



CONSULTATION ON SCOTTISH CHARITY LAW

RESPONSE FROM ICAS TO THE SCOTTISH GOVERNMENT

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Background

ICAS is a professional body for more than 22,000 world class business men and women who work in the UK and in more than 100 countries around the world. Our members have all achieved the internationally recognised and respected CA qualification (Chartered Accountant). We are an educator, examiner, regulator, and thought leader.

Almost two thirds of our working membership work in business and in the not for profit sector; many leading some of the UK's and the world's great organisations. Others work in accountancy practices ranging from the Big Four in the City to the small practitioner in rural areas of the country.

We currently have around 3,000 students striving to become the next generation of CAs under the tutelage of our expert staff and members. We regulate our members and their firms. We represent our members on a wide range of issues in accountancy, finance and business and seek to influence policy in the UK and globally, always acting in the public interest.

ICAS was created by Royal Charter in 1854.

Introduction

The ICAS Charities Panel welcomes the opportunity to comment on the Scottish Government's proposals on changes to the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act).

ICAS participated in the consultation and parliamentary process when the Bill which became the 2005 Act was being developed. In addition to having a keen interest in the establishment of a Scottish charity regulator, we had a particular interest in the establishment of a statutory duty and discretionary right for auditors and independent examiners to report to the regulator and in the establishment of Scottish charity accounting regulations.

A review of the 2005 Act is long overdue and we believe that a more comprehensive post-implementation review is required rather than the more limited review which is currently being undertaken. We would urge the Scottish Government to implement such a review before any parliamentary time is set aside to scrutinise changes to the 2005 Act and related regulations.

We set out below our specific comments on the consultation questions with which we largely agree. We also highlight, in pages 7 to 9, the following specific areas of Scottish charity law which we believe require review and amendment:

- The power under section 35 for OSCR to apply to the Court of Session for approval of an asset transfer scheme which has never been implemented;
- Section 44 'Accounts' and the related Charities Accounts (Scotland) Regulations 2006 (as amended) (The Scottish charities accounting regulations);
- Section 67 on remuneration for services and the remuneration of insolvency practitioners;
- Section 16 changes requiring OSCR consent and the duties of company directors: charitable companies facing severe financial distress or insolvency;
- Regulations made under section 64 about the winding up, insolvency or dissolution of a Scottish Charitable Incorporated Organisation (SCIO).

Any enquiries should be addressed to Christine Scott, Head of Charities and Pensions, at cscott@icas.com.

Detailed response

Question 1

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

Response

Yes. We believe that stakeholders should be able to readily obtain charity annual reports and accounts, which are public documents, and that publication by OSCR is the most appropriate way of achieving this. We set out matters in both our response to question 1 and question 2 which need to be managed in implementing this proposal some of which are unique to the charity sector.

Charity annual reports and accounts should be accompanied by their external scrutiny report.

We recognise that making the publication of charity annual reports and accounts by OSCR a statutory requirement may not remove entirely the need to redact personal data, for example, signatures and disclosures made about trustees who are also beneficiaries of the charity where these disclosures are sensitive. Therefore, there should be scope for OSCR to adjust its on-line filing requirements so that it does not need to redact personal information which would otherwise contravene the General Data Protection Regulation.

In the case of signatures, we would welcome an approach by OSCR towards filing requirements which permit charities to file accounts with printed signatures provided the charity has an original signed copy on file (as allowed by the Charity Commission for England and Wales (CCEW)). Where this approach is taken trustees' annual reports and accounts should show the actual date of approval by trustees and the names of those who signed.

Ideally, disclosures about trustees in annual reports and accounts should be reviewed to ensure that they do not contain sensitive personal data about trustees before they are approved and signed on behalf of the trustees. However, there is a risk that sensitive personal data about trustees may be included in the signed accounts so an additional mechanism for protecting personal data, by way of on-line filing requirements or guidance, is required.

Question 2

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

Response

No. However, our response is conditional on existing provisions for excluding sensitive personal and other data from both the Scottish Charity Register and from the annual report and accounts being sufficient to protect the safety and security of any persons or premises. This is in addition to the point we make above about OSCR being able to adjust its on-line filing requirements to exclude personal data which is sensitive or could create opportunities for fraud.

OSCR already has powers under the Regulation 3(4) of the 2005 Act for excluding information from the Scottish Charity Register, if it "is satisfied that including that information is likely to jeopardise the safety or security of any person or premises".

Paragraph 1.30 of the Charities Statement of Recommended Practice (SORP) (FRS 102) states the following about exemptions from disclosure in the trustees' annual report: "Charities in England and Wales may omit the names of those persons and the charity's principal address from their report provided the Charity Commission has given the charity trustees the authority to do this. In Scotland there is also a provision under charity law for such information to be excluded".

Question 3

Do you think that charities should be allowed to apply for a dispensation from having their annual reports and accounts published in full on the Scottish Charity Register?

Response

No. Apart from the matters we refer to in question 1 and 2 above, OSCR should publish the full annual reports and accounts of all Scottish charities. As the law currently stands, Scottish charities must provide members of the public with a copy of their annual reports and accounts on the basis of a reasonable request being made.

Question 4

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

Response

Yes. We agree that in principle OSCR should be able to develop and maintain an internal database of charity trustees. However, governance arrangements for such a database will need to be robust to ensure that personal data is protected and that personal data is only held where there is a clear purpose for doing so. Personal data on former trustees should only be held for a specified period of time.

Question 5

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

Response

Yes. Subject to the matters we refer to in our responses to questions 1 and 2, the names of trustees are required to be disclosed in the trustees' annual report so this information is already in the public domain.

Question 6

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

Response

Yes. This is consistent with the approach taken by Companies House where individuals have been disqualified from holding company directorships.

Question 7

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

Response

Yes. Individuals may have legitimate reasons for having their details excluded or removed from a public register so the ability to give dispensation is important. However, we are aware that the Companies House approach to dispensation may be stricter than is appropriate for OSCR. Therefore, a less strict approach by OSCR will not assist trustees of charitable companies, as Companies House requirements will continue to apply.

Question 8.

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

Response

Yes. We would welcome a consistent approach being taken by the UK charity regulators, subject to our response to question 7.

Question 9

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

Response

Yes. However, in order for there to be clarity about the extent of any ability to disqualify a senior manager, we recommend that this is restricted to persons in the role of Chief Executive Officer (CEO) or Chief Financial Officer (CFO).

It is also important to note that giving OSCR the power to disqualify a senior manager from being, for example, a charity CEO or charity CFO, could have the effect of giving OSCR the power to dismiss them from their employment. It would normally be a charity's trustees who would take an employment decision. Therefore, care would need to be taken to ensure that any power to disqualify a senior manager could not be construed as OSCR acting as the trustee of a particular charity.

Question 10

Should OSCR be given a power to issue positive directions?

Response

Yes. We agree that it is appropriate for OSCR to have the power to issue positive directions.

Question 11

If you answered 'yes' to question 10, should a power to issue positive directions be wide ranging or a specific power?

Response

We believe that the power to issue directions should be specific rather than general so that the independence of the charity sector from the public sector is maintained.

We are aware that changes have been necessary to housing law to limit the powers of the UK housing regulators to positively direct Registered Social Landlords so that a decision by the Office of National Statistics (ONS) to bring the social housing sector within the public sector could be reversed. The inclusion of the social housing sector within the public sector brought social housing sector borrowing and other debt within the UK's National Accounts. The ONS decision would likely have brought the social housing sector within the scope of the UK's Whole of Government Accounts, had changes to legislation not been planned.

This means that further deliberation will be needed by the Scottish Government before proposing related amendments to the 2005 Act.

The power to issue positive directions should ensure that their use is proportionate and distinct from the powers of the Court of Session. This power should only be used by OSCR following the conduct of a reasonable inquiry. OSCR should also have the ability to amend or repeal a positive direction where new information comes to light or circumstances change.

Question 12

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

Response

Yes. We believe this is appropriate.

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?

Response

This may be appropriate as a last resort, for example, in circumstances where OSCR is unable to get in touch with any of the charity's trustees after reasonable endeavours to make contact. However, we would prefer to see this matter addressed in other ways, for example, through OSCR's powers under Section 45 of the 2005 Act which permit OSCR to appoint a suitably qualified accountant to prepare a "statement of account".

We would also hope that with a positive power of direction to prepare an annual report and accounts, such a scenario could be largely avoided.

However, if a charity were removed from the Charity Register on this basis, it would be essential that robust arrangements were in place to ensure the charity's remaining assets continued to be applied under the regime in Section 19 of the 2005 Act. We suggest that for this to be effective, OSCR needs the power to create a public register of bodies subject to Section 19.

Section 19(3)(b) applies section 44 'Accounts' and section 45 'Failure to provide a statement of account' to entities which have been removed from the register in relation to:

- Any property previously acquired, or any property representing property previously acquired;
- Any property representing income which has previously accrued;
- The income from any such property.

Therefore, such entities are bound by the Scottish Charities Accounts (Scotland) Regulations 2019 and OSCR has the power to appoint a suitably qualified person to prepare a statement of account, if the governing body of the entity does not submit one.

We are not aware of how these provisions are currently operating. However, accounting frameworks, which are underpinned by either regulation or by regulation and financial reporting standards, and external scrutiny requirements are designed to function at entity level and to apply to an entity's statutory accounts. These are not readily adaptable to an element of an entity's annual report and accounts. Therefore, if there is an increase in charities being removed from the Charity Register which continue to hold charitable assets, we recommend that these provisions are reviewed and amended to meet the objectives of section 19 while providing a workable solution from an accounts preparation and external scrutiny perspective.

Question 14

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

Response

Yes. We believe this would be a helpful power for OSCR to have.

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?

Response

Yes. We believe this would be commensurate with the seriousness of a failure to prepare annual reports and accounts and to comply with a positive direction.

However, we know that there are circumstances, such as the loss of accounting records in a fire, which OSCR may wish to consider before issuing a positive direction or treating a failure to comply as misconduct.

Question 16

If you wish to explain your responses to any questions about removing charities from the Register for persistently failing to submit annual reports and accounts, please do so.

Response

We have no additional comments.

Question 17

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

Response

Yes. We believe this is appropriate. However, care will need to be taken to ensure the term 'connection' is clearly defined and that Scottish charity law operates in a consistent manner with Scottish trust law and any EU law, which remains effective in the UK, around the recognition of charitable status. In the case of charities being established outside Scotland we suggest that evidence of an intention to undertake activities in Scotland or to seek support from Scottish donors or funders should be sufficient.

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?

Response

Yes. We believe this would strengthen the law as it currently stands to enable OSCR to protect charitable assets.

Question 19

Should bodies that have been 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?

Response

Yes. We support this measure to protect charitable assets.

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 a charity, and to former trustees of a charity which has ceased to exist?

Response

Yes, on balance we believe this is an appropriate power for OSCR to have.

Question 21

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

Response

Yes, we agree that this should be clarified.

Question 22

Should 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?

Response

We believe it would not be appropriate to introduce an open-ended power. However, we are aware that there is a provision for a joint process to take place in England and Wales involving both the Privy Council and the CCEW. This means that the CCEW does not have sole discretion in areas where charity law is not the only relevant authority. We believe a parallel process between the Privy Council and OSCR may be appropriate, for example, for royal charter charities established in Scotland.

Other comments

We have the following additional comments to make about other areas of the 2005 Act which we believe require review and amendment.

Section 35: asset transfer schemes

The Scottish Ministers have exercised their powers under the 2005 Act to issue regulations in all areas, except for the power to issue regulations under section 35(1). A consultation was conducted during 2011 and 2012 on proposed regulations. ICAS was heavily critical of the proposals which we believe could have placed the stakeholders of Scottish charities and other organisations within the scope of the regulations at risk, including beneficiaries and creditors.

Given the challenges of issuing regulations under section 35(1), we recommend that section 35 is reviewed and, if necessary, amended or withdrawn. If there is no realistic prospect of regulations being issued then it may make sense to withdraw the provisions on asset transfer schemes.

Section 44: Accounts

There are several matters in relation to Section 44 and the Scottish charity accounting regulations 2006 which need to be updated, including the following four key matters:

1. The inclusion of the trustees' annual report within the "statement of account"

Section 44 and the accounting regulations require amendment to make it clear that the trustees' annual report is not part of the statement of account.

We believe amendments to Section 44(1)(b), Regulation 8 and Regulation 9 are required to remove the trustees' annual report from the scope of the "statement of account" for the following reasons:

- The trustees' annual report is not designed to sit within the accounting framework for accounts prepared in accordance with the Charities SORP (FRS 102) which give a true and fair view or prepared on a receipts and payments basis to properly present the affairs of a charity.
- There is an inconsistency within the accounting regulations. In two places within the regulations the "statement of account" is defined as including the trustees' annual report (Regulations 8 and 9) and in two places the "statement of account" is defined as not including the trustees' annual report (Regulations 10 and 11). It is not possible for both scenarios to be correct therefore the current wording undermines the accounting regulations.
- Section 44 does not refer to the trustees' annual report, the implication being that it is included within the statement of account.
- We believe that the policy intention is that a consistency check between the trustees' annual report and the accounts is all that is required. Suitable amendments to the law are required to make this policy intention clear.

2. The references to specific editions of Statements of Recommended Practice (SORPs) for charities and specialist charities (i.e. housing and education bodies)

The reference to specific editions of SORPs in the Scottish charity accounting regulations means that every time a SORP is updated to incorporate changes to financial reporting standards issued by the UK Financial Reporting Council, amendment regulations are being issued. In reality financial reporting standards take precedence over specialist SORPs and charitable companies are required under UK company law to apply extant UK financial reporting standards. Therefore, it is unhelpful for the Charities Accounts (Scotland) Regulations 2006 to take an inconsistent approach. There is no benefit in the way of higher quality accounts for charities to be bound to a specific edition of a SORP if amendments have been made to the underlying standards. There are robust arrangements for setting and issuing SORPs and it would be more efficient if references to SORPs within the Regulations were edition neutral.

3. Consolidation of the Scottish charity accounting regulations

There have been several amendment regulations issued in relation to the Scottish charity accounting regulations and it would be timely to issue consolidated regulations. Amendments include changes to thresholds for accounts preparation and external scrutiny and it would be much clearer for charities and their advisers if all the changes made to the regulations since they were published in 2006 were included in one set of updated regulations.

4. Accounts directions for independent examiners

OSCR has no power to issue directions to independent examiners, i.e. steps an independent examiner must undertake in order to be able to prepare their independent examiner's report.

The CCEW has such a power under section 145(5)(b) of the Charities Act 2011. The Charity Commission for Northern Ireland has a similar power.

Directions would provide clarity about the scope of the work an independent examiner needs to undertake before being able to prepare an independent examiner's report in accordance with the Charities Accounts (Scotland) Regulations 2006.

OSCR publishes helpful guidance for independent examiners but it is good practice rather than mandatory guidance. We believe that formal directions have the potential to improve the quality of the work undertaken by charity independent examiners. However, such a power should be limited to the issuing of directions which do not extend the work of the independent examiner beyond the scope of the 2006 Scottish charity account regulations.

An OSCR power to issue Directions may be possible through an amendment to the Charities Accounts (Scotland) Regulations 2006, as a case could be made that this would fall within the existing power in section 44(4)(g) of the 2005 Act which allows the Scottish Ministers to make regulations about "the examination or audit of the statement of account". However, as this would be an explicit new power for OSCR, there could equally be a case for adding a power to issue directions to independent examiners within section 44 of the 2005 Act.

Section 67 on remuneration for services and the remuneration of insolvency practitioners

Under the 2005 Act, Scottish charities are unable to remunerate 50 per cent or more of the charity's trustees. The appointment of insolvency practitioner to a charity is also an appointment as a trustee. Under charity law, the insolvency practitioner cannot be remunerated.

Insolvency procedures have associated costs and in order for the insolvency practitioner to be paid for their services, these costs need to be included within the associated costs the Court approves. While there is a legal route to addressing the charity law prohibition on remuneration, it would be preferable for the law to be amended to enable insolvency practitioners to be paid for their services.

Section 16 changes requiring OSCR consent and the duties of company directors: charitable companies facing severe financial distress or insolvency

There is an inherent conflict between the duties of company directors and the duties of trustees when a charity which operates through a company is facing severe financial distress or insolvency.

Directors have a duty, under the Companies Act 2006 and Insolvency Act 1986, to take steps to protect the interests of creditors. In many circumstances this will involve taking a decision to place the company into an insolvency process, most often winding up. Section 16(2)(c) and 16(4) of the 2005 Act requires the charity to give OSCR 42 days' notice prior to taking steps to wind itself up. There is often an urgent need for the appointment of an insolvency practitioner and the 42 days' notice period is impractical in such circumstances.

The charities trustees, who are the directors under company law, are faced with competing legislative requirements. In order to minimise the conflict in practice there is often significant co-ordination required between the proposed insolvency practitioner and OSCR to allow notification to be made and a letter of consent to be delivered by OSCR which can be exhibited with the winding up petition to the Court. The process is burdensome and adds unnecessary cost to the legal process of winding up.

Regulations made under section 64 about the winding up, insolvency or dissolution of a Scottish Charitable Incorporated Organisation (SCIO)

The Accountant in Bankruptcy (AiB) is required to administer SCIO sequestrations, although we are aware that very few have occurred since charities were able to operate through a SCIO.

Insolvency practitioners who are accustomed to dealing with sequestrations are not currently permitted to act as trustees in SCIO sequestrations. In order to create more capacity to deal with any increase in SCIO sequestrations as may occur in the future, it would be helpful if Scottish charity law was amended to enable insolvency practitioners to act as trustees in SCIO sequestrations in addition to the AiB.