

Submitted online:

28 March 2019

Dear Sir/Madam,

Consultation on Scottish Charity Law

On behalf of ICSA: The Governance Institute, I am pleased to respond to your consultation on the proposed changes to Scottish charity law.

ICSA: The Governance Institute is the professional body for governance. We have members in all sectors and are required by our Royal Charter to lead 'effective governance and efficient administration of commerce, industry and public affairs'. With over 125 years' experience, we work with regulators and policy-makers to champion high standards of governance and provide qualifications, training and guidance.

We are the professional body qualifying and supporting chartered secretaries and governance, risk and compliance professionals in all sectors of the UK economy. Members are educated in a range of topics including finance, company law, administration and governance, which enables them to add value to any organisation.

ICSA has an extensive pedigree in the governance arena, advising governments and regulators on company law, charity law and governance issues. The breadth and experience of our membership enables ICSA to access a variety of applied experience in order to provide insights into effective practices across a range of organisations. Our members' wealth of expertise and experience, together with their detailed understanding of charity and company legislation and regulation, has informed our response to this consultation.

General comments

We welcome the current consultation and its aims to ensure that the Office of the Scottish Charity Regulator (OSCR) is effective in its regulatory function and promotes transparency, accountability and public confidence. Such public confidence is maintained and promoted by the knowledge that charities are run by those competent and fit to do so and that they are subject to robust, rigorous regulation. This has been and continues to be a difficult time for charities, with the public rightly expecting the highest standards of behaviour and decision making in return for the privileged position which charities occupy. The need to preserve this trust was one driver behind the recent legislative activity elsewhere in the UK. While new legislation cannot of course preclude the possibility of poor behaviour it is nevertheless a crucial part of the framework to promote the greatest degree of public trust and confidence in the sector. Scotland has, to some degree, not moved at the same pace in this respect and we welcome those proposals which seek to bring certain areas of Scottish charity law into line with that in other jurisdictions. This reduces the risk of the Scottish charity sector witnessing



misconduct and mismanagement in general, and also in being seen as a comparatively 'soft touch' when compared to the rest of the UK's legislative and regulatory framework.

Consistency of charity law across jurisdictions will also assist charities and those responsible for their governance in understanding their legal and regulatory obligations. This will be the case particularly for those charities which operate cross-border, but a more uniform legal framework and set of expectations will benefit all charities and trustees and will facilitate the wider public's understanding of charity regulation.

It is also important, however, that the regulation of charities is carried out in a proportionate manner. Many charities have limited resources and are run by trustees who donate their time voluntarily. While we acknowledge that the legal and regulatory obligations which charities and trustees are under are serious and serve an important purpose, we also welcome OSCR's commitment to carry out its functions in a 'pragmatic and proportionate way'.

Specific responses

SECTION 1: Publishing annual reports and accounts in full for all charities on the Scottish Charity Register

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

Yes

In the interests of transparency and accountability and in maintaining trust in the sector, it is important that the public has access to information about a charity's activities and use of charitable funds. The annual report and accounts are a key mechanism for providing this information. Ideally, such documents would be provided by individual charities on their website. However, the OSCR website represents a more centralised resource. Moreover, where charities do not routinely publish these documents online, requests from members of the public for this information would entail increased administrative activity to fulfil. This can be offset by charging a small administration fee.

Concerns have been voiced with regard to such a proposal that the annual report and accounts might be misinterpreted or used unscrupulously by those with a particular agenda against a charity, group of charities or the sector more generally, and who might take the information provided out of context. However, many charities already publish this information on their website and there is a further argument that these documents provide charities with an opportunity to set their activities in the context of their charitable purpose and explain to a range of stakeholders how their use of charitable funds progresses this. We are of the view that the openness and accountability which publication provides outweigh the risks of wilful misinterpretation of the information.

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?

No

It is clearly sensible to remove trustee signatures from published documents. However, much of the other information cited as being currently redacted will be in the public domain, particularly if charities operate transparently, with accountability and engage in effective communication with their stakeholders and the public more generally. As such, we do not consider that they should be removed.

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?

No

We explain in response to Question 7 that we appreciate there are circumstances in which the publication of trustees' names would be inadvisable, perhaps owing to the sensitivity of the area in which the charity operates. However, we are of the view that this argument does not extend to the publication of the charity's report and accounts. The public needs to know what charities are doing to meet their objects and these documents are a vital mechanism for that. Charitable status is a privilege which confers benefits on those who occupy it. However, this comes with a responsibility to exercise a high standard of transparency. There would have to be exceptional circumstances to warrant a charity withholding information from its annual report and accounts.

SECTION 2: An internal database and external register of charity trustees

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

While we are in favour of applying the greatest degree of transparency and accountability to details of trusteeships held, we are cognisant of the fact that circumstances can exist where providing the identities of trustees on a public register would be inappropriate or might lead to adverse consequences. This might be due, for example, to the nature of the area of the charity's activities. Trustees of charities assisting victims of domestic violence or charities involved in or linked to medical research or family planning, for instance, might benefit from their names being withheld from the public.

OSCR should define the grounds on which a dispensation might be granted, setting out criteria to be met, along with possible examples of what would constitute a successful request. An appeal process should also be in place to allow trustees to challenge a decision not to grant dispensation. This should be made clear as part of the dispensation application.

If you wish to explain any of your responses to the questions in Section 2, please do so 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 consider it essential to OSCR fulfilling its role as the regulator of charities in Scotland that it has and maintains an accurate and up-to-date register of trustees. This is the case elsewhere in the UK. The current absence of such a register of trustees in Scotland is a serious obstacle to effective regulation and oversight, and hinders OSCR's ability to take steps proactively in other charities with the same trustee(s), where necessary. Examples of how this affects its work are provided in our responses to other questions in this consultation. It is also important for potential donors, supporters and employees to ascertain who is responsible for leading a charity.

OSCR should consider the collection of information for the internal register which covers: name, contact details (other than the chosen registered address for the charity), date of birth, commencement of trusteeship, and other trusteeships held. The information which is published on the public register need not be particularly detailed and would not cover all of the data held on the internal register. It need not contain, for example, the amount of data published for directors on the Companies House website. It would suffice to provide the names of each trustee for each charity as well as other trusteeships held by each individual to enable transparency as regards conflicts of interest. These pieces of information are currently provided on the Charity Commission for England and Wales website. One useful addition – which is currently published by Companies House – is the date on which a post was taken up. This would provide a clear indication of how long a trustee has been in service. Whilst the Scottish Governance Code for the Third Sector does not explicitly refer to term limits for trustees, this information might be of use to the wider public and those with an interest in how charities are run.

The details of a charity's trustees could be confirmed each year as part of the annual return. Additionally, a facility to individual charities to update these details as and when they change would provide OSCR with the most accurate data with which to carry out its regulatory duties and provide the public with the most useful information on the charities in which they are interested. Moreover, if a change of details prompted the provision of information and guidance from OSCR, this would improve the interaction between the regulator and charities and their trustees.

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

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 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):

Bringing the automatic disqualification criteria into line with that elsewhere in the United Kingdom would be a positive move.

It is important to safeguard public trust in the sector by ensuring that those responsible for leading charities are seen as fit to do so and enforcing appropriate restrictions on who may take up trusteeships and senior management roles is a key part of this. The additional criteria for automatic disqualification set out in the Charities (Protection and Social Investment) Act 2016 are sensible, aimed at excluding those whose behaviour is unfit for leading a charity. The public rightly expects that the charity sector is protected from such individuals. The concern that Scotland might be seen as a 'soft touch' if its criteria for disqualification covered fewer offences is a reasonable one. It is fair to assume that the jurisdiction might be targeted by those who would be unable to take up a position at a charity in England or Wales, for example.

Consistency across jurisdictions is clearly desirable in terms of trustee understanding of what is expected of them, the legal and regulatory responsibilities they owe as trustees and restrictions placed on the eligibility to serve. This is of increased importance when considering charities which operate cross-border. Consistency will also reduce potential confusion for those members of the public who may be interested in the sector's regulation generally or in a particular charity's funding or charitable activity, including identifying who leads a charity and is ultimately accountable for its success or failure.

OSCR will no doubt be aware of concerns that the extended disqualification criteria represent a further obstacle to trusteeship for affected individuals, potentially depriving charities of valuable lived experience. Consequently, the waiver process will be a key mechanism for ensuring that, where appropriate, those with value to add to a charity may still serve, but the public can be reassured that OSCR has applied the correct safeguards.

We support the extension of the disqualification criteria to those exercising senior management functions within a charity. Senior managers have a more hands-on role within a charity and generally have greater exposure to a charity's assets and beneficiaries than do the trustees. As such, it is essential that they are of the correct character to fulfil that role. It is worth noting, as a related issue, the influence from a governance perspective which some notable chief executives, for example, have had over the decision making within charities which was rightly the preserve of the trustees.

Due consideration will need to be given to employment law matters affecting such a proposal, and it might help in this regard to take note of the Charity Commission for England and Wales' experiences in their adoption and implementation of this power.

As an essential part of enforcing this extension, and assisting charities in performing adequate due diligence when recruiting new trustees, a searchable register of disqualified trustees should be made available.

SECTION 4: A power to issue positive directions to charities

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?

Wide ranging

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 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?)

We agree that OSCR should be given the power to issue positive directions to a charity as a result of an inquiry. Again, this is something that we feel would bring consistency to charity regulation across the whole of the UK. However, careful thought needs to be given to the direction to be provided and its potential impact not just on the individual charity, but also on the wider sector and the general public. In some circumstances a specific power will be most advantageous, whilst in others that which is more wide-ranging would be beneficial. If there is only one choice available, a wide-ranging power is likely to provide more OSCR with more flexibility.

A clear decision or non-decision to act in a way not consistent with a direction from OSCR is highly likely to suggest misconduct and misadministration by the trustee body. Treating the failure to comply with a positive direction as misconduct, thus making available associated enforcement action, would improve the implementation of the power and would put it on an equal footing with that relating to other OSCR directions.

We also agree that a positive direction be coupled with the relevant inquiry report, demonstrating the nature of problem and the steps which OSCR has taken to remedy it. This would reassure the public of the role which the regulator plays in identifying areas of concern and in supporting good governance. It might also be of value to the public if OSCR made available, at a high level, statistics regarding the use of its extended powers. This would serve to illustrate the role it plays, but also offer reassurance that those powers are being used sparingly.

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

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 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):

We agree that OSCR should have the ability to remove charities from the Register if they fail to prepare their annual report and accounts. This is a fundamental legal obligation. The information contained in the report and accounts is important both in terms of transparency and public trust and also OSCR's regulatory function. A consistent failure to submit annual accounts would also strongly suggest that other areas of good governance are not being observed by a charity and this might warrant further attention from the regulator.

However, we are of the view that the circumstances in which this action would be taken need to be clarified. The consultation currently frames this in terms of a charity having 'persistently failed' to submit the documents. This would perhaps benefit from a defined timeframe, for example a failure to submit for three years or five years consecutively. It is not clear from the current wording whether intermittent or inconsistent submission of the documents would be treated as a persistent failure. It may be useful to consider whether it would be appropriate to use other mechanisms to encourage the submission of accounts before removal is applied. This might include, for example, 'naming and shaming' charities who have consistently failed to submit.

Paragraphs 53 and 58 of the consultation document highlight that this issue is related to that addressed earlier in the consultation regarding OSCR's holding of accurate details of charities' trustees. It is clear that the absence of these is hampering OSCR in the fulfilment of its regulatory role. The first step must be to ensure that the regulator does have current details of trustees in the form of an appropriate register. OSCR could then be reasonably confident that its endeavours to obtain annual reports and accounts were directed at the relevant individuals. Issuing a positive direction to prepare accounts would be of limited effectiveness if OSCR does not hold accurate relevant details. Failure to provide these in accordance with the timeframe suggested above could then lead to removal from the Register or other enforcement actions.

The order in which the consultation has presented its questions may not be indicative of the order in which action would be taken. However, we would suggest that the issue covered in Question 14 (OSCR's positive power to direct the preparation of accounts) might come prior to Question 13 (removal from the Register for persistent non-submission).

Classing failure to comply with a positive direction to prepare annual reports and accounts as trustee misconduct would underline that in not providing these documents a charity is in breach of a legal obligation. More practically, it would also provide OSCR with useful enforcement options. As noted in the consultation document, these too will be ineffective in the absence of trustee or principal contact details.

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

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

Yes

With the exceptions mentioned below, we are of the view that charities registered with OSCR should have a meaningful connection with Scotland. This will help OSCR to effectively regulate the charities on the Register.

It might be desirable to set out more clearly what constitutes a ‘meaningful connection’. Paragraph 62 indicates that the lack of a connection might be interpreted as charities which are ‘managed or controlled wholly or mainly outwith Scotland, do not occupy land or premises in Scotland and do not carry out activities in any shop or similar premises in Scotland’. For the purposes of establishing what a connection is it might, for example, be worth considering activities or services which are not delivered through a ‘shop or similar premises’. There are a variety of methods of providing charitable services which do not require premises of any kind, much less a shop. A more definitive set of criteria, perhaps with examples of what meets the requirement, might be useful to establish consistency.

Another factor which might warrant consideration is where a charity previously provided services or otherwise operated within Scotland, but which for one reason or another does so intermittently or is presently, perhaps temporarily, inactive in those activities in Scotland. This may be a charity registered in another jurisdiction but with cross-border activities. Similarly, a cross-border charity may have registered with OSCR in anticipation of extending its activities into Scotland – in a sense, pre-registering. It could be argued, however, that such registration should only take place when the organisation is in a position to undertake such activities. Greater clarity around registration requirements would perhaps result in fewer charities registering with OSCR for one-off or sporadic activities that do not meet the criteria detailed.

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

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

The integrity of the charity sector and the public’s confidence in it rests to a significant degree on ensuring that those charged with running charities are fit to do so. As such, it is important that OSCR has the power to investigate and prevent from taking up trusteeships those involved in potential serious misconduct in other organisations. It is currently hampered in doing this by the restrictions outlined regarding bodies which have ceased to exist or which are no longer charities. It should be clarified that this power is intended to allow OSCR to gather the appropriate information to make an application to the Court of Session to determine disqualification. It is not intended to apply retrospectively a different standard of behaviour to that which was current at the time when a charity existed or when a body held charitable status.

Viewing this issue more widely, in England and Wales the Charities (Social Investment and Protection) Act 2016 gives the Charity Commission the power to take action against trustees in order to protect the public perception of the sector and need not relate to conduct as a trustee. These powers include disqualifying trustees where ‘any other past or continuing conduct by the person, whether or not in relation to a charity, is damaging or likely to be damaging to public trust and confidence in charities generally or in the classes of charity specified or described in the [disqualification] order’. While this would offer some protection from a trustee who had previously been involved in unsuitable behaviour, there remains the problem of that trustee serving in the interim and also of evidence-gathering, which the current proposal aims to address.

SECTION 8: De-registered charities' assets and public benefit

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

It is a reasonable assumption to make that assets provided to a charity are done so on the understanding that they would be used to further charitable objects and for the public benefit. The first of these is currently protected should a charity de-register. The public benefit element not so. This risks undermining public trust in charities and by extension the sector more widely. The public do not want to see funds or assets donated to a charity used for private benefit, either if the charity remains a charity or if it ceases to be so.

The concern that de-registered charities would suffer from a burden by having to continue to provide public benefit with pre-removal assets should be seen as secondary to upholding public confidence in the charity sector. This consideration should have formed any part of a decision to de-register and cease to operate as a charitable body. Divestment of the relevant assets would remain an option to such an organisation.

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

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

We agree that providing OSCR with this power will be of benefit in undertaking its regulatory role, allowing it to investigate those categories of persons or bodies which are covered by the proposal more effectively. Again, this is important in enabling it to take appropriate action to protect the integrity of the sector and public trust in it by taking action proactively rather than merely responding to a charity governance failure.

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

Yes

It would be sensible to remove any potential ambiguity in the way the notice periods are presented in the legislation. This may be to clarify that the notice periods can overlap, in particular the first two.

Irrespective of overlapping notice periods, the time taken for the entire process would be reduced in circumstances where the charity that is the subject of the request for information notifies OSCR that it is seeking a review of the decision in fewer than the allotted 21 days, while the third stage is within the competence of OSCR itself to expedite. It should also be noted that, as trustees are volunteers, it may not always be possible for all to attend a trustee meeting to consider OSCR's request and respond accordingly.

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

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

It would clearly be beneficial to all concerned to provide clarity as to whether approval of reorganisation schemes proposed by certain charities under a royal charter, warrant or enactment fall within the competence of OSCR. Only a relatively small number of charities may be affected, but a clear statement of the position, via amendment to the legislation where required, would save expense to those involved as well as unnecessary use of parliamentary time. Ambiguity serves no good purpose.

The Law Commission's *Technical Issues in Charity Law*, published in 2017 and covering England and Wales, recommended that the supplemental Charter procedure for Royal Charter bodies to amend their governing documents be changed to include a default amendment power, exercisable with Privy Council consent, which would be available where the charity does not have an express amendment power.

We hope that our comments and suggestions will prove useful when considering the proposed changes. Should you wish to discuss them further or require any clarification, please feel free to contact me.

Yours sincerely,

Craig Beeston

Policy Officer, Not for Profit
+44 (0)20 7612 7029
cbeeston@icsa.org.uk