

BRIEFING

Scottish Government's "Consultation on Scottish Charity Law" January 2019

Introduction

The Scottish Government launched a consultation on Scottish charity law on 7th January 2019. The consultation paper seeks views on a range of issues, derived mainly from proposals by the Office of the Scottish Charity Regulator (OSCR). The general focus of the proposals is on improvements to charity law that would increase transparency and accountability in order to maintain public trust and confidence in charities and OSCR.

Background

It has been 17 years since the Scottish Charity Law Review Commission proposed establishing a Scottish Charity Regulator in the "McFadden Report"¹ It has also been more than 13 years since the establishment of the legislative framework for charities in Scotland and the creation of the Office of the Scottish Charity Regulator.²

The 2005 Act sets out OSCR's powers and gave them five specific functions:

- To consider applications from organisations seeking to become charities;
- To publish and maintain the Scottish Charity Register;
- To monitor charities and work to encourage their compliance with the 2005 Act (as amended by Part 9 of the Public Services Reform (Scotland) Act 2010;³
- To receive and investigate complaints about charities and have powers to address misconduct;
- To provide information and make recommendations to Scottish Ministers on charity matters.

The proposals OSCR has made to the Scottish Government is the exercise of the fifth function listed above.

The Proposals

- Sections 1 and 2 focus on transparency and accountability in the charity sector
- Sections 3 to 9 identify areas where OSCR's practical experience has shown gaps in its powers.
- Section 10 seeks to clarify the law and OSCR's powers of reorganisation.

Transparency and Accountability

Section 1 of the consultation paper proposes publishing annual reports and accounts in full for all charities on the Scottish Charity Register. All charities in Scotland have a legal duty to prepare annual reports and accounts and to submit these to OSCR. There is currently no legal requirement for these to be published on the Scottish Charity Register. However, since April 2016 (as part of OSCR's programme of targeted

¹ Charity Scotland, "The report of the Scottish Charity Law Commission", available at <https://www2.gov.scot/Resource/Doc/1136/0010186.pdf> (accessed at 5th March 2019)

² Charities and Trustee Investment (Scotland) Act 2005. Available at <https://www.legislation.gov.uk/asp/2005/10/contents> (accessed 5th March 2019)

³ Public Services Reform (Scotland) Act 2010, Part 9, available at <http://www.legislation.gov.uk/asp/2010/8/part/9> (accessed 5th March 2019)

regulation). OSCR has been publishing the accounts of charities with an income over £25,000 and all Scottish Charitable Incorporated Organisations. This covers approximately half of the charities registered in Scotland. In compliance with data protection legislation, personal information has been redacted prior to publication. This is an onerous bureaucratic burden and could be seen to diminish the usefulness of the accounts.

So the consultation paper poses the following three questions in respect of this:

- Should OSCR be able to publish charity annual reports and accounts in full for all charities?
- Is there any information that should not be published on the Scottish Charity Register?
- Should charities be allowed to apply for an exemption from having their annual reports and accounts published in full on the Scottish Charity Register?

Section 2 of the consultation paper proposes the establishment of a new register of trustees, comprising an internal database for OSCR's use only and a reduced external register for public use. OSCR currently collects and keeps current information for **one Principal Contact** for each charity - the Principal Contact will not always be a charity trustee, it may be an employee, an accountant or a lawyer. OSCR wants the power to collect specific information to be held **internally** about all charity trustees, i.e. Title, First Name, Last name, Date of Birth, Charity Number, Charity Name, Home Address, Date appointed, Date Resigned. OSCR would also like to publish the first and last names of trustees on the charity's register entry, in the same way as the other UK Charity Regulators.

So the consultation poses four questions about the Register:

- Should OSCR be able to collect the trustee information noted above for an internal database?
- Should the names of trustees be published on the external public register?
- Should the names of trustees who have been removed following an inquiry by OSCR, be published on the external public register?
- Should trustees be able to apply for an exemption from having their name published on the external public register?

Potential Additional Powers for OSCR

Sections 3 to 9 of the consultation paper proposes stronger enforcement powers for OSCR in the following areas:

- Extension of the criteria for automatic disqualification of charity trustees and those employed in senior management positions in charities, to match the current disqualification criteria in England and Wales; ([Section 3](#))
- A power to issue positive directions to charities, e.g. to manage a conflict of interest effectively and demonstrably – most of OSCR's current powers are about requiring charity trustees or others not to take particular actions ([Section 4](#))
- A power to remove charities from the Register that are persistently failing to submit annual reports and accounts and may no longer exist ([Section 5](#))
- Require all charities in the Scottish Charity register to have and retain a connection in Scotland ([Section 6](#))
- A power to make inquiries into the former charity trustees of bodies which have ceased to exist and bodies which are no longer charities ([Section 7](#))
- A power to require bodies that have de-registered as charities to continue to use the assets held at the time of removal from the Register to provide public benefit ([Section 8](#))

- A power to give the required notice to provide information to a body or individual that is misrepresenting themselves as a charity, bodies which are no longer charities and former trustees of charities which have ceased to exist ([Section 9](#))

Proposal to clarify legislation relating to the reorganisation of charities established under a royal charter, warrant or enactment

The final section of the consultation paper addresses reorganisation schemes, i.e. to modernise the governance of a charity or its purposes and to release unused or underused funds for public benefit. If charities want to reorganise they need to apply to OSCR for approval. However, current legislation is unclear about whether it is competent for OSCR to approve reorganisation schemes for certain charities established under a royal charter, warrant or enactment. The question posed in this section is simply: should the legislation be clarified for these specific charities? ([Section 10](#))

Next Steps

The Scottish Government is seeking views from members of the public, the charity sector, and anyone with an interest in charity law. They want to learn from the sector's expertise and experience and hear first-hand about what really makes an impact on levels of public trust and confidence.

The consultation closes on 1st April 2019.

You can view or download the full consultation paper here:

<https://www.gov.scot/publications/consultation-scottish-charity-law/>

You can respond to the consultation online here: <https://consult.gov.scot/local-government-and-communities/scottish-charity-law/consultation/>

The Scottish Mentoring Network will be responding to the consultation and encourages our members to respond also.

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