Law Society of Scotland

Consultation Response

Consultation on Scottish Charity Law

1 April 2019

Introduction

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Our Charity Law sub-committee welcomes the opportunity to consider and respond to the Scottish Government consultation on Scottish Charity Law. The sub-committee puts forward the following comments for consideration.

General comments

The legislative framework for charity law and regulation in Scotland is contained within the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act), Parts 1 and 4. This framework governs the operation of over 24,000 charities across Scotland (with over 180,000 charity trustees) including community groups, religious charities, schools, universities, grant-giving charities, and major care providers. The contribution of these charitable organisations to the Scottish economy and to civic Scotland is invaluable.

The Charity Law sub-committee works closely with the Scottish Charity Regulator (OSCR) and other stakeholders around the governance and regulation of charities in Scotland. With the legislation regulating charities now almost 15 years old, the committee believes that this legislation merits a comprehensive review. While the questions in sections 1-10 of the consultation paper (CP) address a number of areas requiring reform, there are other areas which in our view ought equally to be addressed. Not to include them in the current review would be a badly missed opportunity.

We therefore welcome the Scottish Government's invitation (CP para 7) to propose changes to the legislation beyond those highlighted in the CP and have set out our response to the consultation in three main parts:

(1) Key additional areas for review
(2) Response to the consultation questions and

(3) Annex listing the provisions of the 2005 Act which in our view merit reconsideration, noting issues of concern and suggesting amendments. The Annex includes provisions discussed in parts (1) and (2) but highlights further points for review.

Key additional areas for review

Changes of legal form

This area can be problematic, particularly for smaller charities. A change from an unincorporated form to an incorporated form with limited liability is often a requirement for funding. We know that 54% of charities across Scotland have incomes of less than £25,000. As a result, they have limited capacity to access legal advice, making user-friendly statutory procedures for change of legal form all the more important. See Annex: the 2005 Act, ss 55(4), 55(6)(b), 58.

Trustee remuneration

Trustee remuneration remains a key point of concern, both within the sector and as a matter of maintaining public confidence in charities. It is important, therefore, that any unintended loopholes are closed and any uncertainties resolved. Introducing clarity to the current statutory provisions at s 67 of the 2005 Act would promote greater confidence. See Annex: the 2005 Act, s 67.

Notifiable events

The 2005 Act does not contain express provision requiring the reporting of notifiable events. Though OSCR sets out its expectations in this area in *Reporting Notifiable Events to the Scottish Charity Regulator* (2016)[1] and makes it clear that failure to meet those expectations could be regarded as misconduct in the management of a charity, express statutory provision would help to clarify responsibilities. In England and Wales there is regulatory provision in respect of the equivalent reporting of 'serious incidents': see Charity Commission, Charities (Annual Return) Regulations 2013, reg 3, Sch, para C2.

Consent for changes

[1] https://www.oscr.org.uk/media/2155/2016-03-15_guidance-for-notifiable-events_web-version.pdf

Changes requiring consent from OSCR cannot be made until a 42-day period has elapsed, even if that consent has been provided earlier. This can create unnecessary delay for urgent changes or build in significant time delays where consent has mistakenly not been sought, for instance, requiring cancellation and rescheduling of members' meetings. See Annex: 2005 Act, ss 11(2), 16(4).

SCIO membership

The requirement to have two members of a SCIO can introduce unnecessary complications. It may be appropriate in governance terms for a charity to have a sole member, for instance, where the SCIO is to be a wholly-owned subsidiary of another charity. We believe that the risks which might arise in certain circumstances where a sole member position applies, such as the death of a sole charity trustee, could be more effectively tackled through provisions directly addressing those specific situations. See Annex: 2005 Act, ss 49, 54.

Social enterprise

The charity sector is continually transforming; and the review of the 2005 Act allows an opportunity to bring legislation into line with current and future developments in the sector. Recent years have seen increasing adoption of the social enterprise model, for which there is no legal definition in Scotland; and there may be potential for clarifying the key criteria for a social enterprise as well as introducing an appropriate regulatory regime for social enterprises.

Response to consultation questions

SECTION 1

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

Yes, we believe that, in principle, OSCR should be able to publish annual accounts (incorporating reports on activities) in full. For qualifications, see our response to Question 2.

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

We suggest 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 s 44(1)(d) of the 2005 Act. The secondary copy would be pre-redacted to exclude (1) all signatures and (2) 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: individual charity trustees could still be contacted via the charity, and the addresses of auditors/external examiners – who perform a quasi-official role in charity accountability and should be contactable by the public direct – would not be redacted.

There should be a further option for provision of a more fully pre-redacted secondary copy for publication in place of the full accounts. Fuller redaction would be permitted on application to OSCR 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, s 3(4).

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, other than in terms of our response to Question 2.

SECTION 2

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

Yes, we agree in principle, but would like to see a much more robust justification for an internal database than provided in para 32 of the CP. There are two main concerns to be set against the value of the database as a regulatory tool for OSCR: (1) the chilling 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 suggest that a more detailed justification be provided at the next stage of consultation. The underlying issue is proportionality, and it may be sufficient to have an internal register of principal contacts only, rather than of all charity trustees. Retention periods will also need to be considered, for instance, how long personal information is retained once a charity trustee steps down. We also query whether maintenance of the register will be an event-based process,

requiring notification of OSCR as and when charity trustee changes occur (again, our concerns here relate to the administrative burden which this would place on smaller charities), or whether it will be managed through the annual accounts or annual return.

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

Yes (subject to the points noted below in response to question 7), provided the register shows only charity trustee names and a principal office or charity trustee contact address as proposed in the CP, para 36. This information is already in the public domain via annual accounts and existing entries in the Register. We reiterate, however, that in our view the names of charity trustees where published should not be accompanied by home addresses; it should be assumed that they can be contacted by members of the public (where appropriate) c/o the charity's address.

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

Yes. We believe that this is a proportionate step to take. The information will be useful when people are being considered for appointment/election as charity trustees; and is analogous to the information on disqualified directors held by Companies House. Publishing such information clearly has negative privacy implications for the affected individuals. However, given the nature of the grounds upon which someone can be disqualified, and the clear public interest in protecting other charities from the risk of repeated instances of improper conduct on the part of such individuals, we consider this to be a proportionate interference.

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, where necessary to avoid jeopardising the safety or security of any person or premises: see the 2005 Act, s 3(4). If there were no scope for allowing dispensation/exemption then someone who might have legitimate reasons for not having their name published (if they were fleeing from domestic abuse, for example) would be deterred from taking up the role of charity trustee. This would be particularly problematic in relation to charities operating in a small geographical area or which only operate out of a single location; or where the nature of the charity's purposes (e.g. working with people who have a history of substance abuse), allied with an emphasis on representation at board level from people with direct personal experience of these issues, could mean that potential charity trustees would be very wary of taking up a position on the board. The dispensation/exemption regime could operate in an analogous way to company directors who can have certain details left off the Companies House registers.

The exemption should be capable of being applied for via an application from either the charity or the individual charity trustee. This would avoid replicating an anomaly under company law, where there is currently no mechanism to remove details of a company director if a company has been dissolved, as only the company itself can request suppression of directors' details. We are aware of situations where this anomaly has resulted in a serious threat to the safety of a former company director. Suppression of details should require OSCR approval to avoid this provision being abused.

This application process should also be straightforward for charity trustees, particularly those involved with smaller charities – the application process, whether through direct online access or by paper application, should be clear, effective and swift.

SECTION 3

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

There are two separate but linked questions here: (1) Should the criteria for disqualification of charity trustees be extended to match the criteria in England and Wales? and (2) Should the criteria for removal of charity trustees be extended to match the criteria in England and Wales? We would answer 'yes' in principle to the first of these because matching the criteria would assist with consistency across the UK: it is clearly anomalous that a person disqualified from being a charity trustee in one jurisdiction should be free to act as a charity trustee in another. However, the provisions on disqualification in England and Wales are complex (see the Charities Act 2011 (the 2011 Act), ss 178-184A) and raise questions which merit much more detailed consultation than allowed for in paras 39-42 of the CP. For instance, in the Scottish context, is there any need for special arrangements in relation to charitable companies and corporate charity trustees (see the 2011 Act, ss 180, 184A), and should provision be made for disqualification orders (see the 2011 Act, ss 181A-181D)?

The second question is linked to the first because a person removed as a charity trustee of one charity would be automatically disqualified from acting as a charity trustee of other charities (see the 2011 Act, s 69 (2)(c), (d)). While here again it would be desirable in principle to have consistency in the criteria for removal across the UK, adapting the removal criteria in the 2011 Act for Scotland (see the 2011 Act, ss 79-83) would, again, raise a number of questions which in our view merit full consultation. For instance, should any extended powers of removal be conferred on OSCR, which currently only has power to suspend, or only on the Court of Session? Are all the criteria for England and Wales appropriate for Scotland, with its much higher proportion of small charities? For example, a charity trustee in England and Wales may in certain circumstances be exposed to removal by the Charity Commission even when involved unintentionally in misconduct or mismanagement perpetrated by others: see the 2011 Act, s 7(4)(c). In the Scottish context, there is a risk that such provisions might have a chilling effect on charity trustee recruitment which would outweigh their regulatory value.

Overall, therefore, while we agree in principle that the criteria for both disqualification and removal of charity trustees should be extended to match the criteria in England and Wales, we ask that proposals for implementation in detail be fully consulted on. We suggest also that the criteria for removal be considered as part of a wider review of OSCR's and the Court of Session's powers of intervention generally: see Annex: the 2005 Act, ss 31, 34, 69, 70A.

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

Here, again, there are two separate but linked questions. Again, we would answer 'yes' in principle to both in the interests of consistency of approach across the UK. Here, too, however, we request that any detailed proposals for implementation be fully consulted on. A key concern in this context would be to ensure adequate protection for employees of charities who might find their livelihoods threatened by removal and disqualification even if not directly responsible for misconduct or mismanagement: see the 2011 Act, ss 79(4) and 181A(7)). There might be a risk of a chilling effect on recruitment to paid employment in the charities sector.

SECTION 4

10. Should OSCR be given a power to issue positive directions?

This is an area requiring careful consideration. 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 Annex: the 2005 Act, ss 31, 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. The power would be triggered in either case as a response to misconduct in the administration of a charity or the need to preserve a charity's assets or secure their proper application: ss 31 and 34 of the 2005 Act. OSCR's exercise of the power should be subject to the review and appeal provisions of ss 74-77 of the 2005 Act.

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, s 84A. This power would be similar to the court's power of interim interdict under s 34(5)(a) of the 2005 Act.

11. If you answered Yes to question 10, should a power to issue positive directions be wide ranging or a specific power?

We considered the examples raised in para 47 of the CP. 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' 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. None the less, 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.

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

Yes. There is a separate issue, though, to be addressed in this context – and that is, the possibility (at least in principle) that a direction issued by OSCR might not be in the best interests of the charity concerned e.g. a direction to the charity trustees of Charity A to transfer the charity's assets and operations to Charity B is unlikely to be in the best interests of Charity A. The legislation should make it clear that a charity trustee would not be deemed to be in breach of his/her charity trustee duties in giving effect to a direction issued by OSCR, irrespective of whether doing so would be in the interests of the charity. This issue is addressed to some extent in s 84 of the 2011 Act, which gives power to the Charity Commission to direct specified actions, but careful further consideration would be needed at the next stage of consultation.

Section 5

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

We believe that while action is required to address the problem identified in para 52 of the CP it is neither necessary nor desirable to give OSCR a new discretionary power to remove. In our view, persistent failure to submit annual reports and accounts can already be addressed through the powers of removal contained in s 30 of the 2005 Act. One of the functions of the report on activities incorporated in the 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 surely creates a presumption that public benefit is not being provided and that the body failing to submit does not meet the charity test. If OSCR is reluctant to act on such a presumption at present, it could be backed by statutory provision.

OSCR should, however, be required to make preliminary inquiries under s 28, as provided in s 30, before removing a charity from the register. Charities are under an obligation to notify OSCR of changes in contact details, so, again, it must in our view be open to OSCR to presume that the contact details in a charity's entry in the register are correct. If OSCR makes inquiries using those details and receives no response, that must reinforce the presumption that the charity's non-submission of accounts indicates a failure to provide public benefit. If the charity is then de-registered, the asset lock under s 19 of the 2005 Act will apply, and if it subsequently emerges that the original entity behind the entry in the register is still active, its pre-removal assets will be protected. In such circumstances, a scheme for transfer to a suitable charity under s 19(4)-(7) might be appropriate. The Scottish Ministers are still to issue regulations to render those provisions active, and we suggest that the draft regulations previously consulted on now be revisited under the current review.

If, on the other hand, OSCR's preliminary inquiries uncover the existence of an entity which is in fact still active, the charity's failure to submit accounts falls to be treated as misconduct under s 66(2), (4) of the 2005 Act and would justify intervention by OSCR or the Court of Session: see the 2005 Act, ss 31, 34, 35. In such circumstances, a scheme for transfer to another charity under s 35 might be appropriate. Here, too, the Scottish Ministers have yet to issue regulations to render the transfer provisions active; and we suggest, again, that the draft regulations previously consulted on now be revisited under the current review.

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

We cannot see that there is any need for this. Paras 56 and 57 of the CP imply that a direction by OSCR is a necessary preliminary to intervention by OSCR or the Court of Session but s 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 s 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 s 45 to appoint an accountant to prepare accounts at charity trustee expense.

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?

See our response to Question 14.

16. If you wish to explain your responses to any of the questions in Section 5, please do so below

We do not have further comments.

Section 6

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

Yes. We believe this would be appropriate and would also be broadly consistent with the approach in England and Wales. The key issue is effective regulatory control. An institution established for charitable purposes outside England and Wales is not treated as a charity under the 2011 Act, partly on the rationale that an entity established outside the jurisdiction is beyond the practical control of the English courts: see the 2011 Act, s 1(1) and *Gaudiya Mission v Bramachary* [1998] Ch 341. The current position in Scotland is unsatisfactory because a body established in a jurisdiction beyond the reach of the Scottish law enforcement authorities is entitled to be entered in the Scottish Charity Register if it meets the charity test. It need have no territorial footprint in Scotland and the public benefit it provides may be provided outside Scotland. It would be entitled to solicit donations in Scotland as a charity, but if it misapplied funds or there was misconduct of some other kind, OSCR and the Scottish courts could take no effective enforcement action.

We agree with the proposal in para 61 of the CP 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. A possible starting point would be the formula used in the definition of a 'recognised body' (i.e., a 'Scottish charity') under the previous regime for the regulation of charities in Scotland, which required a recognised body to be 'established under the law of Scotland' or 'managed or controlled wholly or mainly in or from Scotland': see the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s 1(7). To accommodate cross-border charities, however, the territorial qualification would have to be extended to cover bodies which, though established outside Scotland and managed or controlled wholly or mainly outwith Scotland, occupied land or premises in Scotland or carried out activities in any office, shop or similar premises in Scotland (to mirror s 14 of the 2005 Act).

The value of this additional territorial qualification for enforcement purposes would depend on a charity's individual circumstances; but in the case of cross-border charities established in England and Wales or Northern Ireland, enforcement could be managed to some extent through the Memorandum of Understanding with the relevant regulator. Bodies with no territorial footprint in Scotland of any kind would be excluded from registration. See also Annex: the 2005 Act, s 4(b).

Section 7

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 current situation allows people to avoid regulatory scrutiny by the simple mechanism of de-registering as a charity - which creates a major gap in the protection currently afforded. We believe that any power should, though, be time-limited and proportionate. We also question whether this should be a power available through application to the court, rather than automatically available to OSCR. There would be benefits in reforming the law in this area, not least as there are already powers available to demand charity records from individuals who are not charity trustees.

Section 8

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. The aim of the asset lock under s 19 of the 2005 Act is to protect past donors, grant funders and others who have made their contributions to a charity on the basis that the charity will apply them for public benefit. Under the charity test every charity is under an ongoing obligation to pursue its charitable purposes in such a way as to provide public benefit, and the point of the s 19 asset lock (as we understand it) is to ensure that a charity cannot escape that obligation in respect of its pre-removal assets simply by de-registering voluntarily. The difficulty identified in para 69 of the CP arises from the way the charity test is constructed, as two separate obligations: (1) an obligation to have charitable purposes only and (2) an obligation to provide public benefit through the activities undertaken by the charity in pursuit of its purposes, as assessed holistically. (This contrasts with the treatment of ‘charity’ under the 2011 Act, under which there is no separation of the two elements and individual ‘charitable purposes’ are inherently ‘for the public benefit’ by definition: see the 2011 Act, ss 1, 2.) As currently drafted s 19 omits the second, public benefit, element and would allow a de-registered body to apply its pre-removal assets for its pre-removal purposes (e.g., purposes falling within the advancement of education or the advancement of health) for private, not public benefit.

The obvious solution is to add in the public benefit obligation by requiring a de-registered body to apply its pre-removal assets in accordance with the charity test. Although we suggest this as the best solution its operation might not always be straightforward in practice. De-registration can occur in two main situations: (1) a charity which meets the charity test may de-register voluntarily, in which case it is entirely appropriate

that it should be under a continuing obligation to meet the charity test in respect of its pre-removal assets; (2) a charity may be de-registered because it no longer meets the charity test. This may be because, for whatever reason, it is unable to do so, despite being given an opportunity to take steps to meet the test. In such circumstances the de-registered body would be equally hard pressed to meet the charity test in respect of its pre-removal assets, in which case a court-authorised scheme for transfer of the assets to a suitable charity might be appropriate: see our response to Question 13. Alternatively, in appropriate cases, the Scottish Ministers could disapply the asset lock by order: see the 2005 Act, s 19(8), (9).

Section 9

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, though we would add that there should be time limits applied to this power.

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

Yes.

Section 10

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, clarification would be helpful, but we suggest that substantive reform should also be considered. More generally, we ask that the treatment of royal charter/warrant and enactment charities be looked at as part of an overall review of the reorganisation provisions of the 2005 Act, including those for restricted funds – see Annex: the 2005 Act, ss 39-43, 43A-43D.

So far as clarification is concerned, we think it is already clear that charities constituted under (1) royal charter/warrant or (2) any enactment may not benefit from the reorganisation procedures under ss 39 and

40 of the 2005 Act unless they fall within the exception in favour of endowments of which the governing body is a charity: see s 42(6). Clarification is badly needed, however, on the extent and force of the exception: e.g., what precisely is meant by 'endowment', and may a charity proceed with a reorganisation authorised by OSCR or the Court of Session without reference to the Privy Council? The difficulties of interpretation of the exception provisions are fully explored in S Cross and P Ford, *Greens Annotated Statutes: Charities and Trustee Investment (Scotland) Act 2005* (2nd ed, 2017), paras 43.07-43.10.

So far as substantive reform is concerned, there is a real need to address the situation of charities outside the exception. A charter/warrant charity outside the exception must turn to the Privy Council for authority to reorganise and the committee's experience is that Privy Council procedures in this area are dauntingly time-consuming and expensive. In the case of enactment charities, those constituted under public enactments such as the Companies Act 2006 may normally reorganise without difficulty under the provisions of the governing statute (seeking consent or giving notice to OSCR as appropriate), but those constituted under special enactments may have no alternative but to proceed by private Act of the Scottish Parliament. Again, from the point of view of charities, procedures are time-consuming and expensive, and from the point of view of the taxpayer an extravagant use of parliamentary administrative resources.

We suggest the following possible options for reform for further consideration: (1) provide that reorganisations authorised by OSCR or the court may take effect without any reference to the Privy Council or the Scottish Parliament, despite the traditional deference of the executive and judiciary to the Crown and legislature in the context of reorganisations (see Cross and Ford, paras 43.08, 43.09; also the Education (Scotland) Act 1980, Pt 6, which would provide a precedent for provision of this kind); (2) enact provisions, based on long-established arrangements in England and Wales, under which OSCR could settle a scheme of reorganisation for final approval, as appropriate, by the Privy Council, or by the Scottish Ministers acting by order on behalf of the Scottish Parliament (see the 2011 Act, ss 68, 73); and (3) enact arrangements under which the Privy Council, or the Scottish Ministers on behalf of the Scottish Parliament, could waive any requirement for consent on being notified of a proposed reorganisation in outline, in circumstances in which they saw no need for further involvement. Adopting the point of view of charities, our preference would be for the first option as the most likely to minimise delay and expense.

Conclusion

This consultation paper offers the opportunity to reform the governing legislation for the charity sector, a sector that is integral to the wellbeing of communities and the economy of Scotland. We welcome the opportunity to revise the 2005 Act and believe that a number of the proposals detailed in the consultation paper will improve the accountability, transparency and sustainability of the sector. We also consider that reform in the further areas that we have highlighted would deliver similar benefits, and indeed with potentially greater impact in furthering these objectives. We would urge government to give due consideration to our proposals for more wide-ranging reform and would be very happy to discuss these further with government as part of the consultation process.

Annex

Section	Issue(s) of concern	Impact at a practical level	Suggested amendments
3(6)	This imposes an obligation on OSCR to review each and every entry on the register of Scottish charities. OSCR's focus now is on targeted regulation, prioritising areas within the charity sector (and/or individual charities) where the risk factors regarding non-compliance with charity law are seen to be most significant. That in our view is an appropriate strategy; and it is unhelpful to have a statutory obligation which, on the face of it, runs counter to that targeted approach.	Minimal - but should be addressed as part of the review. In our view, OSCR is in breach of a statutory duty in the meantime.	Re-word so as to be consistent with the principle of targeted regulation, or simply repeal.
4(b) **[Q 17]**	There is no requirement for a body applying for entry on the register of Scottish charities to have any territorial connection with Scotland.	There is a risk that organisations with no linkage to Scotland could present themselves as "a charity registered in Scotland", which would be misleading to those interacting with them. Also, it is possible that this could be used as a route for organisations to circumvent more restrictive charity regimes operating elsewhere e.g. an organisation wholly based in England and operating exclusively in England could register as a Scottish charity, and thus avoid the impact of elements of English charity law which were of particular concern to them.	Re-word so as to require some form of territorial connection with Scotland; or add territorial requirement to charity test at s 7.

7(4)(a)	It would be helpful to introduce provisions to the effect that references to "charity" and "charitable purposes" appearing in the constitutions of pre-OSCR charities should be interpreted as having meanings compatible with both the 2005 Act and the 2011 Act.	The current position would, strictly speaking, require a large number of existing charities to amend their constitutions to ensure compatibility with the 2005 Act and (having regard to charity tax principles) the 2011 Act. While OSCR is not taking a rigorous line in requiring such amendments to be made, it would be better to address this issue directly through the legislation.	Introduce an appropriate technical provision to this effect.
7, 8	[*the Subcommittee would intend to explore further the possibility of adjustments to sections 7 and 8*]		
11(2), 16(4)	These provisions currently have the effect that a change requiring OSCR's consent under s11 or 16 cannot be effected until 42 days after the application to OSCR has been submitted; that introduces unnecessary delay in a case where OSCR issues consent well within that 42-day period.	The requirement to await expiry of the 42-day period causes unnecessary difficult to charities in cases where OSCR has given consent within that period and there is a degree of urgency. There are also cases where the charity has inadvertently failed to take account of the requirement for OSCR consent, has issued notice of the relevant general/members' meeting, and then belatedly applies to OSCR for consent - it is then still faced with a requirement to reschedule the general/members' meeting even if OSCR's consent comes through in time.	The provisions should be adjusted so as to allow the change to be effected following receipt of OSCR's consent, even if the 42-day period has not expired.

16(2(c)	The provisions here refer only to the charity "winding itself up or dissolving itself"; that creates uncertainty as regards timing - e.g. for a company, it is not entirely clear whether winding up should be taken to occur at the point when the charity ceases to operate, at the point when the charity transfers its remaining assets to another charity, at the point when the members pass a formal resolution directing the board to proceed with transfer and (following transfer) an application for striking off, or when the application to Companies House for striking off is made, or when the company is finally struck off.	The issue of timing i.e. at what point application should be made to OSCR for consent in the case of winding-up - and, similarly, what should be taken to be the date of winding-up for the purposes of that application - is a source of significant uncertainty. It would be helpful if this issue were clarified.	Insert detailed definitions of winding-up and dissolution, covering all common legal forms for charities; and going on to set out more general wording to cater for charities outwith those categories.
23(1) **[Qs 1-3]**	The 2005 Act does not currently allow OSCR to publish charities' accounts via the online register of charities maintained by OSCR.	To help to address this issue, OSCR provides where possible a link to accounts on a charity's own website - but this is far from ideal. Specific legislation would be far more satisfactory.	Introduce an appropriate provision to this effect.
31, 34, 69, 70A **[Qs 10-16, 20-21]**	It would be helpful to review and extend the powers of intervention available to OSCR - and, on an application by OSCR - the Court of Session so as to bring them into line with the powers of intervention available to the Charity Commission.	There is benefit in ensuring that OSCR has a wide range of intervention powers, so that the most appropriate steps - focused on what will provide the best solution in the particular circumstances - can be taken.	Introduce appropriate adjustments.

39 – 43 **[Q 22]**	There are a number of technical points which could usefully be addressed in relation to the reorganisation provisions, including: • clarifying the reference to "constituted under any enactment"; • introducing wording which expressly refers to provisions facilitating conversion (or transfer of the assets and undertaking as a going concern) to another type of legal entity;	As a matter of practice, OSCR tends to take a flexible approach in the context of applications for approval of reorganisation schemes. Nevertheless, the current wording would benefit from some fine-tuning to remove technical obstacles.	Introduce adjustments to address the technical obstacles listed here.
43A - 43D **[Q 22]**	There are, similarly, a number of technical points which could usefully be addressed in relation to the reorganisation of restricted funds		Introduce adjustments to address the technical queries identified here.
44(1)(d) **[Q 22]**	There is currently no express obligation under the 2005 Act to submit an annual return to OSCR nor to notify OSCR under the notifiable events regime.	As a matter of practice, OSCR has approached these matters by setting out clear expectations and making it clear that failure to meet those expectations could be regarded as misconduct in the management of a Scottish charity. That is not a particularly sound way of approaching new requirements (it could be argued that these are obligations introduced "by the back door", without the sanction of the Scottish Parliament) - and it would be much more satisfactory to have	Introduce provisions specifically imposing obligations regarding the submission of annual returns, and also provisions expressly requiring appropriate information to be supplied to OSCR on the occurrence of a notifiable event.

		express obligations clearly set out within the legislation.	
49	The current provisions require a SCIO to have two or more members. This runs counter to the position which has applied in relation to companies for over 30 years, where a sole member is permitted; and it serves no useful purpose as currently worded.	The requirement to have two members introduces an unnecessary complication in cases where it is appropriate in governance terms for a charity to have a sole member - e.g. where the SCIO is to be a wholly-owned subsidiary of another charity. We would assume that the intention was to reduce the risks associated with death of a sole trustee - but that ought to be tackled through provisions directly addressing that situation.	Re-word the provision so as to allow for a sole member (with a similar adjustment to s56(2)(b), allowing conversion of a single-member company); but introduce a provision under which - in a situation where a sole member is an individual - the executors of the sole member will be deemed to be members of the SCIO.
51	The general duty imposed on members of a SCIO is ambiguous - in particular, it is not clear whether the general obligation in s.66 (to act in the interests of the charity) is intended to apply to members of a SCIO. We would take the view that it does not - since, if it did include that general duty, there would be no reason for s51 to refer to paragraph (a). In any event, • it is extremely unlikely in practice that any resolution would be put before the members (as distinct from the charity trustees) of a nature where the duty	The existence of a legal duty on members of a SCIO is sometimes referred to as a disadvantage attaching to the SCIO model in comparison with other legal forms - and particularly if those involved are concerned that the wider interpretation of s51 may be adopted.	Section 51 should be deleted in its entirety.

	under paragraph (a) (ensuring that the charity acts in a manner consistent with its purposes) would in fact come into play • There is no reason in principle why it should be desirable for members of a SCIO to have legal duties, when no such legal duties apply to members of companies, registered societies or unincorporated associations and • If the wide interpretation of s51 is taken (i.e. if the duty to act in the interests of the charity applies) this would prevent members from authorising steps which, strictly speaking, could never be in the interests of the charity as a corporate body e.g. a winding-up resolution, a resolution for transfer of the assets and operations to another charity etc		
54	This provision requires an application for formation of a SCIO to be submitted by two individuals. This is unduly restrictive.	The requirement to have two individuals making the application causes complications in a case where the members of a SCIO are to be corporate bodies. Also - see comments on s49(2) - it should be possible for a single individual (or corporate body) to make the application.	Adjust provision so that corporate bodies can apply for formation of a SCIO; also to allow a single individual/body to make the application.

55(4)	This provision was presumably intended to streamline the process of transition to a SCIO, in a situation where assets had to be held meantime by particular individuals while the registration process was under way. The wording, however, is too restrictive in scope; and there is a much more significant issue - regarding the transfer of assets and operations as a going concern from unincorporated associations and trusts - which requires to be tackled in a direct and more focused way (see comments on s58 below)	This provision tends to cause confusion (with some misunderstandings about how it might apply in the context of an unincorporated association or trust transferring to the SCIO legal form) and is unlikely to be directly applicable to more than a tiny proportion of cases where a SCIO is being formed.	Reword the provision so that there is further clarity regarding the circumstances in which it will apply; and adjust so as to be less restrictive in scope.
56(6)(b)	The provision requiring a written resolution for conversion to be signed by or on behalf of all members of a company pre-dates the change in requirements for written resolutions introduced by the Companies Act 2006; and there is therefore some uncertainty about whether a special resolution passed in compliance with the 2006 Act (i.e. agreed by 75% or more of the members) would be sufficient for conversion.	This is unlikely to cause significant difficulty in practice, but it would be desirable for this uncertainty to be resolved.	Adjust the provisions accordingly
58	The 2005 Act provides for a very straightforward conversion process from a company or registered society to a SCIO - registration as a SCIO has the effect that assets, rights and liabilities of the company/registered society are automatically taken to be assets, rights and	One of the key drivers for introduction of the SCIO legal form was recognition that those serving on the management committee of charitable unincorporated associations were exposed to the risk of personal liability; and that there were other significant	Introduce provisions under which the assets, rights and liabilities of an unincorporated association or trust are automatically taken to be

	liabilities of the SCIO. This greatly simplifies the process, and it is very unhelpful that similar provisions do not apply in relation to unincorporated associations or trusts.	disadvantages attaching to unincorporated associations. Unfortunately, while the SCIO has become a very attractive model for new charities, the technical process (and costs) associated with transfer of property, leases, contracts, staff, insurance arrangements etc from an unincorporated association to a SCIO has been a significant barrier for unincorporated associations who would otherwise have been keen to take that step. It is acknowledged that there are additional technical points to be addressed in the case of unincorporated associations and trusts (as compared with companies and registered societies) but these are not insuperable.	assets, rights and liabilities of the SCIO.
59, 60, 61	The provisions allow for a streamlined process for amalgamations or mergers where the charities involved are SCIOs - but there has been a misunderstanding (reflected in OSCR's own guidance) that this implies that the means for effecting an amalgamation/merger available to other types of legal entity cannot be used by SCIOs.	The suggestion that SCIOs can only merge or amalgamate with other SCIOs is sometimes listed as a disadvantage associated with the SCIO legal form; and that may be seen as a significant factor in certain contexts, causing groups to choose a company limited by guarantee in preference. It would be helpful if the legislation cleared up this misunderstanding.	Introduce a "for the avoidance of doubt" provision, confirming that the mechanisms in these sections are additional to the other means for effecting an amalgamation/merger available to SCIOs.
63	The requirement that a resolution passed otherwise than at a general meeting must be passed unanimously by the SCIO's members	The requirement to involve all members in written resolutions to amend a SCIO's constitution is unduly onerous. In line with the	Adjust threshold accordingly.

	pre-dates the changes made by the Companies Act 2006 in relation to written resolutions by members in the context of companies. It would be helpful if the provisions regarding written resolutions were brought into line.	changes to companies legislation - but recognising the different threshold which applies to SCIOs - the requirement should be re-stated as two-thirds of the members.	
66	The duty to "act in the interests of the charity" is incompatible with the steps which charity trustees are expected to take in certain contexts e.g. if a charity is transferring its assets and operations to another charity to give effect to a merger proposal (it could never be said to be in the interests of the charity - taking the charity as a corporate body - to divest itself of all of its assets and operations, such that it became a dormant shell). There would be benefit in re-visiting the definition of "charity trustees"; and in specifying a minimum number of charity trustees (but allowing for the possibility of a sole charity trustee where the charity trustee is a corporate body)	While the use of members' resolutions - e.g. directing the charity trustees to take the appropriate steps to effect a merger - can help to resolve this issue (though there are still those who might argue that the statutory duty still applies), it is unsatisfactory that charity trustees are exposed to the risk that they could be criticised (and/or enforcement action taken against them) in situations of this kind.	Introduce an appropriate carve-out to make it clear that in certain circumstances the charity trustees can legitimately give priority (over the charity's interests) to what they consider will best facilitate furtherance of the charity's charitable purposes.
67	The provisions regarding trustees' remuneration would benefit from some fine-tuning. By way of	Trustee remuneration remains a key point of concern, both within the sector and as a matter of maintaining public confidence in	Introduce appropriate technical adjustments.

	example (but noting that further adjustments would be desirable): • ss(4) should be adjusted so that a situation where a charity trustee might benefit from remuneration is included (currently the wording refers only to a situation where the service provider is the trustee himself/herself) • ss(5)(a) and (6) should be adjusted so as to clarify the extent of the saving provision for pre-Nov 2004 charities	charities. It is important, therefore, that any unintended loopholes are closed and any uncertainties resolved.	
69, 70 **[Qs 8-9]**	It would be helpful to review and adjust the provisions relating to charity trustee disqualification to bring them into line with the corresponding provisions in the 2011 Act.		
70A **[Qs 8-9]**	It would be helpful if OSCR's powers regarding appointment of charity trustees were brought into line with the Charity Commission's powers in this regard; and if there were express provisions making it clear that appointment under the 2005 Act would be effective under the law applicable to the legal form in question.		

Annex

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