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Office of the Scottish Charity Regulator

A proposal for Modernisation of the Charities and Trustee Investment (Scotland) Act 2005

INTRODUCTION

It is almost 17 years since the McFadden commission made proposals for establishing a Scottish Charity Regulator and more than 12 years since the passage of the 2005 Act, which has had only minor modification. Since then, OSCR has built considerable experience of working with the legislation which has enabled us to reflect upon the extent of our powers.

We are aware of a number of areas where the Scottish legislation now lags behind recent improvements made in other parts of the UK, or where loopholes exist, and as a consequence the Scottish public is less well served and protected by charity law.

This paper sets out the case for measures to address this situation.

Summary of new measures

Promoting greater transparency and accountability

1.1 **Enhance Scottish Charity register by adding charity annual reports and accounts in full** (already happens in E,W and NI)

1.2 **Develop an internal and (eventual) external register (database) of all charity trustees** (already happens in E & W)

Enhancing trust through stronger enforcement powers

2.1 **Strengthen the law with regard to the fitness of a person to act as a charity trustee and the grounds for automatic disqualification** (available in E,W and NI)

2.2 **Allow OSCR to direct charities to undertake specific positive actions** (available in E,W and NI)

2.3 **Make it easier for OSCR to remove from the Register charities that are persistently failing to submit annual reports and accounts and may no longer exist** (some other regulators have such a power eg. Republic of Ireland and Australia)

2.4 **Ensure that all charities in the Register have and retain connection in Scotland** (available in E, W and NI)

2.5 **Enable OSCR to make inquiries into the former charity trustees of bodies which have ceased to exist and bodies which are no longer charities** (closing a loophole)

2.6	**Ensure de-registered charities' assets continue to provide public benefit** (closing a loophole)
2.7	**Improve the speed and efficiency of OSCR's powers to gather information when making inquiries**
Streamlining operations and introducing efficiencies	
3.1	**Clarify the law with regard to the reorganisation of charities established under royal charter, warrant or an enactment**

Twelve years of the Scottish Charity Regulator (OSCR)

OSCR is the independent registrar and regulator of Scotland's over 24,000 charities. Our vision is of 'charities you can trust and that provide public benefit.' The majority of these charities are small, with more than half having an annual income of less than £25,000. Our analysis of the sector, and the particular challenges that charities face, has led OSCR to develop an approach to regulation that is positive, preventative and proportionate.

It is now almost 12 years since OSCR took up its functions and powers under the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act). In that time, we have become a more targeted, risk-led regulator, seeking to focus our resources on groups and types of charities that are more likely to pose a risk to public trust and confidence, and to concentrate on preventative work with the remaining majority. As we have taken that journey we have become aware of some limitations in the 2005 Act that impact on our ability to fulfil our role as effectively as we would wish.

The charity sector, too, has changed over this time, with charities continually finding new and enterprising ways to respond to the needs of the communities and beneficiaries they serve. We have also witnessed developments in charity law in other parts of the UK, Ireland and the Channel islands which have improved and strengthened the powers of regulators in these jurisdictions.

This paper sets out how we consider that modernisation of certain parts of the 2005 Act would allow us to improve our effectiveness as a regulator and, fundamentally, to ensure that we can continue to strengthen the role we play in underpinning public trust and confidence in charities.

Transparency: a key tool to support public trust and confidence in charities

One of our main sources of information for understanding what is likely to affect public trust and confidence in charities are our public and charity surveys conducted

every two years. Here are some pertinent figures from the last survey, completed in 2016:

- **84%** say that charity regulation is important
- **81%** say that trust is important in terms of their involvement with a charity (donation, volunteering etc)
- **76%** say that knowing how much of their donation goes to the cause increases trust
- **72%** say that seeing evidence of a charity's achievements increases trust

What this confirms is that public trust and confidence are essential in terms of the strength of the charity sector. Charities continue to rely upon public goodwill as donors, volunteers and supporters in order to flourish. The results also tell us that regulation itself is seen by the public as an important tool and that, very importantly, openness and transparency of charities are key contributors to public confidence.

As the Regulator we have an important facilitative role in encouraging charities to be transparent and we have taken some significant steps towards that. From April 2016 we have been publishing annual reports and accounts of charities with an annual income over £25,000 and of all Scottish Charitable Incorporated Organisations (SCIOs). The legislation as it stands, however, limits our ability to do this effectively. Data protection considerations mean that we have to redact certain important content from the material we publish, taking away from the transparency we seek.

The legislation also constrains our ability to support the transparency of our principal regulated community, charity trustees. As the law stands we cannot create a trustee database that would allow the public and OSCR to fully understand who is managing and controlling the 24,000 charities across Scotland.

Enforcement: a strong and effective regulator

In order to be an effective targeted regulator, we need to get the balance right between preventative action with the majority of charities and strong, efficient intervention with those that prove more problematic. We have to be able to show both charities and the public that we will take action swiftly and firmly where necessary and that 'light touch' does not mean 'soft touch.'

There are areas where improvements to the 2005 Act would assist us in this regard. This paper proposes new powers of positive direction, removal of defaulting charities, inquiries in respect of former charity trustees and changes to the rules regarding fitness to act as a charity trustee. The ability to create a trustee database would be a valuable source of intelligence in this regard, giving us a comprehensive picture of who to hold to account for the running of charities.

There have been significant changes to the powers of the Charity Commission for England and Wales in some of these areas, particularly with regard to the automatic disqualification and removal of certain individual from being charity trustees or holding senior positions in a charity. There is a risk of Scotland being perceived as a weaker link and inconsistencies in the rules of disqualification in neighbouring jurisdictions may hinder effective action against those who pose a risk to charities, ultimately undermining public confidence in us as the Regulator.

Efficiency: adjustments to improve operations

As is to be expected, through our twelve years experience of working with the 2005 Act we have identified sections that would benefit from improvement, to clarify ambiguous or elliptical provisions and to streamline certain processes. These refinements will help to improve the efficiency and effectiveness of our operations and allow us to make the best of the resources we have. This paper proposes changes to chapter 5 of the 2005 Act, providing for charity reorganisations.

How this paper is organised

In preparing this paper we have undertaken a thorough scoping review of Part 1 (Charities) of the 2005 Act, drawing together all our experience of working with the legislation and the professional advice we have received. Although we have identified many areas where minor adjustments could be made, the paper focuses upon our principal strategic priorities and does not call for a wholesale amendment of the 2005 Act. Some of the changes outlined require primary legislation, while others may be achieved through secondary legislation, either by amendment of existing regulations or by making regulations where they have not yet been made. We have excluded from this paper consideration of regulations to be made under s35 of the 2005 Act for transfer schemes as work on drafting regulations is already in hand. We have also not included our review of the 2011 regulations for removal from the Register and dissolution of Scottish Charitable Incorporated Organisations (SCIOs) as this will be the subject of a separate paper.

Proposed changes have been grouped in three main clusters, consistent with the themes identified in this introduction:

- Promoting greater transparency and accountability
- Enhancing public trust by providing greater protection for charity assets and the charity brand through stronger enforcement powers
- Improving the efficiency of OSCR’s operations

For each proposed change we expand upon our policy objectives and the likely impact of the change and we provide technical detail, identifying the applicable sections of the 2005 Act or regulations and comparison with other legislation. There are a number of embedded links (underlined) for ease of reference. Abbreviations and terms used are as follows:

- 'The 2005 Act' means the Charities and Trustee Investment (Scotland) Act 2005.
- 'CCEW' means the Charity Commission for England and Wales.
- 'CA2011' means the Charities Act 2011.
- 'CCNI' means the Charity Commission for Northern Ireland.
- 'CA(NI)2008' means the Charities Act (Northern Ireland) 2008.
- 'CRA' means the Charities Regulatory Authority of the Republic of Ireland.
- 'CA(I)2009' means the Charities Act 2009 in the Republic of Ireland.
- 'JCC' means the Jersey Charity Commissioner
- 'C(J)L 2014' means the Charities (Jersey) Law) 2014
- 'SCIO' means Scottish Charitable Incorporated Organisation.
- 'The dissolution regulations' means the Scottish Charitable Incorporated Organisations (Removal from Register and Dissolution) Regulations 2011.
- 'The Register' means the Scottish Charity Register
- Chapter and section numbers, unless indicated otherwise, refer to the 2005 Act

PART 1: Promoting greater transparency and accountability

1.1 Make it possible for OSCR to publish charity annual reports and accounts more easily

Policy context

One of the contributing factors to maintaining public trust and confidence in charities is increasing transparency. Having more information publicly available about charities is one mechanism to achieve this. It should also be a driver to the increasing of quality of annual reports and accounts.

OSCR's consultation on the publishing of accounts demonstrated a high level of support among charities and other interested parties. 70% of respondents to our Targeted Regulation consultation in 2014 agreed that accounts for all charities (beginning with SCIOs and charities with an income of at least £25,000) should be published. This is also reflected in the findings of our surveys of public attitudes to charities, where, in 2016, 60% of the survey sample said that open access to accounts would improve their trust in charities, while a further 25% said it would influence their trust somewhat.

Both CCEW and CCNI have the power to publish full charity accounts, although in practice CCEW currently only publishes accounts for charities with an income exceeding £25,000 (CCNI publishes all accounts). Other regulators including the Scottish Housing Regulator and the registrars of companies in the UK also publish accounts in full.

Increasingly charities are making use of their own websites to provide accounts accessibly. By January 2018, over 2,350 charities had provided a web link to their published accounts in their most recent OSCR annual return and this is shown on their entry on the Scottish Charity Register. However there are charities that remain resistant despite the duty placed on them under the 2005 Act to supply this information directly if asked. Since 2009 we have opened 114 compliance cases following concerns about this specific issue and which required us to take steps in 72 of those cases to ensure provision of the information requested. We have produced guidance material to explain the legal duty for charities. We need to continue to encourage compliance in this way while looking to make accounts accessible through the Register.

We believe that a wide range of stakeholders is interested in accounts information for many reasons including donors, funders and beneficiaries. While it is true that not all stakeholders will be able to understand full sets of accounts, we expect that many members of the public and other stakeholders will be very interested in the Trustees' Annual Report that sets out the charity's story of activities for the year. As part of our Targeted Regulation programme we are working to help charities understand the importance of and improve the quality of their Trustees' Annual Report. We have developed specific guidance on this topic and it was a focus of our 'Meet the Charity Regulator' events throughout 2017.

From 1 April 2016 we began publishing annual reports and accounts of charities with an income over £25,000 and all SCIOs. Between April 2017 and January 2018 there have been on average around 5,100 views of charity annual reports and accounts per month in respect of 7,800 charities overall. Our aim is to publish all charity annual reports and accounts as outlined in our 2013-14 annual report recommendations to Ministers. However this is not without difficulty. In order to comply with data protection legislation, OSCR must redact all personal information (charity trustee names and signatures, photographs and the signatures and personal details of independent examiners and auditors) from the accounts. This is a resource intensive task that takes OSCR staff away from other priority work. We estimate that it takes an hour of staff time to redact information from 10 sets of accounts.

Redacted accounts are also of diminished interest to viewers. Since we began publishing OSCR has received requests from charities that do not wish information to be redacted from their accounts as well as correspondence from the public

questioning the value of publishing material with the identity of charity trustees missing and seeking to understand why information is redacted.

Impact

The publishing of charity accounts would affect all charities in the Register with significant gains in public confidence due to increased accountability. Defaulting charities and those preparing accounts that do not comply with required standards will be more immediately evident to anyone searching the Register. It is estimated that there will be savings to OSCR of staff time amounting £30,000 per year by removing the requirement to redact information before publishing.

For a small number of charities due consideration may need to be given to concerns of personal safety or whether the publishing of trustee or other names in accounts may be a disincentive to hold office. However, the Charities Accounts (Scotland) Regulations 2006 and the Statement of Recommended Practice (SORP) provide exemptions from the disclosure of trustees' names and addresses in a charity's annual report in cases where OSCR has granted dispensation in terms of section 3(4) of the 2005 Act and excluded such information from the Register. At present where a charity does not have a principal office the name and address of a trustee has to be given and detailed on the register. It is this trustee who can currently get dispensation.

Technical

The difficulty is that currently there is a duty on charities to provide to the public copies of their most recent accounts on request (s23), but no duty on OSCR to provide such information. This raises an issue in respect of the conditions for processing personal data under schedule 2 of the Data Protection Act 1998 and/or sensitive personal data under schedule 3 of the 1998 Act. For some charities, for example, from their criteria for eligibility to hold office as a charity trustee it will be possible for the public to infer sensitive personal data about the charity trustees.

This is not the case for CCEW or CCNI where both regulators have a duty to 'have open to public inspection' the annual reports and accounts submitted to them (s170 of CA2011 and s69 of CA(NI)2008).

We have considered two potential solutions. Our preferred solution is to amend the 2005 Act to replicate the duty placed on CCEW and CCNI. We consider this could be achieved in one of two ways; either by an insertion to chapter 6 (for example a section 44A) making provision for the retention of charity accounts by OSCR and requiring us to make accounts available for public inspection; or by amendment of s3(3) to include accounts in each Register entry.

If the 2005 Act was amended in either of these ways, s3(4) would have to be amended or another provision inserted to ensure OSCR had the power to grant dispensation to charity trustees, where appropriate, to the publication of their names and addresses.

Alternatively, we have considered whether it might be possible to achieve the same result through secondary legislation. s3(3)(f) provides for Scottish Ministers to make regulations in respect of information which is required to be set out in a charity's Register entry. To date no regulations have been made under this section. Regulations could require Register entries to include charity accounts including trustee names and other details. It will be necessary for us to take account of the impact of the GDPR as we consider this area further.

1.2 Make it possible for OSCR to develop an internal and (eventually) external register (database) of charity trustees.

Policy context

Initially we anticipate a register of trustees being an internal database containing specific trustee contact details. Charity trustees are, by definition, in management and control of a charity and therefore the people we hold accountable for a charity's actions. The present unsatisfactory situation is that we regulate charities without any straightforward means of identifying who is in control of them. Our ability to act quickly and decisively in situations where vulnerable beneficiaries or charitable assets may be at risk can be hampered by out of date or incomplete contact information for the charity trustees.

We are also unable to establish quickly whether a person acts as a trustee of more than one charity. This is a particular risk where a trustee's conduct is a matter of concern and we may need to act swiftly to protect the assets and beneficiaries of other charities with which they are connected.

This proposal is linked to the publishing of accounts because the names of trustees must be included in the administrative details of the Trustees' Annual Report. In the longer term a public database would improve transparency. However, the development of a register of trustees would also introduce efficiencies for our compliance, investigation and engagement work. If we could develop this database in a systematic way, we would be in a much better position to facilitate contact with charities and to prevent many from becoming unresponsive. Reliance upon a single 'principal contact' is potentially precarious and increases the likelihood of us losing touch with a charity, especially those without a permanent office base.

We gather information on trustees at the start of the life of a charity (by means of trustee declarations), and as part of the annual reports and accounts. However, the data protection concerns referred to above make it difficult for us to store, keep up to date and optimise the use of this information.

Once a database had been developed our intention would be to publish all trustee names in the Register, as is the case with charities registered with CCEW and CCNI and will be for charities registered in Jersey from May 2018. We would also wish to publish the names of any person removed as a charity trustee under the 2005 Act or preceding legislation in similar fashion to CCEW and CCNI. Under the 2005 Act it is an offence for a person to act as a charity trustee while disqualified. There is no specific duty on charity trustees to ensure that their fellow trustees are not disqualified from holding office but we consider a public list would go some way to assist charities to undertake due diligence into their own trustees.

Impact

An internal database will introduce efficiencies to OSCR's operation, particularly in respect of compliance, inquiries and engagement work. It will reduce the likelihood of OSCR losing contact with a charity and make it simpler to follow up on matters such as failure to submit accounts.

A published database of trustee names will affect all charities and will increase the transparency of their governance to the public. For a small number of charities due consideration may need to be given to concerns of personal safety or whether the publishing of names may be a disincentive to hold office as a charity trustee. The Charities Accounts (Scotland) Regulations 2006 and the Statement of Recommended Practice (SORP) provide exemptions from the disclosure of trustees' names and addresses in a charity's annual report in cases where OSCR has granted dispensation in terms of section 3(4) of the 2005 Act and excluded such information from the Register. At present where a charity does not have a principal office the name and address of a trustee has to be given and detailed on the register. It is this trustee who can currently get dispensation.

Technical

Again, we have considered two routes towards the establishment of the database. The first, preferred, route would be amendment of the 2005 Act to include a direct duty to collect and update details of trustees and make the names of trustees available for public inspection, either through the publishing of unredacted accounts or by including the information directly for each entry in the Register.

If the 2005 Act was amended s3(4) would have to be amended or another provision inserted to ensure OSCR had the power to grant dispensation to charity trustees, where appropriate, to the publication of their names.

Depending on the nature of the amendment of the primary legislation we may also need to expand s3(4) to give OSCR the power to exempt certain information in the Register from public inspection [see CCEW's power at s38 of CA2011]. This is because, in terms of s21 of the 2005 Act the information on the Register must be reasonably obtainable for public inspection. If the trustee data was collected following an amendment to s3 of the 2005 Act without primary legislation to give OSCR the power to exempt information in the Register from public inspection, we would have to publish all information collected including the trustees addresses which we do not wish to do.

The alternative of secondary legislative change through regulations made under s3(3)(f), providing that information on trustees must be contained in the Register entry of each charity, would not work in practice, as the regulations could not be relied on to collect the trustee data necessary for an internal database. As detailed above in terms of s21 the information on the Register must be reasonably obtainable for public inspection. Whilst we could seek to rely on regulations to collect the trustee data necessary to create an external database without primary legislation to give OSCR the power to exempt certain information in the Register from public inspection we would have to publish all information collected including the trustees addresses.

s8(3)(b) of C(J)L2014 requires the JCC to include in the register of charities in Jersey the names of each of the governors (equivalent of charity trustees) of each registered charity. This section will take effect from May 2018 when the JCC commences its process of registration.

With regard to publishing a list of removed trustees, s182 of CA2011 and ss 86(7) and (8) of CA(NI) 2008 require the regulators to keep a register of persons removed from office by their order or by the order of the Court and to make those registers available for public inspection. No comparable provision exists in the 2005 Act. Our proposal is for an insertion to chapter 9 (for example a section 70B) making provision similar to the requirement of other regulators in the UK.

It will be necessary for us to take account of the impact of the GDPR as we consider this area further and we are in discussion with the Information Commissioner's Office on this matter.

PART 2: Enhancing trust through stronger enforcement powers

2.1 Strengthen the law with regard to the fitness of a person to act as a charity trustee and the grounds for automatic disqualification

Policy context

Changes to charity law in other parts of the UK have introduced a risk that a person may be disqualified from acting as a charity trustee in England, Wales and Northern Ireland but that disqualification would not apply to Scotland. The situation has arisen because the 2005 Act has not been updated to take account of these changes. The implication is that a person could act as a charity trustee of a Scottish charity having been found so unsuitable for this role in another jurisdiction that formal action had to be taken against them. The risk is compounded by the current lack of a requirement for a charity to have any territorial connection to Scotland (see paragraph 2.4). In 2016 OSCR was contacted by a person disqualified as a charity trustee by CCNI seeking advice about relocating his charity to Scotland.

In addition, the Charities (Protection and Social Investment) Act 2016 will, when fully in force later this year, change and extend the grounds on which a person is automatically disqualified from being a charity trustee of a charity in England and Wales and give CCEW an express power to remove charity trustees who are disqualified for any reason. The new legislation extends beyond charity trustees to include disqualification of individuals from being employed in certain senior management positions in charities.

It is clearly not desirable for there to be inconsistencies across the UK in respect of the grounds for disqualification and removal of charity trustees. The current situation presents a risk that Scotland will be viewed as a softer touch by those prohibited from involvement in the management or administration of charities elsewhere.

Impact

The proposed change will ensure greater consistency across the UK in terms of the grounds for disqualification of charity trustees and prevent Scotland being (and being perceived) as a softer touch by those disqualified as trustees in neighbouring jurisdictions. The change will introduce greater efficiency in cooperation between OSCR and other UK charity regulators and remove uncertainty about the status of trustees of cross-border charities.

Technical

At present s69(2)(d)(i) disqualifies any person from being a charity trustee if they have been removed from the office of charity trustee by an order made by CCEW under s79(2)(a) of CA2011 or under comparable provisions in earlier legislation (Charities Acts 1960 and 1993). However, s79 of CA2011 has been amended by the Charities (Protection and Social Investment) Act 2016, the relevant subsection for removals now being s79(4).

This results in a complex situation where individuals who were removed under the version of CA2011 s79 as originally enacted are disqualified in Scotland but those removed since s79 was changed will not be. When assessing new status applications OSCR searches the CCEW register of disqualified persons for any match. The change to s79 means we must now know exactly what provision in CA2011 has been used to remove a person before we can determine whether they are disqualified in Scotland.

s86 of CA(NI)2008 provides for the disqualification of persons as charity trustees in Northern Ireland. It includes any person who has been disqualified in Scotland (either under the 2005 Act or earlier legislation). However, s69 of the 2005 Act was not updated to include reference to s86 of CA(NI)2008, resulting in a situation where a person disqualified in Scotland is also disqualified in Northern Ireland, but not the reverse.

Provisions in s9 of the Charities (Protection and Social Investment) Act 2016 relating to the automatic disqualification of charity trustees in England and Wales come into force (subject to certain transitional arrangements) on 1 August 2018. This will add disqualification for unspent convictions for offences related to terrorism, money laundering, bribery and misconduct in public office. It will also disqualify individuals who are subject to notification requirements under sexual offences legislation.

We propose that ss69 and 70 are amended to ensure consistency with other parts of the UK in terms of the grounds for automatic disqualification of persons from holding office as charity trustees.

2.2 Allow OSCR to direct charities to undertake specific positive actions

Policy context

At present the 2005 Act gives OSCR powers to issue various specific types of direction to charities and to charity trustees. The purpose of some of these powers is to protect the assets of a charity or to prevent (further) misconduct by charity trustees where a risk of these occurrences has been identified either during, or as a result of, our inquiries. With one exception in relation to meeting the charity test (see below) these powers are interdictory and preventative, requiring charity trustees or others not to take particular actions. Depending upon the power used, the direction may last for a specified period of time up to six months or permanently only in relation to a charity's name. The 2005 Act does not give OSCR the power to direct charity trustees to take a specified positive action to remedy non-compliance or protect charitable assets.

Powers of positive direction are available to other UK charity regulators and, even if limited to particular situations, would enhance our effectiveness as a regulator. This has been a longstanding recommendation to Ministers made in our annual reports (first raised in the 2008-09 report) and one that we believe would be a beneficial addition to our inquiry and enforcement powers in terms of protecting charitable assets, securing proper application of those assets and generally supporting good governance.

We acknowledge the need for more discussion around whether this power should be wide and general or more specific. In correspondence with John Mason MSP (letter to Margaret Burgess dated 21 January 2013), the Cabinet Secretary for Finance, Employment and Sustainable Growth at the time (John Swinney) responded in February 2013 specifically to this recommendation noting he was not minded to give it effect since it might extend the role of OSCR beyond the original policy intention of the 2005 Act.

However, since then examples have arisen where the absence of such a power has severely impacted our ability to intervene to improve public trust in the governance of particular charities. For example, in the case of Shetland Charitable Trust, where significant change was required to the governance structure, it was not possible for OSCR to compel the charity trustees to make the appropriate changes, resulting in a steady stream of concerns about the governance of the charity over a considerable period of time and protracted discussions between OSCR and the charity.

In its report on the 2013/14 Audit of Coatbridge College: Governance of Severance Arrangements, the Scottish Parliament Public Audit Committee referred to OSCR not having a positive power of direction and recommended that the Scottish Government review OSCR's powers in this respect.

Impact

The extent of the impact would depend upon whether the power of positive direction was general or specific. In either case the impact on charities and charity trustees would be limited to those to whom a direction was given and where non-compliance, a risk to charitable assets or misconduct had been identified through OSCR's inquiries.

Other directions given by OSCR at present require the publication of an inquiry report under s33 against the charity's entry in the Register. This evidence of intervention will encourage public confidence that the Regulator is taking positive steps to intervene to remedy misconduct and protect charitable assets.

Technical

OSCR already has a power of positive direction specifically in respect of the charity test. Under s30(1)(a) we may direct a charity (other than a SCIO) to take such steps as we consider necessary to meet the charity test where, as a result of our inquiries, it appears that the charity no longer meets the test. There are similar provisions in respect of SCIOs in Regulation 8(1)(a) of the dissolution regulations.

Under s84 of CA2011 Act, CCEW has a potentially wide ranging power to direct a charity, one or more charity trustees or an officer or employee of a charity to take specified action which CCEW considers to be expedient in the interests of the charity. A comparable power is available to CCNI under s36 of CA(NI)2008.

In Ireland the CRA has a specific power to direct a charity to have its accounts audited under s50(4) of CA(I)2009.

In Jersey under s27(2) of C(J)L2014 the JCC may serve written notice on a charity or its governors (charity trustees) requiring steps specified in the notice to be taken to remedy the matter prompting service of the notice.

In our view the options available for OSCR range from adopting the model available to other UK regulators of a general positive power of direction, to seeking a set of more specific powers aimed at ensuring compliance and/or improving the governance of charities.

Specific powers to consider here may include a direction:

- to appoint additional trustees (for example, in order to form a quorum or meet a minimum specified in a governing document)
- to take a specific action in line with the charity's governing document (for example, hold an AGM to make a specific decision or take action to remove a trustee in line with the powers they have) .
- to manage a conflict of interest effectively and demonstrably
- to prepare accounts (see below)

We propose that additional powers for OSCR are added in s31.

2.3 Make it easier for OSCR to remove from the Register charities that are persistently failing to submit accounts and which may no longer exist

Policy context

Currently, we are limited in what we action we can take in respect of a charity which continually fails to submit its annual accounts to us.

There are 153[1] charities on the Register for which we have no income or expenditure information, around half of these have been registered charities for at least five years. This means that these charities have repeatedly failed to comply with the legal requirement to submit an annual report and accounts to OSCR. We have invested significant resources into understanding and pursuing non-submitting (defaulting) charities with minimal return.

For each charity that continually fails to provide accounts information, OSCR has no evidence that the charity is providing public benefit in furtherance of its charitable purposes or that charitable assets are being applied solely for charitable purposes. Without resource intensive inquiry OSCR cannot, therefore, determine if these charities continue to meet the charity test. As a result the existing removal powers (see below for details) have proved relatively unhelpful in this regard. Intensive inquiries are also hindered by our lack of knowledge about who the trustees are.

The accounts submission history for each charity is clearly shown against its entry in the Register. Non-submitting charities are therefore highly visible to the public and there is a clear risk to public trust and confidence in charities, since it is impossible to achieve the same level of transparency about these charities' activities and finances as there is for compliant charities. This contrast will become more pronounced as OSCR increases the amount of information it makes available to the public about charities (see paragraph 1.1 above). This non-compliance also impacts on OSCR's reputation as an effective regulator. It is also a frustration for the majority of compliant charities to see others seemingly 'getting away' with not submitting accounts.

OSCR's Board has been increasingly concerned at the level and persistence of annual accounts non-submission. This is reflected in OSCR's corporate Risk Framework. The absence of a power to sanction persistent non-submission has been raised in recommendations to Ministers made in our annual reports 2012-13 and 2013-14.

Impact

The immediate impact would be upon the small number of charities that persistently fail to engage with us or to comply with the requirement to submit annual accounts.

The power would also introduce efficiencies for OSCR, reducing the amount of staff time spent pursuing persistent defaulters. It would improve the accuracy of the Register and have a positive impact on public trust and confidence demonstrating that the regulator is taking action.

[1] As of 23 February 2018

Technical

The Powers currently available to OSCR to remove (non SCIO) charities from the Register are:

- s3(6): removal of charities from the Register in limited circumstances where we have conclusive evidence that they no longer exist e.g. where a charitable company has been struck off the Companies House register (for the purpose of ensuring that the Register is accurate).
- s12(5): removal of charities from the Register which fail to comply with a direction to change their name
- s(30)(1)(b): removal of charities from the Register where we have determined through s28 inquiries that the body no longer meets the charity test. While the lack of accounts, and therefore evidence of activity, might be seen as an indication in itself that the charity is not meeting the charity test, it does not prove it, as we don't have the information necessary to make the assessment. Indeed, this power can generally only be used after a charity has first failed to comply with a direction to take steps to meet the charity test.

The CRA has power to remove non-submitting charities from its register under s43(4) of CA(I)2009 as one of a number of accounts related contraventions.
It is an offence under CA(I)2009 for an unregistered 'charitable institution' to carry on activities in Ireland. The effect of removal from the Irish register is therefore to prevent an institution from continuing to operate in the Republic.

In other parts of the UK, in s1 of CA2011 and s1 of CA(NI)2008 a 'charity' is a body with wholly charitable purposes that is subject to the control of the High Court. In both jurisdictions there is a general requirement for a charity to be registered (with certain exceptions, exemptions and a *de minimis* threshold in England and Wales) but it is not the act of entry in the register that determines whether it is a charity. A body may be inherently a charity without being registered. s34 of CA2011 and s16(5) CA(NI)2008 require the regulator to remove from its register any body that it no longer considers to be a charity or which has ceased to exist or does not operate (and therefore does not provide public benefit). Neither regulator has power to remove a charity from its register as a sanction for persistent non-compliance or failure to communicate.

Under s106 a 'charity' is interpreted as meaning a body entered in the Register. It follows that a body not entered in the Register is not a charity and a body removed from the Register by OSCR is no longer a charity. (s14 provides for some exceptions for charities registered under other jurisdictions.) Under s1 it is one of OSCR's general functions to determine whether bodies are charities and to enter them in the Register accordingly.

Under s5(2) OSCR may not refuse to enter an applicant in the Register if it meets the charity test, unless the applicant's name is objectionable or it must otherwise be refused by virtue of regulations made under s6(1) (which have not been made to date). These exceptions aside, s5 does not permit OSCR to refuse charitable status to a body on grounds other than a failure to meet the charity test. The 2005 Act (at s30 or elsewhere) does not currently give OSCR power to determine that a body should no longer be a charity as a punitive sanction for non-compliance or failure to co-operate with us. It also does not give OSCR the explicit power to remove a charity which has ceased to exist or does not operate which would be of great value in dealing efficiently with certain non submitting charities.

s30 is disapplied in the case of SCIOs. Provision for SCIOs deemed not to meet the charity test is contained in regulation 8 of the dissolution regulations. OSCR's power of direction or application to the Court under this regulation has not been used to date. The dissolution regulations would need to be amended to enable OSCR to take action against SCIOs comparable with other charities, possibly through the introduction of strike-off provisions.

An alternative approach could perhaps be achieved by amending the 2005 Act to give OSCR power to direct a charity to prepare accounts (see paragraph 2.2 above). Such a direction, if available to us, could in common with other directions made under the 2005 Act, require OSCR to publish an Inquiry Report under s33 which would appear against the defaulting charity's entry in the Register. This would have the advantage increasing public confidence that OSCR was taking action against non-submitting charities. It would also strengthen the evidence of trustee misconduct in the event that the direction was not complied with. We consider this to be an effective and more proportionate intermediate step prior to using the powers available to us under s45.

2.4 Allow OSCR to ensure that all charities in the Register have and retain connection in Scotland

Policy context

The 2005 Act does not make it a condition of registration that a body applying for charitable status must have any connection with Scotland. This leaves open the possibility that we might be compelled to register a charity that meets the charity test but has no activities in Scotland and no trustee connection with Scotland. Our concern is the difficulty of effectively regulating entities with no presence in Scotland and the risk of losing contact with them.

Although there are only three charities on the Register with no Scottish connection at present, there exists the potential for more as connection to Scotland is not a

condition of registration. It also leaves open the possibility of 'jurisdiction shopping', with Scotland potentially being used as a charity regulation destination of choice by EU and non-EU organisations. It is also a concern for HMRC as they see the possibility for such charities to circumvent the jurisdiction conditions in Schedule 6 of the Finance Act 2010.

Impact

Although the number of charities directly affected is very small, it is a loop hole that could be exploited by others.

More widely, the change could have implications for all cross-border registrations.

Technical

This change would require primary legislation. Under s1(1)(b) of CA2011 a defining characteristic of a charity for the purposes of the law of England and Wales is that it falls to be subject to the jurisdiction of the High Court. There is a comparable provision in s1(1)(b) of CA(NI)2008. One effect of these provisions is that a body established under Scots law cannot be registered as a charity in other parts of the UK.

The lack of a comparable provision in Scotland allows for cross border registrations. Indeed, in some circumstances under s14 bodies established in countries or territories other than Scotland are required to register with us if they wish to represent themselves as charities in the course of carrying out their activities in Scotland. Introducing a provision to the 2005 Act equivalent to those referred to above would have the effect of preventing bodies established under other jurisdictions from registering as charities in Scotland.

2.5 Enable OSCR to make inquiries into the former charity trustees of bodies which have ceased to exist or which are no longer charities

Policy context

OSCR currently does not have power to make inquiries into the former charity trustees of a body which is no longer a charity and a charity which has ceased to exist. In addition we do not have the power to make inquiries into individuals who were in management and control of a body which is no longer controlled by a charity. The Court of Session, however, does have the power on an application by OSCR to permanently disqualify such individuals from being charity trustees. OSCR therefore needs the power to make inquiries to gather the necessary evidence in order to make the application to Court.

At the moment, therefore, if OSCR is not aware of the potential misconduct before a charity ceases to exist or before the charity is removed from the Register (either at its request or by virtue of OSCR's power of removal) OSCR cannot open inquiries into this when the information comes to light. It also means that where OSCR is concerned about the management and control of a body formerly controlled by a charity, which is part of a group structure of a body which has de-registered as a charity or of which a charity has divested itself, OSCR is currently unable open inquiries into these individuals. There is a risk of instances where an individual whose misconduct would warrant an application to the Court of Session seeking an order for their permanent disqualification in effect puts themselves out of OSCR's reach and there is nothing to prevent them from being appointed as charity trustees of other charities in future.

As an example, OSCR only became aware of the concerns regarding the governance of the Board of Management of Coatbridge College after the charity had ceased to exist. As a result OSCR was unable to open a formal inquiry and use its statutory inquiry powers to obtain additional information. Accordingly in this matter OSCR was limited to relying on information provided by third parties.

Impact

This would close a loophole which could be exploited by unscrupulous individuals and would increase public confidence in charities.

Technical

One of the amendments to the 2005 Act in terms of Part 9 of the Public Services Reform (Scotland) Act 2010 was to introduce s34(5)(ea). This extended the power of the Court of Session on an application by OSCR to disqualify an individual from being a charity trustee for past rather than current misconduct where that individual was no longer a charity trustee, the body was no longer a charity, the body was no longer controlled by a charity or the charity had ceased to exist. However, there was no corresponding amendment to s28 of the 2005 Act (our power of inquiry) to enable OSCR to make inquiries, for the purposes of s34(5)(ea), into a body which is no longer a charity, a body which is no longer controlled by a charity or a charity which has ceased to exist. This severely limits our ability to gather information to build a case for misconduct in support of an application to the Court for a disqualification order.

We propose that s28 is amended to close this loophole.

2.6 Ensure de-registered charities' assets continue to provide public benefit

Policy context

A charity which is removed from the Register but which continues to operate as a non-charitable body is under a duty to use the assets it held prior to de-registration for charitable purposes, but there is currently no requirement for those assets to be used to provide public benefit. This leaves open the possibility of a body de-registering in order to pursue the same activities on a commercial basis, or in a way that results in private benefit, using assets acquired while it was a charity. Therefore if, for example, an educational charity was removed from the Register, whilst it would have to continue to use its charitable assets for educational purposes there would arguably be no requirement for it to continue to provide public benefit such as offering facilitated access and it could simply be run on a commercial basis for private benefit. The same would apply to a regeneration charity which whilst on de-registration would have to continue to utilise its charitable assets for regeneration purposes it could do so on a purely commercial basis.

Impact

The proposed changes would ensure that de-registered bodies continued to use their charitable assets to provide public benefit.

Technical

Former charities removed from the Register under s12(5), s18 or s30(1)(b) continue to be under duty (under s19) to apply any property (and income derived from that property) held while a charity for the charitable purposes set out in their Register entry immediately prior to removal. We continue to monitor these assets until they are spent or have become negligible. However there is a weakness stemming from the separation of 'charitable purposes' and 'public benefit' in the charity test. Although s19(1) requires assets to be used for charitable purposes it does not require them to provide public benefit. This leaves open the possibility that assets could be used in ways that are consistent with a charitable purpose but result in private benefit or some other failure of the public benefit test of s8. A former charity could also transfer assets to another body in furtherance of its purposes but with no requirement that the recipient body uses them in a way that provides public benefit.

We propose that s19 is amended to extend the duty on de-registered bodies to ensure that public benefit results from use of the assets they held while registered.

2.7 Improve the speed and efficiency of OSCR's powers to gather information when making inquiries

Policy context

There is an apparent anomaly in the legislation in respect of our power to obtain information as part of our inquiries. At the moment the 2005 Act requires us to give

notice to the charity that is the subject of our request for information from a third party and to provide it (the charity) with the right of review. However, this does not take account of situations where there is no 'charity' to notify. For example, the 2005 Act gives us the power to make inquiries into bodies or individuals misrepresenting themselves as charities. OSCR's powers of inquiry also continue to apply to former charities with respect to property and income that the body had at the time it was removed from the Register.

A second area of uncertainty concerns the cumulative effect of the requirement to give notice, the period during which a charity given notice may request a review and the period during which OSCR must consider any review. This has given rise to uncertainty about the timescale OSCR may impose for receipt of information we require. Our practice to date has been a cautious one in assuming that these periods do not run concurrently. As a result there may be considerable delays in receiving information vital for our inquiries.

Impact

Lack of clarity about notice requirements in respect of obtaining information inhibits our ability to conduct inquiries swiftly and efficiently. Removing ambiguity and, ideally, reducing timescales by permitting time periods to run concurrently, will enable us to act more quickly to identify risk and protect charitable assets.

Technical

s72(2)(c) requires notice of a decision made under s29 to be given to the charity in respect of which the decision was made. This section requires amendment to provide for circumstances where the body in respect of which information is sought under s29 is not a charity or is no longer a charity.

Should s28 be amended to enable OSCR to make inquiries, for the purposes of s34(5)(ea), into a body which is no longer a charity, a body which is no longer controlled by a charity or a charity which has ceased to exist s29 would also have to be amended to provide for these circumstances.[see section 2.6 above].

Under s29(2)(b) we must give at least 14 days notice of our decision to require any person to provide information for the purpose of conducting our inquiries. As noted above, that notice must be given under s72(2)(c) to the charity which is the subject of our inquiries. Under s74(3) the charity may, within 21 days of receiving the notice, request OSCR to review its decision. Under s74(1) OSCR must, within a further 21 days, review the decision and give notice of the outcome of the review to the charity. A s29 decision may not be appealed to the Tribunal.

s73(3) provides that a decision to require information under s29 is of 'no effect' unless proper notice has been given and until either the period during which a review

may be requested has passed without a request being made or, where a request is made, the date on which OSCR confirms its decision. Advice received by OSCR concludes that the combined effect of the requirements of s29 and ss72-74 is ambiguous and unclear as to whether time periods may run concurrently. Depending upon which interpretation is accepted, OSCR must allow either three, five or eight weeks before it can enforce a notice under s29(1).

In practice, and in the absence of any indication of the intended interpretation, OSCR has opted for a cautious eight-week approach. This can hamper our ability to obtain information swiftly and to conduct inquiries efficiently. We propose that these sections are reviewed to provide clarity and to minimise delays in obtaining information vital to our inquiries.

PART 3: Streamlining operations and introducing efficiencies

3.1 Clarify the law with regard to the reorganisation of charities established under a royal charter, warrant or an enactment.

Policy context

Chapter 5 is a valuable tool for certain charities in Scotland to modernise their governance or purposes and to release unused or underused funds for public benefit. The current provisions, however, introduce uncertainty as to whether it is competent for OSCR to approve reorganisation schemes proposed by certain charities established under a royal charter or warrant or an enactment. While these issues affect only a small number of cases, there has been substantial expense to the charities involved and consequent use of Parliamentary time which could be avoided if these sections were less ambiguous. For example the Burrell Trust and Leith Links and Surplus Fire Fund opted to make constitutional changes through private bills so as to ensure that the changes made are not open to challenge, as they might be if made through the Chapter 5 route. We have highlighted this issue in a number of published responses to the Private Legislation Committee, and the issue is well known in the charity law community.

Impact

The change would affect only a small number of charities but would potentially save them and Parliament considerable time and expense by dispensing with the need for private bills.

Technical

The problem OSCR experiences here is in respect of some difficult drafting at ss42(5-7). This results in a lack of certainty as to whether it is competent for OSCR to approve reorganisation schemes proposed by certain charities established under a royal charter or warrant or by enactment. Whilst ss42(5) provides that a charity constituted under a royal charter or warrant or by enactment cannot use the reorganisation provisions, ss42(6) provides an exception to this rule in the case of an endowment if its governing body is a charity (notwithstanding that it is constituted under a royal charter or warrant or by enactment). 'Endowment' and 'governing body' are defined with reference to the Part 6 of the Education (Scotland) Act 1980 and these definitions do not sit well within the 2005 Act context.

We propose that ss42(5-7) are amended to clarify in what circumstances a charity constituted under a royal charter or warrant or by enactment can use the provisions of Chapter 5 to reorganise.