

Consultation on Scottish Charity Law Response from the Scottish Charity Regulator

1. Background

1.1 The Scottish Charity Regulator

The Scottish Charity Regulator (OSCR) is established under the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act) as a Non-Ministerial Department forming part of the Scottish Administration. OSCR is the registrar and regulator of charities in Scotland. There are currently over 24,400 charities registered in Scotland.

1.2 OSCR's functions

As the introduction to the consultation makes clear, one of OSCR's statutory functions is to give information or advice, or to make proposals, to Scottish Ministers on matters relating to OSCR's functions. A number of the proposals set out in this consultation have been recommended to Ministers in successive OSCR Annual Reports and Accounts.

2. Consultation response

We very much welcome the consultation on potential changes to Scottish Charity law and strongly support all 10 proposals set out in the consultation.

The 10 proposals are a mix of:

- recommendations previously made to Ministers through our Annual Reports
- realigning some elements of Scottish charity law with the rest of the UK
- seeking legal powers to overcome data protection concerns in order to fully implement our targeted approach to charity regulation.

Many of the proposals focus on transparency and accountability in the charity sector. We want public trust in charities to remain high and as Regulator we want to support this through our work.

Our research consistently shows that public trust in charities is closely linked to:

- understanding what the charity has achieved
- knowing that a charity is well run
- knowing that a charity is independently regulated
- knowing how much of donations are spent on the cause.

We think that these proposals will help all charities to demonstrate these things to the public.

Our response is set out as answers to the 22 consultation questions plus a list of other technical changes we have identified as requiring amendment in the attached [Annex](#).

The nature of the charity sector and the wider third sector is continually evolving and there have been some significant changes since the passing of the 2005 Act. We are keen to explore this changing context with a view to ensuring that OSCR can play the best role possible in the underpinning of public trust and confidence in the sector going forwards.

2.1 Consultation questions and answers

Question 1. On the Scottish Charity Register, should OSCR be able to publish charity annual reports and accounts in full for all charities?

Yes

Please explain in the box below your answer including any potential benefits/risks:

There is already a legal duty on charities to provide a copy of their most recent annual report and accounts to anyone who requests a copy. What we want to do is publish that information directly so that there is more information easily available about how the charity functions and what it is doing and charities can direct people to the OSCR website for easy access to their accounts.

We want the public to be able to see the annual reports and accounts of all charities registered in Scotland. Public trust in charities is closely linked to understanding what the charity has achieved and how much of donations and income are spent on the cause.

We want all charities to have the opportunity to show the public through their accounts and annual reports how their funds are used and what the charity does. Potential risks are that the public may misunderstand the information in the accounts; in mitigation, OSCR will continue to focus efforts on improving the quality

of Trustees' Annual Reports, the narrative part of the accounts which helps explain the numbers.

We are currently publishing the annual reports and accounts of charities with an income of over £25,000 and all Scottish Charitable Incorporated Organisations). However, currently, we are only able to do that once they have been redacted. This makes them less transparent. It also puts an administrative burden on OSCR and means that it is not realistic for us to publish the reports and accounts of all charities, which would be the ultimate aim.

Even with our current publishing regime, there is evidence that this is contributing to the transparency of the charity sector. From April 2018 – Feb 2019, the reports and accounts of charities were viewed 57,000 times, relating to 33% of all charities. Were we able to publish the majority of annual reports and accounts in an unredacted form, this could contribute significantly to transparency and accountability.

Question 2. Do you think there is any information in charity annual reports and accounts that should not be published on the Scottish Charity Register?

Yes

Please say what information you think should not be published in the box below:
The Charities Accounts (Scotland) Regulations 2006 (as amended) currently require that the accounts submitted to OSCR are signed. Consideration should be given to how any power for OSCR to be able to publish accounts of charities without the requirement for redaction would work alongside the existing requirements in these Regulations.

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 – we explain this further in our response to question 3.

Question 3. Do you think charities should be allowed to apply for a dispensation (exemption) from having their annual reports and accounts published in full on the Scottish Charity Register?

Yes

Please explain in the box below your answer (e.g. in what circumstances do you think a dispensation (exemption) should be allowed? Why you think a dispensation (exemption) should not be allowed?)

We believe that the provision made under section 3(4) of the 2005 Act should be replicated/expanded to include annual reports and accounts. This provision states that an organisation has the right to ask us not to publish its principal office or trustee's name and address on the Scottish Charity Register. We can only exclude these details from the Register if we believe that publishing this information is likely to jeopardise the safety or security of any person or premises.

Question 4. Should OSCR be able to collect the trustee information noted above for use in an internal database?

Yes

Question 5. Should the names of trustees be published on the external public register?

Yes

Question 6. Should the names of trustees who have been removed following an inquiry by OSCR, be published on the external public register?

Yes

Question 7. Do you think trustees should be allowed to apply for a dispensation (exemption) from having their name published on the external public register?

Yes

Please explain in the box below your answer (e.g. in what circumstances do you think a dispensation (exemption) should be allowed? Why you think a dispensation (exemption) should not be allowed?)

As detailed in question 3, we believe the exemption provided in section 3(4) of the 2005 Act should be replicated/expanded to include trustees' names, where publishing this information is likely to jeopardise the safety or security of any person or premises.

If you wish to explain any of your responses to the questions in Section 2, please do so in the box below. (e.g. setting out what information you think should be / should

not be included on an internal database and external public register, and what you see as the benefits and risks of each proposal)

We would wish to see the following information held in an internal database:

- Full name
- Date of birth
- Home address
- Email address
- Scottish Charity Number
- Charity name
- Date appointed
- Date retired

This information could also be accessed by the charity trustees to ensure that they have an up to date record of all their trustees – a desire for this facility was expressed during our [2014/15 consultation on Targeted Regulation](#) which included the proposal to create a trustee database.

We would also like to publish the first and last names of trustees on the charity's entry in the Scottish Charity Register, in the same way as the other UK Charity Regulators: the Charity Commission for England and Wales and the Charity Commission for Northern Ireland.

Information about a charity's trustees is already provided in its annual reports and accounts, which are available from the charity on request. We want to make this information easily accessible by providing the trustees' names on the charity's Register entry. We also want to increase transparency regarding who is acting as a charity trustee as the information contained in the annual report of a charity can sometimes be abbreviated – for example J Smith instead of John Smith.

Regarding publicly available information about any trustee who has been removed following an inquiry by OSCR, this information is already available as we are legally required to publish an inquiry report where we use our power to suspend a trustee. Similarly, where we apply to the Court of Session for the suspension or removal of a charity trustee, we would also publish an inquiry report about the action taken. The inquiry report is published on the charity's entry on the Scottish Charity Register. Putting these names on an external register would allow this already public information to be more accessible to the public.

Question 8. Should the criteria for disqualification and removal of charity trustees be extended to match the criteria in England and Wales?

Yes

Question 9. Should the criteria for disqualification and removal also be extended to those in certain senior management positions?

Yes

If you wish to explain your responses to any of the questions in Section 3, please do so in the box below. (e.g. why you think yes, why you think no, what criteria for disqualification and removal should / should not be included, are there additional criteria you think should be included):

- **Question 8 Charity Trustees:** Under the 2005 Act certain people are disqualified from acting as charity trustees:
 - Someone with an unspent conviction for an offence involving dishonesty or an offence under the 2005 Act.
 - Someone who is an undischarged bankrupt or has a **Protected Trust Deed**.
 - Someone who has been removed under either Scottish or English Law or the courts from being a charity trustee.
 - Someone who is disqualified from being a company director.

This proposal 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.

Charities work with some of the most vulnerable people in our society and charity law needs to reflect that those in management and control of charities are suitable to hold those positions.

The reasons for automatic disqualification as a charity trustee in Scotland set out in the 2005 Act, have not changed since the Act came into force. These were written to be consistent with the law in England and Wales at the time. Charity law in England and Wales has developed and the reasons for automatic disqualification of charity trustees are now much wider than in Scotland. This criteria has also been replicated in Northern Ireland.

- **Question 9 Senior Management:** Who controls charities and their finances is key to the aim of underpinning public trust and confidence. The senior management positions specifically referred to in the Charities (Protection and

Social Investment) Act 2016 are Chief Executives and Finance Directors. We recognise that these types of positions can have significant power and control over a charity and its money. Therefore we believe charity law should be strengthened to extend automatic disqualification to certain senior management positions.

In both cases we also want this element of Scottish charity law to be updated to ensure consistency and robustness compared to other parts of the UK. There is 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 risk is that a person could still act as a charity trustee or a senior manager of a Scottish charity despite being found unsuitable for the role in another part of the UK. This is compounded by the current lack of trustee information we hold – see question 4.

The use of any powers of removal will always be on a case by case basis taking into account all relevant factors. In addition, waivers for automatic disqualification are available and are considered on the individual circumstances of the case.

Question 10. Should OSCR be given a power to issue positive directions?

Yes

Question 11. If you answered Yes to question 10, should a power to issue positive directions be wide ranging or a specific power? Please select one below:

Wide ranging

We would be in favour of any such power to be more general in nature so that it is of maximum practical use to OSCR whilst ensuring there are appropriate mechanisms to support its proportionate use (for example, the decision could be one that has a right of review and requires an inquiry report to be published). The charity sector is very diverse and the issues and situations that we encounter in our regulation of the sector vary considerably. In our regulatory experience to date we have seen how powers that are very specific can sometimes be difficult to use as the situation we are dealing with will not always exactly fit the criteria for the power to be used. In seeking additional powers, we want to ensure that these can be effectively and suitably deployed to positively contribute to public trust and confidence in the charity sector.

Question 12. If a charity failed to comply with a positive direction that OSCR had issued, should this be classed as trustee misconduct?

Yes

If you wish to explain your responses to any of the questions in Section 4, please do so in the box below (e.g. why you think yes, why you think no, why you think a positive direction should be wide ranging or a specific power, what should a specific power include?)

Having a positive power of direction will give OSCR the ability by means of early intervention to ensure a charity takes steps to improve its governance, rather than just preventing charities taking certain specified actions.

It would be important for there to be an effective sanction where a positive direction was not complied with. Where charity trustees failed to comply with a positive direction then they would be unlikely to be acting in the interests of the charity which is a key component of their existing legal duties under section 66 of the Charities and Trustee Investment (Scotland) Act 2005. At present any failure of the legal duties of trustees under section 66 of the 2005 Act is classed as misconduct under the same section.

Question 13. Should OSCR be able to remove charities from the Scottish Charity Register if they have persistently failed to submit annual reports and accounts?

Yes

Question 14. Should OSCR be given a positive power of direction to direct a charity to prepare annual reports and accounts?

Yes

Question 15. If a charity failed to comply with a positive direction to prepare annual reports and accounts, do you think this should be classed as trustee misconduct?

Yes

Question 16. If you wish to explain your responses to any of the questions in Section 5, please do so in the box below (e.g. why you think yes and why you think no to the questions and what you see as the benefits and risks of each proposal):

Under the 2005 Act, charities are required to prepare reports and accounts and submit them to OSCR on a yearly basis. The reports and accounts include both the financial information about the running of the organisation, and a narrative report on their activities and the impact of their work during the year. This is an important way of a charity being transparent and accountable and helps funders, donors and beneficiaries understand what a charity does and how it operates.

Our existing powers of removal are limited and don't include a power to remove a charity for persistently failing to comply with its legal duty to submit its annual report and accounts.

Having the power to remove charities from the Register which persistently failed to do so would improve the accuracy of the Scottish Charity Register and encourage defaulters to submit their annual report and accounts. The information in the annual report and accounts provides vital information about the activities of a charity, its income and expenditure. Ensuring this information was provided by all charities on the Register would have a positive impact on public trust and confidence in the sector.

Special consideration will need to be given to how the power applies to Scottish Charitable Incorporated Organisations (SCIOs) because removal from the Register has the practical effect of dissolving a SCIO. Other provisions in the 2005 Act for removal of charities are disapplied in the case of SCIOs and replaced by provisions in the SCIO Removal from Register and Dissolution Regulations 2011.

Question 17. Should all charities registered in Scotland be required to have and retain a connection with Scotland?

Yes

Please explain in the box below why you think yes or no:

We want a connection to Scotland to be made a condition of registration as a Scottish charity to safeguard against any potential for exploitation and close this loophole. What 'connection' means needs to be defined broadly enough to ensure that cross-border charities – those registered in England, Wales and Northern Ireland and Scotland can continue to be dual registered. We want to be able to regulate the charities on the Scottish Charity Register effectively and this is very difficult in practice if a charity has no connection to Scotland – for example, if it is based and carries out its activities exclusively overseas.

Question 18. Should OSCR be able to make inquiries into former trustees of a body which is no longer a charity, a charity which has ceased to exist and individuals who were in management and control of a body which is no longer controlled by a charity?

Yes

Please explain in the box below why you think yes or no:

We have powers to request the Court of Session to permanently disqualify people from being charity trustees in Scotland, including former charity trustees. To do this we need to make inquiries and get the sufficient evidence before applying to the court.

At the moment we don't have the power to make inquiries into people who were trustees of a former charity that we have concerns about. This means that if an individual did something wrong at a charity and the charity closes down or the organisation stops being a charity we cannot take action against that individual. We want to be able to investigate former trustees of a former charity so that, where appropriate, they can be permanently disqualified and prevented from acting as charity trustees again. We consider this is a key element in engendering greater public trust and confidence in charities.

Question 19. Should bodies that have de-registered as charities be required to continue to use the assets held at the time of removal from the Scottish Charity Register to provide public benefit?

Yes

Please explain in the box below why you think yes or no:

This proposal would apply to organisations that no longer have charitable status, usually because they have requested to be removed from the Register. If a charity is removed from the Register for any reason, it must still prepare and submit accounts to us for any outstanding charity assets held at the time of removal. This is because the assets still need to be used for charitable purposes and we use the accounts to check that is the case.

We want the law changed so that former charities must continue to use the assets held at the time of removal for public benefit (in a charitable sense) as well as charitable purposes. This would prevent former charitable assets being used purely on a commercial basis for private benefit. This change would potentially allow the philanthropic / benevolent expectations of any donor to a charity to be continued to be met following its removal from the Scottish Charity Register.

Question 20. Should OSCR be given the power to give the required notice of a request for information to a body or individual that is misrepresenting themselves as a charity, that is no longer charity, and to former trustees of a charity which has ceased to exist?

Yes

Please explain in the box below why you think yes or no:

We already have powers to request information from third parties to help us with our inquiries into charities, former charities and their trustees and those misrepresenting themselves as charities.

Before we can request information from a third party, we must notify the charity in question, giving them the chance to request a review. This isn't possible where there is no charity involved, that is where the inquiry is about a former charity, trustees of a former charity or someone misrepresenting themselves as a charity.

We want the law to be changed to include information requested from and about former charities and those misrepresenting themselves as charities.

Question 21. Should it be clarified that the notice periods to charities that are subject to a request for information can overlap?

Yes

Please explain in the box below why you think yes or no:

We want the law to be clear about how long the timescales are before we can enforce a request for information notice. Potentially this would be beneficial for all parties involved in such a request for information.

Question 22. Should the legislation be clarified to make clear whether OSCR can approve reorganisation schemes for certain charities that have been established by royal charter, warrant or enactment?

Yes

Please explain in the box below why you think yes or no:

We want the law clarified to set out in what circumstances charities established by Royal charter, warrant or enactment can apply to OSCR to reorganise, which may potentially save these charities time and money.

3. Conclusion

OSCR has welcomed the opportunity to respond to this consultation and we look forward to discussing the prospects of new legislation with Scottish Government.

We are content for the information provided to be released in full, including contact details. Should you wish to discuss any aspect of the response please contact:

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Annex:

Additional Technical Changes to the Charities and Trustee Investment (Scotland) Act 2005

Introduction

In addition to the options outlined in the consultation, there are a number of more technical issues that we would propose be included in any Bill. These are described below.

Section	Sub-section	Issue / proposed change
3	3(6)	<p>Currently this sub-section states that OSCR ‘must’ review each entry in the register.</p> <p>There are currently over 24,400 charities registered in Scotland. It is unrealistic and disproportionate to expect OSCR to review each charity and is not in line with targeted regulation.</p> <p>The proposal is to amend this general obligation and instead provide the option for OSCR to review when necessary.</p> <p>Furthermore, while the aim of this section is to help OSCR keep an accurate register. It does not explicitly allow us to remove an entry from the Register following a notification of wind-up (under section 17) or where there is evidence that a charity no longer exists. Making this explicit would help ensure a more accurate register.</p>
5,10,12	5(2)(a) 10(1)(a) 12(3)	<p>Currently we cannot enter a body with the same name (or a very similar name) on the charity register. This is problematic when a charity is changing its legal form.</p> <p>The proposal is to amend these sub-sections to allow OSCR discretion to enter a body with the same name on the register provided this is only part of a ‘change in legal form’ process.</p>
11	11(3)	<p>At present there is inconsistency between the consents process for a change of name and other consents required under section 16. We propose that this subsection is amended to allow OSCR to direct a charity not to amend its</p>

		<p>name for up to six months (comparable with section 16(6)(b)) or to refuse consent (comparable with section 16(6)(a)).</p> <p>Section 71(Decisions) would need to be amended to reflect changes to decision making processes brought about by the proposed amendments.</p>
7	7(4)(a)	<p>Some charities on the register have constitutions which pre-date the 2005 Act. Where these constitutions refer to the terms 'charity' or 'charitable purpose' the definitions of these do not refer to the 2005 Act or the Charities Act 2011.</p> <p>In order to avoid charities having to amend their constitutions to make them compatible with these Acts we are proposing that the 2005 Act be amended to deem these terms to have compatible meanings.</p>
17	17(1)(a)	<p>Currently charities are required to notify us of a change of principal office or trustee contact for the charity but there is no explicit requirement to provide a new contact. We propose making it explicit that this alternative contact must be provided to ensure that we continue to have a means of contacting every charity.</p>
	17(2)	<p>Currently this sub-section is ambiguous. In essence, it is contrary to the provisions of 17 (1). We propose that it is deleted.</p>
22	-	<p>In order to support our regulatory duties including keeping an accurate register, we collect information from charities in an annual return. We rely on section 22 to request this information.</p> <p>We would like to make it an explicit requirement for charities to submit an annual return. (The actual requirement would be a standalone requirement and would not sit in this section).</p>
23	23(1)	<p>This section requires a charity to provide a copy of its constitution and/or the latest 'statement of account' if requested. However, there is no timescale for compliance. We propose that a 28-day timescale would be reasonable.</p>
	23(1)(b)	<p>When this section states that a charity needs to supply its 'statement of account' it does not include the independent examination or audit report (as outlined in section 44 of the Act). We propose that the requirement to provide the</p>

		independent examination or audit report is made explicit in this section as it would potentially be helpful to a reader of the accounts in understanding the financial position of the charity.
24	24(3)	Currently we can share information with public bodies or office holders. However, it would be helpful to extend this to appropriate professional bodies, including the accountancy bodies outlined in the Charities Accounts (Scotland) Regulations 2006 and the Law Society of Scotland.
33	33(1)	<p>Currently we are required to prepare a report (referred to later as a section 33 report) on any decision to remove or direct a charity which no longer meets the charity test (section 30). Section 30 is disapplied in the case of SCIOs which are directed or removed under the SCIO dissolution regulations and there is no comparable requirement to prepare a report under those regulations.</p> <p>In order to ensure consistency and transparency in our treatment of charities, we propose that a section 33 report should be required for SCIOs when OSCR takes action to remove or direct a SCIO that no longer meets the charity test.</p>
44	44(1)(d)	While section 44 states that charities must have their accounts independently examined or audited, it does not make it explicit that the reports of the independent examiners or auditors must be sent to OSCR. The proposal is to make that explicit in this section to ensure there is a sound legal basis for OSCR receiving this information which is critical in facilitating understanding of the financial position of the charity and ensuring compliance with the 2006 Regulations.
	44(2)	<p>This section makes provision for charities to retain their accounting records for 6 years 'from the end of the financial year in which they are made'. There are two proposals here.</p> <p>The first is to make an amendment so that that it reads 'from the end of the financial year to which they relate' which makes the provision clearer.</p> <p>In addition, the provision does not extend to dissolved charities. One of the key proposals in the current consultation is to extend OSCR's powers to be able to</p>

		investigate former charities and bodies that no longer exist. We therefore propose that this section be amended to ensure that dissolved charities are also required to retain the appropriate six years of accounting records.
46	46(2)(3)	Section 46 requires auditors and independent examiners to report certain matters to OSCR. For the purposes of good record keeping, we propose that it is made explicit that the reports required by subsections (2) and (3) should be submitted in writing which is what we currently encourage.
51	-	This section relates to the general duty of members of a SCIO. It is confusing and difficult to interpret what this means in practice. We propose that the section be deleted.
52	52(1)	This section outlines the information that SCIOs must publish on documents. However, the Scottish Charity Number is not included. We feel that it would be more consistent to include this number as well as the 'known as' names. This would be directly comparable with the Charities References in Documents (Scotland) Regulation 2007. This would add to consistency across the whole sector and would also help in terms of transparency.
55	55(4)	Clarification is needed in this subsection with respect to the effect of the vesting provision where property is held in trust pending incorporation of a SCIO. In particular clarification is needed with respect to the applicability of this provision to unincorporated charities seeking to change legal form to a SCIO.
67	67(4)(a) 67(4)(c)	Section 67 details when it is permissible for a charity trustee or service provider to be remunerated. The drafting of subsection 4 is ambiguous and should be clarified to make sure that at all times less than half of the total number of trustees are: <ul style="list-style-type: none"> (a) Party to a written agreement (as service provider or charity trustee) of the type described in subsection 67(3)(a)(i), (b) Entitled to receive remuneration from the charity's funds otherwise than by virtue of such an agreement, or (c) Are connected to a person who falls within (a) or (b) above.
70A	-	This section permits OSCR, at the request of a charity, to appoint charity trustees to that charity where it has insufficient trustees to form a quorum to appoint charity trustees under the terms of its governing document, or the

		<p>governing document does not provide a mechanism for appointing charity trustees.</p> <p>The proposal is that this should be extended to allow OSCR to appoint charity trustees to a charity in certain limited circumstances. For instance, where there are no charity trustees, or where the existing charity trustees cannot be found or will not act.</p>
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