

Consultation on Scottish Charity Law 2019

I: Publishing annual reports and accounts in full for all charities on the Scottish Charity Register.

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

Yes

This is a straightforward measure to improve transparency and accountability, and as charities are already required to produce annual reports and accounts and submit them to OSCR, there is no additional burden for charities.

A considerable number of charities already publish their annual report and accounts on their own website, and this should be recognised as good practice. Many others have them published by other regulators; e.g. the 20% of Scottish charities that are also companies already have their annual reports and accounts published in full by Companies House.

The 2005 Act only allows members of the public to request the most recent accounts of a charity, and it is not clear whether the measures proposed in the consultation document refer only to publishing the most recent annual report and accounts.

The interests of transparency would be better served if all previous years' annual reports and accounts were publicly accessible via the register (as is the case for charitable companies on the Companies House website). As OSCR has the past annual reports and accounts of charities these should be made available, backdated to the charity's entry on the register.

In addition to publishing annual reports and accounts, it would greatly aid transparency of charity governance if the governing documents of all charities were publicly available. This is already the case for charitable companies, whose Memorandum & Articles of Association are available on the Companies House website.

OSCR already collects governing documents of all charities when they first register, and then when changes are made (some categories of change require prior approval, others must be notified within 3 months). Implementing this proposal would reduce OSCR's administrative burden: currently it is necessary to manually extract the charitable purposes to populate the register listing.

Whilst the details of subsidiary bodies should be available from the annual report and accounts, in the interests of transparency it would be preferable if these were enumerated as part of a charity's main listing on the register.

It is laudable that OSCR has made the basic details, updated on a daily basis, of the full list of Scottish charities, and a list of the 300 highest income charities, available for download free of charge. This does however throw up some anomalies: 3 of the 13 highest income charities (Glasgow Caledonian University, the Court of the University of the West of Scotland and the Church of Scotland), each with income of over £100 million per annum, are listed as "unincorporated associations".

Given the size of these bodies, and the scale of assets involved, it is essential that governance arrangements are clear: this includes appropriate classification, publication of governing documents and clarification of who has ultimate responsibility and liability for assets.

Q2 Do you think there is any information in charity annual reports and accounts that should not be published on the Scottish Charity Register?

No

OSCR should have an explicit power to publish annual reports and accounts of all charities in full, including personal information (with the exception of signatures), on the Scottish Charity Register. This would be consistent with other charity regulators in the UK.

The consultation document states that “In order to comply with data protection legislation. OSCR has been redacting all personal information from the accounts before publishing (including charity trustee names and signatures, photographs and the signatures and personal details of independent examiners and auditors). This potentially diminishes the utility and quality of the accounts, as well as being a significant administrative burden.” If charity reports and accounts were published in full it would remove this administrative burden from OSCR.

There may be some concerns about publication of signatures (though it should be noted that other regulators publish them). One way to address these concerns whilst minimising the administrative burden on OSCR would be to permit charities to submit unsigned versions of their annual reports and accounts for upload to the Register (this could be either instead of or alongside the signed version).

There may be further concerns with respect to naming trustees in the annual report and accounts, (and this overlaps to some extent with section 2 of the consultation as discussed below) however, this is a fundamental point of transparency and accountability. It should be noted that section 23 of the 2005 Act puts a duty on charities to provide copies of their most recent accounts to members of the public on request.

Q3 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, but in very limited circumstances.

For a small number of charities 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.

For example, 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: under section 3(4) of the 2005 Act this trustee who can get dispensation to have information excluded from the Register where “OSCR is satisfied that including that information is likely to jeopardise the safety or security of any person or premises.”

However, in the interests of transparency, such dispensations should be given sparingly and apply to the address, rather than the name of the Trustee. More generally, charities should be encouraged to identify a principal office in all cases.

2: An internal database and external register of charity trustees

Q4 Should OSCR be able to collect the trustee information noted above for use in an internal database?

Yes

This is a fundamental point of accountability and is essential for the implementation of some of the measures discussed in later sections of the consultation. OSCR is currently charged with regulating charities without any clear means of identifying who controls the charity (it collects information on trustees at the initial registration, but this is not updated over time). It will also be difficult to establish whether an individual is acting as a trustee of more than one charity.

A further issue is that the current reliance on a single principal contact increases the likelihood of OSCR losing touch with a charity, especially those without a permanent office base, and creates the opportunity for one individual (trustee or member of staff) to “lock out” other trustees.

Trustee names, addresses and contact details should be collected in the annual return that all charities must submit within nine months of their accounting year end. This will capture changes that take place at the charity’s AGM (which is typically when most such changes occur), but there should also be a facility for changes at other times to be reported.

Q5 Should the names of trustees be published on the external public register?

Yes

Trustees of charities that are also companies already have their names published on an external register, and the publication of trustee names and profiles on charity websites is commonplace (and should be encouraged as good practice).

It should also be possible, in the proposed external database, to check whether an individual serves as a trustee of more than one charity (in the same way that this is possible with company directors on the Companies House website).

As OSCR does not have records of past trustees it will not be possible to backdate this information, however, the external database of trustee names should not be restricted to current trustees, but going forward this should include all recorded trustees, noting those who are current and those who have resigned (as is the case for charitable company directors on the Companies House website).

Q6 Should the names of trustees who have been removed following an inquiry by OSCR, be published on the external public register?

Yes.

In addition to advancing transparency, a public list would assist charities to undertake due diligence into their own trustees.

Q7 Do you think trustees should be allowed to apply for a dispensation (exemption) from having their name published on the external public register?

Yes, but...

OSCR notes that “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”¹ but does not attempt to quantify “small”. It is unclear therefore how many cases there might be where there are genuine issues (and where they are, these are illegal acts – it might be preferable to make sure that these laws are properly enforced).

If dispensations are granted they should be on a case-by-case basis, rather than as a blanket exemption for a charity or a group of charities, in order to maintain the principle of transparency of charity governance. OSCR should prepare an annual report detailing the number of dispensations granted.

3: Criteria for automatic disqualification of charity trustees and individuals employed in senior management positions in charities

Q8 Should the criteria for disqualification and removal of charity trustees be extended to match the criteria in England and Wales?

Yes

It is an obvious anomaly that a person who has been disqualified from acting as a charity trustee in the rest of the UK is not automatically so disqualified in Scotland.

The criteria for disqualification in the rest of the UK seem reasonable and should apply in Scotland.

Q9 Should the criteria for disqualification and removal also be extended to those in certain senior management positions?

Yes

In principle this seems a sensible measure but “certain senior management positions” is undefined, and should be clarified before legislation is passed.

4: A power to issue positive directions to charities

Q10 Should OSCR be given a power to issue positive directions?

Yes

As with a number of the powers proposed, most would assume that OSCR has such powers already.

Q11 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:

¹ <https://www.oscr.org.uk/media/3451/2018-03-09-modernisation-of-the-2005-act-proposal-paper.pdf> p9

Specific

OSCR's existing powers are specific², so it is appropriate that new powers are equally specified, and designed to meet specific objectives, e.g. to remedy non-compliance or protect charitable assets.

Q12 If a charity failed to comply with a positive direction that OSCR had issued, should this be classed as trustee misconduct?

Yes

In principle this is a reasonable proposal but before action is taken it would need to be clear that individual trustees have been made aware of the positive direction issued by OSCR, and have had the opportunity to comply with that direction. The measures proposed in section 2 to create an internal database of trustees and their contact details will help in this regard.

Trustees have a duty to ensure good governance, however there are circumstances where one or more trustees (or staff) can misuse powers and effectively lock-out other trustees from engagement: one example might be where a trustee has tendered their resignation, however, for whatever reason, this change has not been registered with OSCR.

5: Removal of charities from the Scottish Charity Register that are persistently failing to submit annual reports and accounts and may no longer exist

Q13 Should OSCR be able to remove charities from the Scottish Charity Register if they have persistently failed to submit annual reports and accounts?

Yes

Preparation and submission of accounts is a key element of the transparency and accountability of charities – organisations that persistently fail to submit annual reports and accounts should not be able to claim the benefits of charitable status.

Q14 Should OSCR be given a positive power of direction to direct a charity to prepare annual reports and accounts?

Yes

Q15 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

As with Q12 above before action is taken it needs to be clear that individual trustees have been made aware of a direction issued by OSCR, and have had the opportunity to comply with that direction.

² <https://www.oscr.org.uk/media/1770/2014-12-22-oscr-inquiry-formal-powers-factsheet.pdf>

Q16 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):

The consultation document does not define “persistently” – failure to supply accounts for two years should be sufficient to demonstrate that the organisation is not complying with its obligations.

The measures proposed in section 2 to create an internal database of trustees and their contact details should assist in allowing OSCR to remind all trustees of their responsibilities in this regard.

6: All charities in the Scottish Charity Register to have and retain a connection in Scotland

Q17 Should all charities registered in Scotland be required to have and retain a connection with Scotland?

Yes

It is difficult to see the merit in permitting the Register to include organisations that have no connection to Scotland. OSCR has suggested that there are just three such charities currently registered, nonetheless it is a loophole that could be exploited by others and should be closed.

7: Inquiries into the former charity trustees of bodies which have ceased to exist and bodies which are no longer charities

Q18 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

Again these are powers that most would imagine that OSCR already has and we would regard this as closing a loophole which could otherwise undermine public confidence in charities

8: De-registered charities’ assets and public benefit

Q19 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

There seems little value in the stipulation that former charities must continue to apply previously charitable property (and derived income) for their former charitable purposes if there is no requirement for them to be used to provide public benefit.

9: The speed and efficiency of OSCR’s powers to gather information when making inquiries

Q20 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

As previously it would probably come as a surprise to many that OSCR does not have these powers already.

Q21 Should it be clarified that the notice periods to charities that are subject to a request for information can overlap?

Yes

This seems a sensible clarification.

10: The reorganisation of charities established under royal charter, warrant or enactment

Q22 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

The proposed change would only affect a small number of charities but would save them and Parliament considerable time and expense if it dispensed with the need for private bills.

Unfortunately this consultation has been very narrowly framed, with no opportunity for consultees to suggest additional measures or areas for consideration

As the consultation document notes, it has been 17 years since the Scottish Charity Law Review Commission (the 'McFadden report') proposed establishing a Scottish Charity Regulator and more than 13 years since the passage of the Charities and Trustee Investment (Scotland) Act 2005 which established the legislative framework for charities in Scotland, and the Scottish Government has a responsibility to ensure that the legislative framework is fit for purpose and is protecting and serving the public interest.

Much has changed in the succeeding years, including our understanding of "the public interest", so it is disappointing that the opportunity has not been taken for a broader discussion of whether the general framework of charity regulation, and in particular the charity test, and OSCR's interpretation and implementation of it, still meets our current and future aspirations.

Below are noted a few areas where there are issues around charitable status and where further discussion and consultation would be welcome.

Charitable status and sustainable development

There is no question that Scotland's charities make a huge contribution to Scottish life, and that the 15 specific charitable purposes collectively represent the public's general view of charitable activity. Nonetheless, the current review would be an opportunity to at least seek confirmation as

to whether the charitable purposes are indeed still fit for purpose, or whether there are any amendments or additions that might be appropriate.

One such possible amendment or addition would be the furtherance of sustainable development. Although the term has been in use for many years its importance has only strengthened in the past decade and it is a requirement for community bodies wishing to use Community Right to Buy provisions that Ministers have given it written confirmation that they are satisfied that the main purpose of the body is consistent with furthering the achievement of sustainable development.

Charitable purposes and public benefit

As section 8 of the consultation demonstrates, there is a potential weakness in the separation of charitable purposes and public benefit in the charity test. Section 8 is concerned with situations where activities may fall under charitable purposes but provide no public benefit, for example an educational organisation which used formerly charitable assets but ran on a purely commercial basis.

There are also potential situations where delivery of charitable purposes may run contrary to the public interest. The advancement of religion is one of the charitable purposes, and establishment and management of places of worship is considered to be of public benefit. If however a religious charity were to seek to acquire all property within a settlement with the intention of converting it all to places of worship, few would consider this as in the public interest.

A second example might be where all land around a settlement is owned by a charity with the charitable purpose of the advancement of environmental protection or improvement. Such a charity, might, if so inclined, use this as a pretext to frustrate community and sustainable development.

One option would be to strengthen the charity test to clarify that the public interest, and public benefit, override charitable purposes in such situations and to ensure that charities could not use their charitable purpose to justify acting against the public interest.

Public authorities and charitable status

Most members of the public, if asked, would expect that charities are separate from government, and would not imagine that public authorities can benefit from charitable status.

The charity test appears clear: “an organisation cannot become a charity, or continue to be one, if its governing document allows Scottish Ministers to direct or control its activities” however in practice this is not the case. The Historic Environment Scotland Act 2014 states that “The Scottish Ministers may give Historic Environment Scotland directions (of a general or specific nature) about the exercise of its functions.” and that “Historic Environment Scotland must...comply with any directions given to it by the Scottish Ministers”, however Historic Environment Scotland has charitable status.

A related development in recent years has been the establishment by Local Authorities of Arm's Length External Organisations (ALEOs), many of which have a Local Authority as sole member.

Following public concerns about specific ALEOs, OSCR issued a report in 2015 which recognised that there are potential risks when charities operate within the control of another body, because trustees' decisions may be inhibited by the other party and they cannot act in the interests of the

charity. For ALEOs this is a particular concern where councillors make up a significant proportion of the trustees.

Consideration should be given to using the opportunity presented by the review of charity law to clarify the issues around the charitable status of public authorities, to ensure transparency and public trust, and ensure that all such charities operate in the public interest.