

Memorandum of Understanding between the Office of the Scottish Charity Regulator and Equality and Human Rights Commission

Purpose of the Memorandum of Understanding

The purpose of this Memorandum of Understanding is to set out the powers and responsibilities of the Office of Scottish Charity Regulator and the Equality and Human Rights Commission, and the framework that the organisations have agreed for co-operation and collaboration.

1. Purpose of Memorandum of Understanding

1.1 This Memorandum of Understanding (MOU) provides a framework for closer working between the Office of the Scottish Charity Regulator (OSCR) and the Equality and Human Rights Commission (EHRC). OSCR and the EHRC are fully committed to the aims of this MOU which are to:

- promote a common understanding of the role and functions of each organisation and their regulatory responsibilities, working procedures, legal powers and constraints;
- promote co-operation between OSCR and EHRC and their staff at an operational level;
- promote better regulation
- facilitate effective and appropriate exchange of information with the objective of assisting each organisation to achieve its objectives; and
- ensure appropriate consultation on matters of mutual interest.

2. The role and functions of OSCR

2.1 OSCR is established under the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act) and is the 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 on matters relating to OSCR's functions.

3. The role and functions of EHRC

3.1 The EHRC is established under the Equality Act 2006 (the 2006 Act) and its core role is to be the regulator of equality legislation and an independent National Human Rights Institution. The EHRC's statutory duties are set out in the following sections of the 2006 Act:¹

- Section 3 – General duty
- Section 8 - Equality and diversity duties

¹ Note some of EHRC's duties and powers are subject to change as a result of the UK Government's consultation 'Building a Fairer Britain: Reform of the Equality and Human Rights Commission'

- Section 9 – Human rights duties
- Section 10 – Groups (good relations) duties
- Section 11 – Monitoring the law
- Section 12 – Monitoring progress

3.2 In Scotland, the EHRC will not take human rights action if the Scottish Parliament has legislative competence to enable another person, normally the Scottish Human Rights Commission (SHRC), to take action unless there is general or specific consent to act jointly or in cooperation for a purpose relating to human rights and connected with Scotland.

4. Legal authority for mutual disclosure of information

4.1 Section 24 of the 2005 Act permits OSCR to disclose information with any person, government department, local authority, police officer or body discharging functions of a public nature if this disclosure is made for any purpose connected with either OSCR's functions or to enable or assist the exercise of the relevant person's or body's statutory functions.

4.2 Section 6(3) of the 2006 Act permits the EHRC to disclose information in the following circumstances:

- For the purposes of the exercise of the EHRC's powers under sections 16, 20, 21, 24, 25, 31 and 32 of the 2006 Act
- In a report of an inquiry, investigation or assessment published by the EHRC
- In pursuance of an order of a court or tribunal
- With the consent of each person to whom the disclosed information relates
- In a manner that ensures no person to whom the disclosed information relates to can be identified
- For the purpose of civil or criminal proceedings to which the Commission is party, and
- If the information was acquired by the Commission more than 70 years before the date of the disclosure.

4.3 OSCR and EHRC 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 and 2006 Acts, Human Rights Act 1998, the Data Protection Act 1998, the General Data Protection Regulation (GDPR) (Regulation (EU) 2016/679) and the enabling Data Protection Act 2018 the Freedom of Information Act 2002 and the Freedom of Information (Scotland) Act 2002.

4.4 OSCR will not disclose information received under the terms of this MOU to any other person or body without the consent of the disclosing party.

4.5 When exchanging information, the provider will mark it with the appropriate government protective security classification.

5. Joint working responsibilities

5.1 It is important in ensuring the effective working of this agreement that both parties are clear on their responsibilities.

5.2 OSCR responsibilities

5.2.1 OSCR's statutory functions are set out in the 2005 Act and are outlined in detail above. There are two areas relevant to this MOU: the identification and investigation of apparent misconduct and the determination of whether bodies are charities.

5.2.2 A breach of a legislative duty by charity trustees, including any of the duties set out in the 2010 Act, may be a breach of trustee duties (section 66 of the 2005 Act). OSCR would treat a significant breach as misconduct.

5.2.3 The assessment of public benefit in the context of the charity test can also give rise to questions of charity compliance with the 2010 Act. Section 8(2) ~~(b)~~ of the 2005 Act sets out the factors which OSCR must consider in deciding whether an organisation can be registered as a charity or whether an existing charity can remain on the Register. OSCR will consider what benefit the organisation provides to the public in exercising its functions and conversely what disbenefit (harm) to the public, or private benefit to individuals arises. Once this has been done, OSCR will assess how the benefit compares to any private benefit and disbenefit. If it appears that unlawful discrimination or indeed any other kind of unlawful conduct arises or will arise from an organisations activities, this is a disbenefit. OSCR may be entitled to give such disbenefit considerable weight, depending on the particular facts and circumstances of the organisation. Section 8(2) of the 2005 Act also requires that we consider whether any restriction on benefit is undue and where a restriction is not permitted by the 2010 Act OSCR would ordinarily consider such restriction as unduly restrictive.

5.2.4 OSCR is likely to become aware of possible breaches of the 2010 Act as a result of complaints, applications for charitable status and applications for OSCR's consent under section 16 of the 2005 Act.

5.3 EHRC Responsibilities

- 5.3.1 The EHRC's statutory powers are set out in sections 16–32 of the 2006 Act. These powers allow the EHRC to fulfil their duties to promote and protect human rights and to promote, enforce and protect equality (see appendix for details).
- 5.3.2 The EHRC's primary aim is to achieve better outcomes in equality and human rights by ensuring individuals and organisations comply with the relevant equality and human rights law.
- 5.3.3 The EHRC is likely to become aware of potential breaches of the 2010 Act by charities as a result of complaints, information provided by the Equality Advisory and Support Service and court and tribunal proceedings.

6. Liaison at an operational level

- 6.1 In furthering the aims of this MOU, OSCR and EHRC undertake to share information/evidence and collaborate on cases of a shared interest.
- 6.2 OSCR
 - 6.2.1 Where OSCR becomes aware of possible breaches of the 2010 Act (as outlined in section 5) through the exercise of its functions, these cases will be considered by OSCR in line with our published Inquiry Policy. OSCR will notify EHRC within a reasonable timeframe. Where OSCR is not certain that the discrimination is unlawful, it may seek the opinion of EHRC.
 - 6.2.2 OSCR will take account of any opinion provided by EHRC in deciding the appropriate regulatory action.
 - 6.2.3 OSCR will inform EHRC of its decision. EHRC may decide to take no action, or to take action in parallel with OSCR or afterwards.
- 6.3 EHRC
 - 6.3.1 If it appears relevant to OSCR's statutory role and functions, the EHRC will notify OSCR if it suspects a charity² may have committed or may be likely to commit an unlawful act prohibited by the 2010 Act.
 - 6.3.2 The EHRC will notify OSCR if it is considering using its statutory enforcement powers (see appendix).
 - 6.3.3 If it considers it necessary, the EHRC may seek the advice of OSCR in respect of relevant charity law and may take into account any other information provided by OSCR when reaching its decision.

² All references to a charity, include those acting on behalf of a charity

6.3.4 If the EHRC decides to use its enforcement powers it will inform OSCR of this decision and the reasons for it. OSCR may decide to take no action or to take action in parallel with EHRC or afterwards.

6.4 General

6.4.1 In both situations the following general arrangements for co-operation would be expected.

6.4.2 Where appropriate and in accordance with s.4 of this MOU, the EHRC and OSCR agree to inform each other of the progress and outcomes of relevant regulatory action.

6.4.2 In order to facilitate the flow of information, officers will be appointed to act as single points of contact (SPOCs). If a matter is to be reported in either direction, the SPOC's will first consult with each other, preferably by telephone and later in writing, to provide:

- a briefing on the case, including actions that have already been taken, actions that are likely to be taken, and where appropriate, information about any previous involvement by either organisation with the charity and individuals concerned; and
- details of the name, telephone number and e-mail address of the case officer appointed by each organisation.

6.4.3 The SPOCs will aim to ensure that:

- the disclosure of information and referral of individual cases are screened and processed with an appropriate degree of uniformity and speed.
- any general information, intelligence, announcement or warning that either considers will impact directly on the other will be brought to the attention of the other and it must be disseminated appropriately within each organisation.

6.4.4 Operational referrals and requests for information should be channelled through SPOCs. SPOCs can however delegate liaison to members of their staff, where they consider it appropriate in order to develop operational contact, but should ensure that any member of staff who is in discussion has the appropriate authority to agree principles, policy and process or can secure agreement within a reasonable time frame. The assigned SPOC should also be kept updated on the nature and progress of the case.

6.4.5 Where it appears likely that intervention will generate media interest of relevance to both organisations, or given the profile or substance of the case, that a ministerial briefing is considered, OSCR's Head of Inquiry and Investigations and EHRC Scotland's Head of Policy and Communications (or equivalent) will be consulted.

7. Other assistance

- 7.1 As part of their respective staff training programmes, both organisations will ensure that their teams are made aware of the differing organisational, operational and legal frameworks. In order to facilitate this, appropriate staff will be offered familiarisation visits.
- 7.2 Both will also explore the possibility of mounting joint training and development initiatives and, where practicable, will offer places to each other's staff on relevant internal training courses, conferences and seminars.
- 7.3 In order to support joint working and outreach, both organisations will explore opportunities to co-operate on presentation and seminars for charity sector representatives.

8. General

- 8.1 While it is intended that the arrangements in this MOU should apply generally, it is recognised that some circumstances will require special handling. Nothing in this MOU prevents the making of arrangements to meet specific exceptional needs.
- 8.2 Any disagreement arising from the interpretation of this MOU will be referred to an external arbiter agreed by both parties 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.
- 8.3 The MOU will be reviewed every three years³.

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Agreed point of contact:

³ MOU Updated May 2018 to take account of GDPR.

OSCR – Senior Legal Advisor

EHRC Scotland – Lynn Welsh (Head of Legal/Transitional Programme Co-Director)

Appendix

EHRC enforcement powers

The Equality Act 2006 gives the Commission a wide range of enforcement powers that may apply to potential unlawful acts or breaches of the human rights set out in the European Convention on Human Rights (ECHR).

Section 20: the EHRC can carry out an investigation if it has evidence to suspect that an organisation has committed an unlawful act of discrimination or harassment in breach of the 2010 Act.

Section 21: if as a result of a s.20 investigation the EHRC makes a finding that an organisation has committed an unlawful act it can issue an unlawful act notice.

Section 22: as part of an unlawful act notice, the EHRC can require the organisation to prepare an action plan to avoid repetition or continuation of the unlawful act and recommend action that must be taken.

Section 23: the EHRC can enter into an agreement with an organisation under which the EHRC undertakes not to proceed with an investigation or unlawful act notice and the organisation undertakes not to commit the unlawful act they are suspected of committing and to take, or refrain from taking other specified action to avoid committing an unlawful act.

Section 24: if the EHRC thinks that an organisation is likely to commit an unlawful act, has failed or is likely to fail to comply with an undertaken as part of an agreement with the EHRC it can apply to the relevant Court for an interdict to prevent the unlawful act.

Section 28: the EHRC can assist, by providing or arranging legal advice, representation or other assistance, an individual who is or may become party to legal proceedings if the proceedings involve equality or equality and human rights.

Section 30: the EHRC has the capacity to institute or intervene in legal proceedings, whether for judicial review or otherwise, if it appears to the EHRC that the proceedings are relevant to their statutory functions.

Section 31: the EHRC can assess the extent to which or the manner in which an organisation has complied with s.149 of the 2010 Act (the public sector equality duty). An organisation that is not a public authority but who exercises public functions must also comply with the duty in relation to those functions.

Section 32: if the EHRC thinks that an organisation has failed to comply with the specific equality duties it may issue a compliance notice.