

YOUR VIEWS – STRENGTHENING SCOTTISH CHARITY LAW

Participant information pack

This paper sets out the topics for discussion. It provides a summary of six proposals and an overview of the consultation responses. It then asks questions on each proposal designed to address issues arising from the consultation responses. Full details of the consultation, analysis and summary can be found [here](#).

Strand A: enhancing transparency and accountability in Scottish charities

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”.

Questions for the proposal and feedback:

Q: in what circumstances should there be a dispensation to full annual reports and accounts publication?

Q: if dispensations are made, should some form of annual reports and accounts always be published, for example in a redacted or abbreviated 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.

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

Questions for the proposal and feedback:

Q: what information should be included in an internal database?

Q: how should the internal database information be kept up to date?

Q: what information should be included in a public list of charity trustees?

Q: in what circumstances should there be an exception to being included in a public list?

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%).

Q: how long should a disqualified trustee remain on the list?

Q: what information should be available in the list?

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 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 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.

Questions for the proposal and feedback:

Q: what factors should be considered in defining a ‘senior manager’?

Q: should automatic disqualification criteria always align with charity law in other parts of the UK?

Strand B: increased regulatory powers for OSCR

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.

Questions for the proposal and feedback:

Q: 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?

Q: How long should a charity have to comply? What should be the consequences of non-compliance with a positive direction?

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.

Questions for the proposal and feedback:

Q: what factors need to be considered to define 'persistent' failure to submit?

Q: what steps should OSCR take prior to a decision to remove? Should a positive direction to provide accounts always be required first?

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.

Questions for the proposal and feedback:

Q: 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?

Q: should the need to have and retain a connection to Scotland apply to existing charities or only new charities?