

## Strengthening Scottish Charity Law Survey

### Proposal 1 – Publishing annual reports and accounts in full for all charities on the Scottish Charity Register

Proposal summary: All charities registered in Scotland are under a legal duty to prepare annual reports and accounts, and submit them to OSCR. There is currently no legal requirement for reports and accounts to be published on the Scottish Charity Register.

Currently OSCR publishes the accounts of charities with an income over £25,000 and all Scottish Charitable Incorporated Organisations (SCIOs). OSCR redacts all personal information before publishing to comply with data protection legislation (i.e. charity trustee names and signatures, photographs, and the signatures and personal details of independent examiners and auditors). The proposal is for OSCR to publish all annual reports and accounts in full on the Register.

Consultation response summary: The vast majority of respondents SUPPORTED giving OSCR an explicit power to publish annual reports and accounts in full for all charities (82%), and felt that it was a sensible proposal.

Concerns were raised that publication should be compliant with data protection legislation and that charities SHOULD be allowed to apply for a dispensation from having their annual reports and accounts published in full in “exceptional circumstances”.

1. In what circumstances should there be a dispensation to full annual reports and accounts publication?

We want to be able to publish annual reports and accounts in full, in as many cases as possible as we know that transparency contributes to public trust and confidence in charities. Removing personal information often makes the annual reports and accounts difficult to understand and therefore takes away from the transparency that underpins public trust and confidence. It is also very resource intensive for OSCR .

However we fully recognise there may be circumstances where it would not be appropriate to publish the names of trustees. As such we would suggest that the existing provision under subsection 3(4) of the Charities and Trustee Investment (Scotland) Act 2005 (“the 2005 Act”) be replicated or expanded to include annual reports and accounts. Under subsection 3(4) a charity can ask us not to publish its principal office or trustee's name and address on the Scottish Charity Register (“the Register”). In order for us to grant this dispensation we must be satisfied that if we were to publish this information it would be likely to jeopardise the safety or security of any person or premises. In our view this would be a suitable test when considering whether to grant dispensation for the publication of trustees' names in annual reports and accounts.

2. If dispensations are made, should some form of annual reports and accounts always be published, for example in a redacted or abbreviated form?

It is important for the public to be able to see the annual reports and accounts of charities. This allows them to review the activities of the charity and access its financial information. Our proposal would be that where dispensation is granted the annual reports and accounts still be published in a redacted form

## Proposal 2 – An internal database and external register of charity trustees

Proposal summary: OSCR currently holds limited information on the 180,000+ charity trustees involved in over 25,000 charities in Scotland. The law only requires the Scottish Charity Register to set out the principal office of the charity or the name and address of one of its trustees. The option proposed is for OSCR to establish a new register of trustees to provide valuable and relevant information to better support effective regulation of charities and their trustees, through improved compliance, investigation and engagement work. The proposals include:

An **internal database** for OSCR's use only i.e. name, date of birth (for identification purposes), home address, email address. This register could also include the names of any person removed as a trustee following an inquiry by OSCR under the 2005 Act or preceding legislation.

A reduced **external register** for public use. This could contain trustee names (including removed trustees) and a principal office or trustee contact address against each charity.

**List of disqualified trustees (removed by OSCR):** publish the names of any person removed as a charity trustee under the 2005 Act or preceding legislation in similar fashion to the other UK Charity Regulators.

Consultation response summary: The majority of respondents reported that OSCR SHOULD be able to collect trustee information for use in an internal database. Some 71% of respondents SUPPORTED the proposal for the names of trustees to be published on the external public register.

List of disqualified trustees (removed by OSCR): The majority of respondents reported that the names of trustees who have been removed following an inquiry by OSCR SHOULD BE PUBLISHED on the external public register (79%).

1. What information should be included in an internal database?

There are an estimated 180,000 charity trustees in Scotland. Charity trustees are the people in management and control of a charity and have legal duties to act in certain ways. We have powers to investigate and take action against trustees where appropriate; however, we currently hold limited or no information on the vast majority of trustees. Having powers to regulate charity trustees without knowing who most of them are can severely hamper our work.

We collect and keep current information for one Principal Contact for each charity - the Principal Contact will not always be a charity trustee, it may be an employee, an accountant or a lawyer.

Our view, based on our experience as a regulator is that collecting trustee details from all charities will give us valuable and relevant information to support the effective regulation of charities and communicate directly with trustees. We believe that having this information would assist in our inquiries, particularly in taking urgent protective action when required in order to protect the assets and beneficiaries of charities. In particular it will allow us to quickly establish 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. It would also provide us with additional contacts for non-submitting charities which would hopefully allow us to engage with them further to ensure that their annual reports and accounts are submitted and to increase public trust and confidence in them. Finally an internal database would allow us to provide targeted guidance and updates to charity trustees.

The information which we would wish included in an internal database would be:

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

It is important to note that any information would be processed in accordance with the Data Protection Act 2018 and the UK General Data Protection Regulation and a full DPIA would be conducted.

## 2. How should the internal database information be kept up to date?

We envisage initial population of the database will be carried out through the annual return submission on our online system. Thereafter we would propose annual updates via the annual return. In addition we intend that the successor system to OSCR Online, which is currently being developed, will allow a charity to update as and when changes take place. We feel having these two options available would minimise the administrative burden on charity trustees.

## 3. What information should be included in a public list of charity trustees?

Information about a charity's trustees is already provided in its annual reports and accounts, but is only available from the charity on request. Even if we were to have the power to publish unredacted accounts it is often the case that names within reports and accounts are abbreviated for example, *J Smith* instead of *John Smith*. We would therefore like to publish charity trustee's full names on their charity's Register entry as we believe this would increase transparency regarding who is in management and control of charities. This would also bring us in line with the practice of the other UK Charity Regulators: the Charity Commission for England and Wales ("CCEW) and the Charity Commission for Northern Ireland ("CCNI"). In addition to information about a charity's trustees already being provided in its annual reports

and accounts, information is also already publicly available in other forms. For example, 20% of charities in Scotland are companies; as such the names of those charity's trustees are listed on the public Companies House register.

#### 4. In what circumstances should there be an exception to being included in a public list?

While we do believe it is important for the public to know who a charity's trustees are, we fully recognise that for some people or for specific types of charities, this could pose a safety issue. We would therefore propose that in cases where we are satisfied that publishing a charity trustee's name would likely jeopardise the safety or security of any person or premises then we could grant a dispensation. As with our proposal for dispensation to publishing full annual reports and accounts, we consider the existing provision at section 3(4) of the 2005 Act could be replicated or expanded to incorporate the external trustee database.

#### 5. How long should a disqualified trustee remain on the list?

We do not seek to publish a list as such. Rather there would be a search facility on our website which would allow a user to enter a person's name and address to check if they have been removed. We would only propose to publish the names of those persons removed as charity trustees under the 2005 Act (or by the Scottish Charities Office under the preceding legislation). By making this information publicly available, charities will be able to undertake the necessary due diligence in terms of the trustees they have on their board. There are of course other reasons why a person may be disqualified as a charity trustee. As such we would also propose to produce guidance with links to the other relevant databases to assist charities to carry out full checks. The other databases include the Companies House Register of Disqualified Directors, CCEW's Register of Removed Trustees and the AiB's Register of Insolvencies

In terms of the 2005 Act there is currently no time limit on the period an individual is disqualified from acting as a charity trustee by the Court of Session following an application by OSCR for their removal. In the circumstances the individual would remain on the list of removed charity trustees unless or until their removal was waived following an application to OSCR.

#### 6. What information should be in the disqualified trustee list?

As stated above, we envisage a search facility rather than a list as such. If there was a partial match with a removed trustee but the user was not sure if they were the same person, they would be advised to contact OSCR for further information. We could then verify, whether the person they were checking was the individual removed as a charity trustee where the information we held enabled us to do so.

The Charity Commission of England and Wales operate a similar search facility. In terms of their search where there is a name match the site displays the person's name, address at the time of Removal, date of the order, charity number, charity name, charity status and notes.

We are legally required to publish an inquiry report where we use our power to suspend a trustee. Where we have applied 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 names of those removed are, therefore, already in the public domain but not in a format that would

facilitate an easy search by names. We wish to make this information available to the public in a more useable and useful format.

### **Proposal 3 – Criteria for automatic disqualification of charity trustees and individuals in senior management positions in charities**

Proposal summary: Changes to the charity legislation for England and Wales have extended automatic disqualification criteria for charity trustees and senior employees (Chief Executive and Chief Financial Officer).

To ensure criteria in Scotland are fit for purpose, the option proposed is to extend the criteria for automatic disqualification to ensure parity with legislation in England and Wales, with the provision that individuals could still apply to OSCR for a waiver from disqualification as the law currently allows.

Consultation response summary: The vast majority of respondents SUPPORTED plans to extend the criteria for disqualification and removal of charity trustees in Scotland to match the criteria in England and Wales (84%).

79% respondents SUPPORTED plans to extend the criteria for disqualification and removal to those in senior management positions.

The responses highlighted a number of concerns, namely what is meant by “certain senior management roles” and how this applies to small charities with few/no paid staff.

There were concerns about the implications for ex-offenders recruited by charities as staff or trustees and whether the proposal could “deprive charities of valuable lived experience”. Some respondents felt that a balance needed to be struck between supporting those with criminal convictions to gain meaningful volunteering and employment opportunities, while simultaneously protecting the reputation of a charity.

#### 1. What factors should be considered in defining a ‘senior manager’?

In Scotland, over 51% of all charities have an income of less than £25,000 and only two-thirds of all charities have staff. In large charities with staff, chief executives and finance directors may have a significant power and control over a charity and its money. Where a charity is smaller but still has staff, the titles of those that have a significant level of control might be different.

The Charities Act 2011 provides a definition of a senior management function. In our view this definition would be more helpful than using job titles. Following the definitions set out in the Charities Act 2011 would also help achieve the consistency which we believe is needed across the UK in terms of disqualification. It would be our intention, if enacted, to produce succinct guidance for the sector to help them understand who was covered.

#### Criteria for automatic disqualification

We note the concerns that implications of this proposal could deprive charities of valuable lived experience of ex-offenders. It is important to note that should the disqualification criteria

be extended this would only disqualify those individuals convicted of criminal offences covered by the extended criteria and they could still apply to OSCR for a waiver of the disqualification. In addition the disqualification would only apply to the roles of trustees and those captured under the definition of 'senior manager'. It would not prevent ex-offenders filling other staff/voluntary roles where appropriate or providing advice or experience to the charity trustees in a consultative role.

## Proposal 4 – A power to issue positive directions to charities

Proposal summary: OSCR has legal powers to issue specific types of direction to charities and charity trustees. Most of OSCR's powers are preventative, requiring charity trustees or others not to take particular actions. OSCR cannot direct charity trustees to take a specified positive action to remedy non-compliance or protect charitable assets.

One option would be to give OSCR a power to issue positive directions. The Charity Commissions for England and Wales, and Northern Ireland both have a wide ranging power of positive direction. If OSCR had such a power this could enhance its inquiry and enforcement powers in terms of protecting charitable assets and supporting good governance.

A positive direction could be coupled with a corresponding obligation on OSCR to publish an associated inquiry report, which could improve public confidence that OSCR was taking positive steps to remedy misconduct and protect assets. If a charity failed to comply with a positive direction that OSCR issued, it could be classed as misconduct. This could mean that enforcement action would be taken against the charity or trustees as appropriate. This is currently the case if a charity fails to comply with a direction from OSCR.

Consultation response summary: The vast majority of respondents said that OSCR SHOULD be given a power to issue positive directions (83%).

There was more mixed feedback regarding whether the power to issue positive directions should be wide ranging or a specific power. Just over half of respondents that said that OSCR should be given power and a remit to issue positive directions and that this should be WIDE RANGING.

1. If a positive power of direction were to be specific, what areas should be subject to the power, or are there any areas that should not fall within the power?

Our preference is for a power of positive direction to be wide ranging. We believe that it is this type of power that would be best suited to a proactive and preventative approach to regulation. The charity sector is very diverse and the issues and situations that we encounter in our regulation of the sector vary considerably.

However if the powers were to be specific we consider those set out below would aid our existing inquiry powers. In our experience the issues that such directions could address are

those that often cause protracted inquiries. Early intervention by means of these positive directions would hopefully ensure that the issue is resolved quickly and the charity can then refocus its attentions on its charitable activities.

- 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 and submit annual accounts

## 2. How long should a charity have to comply?

At present we have one existing power of positive direction: to direct a charity that no longer meets the charity test to take the steps we consider necessary for it to do so. There is no timescale set out in the legislation to say how long the charity has to comply. When we have used this power in the past we have used our discretion to set a timescale that we consider reasonable in the circumstances. We would propose that any additional positive powers of direction also afford OSCR this discretion. As set out above the issues we encounter in our inquiries into charities varies vastly and a specific timescale would not be suitable. This would be in line with the other UK Charity Regulators as neither the Charities Act 2011 nor the Charities Act (Northern Ireland) 2008 prescribe a timescale for compliance.

We would highlight that where a direction is issued under the 2005 Act charities have the right, in terms of this Act, to seek a review of the decision and then appeal in terms of Chapter 10 of the 2005 Act. It would therefore, in our view, be appropriate, if we were given the power to issue positive directions, that charities also have the power to request a review of these decisions and the power of appeal to First-tier Tribunal for Scotland, Upper Tribunal for Scotland and ultimately the Court of Session.

## 3. What should be the consequences of non-compliance with a positive direction?

In terms of section 66 of the 2005 Act failure to comply with a direction is misconduct in the administration of the charity and in such circumstances we can use our enforcement powers where appropriate. Should charity trustees fail to comply with a positive direction this would be misconduct.

## **Proposal 5 – Removal of Charities from the Scottish Register that are persistently failing to submit annual reports and accounts and may no longer exist**

Proposal summary: All charities in Scotland are under a legal duty to prepare annual reports and accounts, and submit these to OSCR. Failure to do so can be regarded as misconduct. There are currently a number of charities where OSCR does not have up to date reports and accounts - some of which have never submitted accounts. It is thought that some charities no longer exist but have failed to notify OSCR to be removed from the Register.

OSCR endeavours to understand and pursue defaulting charities, but with limited return. While OSCR has a legal power to appoint someone to prepare accounts for a

charity, and has the power to make inquiries into charities, it can only use these powers if it has current information on where the charity trustees or principal office is.

Consultation response summary: The vast majority of respondents reported that OSCR SHOULD be able to remove charities from the Scottish Charity Register if they have persistently failed to submit annual reports and accounts (87%).

Almost three-quarters of respondents reported that if a charity failed to comply with a positive direction to prepare annual reports and accounts, that this SHOULD be classed as trustee misconduct.

1. What factors need to be considered to define 'persistent' failure to submit annual reports and accounts?

If a charity has not submitted its annual reports and accounts for a specific period of time, and is failing to engage with OSCR we would suggest that this is considered to be a persistent failure. We are currently suggesting that this period of time be two consecutive years.

2. What steps should the Scottish Charity Regulator (OSCR) take prior to a decision to remove? Should a positive direction to provide accounts always be required first?

As set out above we would seek to engage with the charity to ascertain the reason for non-submission and to encourage compliance. Where such engagement proved fruitless we would issue a positive direction to prepare and submit accounts. However there are non-submitting charities on the Register whose principal contact information is out of date and has not been updated by the charity. Where we cannot, through internet searches, find the current address of the charity or contact details for current trustees we would be unable to engage with the charity and there would be no purpose served in issuing a positive direction to prepare and submit accounts on the out of date address. In such cases, taking all factors into account, we would remove the charity without first issuing a positive direction.

## **Proposal 6 – All charities in the Scottish Charity Register to have and retain a connection in Scotland**

Proposal summary: To be a registered charity in Scotland a body must have wholly charitable purposes and provide public benefit, but there is no requirement for the body to have any connection to Scotland (with the exception of SCIOs). This means that OSCR might be compelled to register a charity that meets the charity test but has no activities in Scotland and no trustee connection with Scotland.

The proposed option would be to require all charities in the Scottish Charity Register to have, and retain, a connection to Scotland. This would not preclude the registration of cross-border charities, which could continue to register with both the Charity Commission for England and Wales and OSCR. However, this option would mean that charities established under the law of a country or territory other than Scotland, which are managed

or controlled wholly or mainly out with Scotland, do not occupy land or premises in Scotland and do not carry out activities in any shop or similar premises in Scotland, would no longer be able to be entered on the Register.

Consultation response summary: The vast majority of respondents SUPPORTED the proposal that all charities registered in Scotland should be required to have and retain a connection with Scotland (82%).

A strong message from the consultation responses was that what is meant by “to have, and retain, a connection with Scotland” would need to be clearly and sufficiently defined. While some respondents went on to suggest that the connection needed to be “strong” or “substantial”, others called for more detail on what would be regarded as “enough connection”. There was strong support for a “sufficiently broad” rather than narrow definition of connection to be used.

Concerns were raised around the implication this proposal might have for charities with a registered base in Scotland but where the area of benefit is overseas.

1. What factors should be considered when defining what ‘have and retain a connection to Scotland’ means? Does this have to require a physical presence in Scotland, such as an office address or trustee address?

Our desire is to be able to effectively regulate the charities on the Register. Where charities are based overseas and they carry out all of their activities overseas it would be extremely difficult for OSCR to effectively regulate them. Should there be misconduct in the administration of such a charity or the charity’s assets were being misapplied OSCR and the Scottish Courts would be unable to take any effective enforcement action.

It is not our intention to exclude cross border charities (those registered in England, Wales and Northern Ireland) from the Register. The definition would therefore need to be broad enough to ensure these bodies could continue to be dual registered.

Factors which could be considered when considering ‘have and retain a connection with Scotland’ would not necessarily require the charity to have a physical presence in Scotland such as an office or trustee address. In light of COVID there will be more homeworking and charities may decide to give up their office premises.

A possible test could be:-

*Charities established under the law of a country or territory other than Scotland, are managed or controlled wholly or mainly outside of Scotland, do not occupy land or premises in Scotland and do not carry out any activities in Scotland would no longer be able to be entered on the Register.*

