislation. The following sections provide details of the regimes in both Scotland and England & Wales along with some key differences.

### **6.2.1 The position under the CTI(S) Act 2005**

Section 67 provides that a charity trustee (or a connected person) may not be paid for services provided to the charity including those provided in their capacity as a charity trustee, as an employee or for any other services rendered unless the charity's constitution contains specific authority to do so and certain conditions are met.

The Act defines 'connected' persons as including:

- immediate family, spouses, civil partners and co-habitees
- a company in which the charity trustee or persons connected with them may have a substantial interest, or
- a Scottish partnership in which the charity trustee or a person with whom the charity trustee is connected is a partner

The specific conditions under the CTI(S) Act 2005 that would allow charity trustees to receive remuneration are that:

- the maximum amount of the remuneration is set out in a written agreement;
- the maximum amount is reasonable in the circumstances;
- it is in the interests of the charity for the services to be provided by the charity trustee for that amount (this must be agreed by the charity trustees before the agreement is entered into);
- after the agreement is entered into, less than half of the charity trustees receive remuneration; and
- the charity's constitution or governing document does not expressly prohibit it.

The Act states that the above conditions regarding charity trustee remuneration do not apply if:

- the charity trustee was entitled to remuneration by virtue of a specific authorising provision in the constitution or governing document that was in force on 15 November 2004 (the day the Charities and Trustee Investment (Scotland) Bill was introduced into the Scottish Parliament)
- there is legislation or an order is made by the Court of Session that entitles charity trustees to receive remuneration

However, it must be remembered that charity trustees are still bound by their general duty to act in the interests of the charity. If the remuneration appears to be excessive or unreasonable there may be a breach of that duty. This would constitute misconduct.

The date of 15 November 2004 is only relevant if the constitution or governing document specifically permits the payment of remuneration. If the constitution is silent on remuneration, or only has a general authorising provision, then the conditions set out above for the remuneration of charity trustees apply.

Further details on matters outlined in section 6.1 and 6.2.1 can be found in OSCR's guidance 'Guidance for Charity Trustees'.

### **6.2.2 The position under the legislation in England & Wales**

In England and Wales, the Charities Act 2006 introduced provisions regarding trustee remuneration into the Charities Act 1993.

Sections 73A to C now set out the conditions that would allow charity trustees to receive remuneration for providing services to the charity. In brief, these are that:

- there is a written agreement between the charity and the person who is to be remunerated which sets out the exact or maximum amount to be paid and that the payment is reasonable in the circumstances.  
A charity trustee who is to be remunerated or who is connected to the person who is to be remunerated is disqualified from acting as such in relation to any decision about this agreement.

- the charity trustees are satisfied that the payment is in the best interests of the charity. The duty of care in the Trustee Act 2000 applies to the charity trustees making this decision.
- the total number of charity trustees who are being remunerated are in a minority
- there is no express provision within the charity's governing document that prohibits the payment of that person

It is also a condition that, before entering into this type of agreement, trustees must 'have regard' to the Charity Commission guidance on the subject.

The 1993 Act power is additional to any other form of authority to pay a charity trustee which exists in law of England and Wales or in a charity's governing document.

### **6.2.3 Key differences between the regimes**

The key difference between the statutory provisions in Scotland and those in England and Wales is their scope. Section 67 of the CTI(S) Act 2005 applies to all services provided to the charity including services provided as a charity trustee and under a contract of employment. In England and Wales, section 73A does not apply to remuneration for services as a charity trustee, services under a contract of employment or remuneration a person is entitled to receive under a provision contained in the trusts of a charity. The Scottish legislation limits entitlement to remuneration by virtue of a specific provision in the constitution of the charity to provisions that were in force on 15 November 2004. Neither statutory regime prohibits remuneration to which charity trustees are entitled by virtue of an order of the court or by statute.

In addition the Charity Commission has the statutory power to authorise payments to charity trustees in certain circumstances; OSCR has no equivalent power.

Cross-border charities that are remunerating trustees in accordance with the law of England and Wales will need to carefully consider the requirements of the 2005 Act in order to determine whether such remuneration is permissible under the terms of the 2005 Act.

## **7. Fundraising for benevolent bodies**

### **7.1 Benevolent fundraising**

The 2005 Act introduced a prohibition on professional fundraising for the benefit of a benevolent body (including a charity) without a formal agreement and allows Ministers to make Regulations about fundraising (s.83). These Regulations set out requirements for such formal agreements and stipulate the information to be provided by fundraisers when soliciting funds for benevolent bodies, including information regarding remuneration. The Regulations came into force on 1 July 2009 and guidance to aid compliance with the new Regulations has been published by OSCR and may be downloaded from the [OSCR website](#).

The Scottish Government jointly with the Home Office also supports the UK-wide scheme of self-regulation of fundraisers administered by the Fundraising Standards Board ([www.frsb.org.uk](http://www.frsb.org.uk)). Members of the self-regulation scheme commit to abiding by the Fundraising Standard Board's Fundraising Promise and the Institute of Fundraising's Codes of Fundraising Practice.

### **7.2 Licenses for public benevolent collections**

Issuing licenses for public benevolent collections – that is, collections in public places – continues to be the responsibility of local authorities in Scotland. There is no proposal for OSCR to license individual operators. In England & Wales, the Charities Act 2006 provides for a licensing regime for all public collections of money and gifts. All such public collections would require a Public Collection Certificate that is issued by the Charity



Commission. There is an exemption from the licensing regime for collections that are both local and short-term. The Office of the Third Sector announced in early 2009 that it was looking at the various options available for implementing the certification scheme and as such this is not currently in force.

As in England and Wales, the Regulations in Scotland relating to public benevolent collections are to be extended to include not only cash donations, but also promises of money such as direct debits and standing orders. It is anticipated that the Scottish Government will consult on these new Regulations in late 2009. Meanwhile, the current legislation for public charitable collections contained in the Civic Government (Scotland) Act 1982 and the Public Charitable Collections (Scotland) Regulations 1984 and 1988 remains in force. For further details, please see our guidance publication, 'Public Charitable Collections'.

## **8. Further information**

The OSCR guidance documents referred to in this guidance notes can be accessed from our website: [www.oscr.org.uk](http://www.oscr.org.uk) by following the 'Guidance' link. There you will be able to download a range of guidance materials, including those mentioned in this document.

Alternatively, you can request hard copies of the guidance documents by contacting us at the address below.

## **9. Contact details**

Office of the Scottish Charity Regulator

2nd Floor, Quadrant House

9 Riverside Drive

Dundee

DD1 4NY

Tel: 01382 220446

E-mail: [info@oscr.org.uk](mailto:info@oscr.org.uk)

Fax: 01382 220314

Website: [www.oscr.org.uk](http://www.oscr.org.uk)

## Appendix 1: Regulatory requirements for preparation and external scrutiny of accounts for cross-border charities

### Format of accounts

Gross income	Under charity law in Scotland		Under charity law in England & Wales (post April 2009)	
Less than £5,000	Non-company charities: receipts and payments accounts	Charitable companies: fully accrued accounts	Non-company charities: receipts and payments accounts	Charitable companies: fully accrued accounts
£5,000 – £25,000				
£25,000 – £100,000				
£100,000 – £250,000	Receipts and Payments accounts for accounting periods starting on or after 1 April 2011. Fully accrued accounts for accounting periods starting before 1 April 2011			
£250,000 – £500,000	Fully accrued accounts		Fully accrued accounts	
More than £500,000				

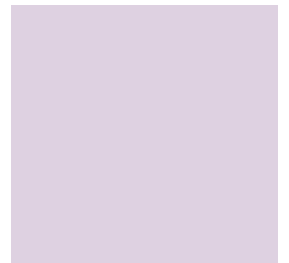
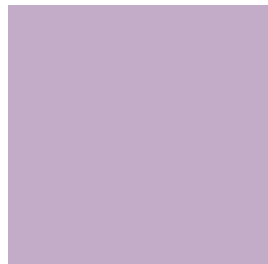
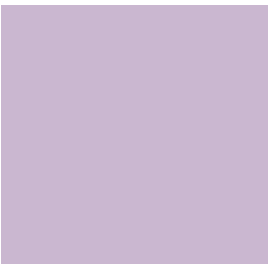
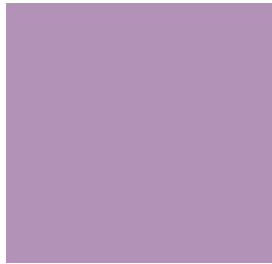
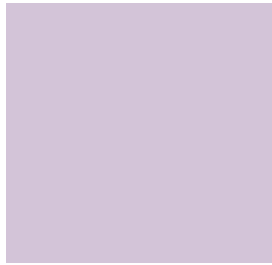
### External scrutiny of accounts

Gross income	Under charity law in Scotland		Under charity law in England & Wales (post April 2009)
Less than £5,000	Non-company charities: independent examination by a person with requisite skills (where receipts and payments accounts are prepared)	Charitable companies: independent examination by a qualified person	N/A
£5,000 – £25,000			
£25,000 – £100,000			
£100,000 – £250,000	Independent examination by a qualified person for accounting periods starting before 1 April 2011. Independent examination by a person with requisite skills for accounting periods starting on or after 1 April 2011 (where receipts and payments accounts are prepared)		Independent examination by a person with requisite skills
£250,000 – £500,000	Independent examination by a qualified person		
More than £500,000	Audit		
	Audit also required where accrued accounts are prepared <u>and</u> gross assets are more than £3.26m for accounting periods starting on or after 1 April 2011) (or £2.8m for accounting periods starting before 1 April 2011)	Audit also required where income is £250,000 or more <u>and</u> gross assets are more than £3.26m	

### Filing of accounts

	Under charity law in Scotland	Under charity law in England & Wales
Deadline for filing accounts with charity regulator	9 months from the date of the financial year end	10 months from the date of the financial year end

\*Note that where there is a constitutional requirement for audit within a charity's governing document or any applicable enactment that sets out this requirement, this takes precedence over the income and asset thresholds outlined above.



# OSCR

Scottish Charity Regulator

2nd Floor  
Quadrant House  
9 Riverside Drive  
Dundee  
DD1 4NY

**P.** 01382 220446  
**E.** [info@oscr.org.uk](mailto:info@oscr.org.uk)  
**W.** [www.oscr.org.uk](http://www.oscr.org.uk)

APS Group (Scotland) 206275 1/12

