



Law Society  
of Scotland

# Consultation Response

## Strengthening Scottish Charity Law Survey

February 2021



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Charity Law sub-committee welcomes the opportunity to consider and respond to the Scottish Government consultation: Strengthening Scottish Charity Law Survey.<sup>1</sup> The sub-committee has the following comments to put forward for consideration.

## General Comments

We welcome the opportunity to further engage with proposals to reform charity law in Scotland. We are, and have been, broadly supportive of the proposed direction of reform in this area. We responded to the Scottish Government's last consultation on proposed changes to Scottish charity law in 2019.<sup>2</sup> Whilst we recognise that further consultation on the detail of the proposals is necessary, we look forward to seeing legislative changes brought forward early in the next session of the Scottish Parliament. We have identified reviewing charity law as one of our priorities for the 2021 Scottish Parliament elections.<sup>3</sup>

We understand that the purpose of the survey is to re-engage with stakeholders with a view to building on the responses to the earlier consultation in order to assist the Scottish Government in deciding the next steps for charity law. The survey focuses on the first six of the proposals put forward in the 2019 consultation and we have provided further input on these. It is clear from the responses to the earlier consultation that respondents were in favour of a comprehensive review of the Charities and Trustee Investment (Scotland) Act 2005 ("the 2005 Act") and that it would be a badly missed opportunity not to carry out such a review at this stage in the development of charity law and practice in Scotland.<sup>4</sup> We would

<sup>1</sup> <https://consult.gov.scot/local-government-and-communities/strengthening-scottish-charity-law/>

<sup>2</sup> Scottish Government, Consultation on Scottish Charity Law, 2019 <https://consult.gov.scot/local-government-and-communities/scottish-charity-law/>

<sup>3</sup> Law Society of Scotland, Our Priorities for the 2021 Scottish Parliament Elections, <https://www.laws Scot.org.uk/media/370355/our-priorities-for-the-2021-scottish-parliament-elections-v3.pdf>

<sup>4</sup> Scottish Government, Analysis of Consultation on Scottish Charity Law, 2019, Section 11 <https://www.gov.scot/publications/analysis-consultation-scottish-charity-law/pages/13/>

be grateful for reassurance, therefore, that the remaining proposals consulted on in 2019 are also to be taken forward and that other issues of concern raised by respondents will be fully considered.

In our own response<sup>5</sup> we raised some 20 additional issues in an Annex listing the relevant provisions of the 2005 Act with suggested amendments, and in the text of the response highlighted five of these as key additional areas for review: Changes of legal form, Trustee remuneration, Notifiable events, Consent for changes and SCIO membership. Under the heading Social enterprise we also raised as a key area for policy review the definition and regulation of social enterprises not covered by the 2005 Act<sup>6</sup> and we note OSCR is actively looking at the interplay of public and private interest in the context of charitable social enterprises.

We would also now take this opportunity to highlight a further additional area for review, linked to our previous comments on changes of legal form:

#### Legacies

For charities that are changing legal form or transferring assets to another charity, consideration should be given to a mechanism to protect legacies in wills. A legacy to certain charities can be lost when such a charity changes legal form. This would apply to e.g. a trust becoming a SCIO. While it appears to be the same charity, its original legal entity has ceased and a new legal entity has been created. This can mean that a legacy under some wills could not work so as to benefit the 'new' charity.

This risk to legacies can be a significant factor in charities holding off updating their legal form to support better governance. In other cases, the charity will change legal form, but 'leave behind' the 'old' charity as a shell to collect legacies. This creates burdens for the charity and OSCR. It is a source of confusion for the public and donors due to the presence of two apparently identical charities.

The 'register of mergers' system in England and Wales<sup>7</sup> could form the basis of a solution to this issue. A solution would help charities put in place better and more modern governance, and prevent the loss of income to the sector through failed legacies.

We join with those other respondents to the 2019 consultation who consider that now is the right time for a comprehensive review of the 2005 Act and would be glad to discuss with Scottish Government how best these additional areas of concern might be explored further.

<sup>5</sup> Law Society of Scotland, Consultation Response: Consultation on Scottish Charity Law, 2019 <https://www.lawscot.org.uk/media/362407/01-04-19-cha-scottish-charity-law-consultation-response-final.pdf>

<sup>6</sup> Ibid, pages 3-4

<sup>7</sup> <https://www.gov.uk/government/publications/register-of-merged-charities>

## Consultation Questions

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

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

We believe that it is a sensible approach for OSCR to publish the accounts and trustees' report for all charities (subject to our comments below). This will provide greater transparency and will also help smaller charities which do not have their own website for publication.

That said, in a world where charities are increasingly victims of phishing scams and where personal data is increasingly protected, we do not support publication in full and believe that any personal details (names and signatures) should be redacted. This not only reduces risk of fraud but also protects the identity of beneficiaries and donors. In our experience many high-profile individuals may be put off acting if their information is readily available (in short, they are concerned about being contacted directly for donations).

We reiterate the suggestion in our response to the 2019 consultation that all charities should have the option of providing OSCR with a modified secondary copy of their annual accounts in addition to the copy of the full accounts submitted under section 44(1)(d) of the 2005 Act.<sup>8</sup> The secondary copy would be pre-redacted to exclude (1) all signatures, (2) any personal details of beneficiaries or donors and (3) any personal details of charity trustees other than names, with the exception of the address of the charity trustee contact in the case of a charity with no principal office. OSCR would publish the secondary copy on the Register in place of the full accounts. The object would be to give the option of some protection against identity fraud and invasion of charity trustee privacy without materially impacting on accountability.

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

As detailed above, we believe that all accounts should be redacted to protect personal data.

In addition, there should be a further option for provision of a more redacted copy for publication in place of the full accounts in certain limited circumstances. Fuller redaction would be permitted on application to OSCR, for instance where the redacted information would be likely to jeopardise the safety or security of any person or premises. Provision for this option could be modelled on the 2005 Act, section 3(4).

<sup>8</sup> Law Society of Scotland, Consultation Response: Consultation on Scottish Charity Law, 2019 <https://www.lawscot.org.uk/media/362407/01-04-19-cha-scottish-charity-law-consultation-response-final.pdf>, page 5

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

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

In our response to the 2019 consultation we supported in principle the establishment of an internal database of charity trustees, but called for a detailed and proportionate justification to be provided at the next stage of consultation.<sup>9</sup> We note that the current survey does not provide a more detailed justification for an internal database. We therefore remain concerned regarding (1) the effect on charity trustee recruitment, especially for small charities, of committing personal details to yet another state register, even if data protection norms are met, and (2) the administrative burden on charities. We accept that such concerns must be set against the value of the database as a regulatory tool but believe that in the interests of transparency a full explanation should be provided of how it would assist OSCR in the exercise of its functions.

Subject to our comments above, we would suggest that any internal database should include the name, date of birth and home address of charity trustees. Some charity trustees may be content to be contacted by email, but we would suggest that formal written correspondence should be the primary means of contact and that providing an email address should be optional rather than mandatory.

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

In our response to the 2019 consultation, we queried whether maintenance of the proposed register would be an event-based process, requiring notification of OSCR as and when charity trustee changes occur, or whether it would be managed through a charity's annual return. We recognise that the key challenge will be balancing the need to ensure accuracy of the database against the administrative burden to charities, and particularly smaller charities. It may be proportionate to develop a system which allows or encourages charities to make event-based reports throughout the year, subject to a statutory default reporting requirement in the annual return.

Consideration should be given to retention periods in respect of personal information for charity trustees who have stepped down. Equivalence with company directors may be appropriate.

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

Full names of trustees only. We reiterate our view that the names of charity trustees where published should not be accompanied by home addresses. Where it is appropriate for charity trustees to be

<sup>9</sup> Law Society of Scotland, Consultation Response: Consultation on Scottish Charity Law, 2019 <https://www.lawscot.org.uk/media/362407/01-04-19-cha-scottish-charity-law-consultation-response-final.pdf>, page 5

contacted by members of the public, this should be via the charity's address. We understand that this is the usual practice in respect of companies and the public registers available via Companies House.

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

Limited exemptions should be available, on application to OSCR, such as where making information available would be "likely to jeopardise the safety or security of any person or property" (see section 3(4) of the 2005 Act). This would allow for situations where a potential charity trustee may have a legitimate reason for not having their name published, such as someone fleeing from domestic abuse, or where the nature of the charity's purpose allied with an emphasis on representation at board level from people with direct personal experience of these issues could disclose information about the potential charity trustee's health or personal circumstances. A system of exemption in these circumstances would limit the risk of potential charity trustees being deterred from taking up charity trustee roles.

There should be a mechanism for OSCR to make a decision about exemption before the potential charity trustee becomes an actual charity trustee. Some people will not proceed without knowing that they would have that protection.

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

We understand that this question relates to a proposed list of charity trustees who have been disqualified by removal in Scotland (currently by the Court of Session on an application by OSCR). We understand that this list (to be accessible in practice via an electronic search facility) would not seek to reflect individuals who may be disqualified from serving as a charity trustee for reasons other than removal (eg bankruptcy or conviction of an offence involving dishonesty), or by removal as a charity trustee in England and Wales.

Subject to the above, we would suggest that a disqualified charity trustee should remain on the list for as long as the disqualification by removal lasts, i.e., until waived on application to OSCR. We note that neither OSCR nor the Court of Session currently have the power to impose time-limited disqualifications.

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

We suggest following the system in England and Wales, where the list shows the disqualified person's name and provides a reference to the report of the inquiry which led to the disqualification. There would be a case also for showing other U.K. charities of which the disqualified person had been a charity trustee in the three years before disqualification.

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

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

We note that criteria for automatic disqualification of individuals in senior management positions in charities already operate in England and Wales under section 178(3) and (4) of the Charities Act 2011 (“the 2011 Act”) and that Charity Commission guidance identifies as senior manager positions the Chief Executive (or equivalent) positions and Chief Finance Officer (or equivalent) positions.<sup>10</sup> We note that it is the function, rather than the title, of the position that is relevant. In the interest of consistency of approach across the UK, we would support mirroring the approach used in England and Wales but with guidance from OSCR tailored to the Scottish charitable sector.

We note that there may be particular difficulties in defining a ‘senior manager’ in the case of a small charity with few or no staff. We would suggest the above approach could apply to the only member of staff of a charity, where that individual has the responsibilities of chief executive or chief financial officer. In such circumstances they are the only manager.

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

### **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?**

This is an area requiring careful consideration. We reiterate our previous comments.<sup>11</sup> We suggest that it should not be looked at in isolation but as part of a full review of OSCR’s and the Court of Session’s powers of intervention – see the 2005 Act, sections 31 and 34. A preliminary question would be whether the broad distinction between powers available to OSCR and those available to the Court of Session should be retained, OSCR’s powers being generally time-limited and the court’s of permanent effect. We would be in favour of both OSCR and the court being given a power to issue positive directions, subject to retention in principle of that broad distinction. We can envisage circumstances where a power to issue positive directions could be used by OSCR to facilitate early support and resolution of problems identified during the course of inquiries. We suggest that the power should be triggered as a response to apparent misconduct in the administration of a charity or the need to preserve a charity’s assets or secure their proper application: see sections 31 and 34 of the 2005 Act; also section 84 of the 2011 Act, providing for the Charity Commission’s power to direct specific action. OSCR’s exercise of the power should be subject

10 <https://www.gov.uk/guidance/automatic-disqualification-rules-for-charity-trustees-and-charity-senior-positions#detailed-check---what-a-senior-manager-position-is>

11 Law Society of Scotland, Consultation Response: Consultation on Scottish Charity Law, 2019 <https://www.lawscot.org.uk/media/362407/01-04-19-cha-scottish-charity-law-consultation-response-final.pdf>, page 8

to the review and appeal provisions of sections 74-77 of the 2005 Act. We suggest that consideration should also be given to conferring a time-limited power on OSCR to direct that specified action not be taken where the action would constitute misconduct: see the 2011 Act, section 84A. This power would be similar to the court's power of interim interdict under section 34(5)(a) of the 2005 Act.

Directions to appoint additional charity trustees or to take a specific action in line with the charity's governing document seem appropriate. A direction to manage a conflict of interest effectively and demonstrably seems less appropriate, and particularly given that the charity trustees' express duty regarding conflict of interest is worded in very narrow terms in the 2005 Act; this should not be used as a means for OSCR to impose its own views on managing conflicts of interest going beyond what was contemplated in the primary legislation. Nonetheless, to be of real value as a regulatory tool the power should in our view be wide-ranging, with protection against inappropriate use by OSCR lying in the review and appeal provisions and the time-limited character of the power.

## **2. How long should a charity have to comply? What should be the consequences of non-compliance with a positive direction?**

Timescales for compliance should be proportionate and take into account all relevant circumstances.

Non-compliance with a positive direction should be treated as a breach of the charity trustee duty provided for in section 66(2) of the 2005 Act, and therefore as misconduct under section 66(4). That would bring into play the enforcement powers of OSCR and the Court of Session in Chapter 4 of the 2005 Act, possibly as reinforced by amendments arising out of the present review.

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

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

In our view, a common sense approach suggests that if a charity has not submitted accounts for three consecutive years, then that amounts to a persistent failure and leads to a presumption that there is no provision of public benefit. However, we would argue that where there are other aggravating factors, for example through clear evidence of charity trustee misconduct or a material risk to charity assets, it should be possible for OSCR to determine that failure to lodge a single set of charity accounts despite reminders may amount to a persistent failure. OSCR should be permitted to develop guidance which sets out how it would determine that persistency of failure to submit had arisen, without the need for a statutory definition.



## 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?

We cannot see that there is any need for a positive direction, since section 44 of the 2005 Act already imposes a duty on all charities to prepare and submit accounts. A breach of that duty is deemed to be misconduct by section 66(2), (4) and would justify intervention as the law currently stands. These provisions are reinforced, as a means of bringing pressure to bear on charity trustees to prepare accounts, by the existing power under section 45 to appoint an accountant to prepare accounts at charity trustee expense.

In our view, persistent failure to submit annual reports and accounts can already be addressed through the powers of removal contained in section 30 of the 2005 Act. One of the functions of the report on activities incorporated in a charity's annual accounts is to illustrate a charity's ongoing compliance with the charity test, as regards continuing provision of public benefit. If no report is submitted, that creates a presumption that public benefit is not being provided and that the body failing to submit does not meet the charity test. In acting on such a presumption OSCR should, however, be required to make preliminary inquiries under section 28, as provided in section 30, before removing a charity from the register. If OSCR makes inquiries and receives no response, that must reinforce the presumption that the charity's non-submission of accounts indicates a failure to provide public benefit.

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

### 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?

In our response to the 2019 consultation, we noted that “We agree with the proposal in para 61 of the CP [consultation paper] and suggest adding into the charity test a requirement for an ongoing territorial connection with Scotland. In general terms, this should be **such as to provide the Scottish authorities with some practical control over the personnel or assets of the charity in the event that enforcement action becomes necessary.**”<sup>12</sup> (emphasis added)

We suggested that a basis for a formulation of what “have and retain a connection Scotland” would mean is an amalgam of section 1(7) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and section 14 of the 2005 Act. That base formulation could be added to what is required to enter the Scottish

<sup>12</sup> Law Society of Scotland, Consultation Response: Consultation on Scottish Charity Law, 2019 <https://www.lawsocot.org.uk/media/362407/01-04-19-cha-scottish-charity-law-consultation-response-final.pdf>, page 11

charity register (currently section 4 of the 2005 Act). This would differ from the current position where a connection to Scotland has relevance for the use of the phrases “Scottish charity” or a “registered Scottish charity”. This approach would cover bodies that were established and controlled under Scots law as well as bodies which had a direct physical presence in Scotland (eg cross-border charities).

We agree with the proposal but consider one area needs further consideration. In respect of a direct physical presence in Scotland, there is perhaps a need to reconsider the extent and meaning of “carry out activities in any office, shop or similar premises in Scotland” (section 14(b)(ii) of the 2005 Act). There should be appropriate methods to have regulatory oversight of bodies that could have significant operations in Scotland but who might not characterise that they carry out activities in any office, shop or similar premises. They operate more flexibly and even digitally in Scotland. Other organisations might operate at a number of premises (conferences etc via hired space) but would not have a base premises.

It would be preferable to add in the suggested territorial connection as an element of the requirements for entry to the register than to seek to extend the notion of “public benefit” to “public benefit in Scotland”.

There is a balance to be drawn between preventing bodies securing the use of the word “charity” via OSCR without a proper connection to Scotland while at the same time ensuring that all bodies (irrespective of their geographical connections) that operate in Scotland but operate and act like an OSCR registered charity are covered by the regulation of charities and benevolent fundraisers. Our view is that the ability to ensure there is an appropriate and effective method of control and, where necessary, enforcement action over bodies engaging with, working with and being supported by the Scottish public should be the dominant consideration.

**For further information, please contact:**

Jennifer Paton  
External Relations  
Law Society of Scotland  
DD: 0131 476 8136  
[JenniferPaton@lawscot.org.uk](mailto:JenniferPaton@lawscot.org.uk)